

**Nos. 12-1236, 12-1561**

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

**PIGGLY WIGGLY MIDWEST, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED FOOD AND COMMERCIAL WORKERS UNION  
LOCAL 1473**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STUART F. DELERY**  
*Acting Assistant Attorney General*

**BETH S. BRINKMANN**  
*Deputy Assistant Attorney General*

**SCOTT R. McINTOSH**  
**SARANG V. DAMLE**  
**MELISSA PATTERSON**  
**BRIAN P. GOLDMAN**  
*Attorneys, Appellate Staff*

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**Robert J. Englehart**  
*Supervisory Attorney*

**Milakshmi V. Rajapakse**  
*Attorney*

**U.S. Department of Justice**  
**Civil Division, Room 7259**  
**950 Pennsylvania Avenue, N.W.**  
**Washington, D.C. 20530**  
**(202) 514-4052**

**National Labor Relations Board**  
**1099 14th Street, N.W.**  
**Washington, D.C. 20570**  
**(202) 273-2949**  
**(202) 273-2965**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on a petition filed by Piggly Wiggly Midwest, LLC (“the Company”) to review, and the cross-application of the National Labor

Relations Board (“the Board”) to enforce, a Board Order issued against the Company. The Board’s Decision and Order issued on January 3, 2012, and is reported at 357 NLRB No. 191. (A 1-25.)<sup>1</sup> In its decision, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158 (a)(5) and (1)) (“the Act”), by failing to timely provide requested information to the United Food and Commercial Workers Union Local 1473 (“the Union”), and by failing to bargain in good faith with the Union over the effects of the Company’s decision to sell two unionized grocery stores. (A 1, 13-21.) In this proceeding, the Union has intervened on the side of the Board.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in

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<sup>1</sup> Record references are to the joint appendix (“A”) filed with the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

Appleton and Sheboygan, Wisconsin, and because the Board's Order is final with respect to all parties.<sup>2</sup>

The Company filed its petition for review on January 30, 2012. The Board filed its cross-application for enforcement on March 9, 2012. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to timely comply with the Union's request for information pertaining to the Company's sale of two unionized stores to non-union entities that the Union reasonably suspected were alter egos of the Company.

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<sup>2</sup> The record before the Court in this case consists of the Order issued by the Board, the findings on which it is based, and the related pleadings and evidence. *See* 29 C.F.R. 102.45(b) (defining contents of record in an unfair labor practice case); Fed. R. App. P. 16(a) (defining contents of record on review or enforcement of an agency order). Although the Company asserts (Br.1) that "[t]he Record from the underlying representation proceedings . . . is also before the Court pursuant to Section 9(d) of the Act [29 U.S.C. §159(d)]," the Board notes that there was no question regarding the Union's status as the employees' collective-bargaining representative, and therefore no representation proceeding, related to the unfair labor practices here. Indeed, the Union's status as the employees' bargaining representative has long been established and is recognized in the most recent collective-bargaining agreements executed between the Union and the Company. (A 6; 58, 66, 414, 448, 477.)

2. Whether substantial evidence supports the Board's finding that the Company's failure to timely provide the requested information impeded bargaining over the effects of the sale of the two stores, further violating Section 8(a)(5) and (1) of the Act.

3. Whether the Board acted within its broad remedial discretion in ordering the Company to provide a minimum of two-weeks backpay to all affected employees pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389, 391 (1968).

4. Whether the Board's cross-application for enforcement is valid.

### **STATEMENT OF THE CASE**

Acting on charges filed by the Union (A 898, 904), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to timely furnish requested information to the Union, and by failing, since December 18, 2009, to bargain with the Union over the effects of the Company's decision to close two unionized stores. (A 914-15.) As part of the remedy for these alleged unfair labor practices, the General Counsel requested an order that the Company compensate affected bargaining-unit employees in the manner provided in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (A 915.)

Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to provide, and delaying the provision of, various items of information requested by the Union and relevant to the Union's performance of its duties as the collective-bargaining representative of employees in the closing stores.<sup>3</sup> (A 5-20.) The judge further found that the Company's failure to timely provide the requested information impeded the Union's ability to engage in effects bargaining over the store closures, producing a separate violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 20-21.) To remedy the latter violation, the judge granted the *Transmarine* relief requested by the General Counsel. (A 22-25.) Thereafter, the Company filed timely exceptions, and the General Counsel filed timely cross-exceptions. (A 1.)

After considering the parties' exceptions and briefs, the Board (Chairman Pearce and Member Becker, Member Hayes dissenting) issued a Decision and Order affirming, for the most part, the judge's findings of Section 8(a)(5) and (1)

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<sup>3</sup> However, the judge dismissed some of the information-related complaint allegations: that the Company unlawfully delayed its overall response to the Union's written request for information dated December 17, 2009; and that the Company unlawfully refused to provide a specific kind of seniority list requested by the Union, information about fund-transfers between the Company and the franchisees who took over the closed stores, and information about company employees who were or had been employed by the franchisees. (A 17-19.)

violations.<sup>4</sup> (A 1-2.) The Board also unanimously adopted the judge's dismissals of some of the complaint allegations,<sup>5</sup> and the Board majority (Chairman Pearce and Member Becker) adopted the judge's *Transmarine* remedy. (A 1 n.7, 3.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACTS

#### A. **Background; the Union Is the Collective-Bargaining Representative of Employees at Two Company Grocery Stores; the Company Announces that It Is Selling Those Stores to Independent Franchisees, But the Union Later Learns that One of the Franchisees Is a Company Manager**

The Company is a grocery-products wholesaler, and also owns and operates retail grocery stores. (A 5-6; 910-11, 957.) As of late 2009, when the events at issue unfolded, the Company owned and operated two stores in the area of Appleton, Wisconsin, and two stores in Sheboygan, Wisconsin. (*Id.*) The Union

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<sup>4</sup> The Board unanimously reversed the judge as to the finding that the Company unlawfully refused to provide information about employees' accrued vacation and holiday pay. The Board held that no such violation was alleged in the complaint. (A 2.)

<sup>5</sup> These dismissals are not before the Court.

was the collective-bargaining representative of employees at all four stores, pursuant to three separate collective-bargaining agreements.<sup>6</sup> (A 6; 945-47.)

While the parties were involved in negotiations for the above agreements in 2008, Company Owner Paul Butera complained to union officials about the cost of negotiations and told them, “If you guys want to fight, I know how to get rid of the [U]nion.” (A 15; 81-82, 311.) Butera further told them, “When I’m non-union my pockets get like this [gesturing to show full pockets] and when I’m union my pockets are like this [gesturing to show empty pockets].” (*Id.*) Nevertheless, the Company ultimately entered into collective-bargaining agreements with the Union in the spring of 2009, covering the Appleton and Sheboygan stores. (A 6; 945-47.)

About six months after these agreements were executed, the Company announced that it planned to close and sell two of the covered stores—Store 23 in Appleton, and Store 31 in Sheboygan. (A 6; 507-08.) In letters to the Union dated October 30, 2009, the Company explained that each store was to be sold to an “independent franchisee” who would “accept[] responsibility for the store” on December 30, 2009, and therefore all current employees of Store 23 and Store 31

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<sup>6</sup> Specifically, the parties had one collective-bargaining agreement applicable to employees in the Appleton-area stores, effective from April 13, 2009 to February 1, 2011; one agreement applicable to the retail clerks in the Sheboygan stores, effective from May 7, 2009 to September 7, 2011; and one agreement applicable to the meat-department employees in the Sheboygan stores, also effective from May 7, 2009 to September 7, 2011. (A 6 & nn.4-6; 412-506.)

would be terminated on December 29, 2009. (*Id.*) The Company did not provide further details regarding the sale and franchising of these stores, but expressed interest in discussing with the Union “any transfers of employees which may be applicable and other matters relative to the [e]ffects of the transaction on our employees.” (*Id.*)

Upon receiving the Company’s letter, the Union immediately contacted the Company and arranged for an effects-bargaining session on November 16, 2009. (A 6; 516-19.) In addition, by letter dated November 5, 2009, the Union requested information about the identity of the party or parties buying Stores 23 and 31, and the name, address, and telephone number of a contact person for each of the buyers. (A 6-7; 520.) The Union further requested “all documents including correspondence between the purchaser and the seller relative to the Collective Bargaining Agreement . . . .” (A 7; 520.)

On November 16, 2009, the Company provided some of the information requested in the Union’s November 5 letter. (A 7; 90-91, 521.) Specifically, the Company identified the buyer of Store 23 as Schneider Markets Inc., whose principal was Daniel Schneider, and identified the buyer of Store 31 as ONE GUIDE, INC., whose principals were Robin and Mark Tietz. (A 7; 521.) The Union recognized Mark Tietz’s name, as he was the current manager of the Company’s Store 31. (A 7; 112.)

In addition to the above buyer information, the Company provided contact information—in fact, the identical contact information—for each of the buyers of the two stores. (A 7; 521.) With regard to the Union’s remaining request, for documents or correspondence exchanged between the Company and the buyers “relative to the Collective Bargaining Agreement[s],” the Company stated that it was still trying to identify responsive information. (*Id.*)

**B. The Parties Meet for Effects Bargaining; the Union States that It Does Not Waive Bargaining Over the Decision To Close the Stores and Requests Further Information About the Transactions Between the Company and the New Franchisee-Owners**

On November 16, 2009, the parties met as scheduled for effects bargaining. (A 7; 84, 141.) The Union’s principal negotiator, Mark Sweet, began by stating the Union’s belief that the sale of the stores was a “sham transaction” and accordingly requested bargaining over both the decision to close the stores and its effects. (A 7; 142-43, 162, 190, 246, 295, 322-23, 343.) The Company’s principal negotiator, Robert Simandl, stated that “the decision to sell these stores has absolutely nothing to do with anything which is labor-and-employment-related,” and rejected Sweet’s request to discuss the merits of the sale and closures. (A 7; 323.) Simandl also “made very clear,” beginning on this first day of bargaining, that the Company was not in control of hiring or wages at the franchised stores, and that “[t]here was nothing being carried from one employer to the other.” (A 9;

344.) In short, he maintained that the franchised stores were “a clean-cut, new operation.” (*Id.*)

Despite Simandl’s refusal to discuss the underlying sale and closure decisions, or to allow further probing into the relationship between the Company and the franchisee-owners, Sweet said the Union would engage in effects bargaining. (A 7; 246-48.) However, Sweet indicated that the Union was not thereby waiving its position that it was also entitled to bargain over the underlying decisions. (*Id.*)

Sweet also inquired about the Union’s outstanding November 5 information request—that is, the request for transactional documents exchanged between the Company and the franchisee-owners “relative to the [c]ollective [b]argaining [a]greement[s].” (A 7; 143, 247-48.) He clarified that the request for transactional documents “included the sales agreement itself and the franchise agreement” between the Company and the franchisee-owners. (A 7; 247-48.) Simandl stated that he was looking into the issue and would provide responsive documents, if required to do so, by the end of the week. (A 7; 86-87, 248, 323.)

The parties then proceeded to a discussion of the issue that was foremost in the Company’s view: the merger of employees from the closing stores into the other stores that the Company owned in the area. (A 7-8; 155, 190, 219, 248-50, 260, 287, 319, 326, 634.) The Company’s purpose, in pressing this issue, was not

only to mitigate the effects of the sale on employees, but also to avoid grievances that could result from the merger. (A 7; 155-56.) At the conclusion of the bargaining session, the parties arranged to meet for further bargaining on December 1, 2009. (A 8; 156, 327.)

**C. The Company Provides One Paragraph of a Transactional Document; Meanwhile, the Union Learns that the Franchised Stores Will Operate and Look Like the Company Stores, and Also Sees a Company Official Going Over Employment Applications for One of the Franchisees**

By letter dated November 20, 2009, Simandl told the Union that his search for information responsive to the Union's November 5 request for transactional documents revealed only one relevant provision from an unidentified document. (A 8; 603-04.) Simandl quoted the one-paragraph provision, which indicated that the franchisees would have "exclusive and complete" control over labor-relations matters at the franchised stores, and the Company would have "no authority" to direct or recommend particular personnel decisions or actions in the franchised stores. (*Id.*)

Meanwhile, the Union learned from news reports that the transition of Stores 23 and 31 from Company ownership to new ownership would be "seamless." (A 14; 236, 264, 312, 395.) Customers, according to the reports, would not notice any difference in either the appearance or operation of the stores, as they would continue to operate under the same name, with the same logo and advertisements,

and with the same merchandise from the Company's warehouses. (A 14; 231, 264, 312, 344.)

Around the same time, union officials also saw Company Manager Rick Saeger reviewing employment applications at one of the soon-to-be-franchised stores. (A 14-15; 112, 273-74.) The Union raised concerns about Saeger's involvement in hiring for the franchisees with Simandl and Company Vice President David Koenig. (A 14-15; 112, 186-87, 273-74, 357.) In response, Simandl said that Saeger was reviewing applications, but not hiring employees. (A 14-15; 112.) Koenig similarly maintained that Saeger was "just helping out with the paperwork." (A 14-15; 273.)

**D. The Parties Meet for a Second Effects-Bargaining Session; the Union States Its Suspicion that the Franchisees Are Alter Egos of the Company and Reiterates Its Request for Transactional Documents; the Company Again Refuses To Comply with This Request**

The parties met for their second effects-bargaining session on December 1, 2009, and Sweet began the discussion by reiterating the Union's desire to bargain over the store-closure decisions, as well as their effects. (A 8; 92-93, 260.) Sweet also inquired about the franchise agreement that he had requested at the November 16 bargaining session, and specifically articulated the Union's concern that the franchisee-owners were alter egos of the Company and therefore the transactions at issue were a sham. (A 8; 93, A 261, 343-44.)

As before, Simandl responded by stating that the Company would not engage in decisional bargaining because the Company was “out of the deal” once the stores were sold, and the franchised stores were a “clean-cut, new operation.” (A 9; 344.) With regard to Sweet’s inquiry about the franchise agreement requested on November 16, Simandl stated that he would not provide that document because it did not contain anything “else” that related to labor and employment issues.<sup>7</sup> (A 8; 342-43.)

Notwithstanding Simandl’s statements, Sweet pressed the issue of the Union’s outstanding request for sale and franchise documents. (A 8; 261-62.) He took the position, on behalf of the Union, that these requested documents were necessary, not only for decisional bargaining but also for the effects bargaining in which the parties were involved. (A 8-9; 261-62.) Simandl responded that he understood the Union’s right to make “frivolous claims,” but emphasized that the Company wanted to discuss “the issues”—specifically, the method of merging employees from the closing stores into the Company’s remaining area stores. (A 9; 94, 261-62, 265.) Although the parties thereafter discussed the merger issue, it remained unresolved at the end of the December 1 bargaining session. (A 9; 94, 193, 261-62, 268-72.)

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<sup>7</sup> Simandl’s statement suggests that his November 20, 2009 letter to the Union quoted a portion of the operative franchise agreement, but, as indicated above, the letter itself did not identify a source document.

**E. The Union Requests Further Information About the Relationship Between the Company and the New Franchisee-Owners; While the Request Is Pending, Effects-Bargaining Breaks Down; the Stores Close Days Later**

On December 17, 2009, one day before the parties' third scheduled bargaining session, the Union submitted an additional information request to the Company. (A 9-10; 605-14.) In a letter accompanying the Union's request, Sweet explained, as he had in the parties' bargaining sessions, that the Union was interested in bargaining over the decision to close Stores 23 and 31. (A 9-10; 605-06.) Sweet further reiterated that:

by agreeing to discuss the pending transfer of employees, the Union does not waive, and specifically preserves, its right to challenge the decision of Piggly Wiggly Midwest to transfer nominal ownership of each store to other corporate entities but retain financial and ultimate managerial control of each through franchise agreements at each location.

(*Id.*) Based on the Union's "understanding" that the Company was "related" to the franchisees, Sweet stated that the Union was requesting information about those relationships, "[i]n order to enforce rights under the collective bargaining agreements." (*Id.*) In a questionnaire attached to Sweet's letter, the Union requested, among other things, information about equipment transactions between the Company and the franchisees, and information about services provided by the Company to the franchisees. (A 9-10, 17-18; 609-10.)

The day after the Union submitted this letter to the Company, the parties met for their third bargaining session. (A 10-11; 103, 272.) In this session, Sweet reprised the points he had made in his December 17 letter and in earlier bargaining sessions: that the Union suspected a non-arms-length relationship between the Company and the franchisees; that the Union was requesting information about this suspected relationship; that the Union could not fully deal with the effects of the closure of the stores without the requested information; and that the Union was not waiving its right to bargain with the Company over the decision to close the stores. (A 10-11; 103, 273-74, 278, 281-82.)

With these matters outstanding, the parties attempted to discuss the merger of employees into the remaining Company stores, but they were unable to reach any agreement on that issue. (A 10-11; 281-83.) At the conclusion of the December 18 session, the Company announced how it would proceed with the transfer of employees from the closing stores to the remaining company stores. (A 10; 108-09, 176, 277, 281-83.) The parties did not make plans to meet again regarding the store closures. (A 11; 182-83, 283.)

Less than two weeks later, at the end of December 2009, Stores 23 and 31 closed. (A 11; 117-18.) The Company transferred some of the employees from the closing stores to other company stores in the area, but those other company stores could not absorb all of the employees involved, nor could they guarantee

employees the work hours that they had previously enjoyed. (A 11-12, 23; 116-17, 184.) As a result, some of the employees who received transfers had to accept reduced work hours, with a possible loss of health benefits if they went from full-time to part-time status; others were laid off or quit and sought employment outside the Company, including at the nonunion franchised stores, for uncertain wages and benefits; and still others retired. (A 23; 118-20, 174, 198-200, 202-03, 206, 230, 389-90.) The Company did not provide severance pay for those who left the Company's employ. (A 23; 224-25.)

On January 19, 2010, weeks after these events played out, the Company provided a partial written response to the Union's December 17 information request. (A 11-12; 284, 619-26.) In its partial response, however, the Company did not provide information responsive to the Union's specific requests for sales and franchise agreements, nor did it provide the requested information about equipment transactions and services provided by the Company to the franchisees. (A 12; 622.) The Company ultimately produced some responsive transactional documents at the underlying unfair-labor-practice hearing in this case, including documents relating to equipment leases. (A 12; 293, 331-34.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Member Becker, Member Hayes dissenting) found (A 1-2) that the Company violated Section

8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to provide the Union with requested information about services that the Company provided to the franchisees, and by delaying provision of other requested information—specifically, the sales and franchise agreements executed by the Company and the franchisees, and information about equipment transactions between these entities.<sup>8</sup> The Board also found (*id.*) that the Company’s failure to provide the requested information impeded the Union’s ability to engage in effects bargaining, further violating Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

The Board’s Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 3, 24.) Affirmatively, the Board’s Order requires the Company to: furnish the requested information, to the extent it has not already done so; bargain with the Union, on request, about the effects of the store closures; compensate employees in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); post a remedial notice; and mail the remedial notice to all of the bargaining-unit employees who were employed at the closed stores. (A 22-24.)

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<sup>8</sup> This brief refers to the information violations collectively as a failure to timely comply with the Union’s information requests.

## SUMMARY OF ARGUMENT

An employer has a statutory duty to bargain in good faith with the representative of its employees. Under well-settled law, this duty to bargain includes an obligation to provide relevant information to the bargaining representative, as well as an obligation to engage in meaningful bargaining over the effect (on employees) of a decision to close operations. As the Board reasonably found (A 1), the Company breached these obligations, and therefore violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

Substantial evidence supports the Board's finding (A 1-2, 13-19) that the Company unlawfully refused to comply with the Union's requests for information relating to the purported sale of two unionized grocery stores to franchisees. The Union's requests were based on its reasonable suspicion that the Company and the franchisees were alter egos, and that the employees' rights under their collective-bargaining agreements might not be extinguished by the purported sale of the stores. The information sought by the Union was accordingly relevant to the performance of its duties as the employees' representative. Although the Company here disputes (Br. 14-24) the Union's "need" for this information, the Board properly found (A 1-2) that the Union established the relevance of the requested information, and the law requires no greater showing. Moreover, contrary to the Company (Br. 24-30), the Union was entitled to investigate the suspected alter-ego

status of the Company and the franchisees, and was not required to overcome the Company's denials of alter-ego status, or definitively prove that the entities in question were alter egos, before inquiring further through information requests.

Substantial evidence also supports the Board's finding (A 1, 20-21) that the Company's refusal to provide the requested information, despite the Union's repeated requests, impeded meaningful bargaining over the effects of the Company's decision to close the stores in question. In so finding, the Board considered (*id.*) the record of the parties' effects-bargaining sessions, which clearly show that discussions at each session were hampered by the Union's ignorance of the relevant information above, and were ultimately paralyzed by the lack of that information. The Company's defense (Br. 21 n.7) that the Union was never "precluded" from bargaining is meritless, as the salient issue is whether the Union was able to participate *meaningfully* in the give-and-take process contemplated by the Act.

As a remedy for the unfair labor practices, the Board ordered (A 22-23) the Company not only to bargain with the Union over the effects of the store closures, but to compensate employees who worked in those stores with a minimum of two-weeks backpay, as provided in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Contrary to the Company (Br. 30-36), the Board's order of a limited

*Transmarine* backpay remedy is well within the Board's broad remedial discretion, and is consistent with the statutory goal of ensuring meaningful bargaining.

Because the Board's unfair-labor-practice findings are supported by substantial evidence, and its choice of remedy is proper, the Board is entitled to enforcement of its Order. This result is in no way altered by the passing claim, in the last paragraph of the Company's brief (Br. 36-37), that the Acting General Counsel does not have authority to seek enforcement of the Board's Order because the Board assertedly lacks a quorum of validly appointed members at present. As explained below, pp. 51-60, the Company has failed to properly preserve this claim by sufficiently explaining it. In any event, the Company's objection fails because the Acting General Counsel is validly authorized to seek enforcement here, regardless of whether the Board currently has a quorum, based on the Board's permanent delegation of such authority to the General Counsel in 1955. As a result, while there is no merit to the Company's suggestion that the President lacked the power under the Recess Appointments Clause to appoint Board Members during a twenty-day period during which the Senate declared it would conduct "no business," it is unnecessary for the Court to address that issue.

### **STANDARD OF REVIEW**

This Court considers the Board's finding of a Section 8(a)(5) and (1) violation to be "a predominantly factual determination," and therefore the Court

will uphold that determination “if it is supported by substantial evidence in the record as a whole.” *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1330 (7th Cir. 1991); 29 U.S.C. § 160(e). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). In applying the substantial-evidence standard, the Court does not “dabble in fact-finding, and . . . may not displace reasonable determinations simply because [the Court] would have come to a different conclusion if [it had] reviewed the case de novo.” *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1373 (7th Cir. 1991). The Court similarly will not disturb the Board’s legal conclusions unless they are irrational or inconsistent with the Act. *NLRB v. Transp. Serv. Co.*, 973 F.2d 562, 566 (7th Cir. 1992).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO TIMELY COMPLY WITH THE UNION’S REQUEST FOR INFORMATION PERTAINING TO THE COMPANY’S SALE OF TWO UNIONIZED STORES TO SUSPECTED ALTER EGOS OF THE COMPANY**

#### **A. An Employer’s Statutory Duty To Bargain Includes the Duty To Provide Relevant, Requested Information to the Union; Breach of This Duty Violates Section 8(a)(5) and (1) of the Act**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively” with the representative of its employees. Section 8(d) of the Act (29 U.S.C. § 158(d)), in turn, defines “to bargain collectively” as “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 . . . .” It is well settled that the duty to bargain in good faith described in Section 8(d) includes the employer’s obligation to “provide the union with all requested information that is relevant to [the] union’s discharge of its statutory obligations as representative of bargaining unit employees.” *Nat’l Steel Corp. v. NLRB*, 324 F.3d 928, 934 (7th Cir. 2003) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956)). Thus, an employer’s failure to timely provide relevant, requested information is a violation of the duty to bargain collectively imposed by Section 8(a)(5) of the Act

(29 U.S.C. § 158(a)(5)).<sup>9</sup> See *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 756 (7th Cir. 2001); *P.R. Mallory & Co. v. NLRB*, 411 F.2d 948, 953 (7th Cir. 1969).

The key inquiry in information-request cases is whether the requested information is relevant to a union’s collective-bargaining duties. *Emeryville Research Ctr. v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971); accord *NLRB v. Jarm Enters., Inc.*, 785 F.2d 195, 203 (7th Cir. 1986). Where, as here, the union seeks information that is not ordinarily pertinent to a union’s role as bargaining representative, but nevertheless may be pertinent under particular circumstances, the union has the threshold burden of establishing relevance. See *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991). But the union’s burden “is not a heavy one.” *Lenox Hill Hosp.*, 327 NLRB 1065, 1068 (1999) (citing *Leland Stanford Jr. Univ.*, 262 NLRB 136, 139 (1982), *enforced*, 715 F.2d 473 (9th Cir. 1983)). Indeed, as this Court has recognized, a “very liberal relevancy standard applie[s],” and under that standard information is deemed relevant if there is even “a probability” that it “would be of use to the union in carrying out its statutory duties and responsibilities.” *Naperville Ready Mix*, 242 F.3d at 756 (citing *NLRB*

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<sup>9</sup> A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . .” See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

*v. Acme Indus. Co.*, 385 U.S. 432, 437 n.6 (1967)); *George Koch Sons*, 950 F.3d at 1332 (internal quotation marks omitted).

This broad, discovery-type standard allows the union access to “a broad range of potentially useful information . . . for the purpose of effectuating the bargaining process,” including information about alter egos—nonunion companies substantially identical to the employer—that the employer may be using to evade its contractual obligations to bargaining-unit employees. *George Koch Sons*, 950 F.2d at 1331-32 (internal quotation marks and citation omitted); *see also NLRB v. Leonard B. Hebert, Jr. & Co.*, 696 F.2d 1120, 1124-25 (5th Cir. 1983); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 535-36 (4th Cir. 1985). However, for information about a suspected alter ego to be relevant, the union must have a reasonable, objective basis for believing that the alter-ego relationship exists. *Contract Flooring Sys., Inc.*, 344 NLRB 925, 925 (2005); *accord George Koch Sons*, 950 F.2d at 1332.

The union may form the requisite reasonable belief based not only on direct evidence, but on indirect evidence and hearsay accounts. *See Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 968 (2006) (observing that information supporting reasonable basis for further investigation need not be “accurate, non hearsay or even ultimately reliable”); *see also George Koch Sons*, 950 F.2d at 1333 (finding that “[i]t was reasonable for the [u]nion to rely on the . . . observations of union

officials, employee reports and records in forming the reasonable suspicion that the [company] was diverting work to Alpha Industries”). In addition, the union is not required to actually prove the existence of the suspected alter-ego relationship before it can investigate the matter through an information request. *See Maben Energy Corp.*, 295 NLRB 149, 152 (1989) (finding that union “is not required to prove the existence of [the alter-ego] relationship” in order to make an information request about it).

**B. The Board Reasonably Found that the Company Unlawfully Withheld Relevant, Requested Information from the Union**

After the Company announced its plan to sell Stores 23 and 31 to purportedly independent franchisees, the Union requested that the Company provide information about its relationship with the franchisees. Specifically, the Union requested the sales and franchise agreements executed between Company and the franchisees, information about equipment transactions between them, and information about services that the Company provided to the franchisees. The Union’s clear purpose in making these requests—which it conveyed to the Company at the time of each request—was to determine whether the Company and the franchisees were involved in arms-length transactions that genuinely extinguished the Company’s contractual obligations towards the employees of Stores 23 and 31. Understanding the Union’s concern, the Company denied that

the transactions in question were anything but arms-length. However, the Company refused to provide information that would allow the Union to verify this claim while the stores were still open, and the bargaining units still intact. In these circumstances, the Board found that the Company breached its duty to provide information relevant to bargaining, and thus violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

In finding that the information requested by the Union was relevant to the Union's performance of its representational duties, the Board relied (A 1-2, 14-15) not only on the concern that the Union articulated to the Company, but also on the objective facts underlying that concern. *See Contract Flooring Sys.*, 344 NLRB at 925 (in requesting alter-ego information from employer, union must state its belief that there is an alter ego relationship between employer and non-union entity, but need not spell out to employer factual basis for its belief). As the Board found (A 15), in the contract negotiations that preceded the events at issue, Company Owner Butera ominously told union officials that he "kn[e]w how to get rid of the union" and suggested that he would be financially better off as a non-union employer. Notwithstanding Butera's comments, the parties executed collective-bargaining agreements in the spring of 2009, but then 6 months later the Company announced that 2 of the covered stores were being sold to "independent" franchisees. When the Union requested information about the identity of the supposedly independent

franchisee-owners, it learned that the would-be owner of Store 31 was none other than the Company's manager of Store 31.

As the Board further found (A 2, 14), press reports about the upcoming sales of the stores only tended to support the Union's suspicions that the Company and the purchasers were alter egos. Those reports indicated that there would be a "seamless" transition to new ownership, with the stores closing under company ownership one day and opening under new ownership the next. Lending further support to the Union's suspicions were reports that customers would notice no difference between the company stores and the franchised stores because the franchised stores would operate, as before, under the Company's name, with the same logo and advertisements, and with the same merchandise from the Company's warehouses.

Amidst these reports, Union officials also witnessed a company manager, Rick Saeger, reviewing employment applications for one of the franchisees. The Union questioned the Company about Saeger's role in hiring employees at the franchised stores and reiterated its need for information about the relationship between the Company and the franchisees. In response, the Company did not dispel the Union's concerns, but stated that Saeger was "just helping out with the paperwork."

Given the above facts known to the Union “at the relevant time” (A 1)—that is, at the time of the Union’s information requests—the Board reasonably found that the Union had an “objective, factual basis” for believing that the franchisees were alter egos of the Company. (A 311-12.) Accordingly, the information sought by the Union, relating to the suspected alter-ego status of the three companies here, was relevant to the Union’s representational duties, and therefore the Union was entitled to that information.

As the Board noted (A 2 & n.11), the Union’s entitlement to the requested information is the same even under the more stringent relevancy standard applied by this Court. Under that standard, the Union’s stated reason for its information requests is evaluated by considering the facts “known” to both the Union and the Company “at the time of the demand and refusal.” *George Koch Sons*, 950 F.2d at 1330 (citing *Gen. Elec. Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1990) (“We deal with the fact situation presented to the Company at the time it acted.” (internal quotation marks and citation omitted))). But in determining what facts are “known” at the relevant time, the Court looks to “the entire pattern of facts available to the employer . . . not just the communications” between the parties. *Gen. Elec. Co.*, 916 F.2d at 1170 (internal quotation marks, brackets, and citation omitted).

Applying this approach here, the Board found (A 2) that “[e]ven without the Union expressly informing the [Company] of the specific facts giving rise to its belief that an alter ego relationship existed, the [Company] was well aware of the circumstances underlying the Union’s suspicion.” Indeed, the Company was responsible for releasing much of the basic information on which the Union relied in forming its belief that the Company and the franchisees were alter egos. Thus, the Company released to the Union the name of the new franchisee-owner of Store 31, who happened to be managing Store 31 for the Company in the months prior to the purported transfer of ownership. Similarly, the Company released to the public the information that the Union learned from press reports, about the “seamless” and imperceptible transition of Stores 23 and 31 to new ownership. Moreover, the Company was well aware that the Union had witnessed one of its managers reviewing employment applications for one of the franchisees, and indeed offered the explanation that this manager was “just helping out with the paperwork.”

In these circumstances, the Board found (A 2) that the factual basis for the Union’s information requests, and their relevance to the employees’ contractual rights, should have been obvious to the Company. Specifically, “it should have been apparent to the [Company] that the Union had a reasonable basis to suspect that the franchisees and the [Company] had sufficiently similar business purposes, management, operations, equipment, supervision, and ownership to constitute alter

egos.” (*Id.*) The Board concluded (*id.*) that the Company’s failure to timely provide the manifestly relevant information requested by the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

### **C. The Company’s Arguments Lack Merit**

The Company argues (Br. 14-30) that it was not under any obligation to provide the information that the Union requested, and that the Board’s finding of such an obligation reflects a misapprehension of Board law and the relevant facts. As explained below, these arguments do not warrant reversal of the Board’s reasonable unfair-labor-practice finding.

#### **1. Board precedent does not establish an onerous three-part test that a union must satisfy before it is entitled to requested information**

The Company contends (Br. 14-16, 20-24) that the Board failed to follow precedent applying “a three step analysis for determining whether an employer has a duty to furnish requested information.” However, the Company cites no case in which this burdensome three-step analysis has been applied, requiring a union to show (1) the relevance of the requested information, (2) as a separate matter, the “necessity” for the information, and (3) the good-faith nature of its request.

Although the Board and reviewing courts often refer to an employer’s statutory duty to provide information “necessary” or “needed” for the union to perform its collective-bargaining duties, they do not require the union to make a

showing of necessity or need before the employer's duty is triggered. *See, e.g., Illinois-American Water Co.*, 933 F.2d at 1377-78; *Contract Flooring Sys.*, 344 NLRB at 928. Rather, the union need only “demonstrate the relevance of the requested information under the very liberal relevancy standard” announced by the Supreme Court in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 n.6 (1967). *Naperville Ready Mix*, 242 F.3d at 756. Applying this standard, this Court has affirmed that “[i]n determining whether an employer is obligated to supply particular information, the Board need only find *a probability* that the information is relevant and that it will be of use to the union in carrying out its statutory duties.” *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 889 (7th Cir. 1985) (emphasis added)). Thus, if the requested information is relevant, the union is normally entitled to it. *See Illinois-American Water Co.*, 933 F.2d at 1377-78.

To be sure, there are exceptional situations in which a union may not be entitled to requested information, despite a showing of relevance. In such situations, the employer has mounted an effective defense to the union's showing of relevance—for example, a defense based on the confidentiality of the requested information or the danger posed to employees' safety. *See, e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-20 (1979) (employer entitled to place conditions on disclosure of relevant information, based on confidentiality concerns); *Chicago Tribune Co. v. NLRB*, 79 F.3d 604, 607-08 (7th Cir. 1996) (employer entitled to

withhold presumptively relevant information from union based on confidentiality and safety concerns). But the basic showing required of the union to support its request for information remains limited to the issue of relevancy, and “in general an employer violates [S]ection 8(a)(5) by failing to disclose relevant information upon request.” *Naperville Ready Mix*, 242 F.3d at 756.

The Board cases cited by the Company are not to the contrary. In *Columbus Prods. Corp.*, 259 NLRB 220, 220 n.1 (1981) (“*White Westinghouse Corp.*”), the Board reaffirmed as “correct[]” the general rule “requiring the employer to provide information which is of probable or potential relevance to the proper performance of the duties of a collective-bargaining representative.” Adding that this is not a *per se* rule, the Board found in the particular circumstances of the case that “all relevant and needed information” had already been provided to the union, obviating the union’s need for additional, arguably relevant, information. Similarly, in *Transport of New Jersey*, 233 NLRB 694, 694 (1977), the Board once again applied its usual relevancy standard and found that certain information requested by the union was not only relevant, but necessary for the Union’s performance of its representational duties. Contrary to the Company’s suggestion here (Br. 14-15), the Board did not, by this finding, create a separate requirement that a union must prove “necessity” to support an information request. Hence, because the Board did not set out a separate “necessity” requirement in either

*White Westinghouse* or *Transport of New Jersey*, the Board’s failure to apply such a requirement in this case does not constitute a departure from those precedents.<sup>10</sup>

**2. The Union did not have to justify its information requests by proving the alter-ego status of the various companies involved here, nor did it have to accept the Company’s denials of alter-ego status**

The Company argues (Br. 27-29) that the Union did not have a sufficient factual basis for its suspicion that the Company and the franchisees were alter egos, because the Union “failed to demonstrate any centralized control of labor relations” between the Company and the franchisees. In so arguing, the Company conflates the requirements of single-employer status and alter-ego status under the Act. “Centralized control of labor relations” is a factor considered in determining whether two or more entities are a single employer; but that factor is not involved where, as here, the issue is possible alter-ego status. *See Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983) (noting that single-employer and alter-ego

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<sup>10</sup> To the extent that the Company is arguing (Br. 20, 22) that the Board “appl[ied] a new standard” for evaluating the relevance of the requested information, that argument is not properly before the Court because it was not first raised to the Board. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (finding that employer “could have objected to the Board’s decision in a petition for reconsideration or rehearing”); *Cast N. Am. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 1000 (7th Cir. 2000) (recognizing that 29 U.S.C. § 160(e) “is a jurisdictional bar, designed to allow the NLRB the first opportunity to consider objections and to ensure that reviewing courts receive the full benefit of the Board’s expertise”). In any event, the Board here did not apply a new standard, but adhered to the well-established relevancy standard that has been approved by this Court, as explained above.

inquiries are “conceptually distinct” and that “[i]t is the alter ego finding which will bind a nonsignatory [company] to a collective bargaining agreement, not a finding of single employer status”). Nominally separate entities may be alter egos if they have “substantially identical” business purposes, management, operations, equipment, supervision, and ownership, regardless of whether the evidence also shows centralized control of labor relations. *See Advance Elec., Inc.*, 268 NLRB 1001, 1002 (1984).

Leaving aside these distinctions, the Company is fundamentally mistaken in its suggestion that the Union had to “demonstrate” the merits of its alter-ego claim by proving any particular indicium of alter-ego status. *See Maben Energy*, 295 NLRB at 152 (party requesting information about a suspected alter ego is not required to actually prove existence of alter-ego relationship). The merits of the legal claims that underlie the Union’s information request are not in issue.<sup>11</sup> *See Acme Indus.*, 385 U.S. at 437 (observing that the discovery-type standard for

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<sup>11</sup> Thus, it is irrelevant that the Board’s Regional Director for Region 30 dismissed aspects of a union unfair-labor-practice charge alleging that the Company and the franchisees were alter egos. Contrary to the Company’s suggestion (Br. 26), the dismissal of an unfair-labor-practice charge is not a legally binding determination that the charge has no merit. Indeed, dismissal may signify nothing more than that the Region’s investigation of the charge produced insufficient evidence to support issuance of a complaint. *See* NLRB Casehandling Manual, Part 1 (Unfair Labor Practice Proceedings), § 10122.2(a) & (b). In this regard, there is no indication that the Regional Director had the benefit of all the information that the Board found relevant here when he dismissed the Union’s alter-ego allegation.

relevance decides nothing about the merits of the contractual claims underlying an information request); *NLRB v. Associated Gen. Contractors of Calif., Inc.*, 633 F.2d 766, 771 (9th Cir. 1980) (“Actual violations need not be established in order to show relevancy.”). Rather, the sole issue is whether the Union established the relevance of the information requested by reference to its reasonable beliefs based on objective facts. As indicated above, the Union carried this limited burden here, and therefore it was entitled to the relevant information it requested.

Contrary to the Company (Br. 25, 28), moreover, the Union was not obliged to abandon its reasonable alter-ego suspicions simply because the Company represented, in bargaining, that the Company and the franchisees were not alter egos. Indeed, given the employee rights at stake where an employer purports to sell its facilities and terminate its contractual obligations to employees at those facilities, the Union appropriately sought to probe beyond the Company’s representations and selective excerpts from the transactional documents. The Board thus found (A 15) that the Union was not required to blindly accept the Company’s claims, but “ha[d] a right to assess and verify for itself the accuracy of th[ose] claims [made] in bargaining.” In the absence of any valid defense to the Union’s right to the relevant, requested information, the Board reasonably found (A 1-2) that the Company’s withholding of that information violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY’S FAILURE TO TIMELY PROVIDE THE REQUESTED INFORMATION IMPEDED EFFECTS BARGAINING, FURTHER VIOLATING SECTION 8(a)(5) AND (1) OF THE ACT**

The Board reasonably found (A 20-21) that the Company’s unlawful refusal to provide information to the Union hindered the bargaining process at each of the parties’ effects-bargaining sessions, and paralyzed bargaining as of December 18, 2009. Although the Company suggests (Br. 21 n.7), based on the testimony of one witness, that the Union nevertheless was not “precluded” from engaging in effects bargaining, this observation misses the point. As explained below, the Act requires the parties to engage in *meaningful* bargaining, and substantial evidence supports the Board’s finding the Company’s conduct here precluded *meaningful* bargaining on the Union’s side—specifically, the development of informed positions and proposals on behalf of the represented employees that would have allowed productive effects bargaining in the critical days before the stores in question closed. The Board accordingly found that the Company’s impairment of effects bargaining violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

**A. The Company Had a Duty to Engage in Effects Bargaining With the Union in a Meaningful Manner, and at a Meaningful Time**

Under well-settled law, an employer that decides to sell, close, or partially close its operations has a statutory duty to bargain with its employees’ union over

the effects of the decision on the union-represented employees. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (recognizing duty to engage in effects bargaining over partial closure); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286, 1291 (7th Cir. 1989) (recognizing duty to engage in effects bargaining over closure); *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988) (recognizing duty to engage in effects bargaining over sale and closure). As this Court has recognized, moreover, this duty “is critical to protect employees from the ravages of economic dislocation.” *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983). It allows the union to negotiate for benefits that will help soften the blow of the employer’s decision, without necessitating a change in the decision. *Id.* Thus, the requirement of effects bargaining “maintains an appropriate balance between the employer’s right to close its business and an employee’s need for some protection from arbitrary action.” *Kirkwood Fabricators*, 862 F.2d at 1306.

For effects bargaining to comport with the requirement of good-faith bargaining under Section 8(a)(5) and 8(d) of the Act (29 U.S.C. §158(a)(5) and (d)), it must be conducted “in a meaningful manner and at a meaningful time.” *First Nat'l Maintenance*, 452 U.S. at 682. As a corollary, employer conduct that prevents a union from bargaining over effects “in a meaningful manner” violates Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)). *See, e.g., Miami*

*Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995) (employer's unlawful failure to provide relevant information requested by union undermined union's ability to engage in meaningful effects bargaining, violating Section 8(a)(5) and (1)).

**B. The Board Reasonably Found that the Company's Refusal To Provide Information Repeatedly Requested in Bargaining Hindered Meaningful Effects-Bargaining Discussions and Ultimately Caused Them To Break Down**

The parties met for effects bargaining on three occasions—on November 16, December 1, and December 18, 2009—prior to the closure of Stores 23 and 31. As the Board found (A 21), the Union's demand for information was “a focus of and an issue of contention at each of the three meetings between the parties.”

Thus, Company Vice President Koenig testified that, from the parties' very first bargaining session on November 16, Union Attorney Sweet conveyed the impression that the Union would not be “discussing anything very long that day,” given the Company's failure to provide transactional information that the Union had requested. (A 20; 190-92.) According to Koenig, the parties then went “back and forth as far as what the [C]ompany was legally required to provide.” (A 192.)

At the parties' next bargaining session on December 1, Sweet reiterated the Union's request for information, but Company Attorney Simandl refused to provide it, claiming it was “none of [the Union's] business.” (A 8; 261.) As the Board found (A 8-9), Simandl and Sweet once again “went back and forth on the issue of the information,” with Sweet explaining why the Union was entitled to the

information and Simandl responding that the Company was not under an obligation to provide it. (A 93-94.)

Notwithstanding the distraction to negotiations posed by this “back and forth” over the information issue, the parties eventually proceeded, on December 1, to discuss the matter of greatest importance to the Company: the merger of employees from the closing stores into the remaining company stores. And at the parties’ December 18 bargaining session, the Company presented a proposal as to how the merger should be handled. However, the Union took the position that it could not fully deal with the merger issue and the other effects of the store closures without the transactional information it had requested.

Although effects discussions continued on December 18, the parties were unable to reach agreement on any issue. Simandl expressed disappointment at this state of affairs. (A 10; 108, 176, 282, 362.) Sweet, in response, reiterated that the Union “hadn’t received the information that we requested,” and therefore the Union was “unable to have meaningful discussions that would allow us to reach any kind of agreement.” (A 10; 282.)

Despite the Union’s repeated requests for information and indications that it could not bargain without that information, the Company did not provide any of the requested information in time for further bargaining before Stores 23 and 31

closed at the end of December 2009. Accordingly, the parties' December 18 effects-bargaining session was their last.

On the above evidence, the Board reasonably found (A 21) that “the [Company’s] failure to provide requested information undermined and tainted the effects bargaining negotiations.” By withholding relevant information from the Union, the Company essentially forced the Union to bargain in ignorance of matters that it deemed important to the development of reasonable positions and proposals on behalf of the employees.<sup>12</sup> (20-21; 286-89, 292, 308.) The Company’s conduct, thus, impeded meaningful bargaining by the Union, and ultimately caused the breakdown of bargaining on December 18, 2009. In these circumstances, the Board reasonably found (A 1, 21) that the Company breached its statutory duty to engage in *meaningful* effects bargaining, violating Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

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<sup>12</sup> For example, even if the information that the Company should have disclosed did not prove all the elements of alter-ego status, if it showed, even just during the transition, that the Company retained some element of control over matters affecting working conditions of employees, the Union could have advanced proposals over how the Company would exercise that control. *See, e.g.*, A 230-31, where Company Vice President Koenig admitted that his job included improving the “operational efficiencies” of the franchised stores, including payroll.

**C. To the Extent that the Company Addresses the Effects-Bargaining Violation At All, It Makes a Flawed Factual Claim**

The Company does not specifically contest the Board’s finding of this effects-bargaining violation, but claims (Br. 21 n.7)—in challenging the separate finding that it unlawfully withheld requested information from the Union—that the Union “was not precluded from effects bargaining.” This claim reflects the Company’s misunderstanding of both the record and the relevant law.

Contrary to the Company (Br. 10, 21 n.7), Union Secretary-Treasurer Grant Withers did not “admit[]” at the underlying hearing that the Union was not “precluded” from engaging in effects bargaining. On the contrary, Withers testified that through the parties’ first two bargaining sessions, the Union was unable to make proposals because it lacked the information it had requested. (A 163, 175-76.) At the third bargaining session on December 18, the Union made *two* proposals, relating to severance pay and health and welfare benefits for employees who quit or were laid off as a result of the store closures. (A 106, 108, 224-25, 276-77, 279, 286-87.) According to Withers, the Union only took this step, notwithstanding that the Union was “bargaining with one hand tied behind [its] back,” because the store closures were close at hand, “the [Company] was stonewalling [the Union] as far as providing anything,” and the Union felt it was necessary to “take one last gasp . . . at putting a proposal together . . . [to] get [the

employees] something before they're out on the street with nothing." (A 163.)

This testimony hardly qualifies as a concession, as the Company contends (Br. 21 n.7), that the Union was not precluded from participating in effects bargaining.

More importantly, the operative question here is not whether the Union was literally prevented from making proposals or otherwise participating in effects discussions. Rather, the question is whether the Union was able to participate meaningfully in the give-and-take process contemplated by the Act, as opposed to being dragged along in discussions focused on the Company's bargaining priorities. *See Emsing's Supermarket*, 872 F.2d at 1286 (holding that effects-bargaining must be "done in a meaningful manner and at a meaningful time" (internal quotation marks and citation omitted)). Addressing this question, the Board reasonably found (A 21) that, as of the parties' December 18 bargaining session, if not earlier, the Union was unable to engage in meaningful discussions about the effects of the store closures.

**III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE COMPANY TO PROVIDE A MINIMUM OF TWO-WEEKS BACKPAY TO EMPLOYEES PURSUANT TO *TRANSMARINE NAVIGATION CORP.***

**A. Where an Employer Unlawfully Refuses To Engage in Meaningful Effects Bargaining, the Board Considers a Limited Backpay Remedy Appropriate, for Reasons Explained in *Transmarine Navigation Corp.***

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), once the Board finds that an unfair labor practice has been committed, it is empowered to order the offending party “to take such affirmative action . . . as will effectuate the policies of the Act.” *See NLRB v. Midwestern Personnel Servs., Inc.*, 508 F.3d 418, 422-23 (7th Cir. 2007). Moreover, as this Court has recognized, “[e]nsuring meaningful bargaining comports with the primary objective of the Act.” *Yorke*, 709 F.2d at 1145.

Thus, in *Transmarine Navigation Corp.*, 170 NLRB 389, 389-90 (1968), the Board announced a limited backpay remedy adapted to address the peculiar remedial challenge posed by an employer’s refusal to bargain about the effects of a decision to terminate operations. *See also NLRB v. Cent. Ill. Pub. Serv. Co.*, 324 F.2d 916, 919 (7th Cir. 1963) (citing *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938), in which the Supreme Court held that a Board remedy should be “adapted to the situation which calls for redress”). Where such a refusal to bargain has occurred, and the termination of operations has already taken place, “it is

impossible to reestablish a situation equivalent to that which would have prevailed had the [employer] more timely fulfilled its statutory bargaining obligation.”

*Transmarine*, 170 NLRB at 389. The Board accordingly found that “a bargaining order alone cannot serve as an adequate remedy,” as the result would likely be *pro forma* bargaining in which the union has no leverage. *Id.* at 390.

To restore the bargaining situation more closely to what it would have been absent the employer’s unlawful refusal to bargain, the Board determined that its effects-bargaining order should be accompanied by a limited backpay requirement. *Id.* Specifically, the Board required that the employer provide backpay to the bargaining-unit employees, beginning from five days after the date of the Board’s decision, until the occurrence of one of four specified conditions: (1) the parties reach agreement; (2) the parties reach a bona fide impasse; (3) the union fails to request bargaining within 5 days of the Board’s decision, or to begin bargaining within 5 days of the employer’s notice of its desire to bargain; or (4) the union ceases to bargain in good faith. *Id.* The Board further provided that the sum paid to a given employee must equal, at minimum, what the employee would have earned from the employer over a two-week period. *Id.*

This limited backpay remedy serves a twofold purpose. *See id.* First, it makes employees whole for their losses to a limited degree. *Emsing’s Supermarket*, 872 F.2d at 1291. Second, and more importantly, it “restore[s] at

least some economic inducement for an employer to bargain as the law requires.” *Id.*; accord *Yorke*, 709 F.2d at 1145 (noting that “[t]he purpose of the limited backpay requirement is . . . to create an incentive for the [c]ompany to bargain in good faith”).

Since *Transmarine*, the Board, with court approval, has applied the *Transmarine* backpay remedy in other cases involving an employer’s unlawful failure to engage in effects bargaining. See, e.g., *Kirkwood Fabricators*, 862 F.2d at 1307 (upholding *Transmarine* remedy where employer refused to meet with union for effects bargaining); *Embarq Corp.*, 356 NLRB No. 125, 2011 WL 1210525, at \*2 n.2, 18-19, 21 (2011) (ordering *Transmarine* remedy where employer met with union for effects bargaining, but failed to provide relevant information that union requested for bargaining purposes). And this Court, in particular, has approved the Board’s application of the *Transmarine* remedy to address effects-bargaining violations, upholding this choice of remedy as “well within the broad remedial discretion granted by the Act.” *Yorke*, 709 F.2d at 1145 (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189-200 (1941)); accord *Emsing’s Supermarket*, 872 F.2d at 1290-91.

The Court has also noted that “in fashioning remedies for violations of the Act, ‘the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by the reviewing

courts.’’ *Emsing’s Supermarket*, 872 F.2d at 1290-91 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969)). Accordingly, a Board remedy, such as the *Transmarine* remedy ordered here, may not be set aside unless it is shown that the Board abused “its broad discretion in its field of specialization” by attempting to achieve ends “other than those which can fairly be said to effectuate the policies of the Act.” See *Emsing’s Supermarket*, 872 F.2d at 1291 (internal quotation marks and citations omitted). The Company, as discussed below, has shown no such abuse of discretion in the Board’s application of the *Transmarine* remedy here.

**B. The Board Properly Ordered a *Transmarine* Backpay Remedy Here, Given the Company’s Failure To Engage in Meaningful Effects Bargaining**

As discussed above, pp. 36-42, the Company’s refusal to provide relevant information requested by the Union prevented meaningful effects bargaining and created a situation where the parties could not have productive effects discussions in the final days before the store closures took effect. As a result, the Board found (A 22) that the bargaining-unit employees were “denied an opportunity to bargain through their collective-bargaining representative at a time when the [Company] might still have been in need of their services and a measure of balanced bargaining power existed.” To address this unfair situation, now that the Company will have provided the requested information pursuant to the Board’s Order, the

Board ordered the Company to bargain with the Union, upon request, about the effects of the store closures. However, the Board also found (A 23) that, in the circumstances here, “imposition of a *Transmarine* remedy is appropriate.”

Indeed, the situation here is “one for which the *Transmarine* remedy was designed.” (A 23.) The affected employees represented by the Union “have now been dispersed, and the bargaining unit dissipated, negating any potential that a mere bargaining order will even remotely recreate the bargaining terrain and incentives that prevailed at the time of the [Company’s] violation.” (*Id.*)

Accordingly, to recreate “in some practicable manner” the situation that would have existed absent the Company’s unlawful conduct, the Board found (A 22-23) a limited backpay remedy necessary. *Transmarine*, 170 NLRB at 390.

In imposing this limited backpay remedy, the Board also considered the secondary purpose of such a remedy, which, in this case, would be to make employees whole, to some degree, for the losses they suffered by virtue of the breakdown in bargaining over the effects of the store closures. Although “the results that would have emerged from good-faith bargaining, had it occurred, cannot be discerned,” the record makes clear that the employees were adversely affected by the sale and closure of the stores where they worked, and they were not provided any economic cushion to soften the blow of these events. Thus, there was no severance pay for employees who quit or were laid off due to the store

closures. As the Board observed (A 23), a limited number of employees transferred to other Company stores in the area, “but many others did not and either moved on, managed to get hired [by] the franchisees (for uncertain wages, benefits, and uncertain working conditions), or retired.”

After carefully considering the above uncertain circumstances created by the Company’s unlawful failure to engage in meaningful effects bargaining, the Board ordered (A 20-21) the Company to not only resume effects bargaining, upon the Union’s request, but also to provide limited *Transmarine* backpay to the employees. In so ordering, the Board acted well within its broad remedial discretion under the Act.

**C. The Company’s Challenges to the Board’s *Transmarine* Remedy Are Meritless**

**1. Board precedent does not limit application of the *Transmarine* remedy to situations where an employer unlawfully fails to give a union notice of an operational change that requires effects bargaining**

The Company argues (Br. 30-33) that the Board’s application of a *Transmarine* remedy here is “erroneous under existing Board precedent” because this remedy only applies “where an employer fails to notify a union of an important change to the employer’s business” and thus renders effects bargaining impossible from the outset. The Company is mistaken.

As discussed above, the duty to bargain over the effects of an operational decision requires not only bargaining “at a meaningful time”—for example, by giving sufficient notice for bargaining to occur before the decision is implemented—but also bargaining “in a meaningful manner.” *First Nat’l Maintenance*, 452 U.S. at 682. Here, the Company failed to bargain in a meaningful manner, by unlawfully withholding relevant information requested by the Union, and continuing to do so in the face of the Union’s repeated requests and assertions that it needed the information to participate meaningfully in effects discussions. The obstruction to bargaining caused by the Company’s conduct is no less an unlawful failure to bargain than an employer’s failure to give a union adequate notice and an opportunity to bargain at the outset.

Nevertheless, the Company suggests that the effects-bargaining remedy set forth in *Transmarine* applies exclusively to one subset of failure-to-bargain cases—those involving a failure to bargain at a meaningful time. There is simply no basis, in law or logic, for this suggestion. Although *Transmarine* itself involved an employer’s unlawful failure to give a union notice sufficient to allow timely effects bargaining, the remedy set forth in *Transmarine* is not limited to that underlying factual situation. (A 23.) Rather, the *Transmarine* remedy applies wherever there is an effects-bargaining violation that implicates the remedial concern recognized in *Transmarine*—that is, the concern that the remedy “recreate,

in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the [employer]." *Transmarine*, 170 NLRB at 390.

**2. Application of the *Transmarine* remedy here is not punitive**

Similarly lacking in merit is the Company's argument (Br. 33-36) that the Board's application of a *Transmarine* remedy here is punitive, and confers a windfall on employees and the Union. As this Court has emphasized, a *Transmarine* remedy is not punitive where, as in this case, it is directed towards recreating the necessary "economic inducement for an employer to bargain [over effects] as the law requires." *Emsing's Supermarket*, 872 F.2d at 1291; *see also Yorke*, 709 F.2d at 1145.

The Company does not claim that it needs no such inducement to resume bargaining years after its closure of the two stores in question. Instead, it claims (Br. 34-35) that it engaged in three meaningful effects-bargaining sessions that should have been sufficient to fulfill its effects-bargaining obligation. However, as discussed above, substantial evidence supports the Board's finding (A 20-21) that the Company *did not* engage in meaningful effects bargaining, and indeed caused the breakdown of effects bargaining as of December 18, 2009. The *Transmarine* remedy is intended to address this failure of the bargaining process, and to provide an incentive for the Company to return to the bargaining table and discuss in good

faith the effects of the store closures. Accordingly, whether the Union and some of the employees have already received benefits from the Company, in spite of the failure of the bargaining process, is beside the point. *See Yorke*, 709 F.2d at 1145 (upholding Board’s application of *Transmarine* remedy, notwithstanding fact that “the Union already has enjoyed some of the benefit it could have hoped to attain from bargaining”). The *Transmarine* remedy is necessary to effectuate “the primary objective of the Act,” which is ensuring meaningful collective bargaining. *Emsing’s Supermarket*, 872 F.2d at 1291.

#### **IV. THE BOARD’S CROSS-APPLICATION FOR ENFORCEMENT IS VALID**

As an afterthought to its arguments on the merits of the unfair practices, the Company challenges (Br. 36-37) the Acting General Counsel’s authority to seek enforcement of the Board Order. In a single paragraph, the Company asserts that the President’s January 4, 2012, recess appointments of three Board Members were invalid, so the Board *currently* lacks a quorum of three members, and thus the Acting General Counsel may not now seek to enforce an Order that was issued on January 3, 2012, when the Board indisputably had a quorum.<sup>13</sup>

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<sup>13</sup> The President appointed Members Sharon Block, Terence Flynn, and Richard Griffin, Jr., on January 4. Members Block and Griffin’s nominations remain pending before the Senate, and Member Flynn has since submitted his resignation.

This Court should not address the Company’s constitutional challenge for two reasons. First, the Company makes conclusory assertions but offers no analysis or legal argument, so its challenge should be deemed waived. Second, if it is not waived, this issue should be resolved on straightforward statutory grounds: pursuant to a longstanding delegation of authority that predates by decades the recent recess appointments, the Acting General Counsel is authorized to initiate a cross-application for enforcement entirely independent of the Board itself. As a result, the cross-application filed by the Acting General Counsel in this case is valid regardless of whether the Board presently has a quorum, and thus any decision on the constitutionality of the recess appointments would be unnecessary and advisory. If this Court does reach the issue, however, it should reject the Company’s unsupported assertions on their merits.

“A skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim,” especially where it is “bur[ied] in a single unreasoned paragraph of [a] brief on appeal.” *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). The Company offers no analysis and cites no authority in support of its assertion that “the Senate was in session” on January 4, 2012, when the President appointed three Board Members under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. Br. 36 (italics and boldface omitted). Nor does the Company explain why the Acting General Counsel and other Board employees are

without authority to act if the Board loses a quorum. Br. 37. As explained below, neither of the Company's assertions is self-evident; indeed, both are incorrect.

Because “[j]udges are not like pigs, hunting for truffles buried in briefs,” *Dunkel*, 927 F.2d at 956, and because the Company's cursory and conclusory presentation unfairly prejudices the Board's ability to respond, this Court should deem the Company's argument waived.

In any event, this Court need not reach the Company's constitutional claim, because regardless of whether the Board members were properly appointed under the Recess Appointments Clause, the Acting General Counsel was validly authorized to file the cross-application for enforcement pursuant to the Board's longstanding delegation of such authority to the General Counsel. Four district courts recently relied on an analogous delegation of authority in rejecting similar challenges to the President's January 2012 recess appointments – including, most recently, in a case involving this very company. *See Gottschalk v. Piggly Wiggly Midwest, LLC*, No. 12-C-0152, 2012 WL 1805492, at \*1-\*2 (E.D. Wis. May 17, 2012); *Garcia v. S & F Market St. Healthcare, LLC*, No. CV 12–1773, 2012 WL 1322888, at \*2 n.1 (C.D. Cal. April 17, 2012); *Paulsen v. Renaissance Equity Holdings, LLC*, No. 12 Civ. 0350 (BMC), --- F. Supp. 2d ----, 2012 WL 1033339, at \*5-\*7 (E.D.N.Y. Mar. 27, 2012); *Fernbach v. 3815 9th Ave. Meat & Produce*

*Corp.*, No. 12 Civ. 00823 (GBD), 2012 WL 992107, at \*1 (S.D.N.Y. Mar. 21, 2012).<sup>14</sup> The same result is proper here.

The General Counsel's authority to seek enforcement of the Board's order here derives from the Board's 1955 delegation to the General Counsel of full authority to "petition for enforcement and resist petitions for review of Board Orders as provided in [S]ection 10(e) and (f) of the [A]ct [29 U.S.C. § 160(e) and (f)] . . . ." 20 Fed. Reg. 2175 (1955); see *Vapor Blast Independent Shop Worker's Ass'n v. Simon*, 305 F.2d 717, 719 (7th Cir. 1962). In so delegating, the Board acted under Section 3(d) of the Act (29 U.S.C. § 153(d)), which provides that the General Counsel, in addition to the powers and duties specifically enumerated in that Section, "shall have such other duties as the Board may prescribe." As a result of this statutory authority supporting the 1955 delegation, the power to initiate and maintain enforcement actions "is permanently within the General Counsel's authority," and it "is not . . . conditioned on approval of the Board." *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1098 (9th Cir. 2009); see also *Frankl v. HTH Corp.*, 650 F.3d 1334, 1353 (9th Cir. 2011) (noting longstanding nature

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<sup>14</sup> Those cases were brought pursuant to Section 10(j) of the Act (29 U.S.C. 160(j)), which authorizes the Board to seek a district court order for temporary relief during the pendency of the administrative proceeding before the Board. They involved the Board's November 2011 temporary delegation of Section 10(j) authority to the Acting General Counsel, in the event the Board had only two sitting members.

and history of judicial acquiescence in delegation to the General Counsel of the authority to seek enforcement of Board orders), *cert. denied*, 132 S. Ct. 1821 (2012). It is thus immaterial here whether the Board currently has a quorum, because the Board has taken no action itself with respect to the cross-application for enforcement, nor need it take any. The Acting General Counsel validly authorized the cross-application on his own, pursuant to the General Counsel’s long-held authority.<sup>15</sup>

Nor does this permanent delegation to the General Counsel depend on the Board maintaining a quorum. This is so because when a governmental entity such as the Board takes a concededly permissible action—whether a regulation, order, or delegation—that action acquires the force of law in its own right. *Cf. Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2194-95 (2009) (noting that the “expiration of the *authorities* . . . is not the same as cancellation of the *effect* of the President’s prior valid exercise of those authorities”). Nothing in Sections 3(d) or 10(e) of the Act (or in Section 3(b) prescribing the Board’s quorum) suggests that the legal effect of a valid Board delegation may be abrogated based on later changes in the Board’s

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<sup>15</sup> Lafe Solomon was named Acting General Counsel by the President in June 2010 under the Vacancies Act, 5 U.S.C. § 3345 *et seq.* His nomination to be General Counsel is pending before the Senate. For the reasons stated above, pp. 52-53, the Company has waived any argument based on its one sentence claim (Br. 37) that “the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed the [enforcement] Petition be filed.”

membership. *See* 29 U.S.C. §§ 153(b) and (d), 160(e). In this respect, the Act is in harmony with the general principle that “[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office.” *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir.), *cert. denied*, 457 U.S. 1125 (1982); *accord Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan v. Nat’l Bank*, 696 F.2d 678, 682-83 (9th Cir. 1983). *Cf. Champaign Cnty., Ill. v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) (“a delegation of authority survives the resignation of the person who issued the delegation”).

The weight of authority strongly confirms that the legal effect of the Board’s permanent delegation of enforcement authority to the General Counsel is not nullified if the Board subsequently, and temporarily, lost its quorum. In an analogous context involving a delegation to the General Counsel of authority to seek injunctive relief under Section 10(j) (29 U.S.C. § 160(j)), courts of appeals have held that the delegation did not lapse when the Board subsequently lost its quorum. *See Frankl*, 650 F.3d at 1354; *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 853 (5th Cir. 2010).<sup>16</sup> Similarly, in more recent Section 10(j) injunction cases, district

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<sup>16</sup> These decisions, which issued after the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), all rejected the D.C. Circuit’s

courts have uniformly held that the Board's temporary delegation to the Acting General Counsel would survive any loss of a Board quorum, and thus found it unnecessary to decide whether the President's January 2012 recess appointments were valid. *See* cases cited *supra* at 53-54.

If this Court agrees, then “[r]egardless of whether President Obama’s recess appointments to the N.L.R.B. were constitutional,” it “would still find that the instant [cross-application for enforcement under Section 10(e)] was brought pursuant to validly-exercised powers” delegated to the General Counsel. *Paulsen*, 2012 WL 1033339, at \*14. It should therefore decline to reach the Company’s unnecessary constitutional challenge, given the “well established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam).

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pre-*New Process Steel* decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (2009), *cert. denied*, 130 S. Ct. 3498 (2010), which held that the Board’s delegation of its authority to a group of three Board members lapsed when the Board went to two members. As the three courts of appeals noted, the Supreme Court in *New Process*, while holding that the Board could not act with only two members, expressly declined to adopt the D.C. Circuit’s reasoning that any delegation made by the Board lapses when the Board loses a quorum. *See New Process*, 130 S. Ct. at 2642 n.4; *Frankl*, 650 F.3d at 1354; *Osthus*, 639 F.3d at 844; *Overstreet*, 625 F.3d at 853.

Even if the Company’s constitutional claim were properly presented, it lacks merit. The Constitution gives the President the power to fill official vacancies – temporarily – during any “Recess” of the Senate. Presidents have relied upon this power to make temporary appointments during both intersession recesses and intrasession recesses, during long Senate recesses and comparatively short Senate recesses, at the beginning of recesses and in the final days of recesses, to fill vacancies that arose during the recesses and those that arose before the recesses, and to fill both Article II and Article III vacancies. Indeed, every President (with the possible exception of William Henry Harrison) has made recess appointments. Consistent with its firm foundation in historical practice, courts interpret the President’s recess appointment power broadly.<sup>17</sup>

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<sup>17</sup> See, e.g., *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (holding that the recess appointment power extends to an intrasession recess of eleven days, to vacancies that arose before the recess, and to Article III appointments); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (holding that the power extends to vacancies that arose before the recess and to Article III appointments); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) (same); *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367 (Ct. Int’l Tr. 2002) (holding that the power extends to intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593 (Ct. Cl. 1884) (same).

The plain meaning of the term “Recess” is a “suspension of business” or a “period of cessation from usual work.”<sup>18</sup> The Senate expressly stated that it would hold only *pro forma* sessions, “with no business conducted,” during its break between the beginning of its session on January 3, 2012, and January 23, 2012. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). And that is what the Senate did, with a single Member gaveling in an empty chamber for a few seconds every few days during the break, without conducting business. The *pro forma* sessions here were thus part of, not an interruption of, the Senate’s recess.

The purpose of the Recess Appointments Clause reinforces the plain meaning of the constitutional text. The Framers anticipated that Congress would not always be in session, and they sought to ensure a functioning government by giving the President the power to fill vacancies temporarily when the Senate was not in business to provide its advice and consent to Presidential nominations. *See, e.g., The Federalist No. 67*, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton). To treat the Senate’s *pro forma* sessions as precluding recess appointments would frustrate this purpose and halt the longstanding practice, preventing the President from filling vacancies even when the Senate, under its own orders, is not conducting business for a significant period of time. Indeed,

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<sup>18</sup> II N. Webster, *An American Dictionary of the English Language* 51 (1828); *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706).

such treatment would allow the Senate to *eliminate* the President's Article II recess appointment power – not by remaining continuously in session to advise and consent to Presidential nominations, but instead by having one Member gavel in an empty chamber for a few seconds every few days without conducting business.

The Senate may choose to remain in session, but when the Senate takes an extended break from business, as it did here, the Constitution gives to the President the authority to make temporary appointments so he can “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3.

Because the Senate was under its own order *not* open to conduct business during its *pro forma* sessions, the Senate was in a twenty-day recess at the time the President appointed three new members to the NLRB. Those appointments thus represent a valid exercise of the President's authority under the Recess Appointments Clause, and nothing in the Company's perfunctory presentation demonstrates otherwise. Therefore, there is no bar to this Court's adjudication of the Board's cross-application for enforcement.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

STUART F. DELERY  
*Acting Assistant Attorney General*

LAFE E. SOLOMON  
*Acting General Counsel*

BETH S. BRINKMANN  
*Deputy Assistant Attorney General*

CELESTE J. MATTINA  
*Deputy General Counsel*

SCOTT R. McINTOSH  
SARANG V. DAMLE  
MELISSA PATTERSON  
BRIAN P. GOLDMAN  
*Attorneys, Appellate Staff*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

U.S. Department of Justice  
Civil Division, Room 7259  
950 Pennsylvania Avenue N.W.  
Washington, D.C. 20530  
(202) 514-4052

/s/ Robert J. Englehart  
ROBERT J. ENGLEHART  
*Supervisory Attorney*

/s/ Milakshmi V. Rajapakse  
MILAKSHMI V. RAJAPAKSE  
*Attorney*

National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2978  
(202) 273-1778

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

PIGGLY WIGGLY MIDWEST, LLC	)	
	)	
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	)	Nos. 12-1236 &
v.	)	12-1561
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	Board Case Nos.
	)	30-CA-18574
UNITED FOOD AND COMMERCIAL WORKERS	)	30-CA-18575
UNION LOCAL 1473	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,999 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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

Dated at Washington, D.C.  
this 15th day of June 2012

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	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on June 15, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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

Gregory H. Andrews  
Sarah J. Gasperini  
Jackson Lewis LLP  
150 N. Michigan Ave., Suite 2500  
Chicago, IL 60601

Mark A. Sweet  
Sweet & Associates  
2510 East Capitol Drive  
Milwaukee, WI 53211

/s/ Linda Dreeben

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

Dated at Washington, D.C.  
this 15th day of June 2012