

Nos. 11-1267, 11-1296

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

ALDEN LEEDS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1245

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2989

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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

ALDEN LEEDS, INC.)	
)	
Petitioner/Cross-Respondent	)	Nos. 11-1267, 11-1296
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-29188
)	
UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1245)	
)	
Intervenor)	

**THE BOARD’S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

Alden Leeds was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board. The United Food and Commercial Workers Local 1245 was the charging party before the Board and is the intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on July 19, 2011, reported at 357 NLRB No. 20.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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

Dated at Washington, DC
this 17th day of August, 2012

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory provisions.....	3
Statement of issue	3
Statement of the case.....	3
Statement of facts.....	5
I. The Board’s findings of fact.....	5
A. Background	5
B. The parties attempt to negotiate a new agreement.....	5
C. The company locks out its employees	11
II. The Board’s conclusions and order.....	12
Summary of argument.....	14
Standards of review.....	15
Argument.....	17
Substantial evidence supports the Board’s findings that the company violated the Act by locking out its employees without clearly and fully informing the union of its bargaining demands in a timely manner.....	17
A. An employer violates the Act by locking out its employees without first clearly and timely informing the employees of its bargaining demands	17
B. The company failed to clearly and timely set forth the conditions that the union needed to accept to avert the lockout.....	18

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
C. The Board determined that the lockout retained its unlawful taint until terminated and reasonably ordered the company to make the employees whole; the court is jurisdictionally barred by Section 10(e) of the Act from considering the company’s attack on the Board’s remedy	23
Conclusion	29

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alden Leeds, Inc.</i> , 357 NLRB No. 20, 2011 WL 2883219 (July 19, 2011)	2
<i>Allentown Mack Sales & Service, Inc. v. NLRB</i> , 522 U.S. 359 (1998).....	15
<i>Allied Mechanical Services, Inc. v. NLRB</i> , 668 F.3d 758 (D.C. Cir. 2012).....	15,16
<i>Alwin Manufacturing Co. v. NLRB</i> , 192 F.3d 133 (D.C. Cir. 1999).....	27
<i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965).....	17
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	15,16
<i>Boehringer Ingelheim Vetmedica, Inc.</i> , 350 NLRB 678 (2007)	22
<i>Brockton Hospital v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	16
<i>Chevron Mining, Inc. v. NLRB</i> , 684 F.3d 1318 (D.C. Cir. 2012).....	25,26,28
<i>Contractors’ Labor Pool, Inc. v. NLRB</i> , 323 F.3d 1051 (D.C. Cir. 2003).....	27
* <i>Dayton Newspapers, Inc.</i> , 339 NLRB 650 (2003), <i>enforced</i> , 402 F.2d 651 (6th Cir. 2005)	17,23

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>*Dietrich Industries, Inc.</i> , 353 NLRB 57 (2008)	18,23
<i>Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB</i> , 921 F.2d 1275 (D.C. Cir. 1990).....	26
<i>Exxel/Atmos, Inc. v. NLRB</i> , 28 F.3d 1243 (D.C. Cir. 1994).....	16
<i>Greensburg Coca-Cola Bottling Co.</i> , 311 NLRB 1022 (1993), <i>enforcement denied on other grounds</i> , 40 F.3d 669 (3d Cir. 1994).....	27
<i>Harter Equipment, Inc.</i> , 280 NLRB 597 (1986), <i>affirmed sub nom.</i> , <i>Local 825, International Union of Operating Engineers v. NLRB</i> , 829 F.2d 458 (3d Cir. 1987).....	17
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	16
<i>Horsehead Resource Development Co.</i> , 321 NLRB 1404 (1996)	24
<i>J. Michael Lightner v. Alden Leeds, Inc.</i> , No. 10-3237 (D. N.J. July 21, 2010).....	5
<i>Marshall Field & Co. v. NLRB</i> , 318 U.S. 253 (1943).....	26
<i>*Movers & Warehousemen’s Association of Metropolitan Washington, D.C., Inc.</i> , 224 NLRB 356 (1976), <i>enforced</i> , 500 F.2d 962 (4th Cir. 1977)	24

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Capital Cleaning Contractors, Inc.</i> , 147 F.3d 999 (D.C. Cir. 1998).....	16
<i>Parsippany Hotel Mangement Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	16
<i>Puerto Rico Drydock & Marine Terminals, Inc. v. NLRB</i> , 284 F.2d 212 (D.C. Cir. 1960).....	28
<i>Stanford Hospital & Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003).....	27
<i>Teamsters Local Union No. 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	21
<i>Teamsters Local Union No. 639 v. NLRB</i> , 924 F.2d 1078 (D.C. Cir. 1991).....	17
* <i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	25,26

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

Statutes:

Page(s)

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

Section 7 (29 U.S.C. § 157)	13,17
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3,12,15,18,23
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3,12,15,18,23
Section 10(a) (29 U.S.C. § 160(a)).....	2
Section 10(e) (29 U.S.C. § 160(e))	2,15,25,27,28
Section 10(f) (29 U.S.C. § 160(f))	2
Section 10(j) (29 U.S.C. § 160(j)).....	4

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

Nos. 11–1267 & 11–1296

ALDEN LEEDS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1245

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Alden Leeds, Inc. (“the Company”) to review, and on the cross-application of the National Labor Relations

Board (“the Board”) to enforce, the Board’s Order in *Alden Leeds, Inc.*, 357 NLRB No. 20, 2011 WL 2883219 (July 19, 2011). (JA 47-61.)¹

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. The Board’s Order is final with respect to all parties. The Company filed its petition for review on July 26, 2011, and the Board filed its cross-application to enforce the Board’s Order on August 18, 2011. Both filings were timely; the Act places no time limit on seeking review or enforcement of Board orders. The United Food and Commercial Workers Local 1245 (“the Union”), the charging party before the Board, has intervened in this proceeding on the Board’s behalf.

¹ “JA” refers to the joint appendix. “SA” refers to the Supplemental Appendix that the Board is moving to file with this brief. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF ISSUE

Under the Act, an employer may lawfully lockout its unionized employees in support of legitimate bargaining demands, but only after providing the union with clear and timely notice of its offer so that the union, and the employees it represents, can decide whether to accept those demands and thereby avert the lockout. Was there substantial evidence to support the Board's finding that the Company failed to provide such clear and timely notice, and therefore violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) & (1)) by locking out its employees?

STATEMENT OF THE CASE

On November 3, 2009, the Company locked out its employees during negotiations over a successor collective-bargaining agreement. Acting on charges filed by the Union, which represented the locked-out employees, the Board's General Counsel issued a complaint alleging that the lockout was illegal because the Company failed to clearly and fully inform the Union of its bargaining demands in a timely manner, thus preventing the Union and the employees from

determining whether or not to accept those demands and avert the lockout. The complaint also alleged that the Company unlawfully threatened to relocate its facilities and unlawfully failed to produce certain financial information. Following a hearing, an administrative law judge issued a decision finding that the Company violated the Act by locking out its employees and dismissed the remaining allegations.

On review, the Board (Members Becker and Pearce, Member Hayes dissenting in part) issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and affirmed the judge's remedy as modified. Below are summaries of the Board's findings of facts, and its Conclusions and Order.

In a separate but related action, which commenced before the issuance of the Board's Order, the Board's Regional Director sought an injunction against the Company from the United States District Court for the District of New Jersey, pursuant to Section 10(j) of the Act (29 U.S.C. § 160(j)). On July 21, 2010, the district court issued the temporary injunction pending the Board's final disposition of the case, enjoining and restraining the Company from locking out its employees and from, in any other manner, interfering with, restraining, or coercing its employees, and ordering the Company to reinstate the locked out employees within 5 days and to post copies of the Court's Order at its South Kearney facilities.

J. Michael Lightner v. Alden Leeds, Inc., No. 10-3237 (D. N.J. July 21, 2010)
(order granting temporary injunction).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company, led by president and chief executive officer Mark Epstein, manufactures and packages swimming pool cleaning supplies and chemicals at two locations in South Kearny, New Jersey. (JA 48-49; 281-82.) Prior to 2001, the Company's production and delivery employees at those locations were represented by UFCW Local 174. (JA 49; 167.) In 2001, the Company recognized the Union as the successor to Local 174, although the parties kept in place the existing collective-bargaining agreement until it expired in October 2002. (JA 49; 65; 167.) Thereafter, the parties extended the terms of that agreement, with modifications, by entering into a memorandum of agreement in October 2002, and another in 2005 that expired on October 3, 2009. (JA 49; 85, 86, 167.)

B. The Parties Attempt To Negotiate a New Agreement

On July 17, 2009, the Union asked the Company to open negotiations for a new collective-bargaining agreement. (JA 49; 61, 143, 169.) Union Business Agent Tom Cunningham and Epstein agreed to meet on September 30. (JA 49; 172-73.) On September 22, Cunningham sent to Epstein a list of requested

modifications to the existing agreement, including increases in wages, sick days, and vacation days; changes in seniority; and a request that they execute a 3-year agreement. (JA 49; 173-74, 214-16, SA 1-10.) The Union also indicated that it would propose increasing the Company's contributions to the premiums of the union-administered healthcare plan, but that it was waiting on those figures from the Union's Health Fund Office. (JA 49; SA 1-10.)

At the September 30 meeting, Cunningham presented Epstein with an updated version of the Union's proposals, which included the Company's increased healthcare contributions. (JA 49; 126-34, 176.) Without responding to the Union's other proposals, Epstein stated that the increases were outrageous and that the Company would not agree to those amounts. (JA 39; 177, 285.) Epstein said that he would explore alternative healthcare plans with the Company's insurance broker. (JA 49; 178, 286.) Cunningham asked Epstein to sign a 30-day extension of the agreement, which was to expire on October 3, 2009, but Epstein refused to do so. (JA 49; 178-79.)

Cunningham and Epstein met for a second time on October 5. (JA 49; 180, 286-87.) Epstein provided Cunningham with a spreadsheet, prepared by the Company's insurance broker, summarizing a number of alternatives to the Union's healthcare plan. (JA 49; 104-06, 180, 287.) Cunningham observed that the deductibles and out-of-pocket costs were very high in each plan and stated that the

employees would not be able to afford them. (JA 49; 181, 219.) Epstein responded that the broker would look into other, possibly more affordable, plans. (JA 49; 181, 219.) When Cunningham attempted to address the Union's other proposals, Epstein responded that he "couldn't do anything"; he wanted to keep everything the same for 1 year and all he was looking for was "a freeze for one year." (JA 49; 182, 220.) Cunningham said he could not do that because the healthcare contributions that the Company was currently paying would not provide the same level of medical coverage for the following year. (JA 49; 182, 221.) He offered, however, to take it back to the membership for a vote. (JA 49; 136, 287.) Finally, Cunningham renewed his request that Epstein sign an extension agreement. (JA 49; 182-83.) Epstein declined to do so but said that he would forward additional healthcare plans to the Union. (JA 49; 182-83, 219-20, 288.)

On October 8, Epstein and Cunningham, along with the Union's secretary-treasurer John Troccoli, met for a third time. (JA 49-50; 184, 289.) Epstein said he was still trying to obtain additional healthcare proposals. (JA 50; 230, 291.) There was no discussion of the healthcare plans that the Company provided to the Union on October 5. (JA 50; 310.) Epstein repeated his offer to extend the contract that had just expired, stating he still wanted a 1-year "freeze." (JA 50; 223, 231, 289.) Epstein ultimately agreed to sign an agreement extending the contract through November 2. (JA 50; 107, 291.) The meeting ended with Epstein

again promising to forward additional healthcare plans to the Union. (JA 50; 187-88.)

On October 21, Epstein emailed Cunningham details of an additional healthcare plan for the Union to review, stating that he had “hoped to have something even better” and that he would advise the Union if anything else came through. (JA 51; 109, 189.) The next day, Epstein sent to Cunningham an email explaining that, although the Company still hoped to find a less expensive plan, it had analyzed the cost of the plan that it had provided the day before and that it would be more expensive than the existing plan but less expensive than the Union’s proposed renewal plan. (JA 51-52; 119, 191.) He also suggested that if the Company provided single (employee only) coverage, and eliminated family coverage, the cost would drop below the existing plan, and the Company could pay \$400 towards each employee’s deductible. (JA 52; 119.) He ended the email by reiterating that he hoped to have something better that day. (JA 52; 119.)

Later that day, Epstein emailed Cunningham details of yet another healthcare plan and stated that, although the cost was similar to the plan he had sent the previous day, the deductible was higher but employees would not be required to provide a medical history. (JA 52; 120, 192, 293.) Cunningham showed these plans to Troccoli and told Troccoli he was not sure what the Company was offering on healthcare. (JA 52; SA 16.)

On Friday, October 30, Troccoli informed Epstein that he received the Company's proposed plans and that he did not think any of them would work because of the high deductibles, because medical reviews were required in order to obtain insurance, and because the overall cost to employees would be too high.² (JA 52; 237.) He offered, however, to continue the Union's existing plan for 1 year at the same Company contribution levels, but said that it may result in a cut in benefits depending upon the trustees' decision. (JA 52; 237.) Epstein did not accept that offer. (JA 57 & n.9; 237-38.) Troccoli then asked to discuss other issues, but Epstein responded by saying "[y]ou don't understand. I just want to keep everything the same. I don't want to pay anymore I want to keep everything the same for one year." (JA 52; 238.) Epstein told Troccoli that Cunningham was supposed to have employees vote on that offer. (JA 52; 271.) Troccoli responded by asking "Vote on what? I have no idea what we're voting on." (JA 52; 243, 271.) Epstein said that if the employees did not vote and agree to the Company's offer, that they would be locked out. (JA 52; 271-72.) Troccoli repeated that he did not know what the employees were supposed to be voting on,

² The Company asserts (Br. 8) that this conversation included Cunningham and took place on October 26. The judge, however, credited the testimony of Cunningham and Troccoli that this conversation took place on October 30 between only Epstein and Troccoli. (JA 53; 208-09, 237.)

and Epstein replied that the Union would have something by the end of the day. (JA 52; 271-72.)

That afternoon, the Company sent the Union an email stating that it had “tried [its] best to come up with an alternative medical plan that would cost the same or less than the proposed increase for the Union’s existing plan.” (JA 53; 64.) The Company further explained that the best healthcare plan that the Company could come up with would require employees to submit to a medical interview to obtain coverage; would not include dental or optical coverage; and would still cost more than the existing plan. But, if the parties agreed to eliminate family coverage, the plan would cost less than the existing plan and the Company would agree to pay \$400 towards the deductible of each employee. The Company also maintained that Troccoli had stated he was unaware of the option to eliminate family coverage, but that regardless, the Union wanted to keep its existing plan and cut benefits to keep the Company’s costs the same. The Company also stated that it “still want[ed] a freeze on wages for a one or two year Agreement.” (JA 53; 64.) It concluded the email by stating that if no agreement was in place by the close of business on Monday, November 2, the Company would lock out the union members on November 3. (JA 53; 64.)

DeVito and Troccoli were at a staff meeting when the email arrived. (JA 52; JA 147.) After reviewing it, they decided to discuss it further on Monday,

November 2, when Cunningham was available and would allow DeVito time to consult with legal counsel. (JA 52-53; 148.)

On November 2, Troccoli and Cunningham met to discuss the email. Cunningham found it “very confusing because so many plans were coming at [the Union] that [it] really didn’t [know] what plan [Epstein] was referring to.” (JA 53; 225.) Likewise, Troccoli was confused both because the email “mention[ed] dribs and drabs of a health plan,” and because he did not know which healthcare plan the Company was referring to or what the Company was proposing with respect to a freeze. (JA 53; 240-41, 244, 263.)

C. The Company Locks Out Its Employees

On Monday afternoon, Epstein informed shop steward Simon Hemby that, “effective immediately,” the employees were locked out. (JA 53; 277.) Hemby passed along this news to the employees as well as the Union. (JA 53; 148-49, 277-78.) The Union asked all employees to report to work the following day and attempt to clock in. (JA 53; 149.)

The next day, about 40 employees arrived at work, along with Hemby, Cunningham, DeVito and Troccoli, but the Company prohibited them from clocking in. (JA 53; 198, 245.) The group then went to Epstein’s office to talk with him. (JA 53; 150.) Epstein, upset by the group’s presence, agreed to speak with Hemby, Cunningham, and DeVito, but demanded that everyone else leave the

building. (JA 53; 150-51.) Epstein then refused to put the employees back to work until there was a signed agreement. (JA 53; 150-51, 298.) There was no discussion at that time about the terms of the agreement that the Company was offering but they agreed to meet the following day. (JA 53; 158.)

The parties met on Wednesday, November 4, then again on Monday, November 9, at which time the Company presented the Union with a document entitled “Final Offer.” (JA 53-54; 123, 305-06.) In it, the Company offered to enter into a 1-year agreement, specified the healthcare plan that would be provided to employees as well as the contribution rates of the Company and employees, and proposed that all other terms of the prior agreement would remain in effect. (JA 54; 123.) On November 12, the Union rejected this final offer. (JA 54; SA 23.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On July 19, 2011, the Board (Members Becker and Pearce, and Member Hayes dissenting in part) issued a Decision and Order affirming the judge’s decision finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by locking out its employees on November 3, 2009. (JA 47-60.) The Board explained that before locking out its employees, the Company was obligated to provide the Union with clear and timely notice of the conditions of its bargaining offer so that the Union and the employees could

evaluate whether to accept the Company's offer and avert the lockout. (JA 56.)

The Board found that the Company's October 30 email purporting to detail the terms of the Company's offer failed to provide the required notice because it "was confusing, incomplete, and internally inconsistent," and because it was untimely, coming one business day before the threatened lockout. *Id.* Finally, the Board found that further litigation over whether or not the Company limited its backpay liability, by providing the Union with a complete contract proposal on November 9, was unwarranted given that that the Company failed to raise this challenge with the Board. (JA 47 n.3.)

The Board ordered the Company to cease and desist from locking out its employees without providing them with a timely, clear, and complete offer that sets forth the conditions necessary to avoid the lockout, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the Act (29 U.S.C. § 157). (JA 48, 59.) Affirmatively, the Board ordered the Company to offer all employees who were on the Company's November 3, 2009 payroll full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, employees hired from other sources to make room for them. (JA 48, 59.) The Board also

ordered the Company to make the employees whole for any loss of earnings or benefits, to pay interest on backpay and any other monetary award compounded on a daily basis, and to make available to the Board all records necessary to analyze the amount of backpay due under the terms of the Order. (JA 47 n.4, 48, 59.) Finally, the Board ordered the Company to post a remedial notice at its South Kearny, New Jersey facilities, and to distribute the notice electronically if it customarily communicates with its employees by such means. (JA 47-48.)

SUMMARY OF ARGUMENT

Although the Company was entitled to lock out its employees in order to place economic pressure on the Union and the employees to support its legitimate bargaining position, it was first obligated to provide them with clear and timely notice of its bargaining demands so that they could knowingly reevaluate their position and decide whether to accept those demands and avert the lockout. The Company insists that throughout the negotiations, up to the date of the lockout, it was demanding that the Union agree to a 1-year freeze of all terms in the parties' existing collective-bargaining agreement, and that the Union, and its experienced negotiators, were well aware of this demand. Substantial evidence, however, supports the Board's finding that, 1 business day before the lockout, the Company set forth a bargaining position in an email to the Union that was "confusing, incomplete, and internally inconsistent," and was untimely. By locking out its

employees without providing clear and timely notice of its demands, the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

The Company argues, in the alternative, that even if the lockout was unlawful, it should have the ability, during a subsequent compliance proceeding before the Board, to limit its backpay liability. On November 9, approximately 1 week after the lockout began, the Company submitted its first complete bargaining proposal to the Union. But because the Company did not reinstate the locked out employees or make them whole, the Board found that the lockout retained its unlawful taint. While the Company seeks to alter the Board's make-whole remedy, the Company failed to raise its argument before the Board. Accordingly, under Section 10(e) of the Act, the Court lacks jurisdiction to consider this objection now.

STANDARDS OF REVIEW

On review, the Court accords the Board's adjudications "a very high degree of deference." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Board's findings of fact are upheld if supported by substantial evidence test, which "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder." *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quoting *Allentown Mack*

Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 377 (1998)). And the Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). Thus, the “Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Allied Mech. Servs., Inc.*, 668 F.3d at 772 (citing *Bally’s Park Place*, 646 F.3d at 935).

The Court also gives great deference to an administrative law judge’s credibility determinations, as adopted by the Board. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). Indeed, this Court defers to such credibility determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unreasonable.” *NLRB v. Capital Cleaning Contractors Inc.*, 147 F.3d 999, 1004 (D.C. Cir. 1998); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED THE ACT BY LOCKING OUT ITS EMPLOYEES WITHOUT CLEARLY AND FULLY INFORMING THE UNION OF ITS BARGAINING DEMANDS IN A TIMELY MANNER

A. An Employer Violates the Act by Locking Out Its Employees Without First Clearly and Timely Informing the Employees of Its Bargaining Demands

An employer may lawfully lock out its employees for “the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); accord *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991). In sanctioning such lockouts, the Court reasoned that the impact on an employee’s rights protected by Section 7 of the Act (29 U.S.C. § 157) is slight given that a union can end the dispute at any time by agreeing to the employer’s legitimate terms and returning to work. *American Ship Bldg. Co.*, 380 U.S. at 309; *Harter Equip., Inc.*, 280 NLRB 597, 599-600 (1986), *aff’d sub nom., Local 825, Int’l Union of Operating Eng’rs v. NLRB*, 829 F.2d 458 (3d Cir. 1987). Thus a “fundamental principle” underlying a lawful lockout is that the employer must clearly and fully inform the union of its bargaining demands, and do so in a timely manner, to allow the union to evaluate whether to accept those terms. *Dayton Newspapers, Inc.*, 339 NLRB 650, 656 (2003), *enforced*, 402 F.2d 651 (6th Cir.

2005); *see also Dietrich Indus., Inc.*, 353 NLRB 57, 60 (2008). By locking out employees without providing clear and timely notice of its demands, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

B. The Company Failed To Clearly and Timely Set Forth the Conditions that the Union Needed To Accept To Avert the Lockout

On Friday, October 30, the Company sent the Union an email purporting to detail its bargaining demands that the employees had to vote on and accept in order to avoid a lockout on Tuesday, November 3. Substantial evidence supports the Board's finding (JA 57) that the email was "confusing, incomplete, and internally inconsistent," and failed to provide the Union and the employees with timely notification of the terms that the employees had to accept in order to avert the lockout.

To place the email in context, the Board began its analysis by explaining (JA 57) that the parties had previously held only three, brief negotiation sessions, during which little substantive bargaining took place. The parties had never discussed any of the Union's proposals other than healthcare, but instead spent a good deal of time discussing whether or not to extend the expiring agreement. And with respect to healthcare benefits, because the Company felt that the proposed increases to its contributions were too high, it provided the Union with summaries of a number of plans, but did not propose that the parties agree to any specific

plan.³ The Company also proposed eliminating family coverage, which, the Company maintained, could allow the Company to pay \$400 towards each employee's healthcare deductible, though this obviously departed from its assertions that it sought a "1-year freeze" of the existing contract. These negotiations culminated in an October 30 telephone conversation during which Epstein threatened to lockout the employees if the employees did not vote on, and agree to, the Company's demands. Troccoli informed Epstein that he did not know what the employees were supposed to vote on, at which point Epstein stated that the Union would have something by the end of the day. It was against that backdrop that the Company sent its October 30 email to the Union.

The Company's email (JA 64) did not clarify matters. First, it summarized the "best . . . alternative medical plan," that it could come up with, leading the Board to reasonably ask (JA 57) whether the Company was proposing that the employees vote in favor of one of the alternative healthcare plans. The Company then suggested that if family coverage were eliminated, that would result in savings

³ The Company now asserts (Br. 6), for the first time in these proceedings, that it only researched those plans and provided summaries to the union "in order to assist the Union in securing a less expensive health insurance plan consistent with the Company's proposed freeze on all economic issues, including health care costs." But the Company offers no support for its suggestion (Br. 37-38) that the Company provided these alternatives "simply to show the Union that there were other plans that might provide greater coverage to its members than the union-sponsored plan"

that would allow the Company to subsidize the employees' deductibles. But the Board found that this would be different from the 1-year freeze that the Company previously sought, leading the Board to find (JA 57) that "the Union could not reasonably determine what [the Company] was proposing on health care."

Moreover, the Company asked for a "freeze on wages for a one or two-year agreement," which did not clarify its position on healthcare, and indeed belies its assertion here that it sought a freeze on everything. And although the Company mentioned that the Union had offered to freeze the Company's contributions for 1 year, the Board found (JA 57 n.9) that the Company never accepted that offer. Finally, the Company's demand made no mention of the Union's proposals on issues other than wages and healthcare. Given the many ambiguities in the Company's "offer," the Board reasonably found (JA 57) that it failed to provide the Union or the employees with clear notification of the terms that the employees had to accept in order to avert the lockout.

Despite these various proposals, the Company argues (Br. 26) that the Union understood that the Company simply wanted a 1-year freeze on all of the terms of the existing agreement, including the cost of healthcare benefits. But if that is all that the Company wanted, there is no explanation for why the Company refused to accept the Union's offer to freeze the Company's contributions to the existing healthcare plan. Thus, when both Troccoli and Cunningham testified that they

were confused about what the Company was seeking in the October 30 email, the Board found their testimony credible. (JA 57-58.) Because the Company failed to establish that these credibility determinations were “hopelessly incredible” or “self-contradictory,” those determinations are due great deference on review. *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988).

The Company carefully points (Br. 26-30) to selective statements in which union officials suggested that they understood that the Company was merely seeking a 1-year freeze on the terms of the existing agreement. But many of those statements were made before the October 30 email and merely confirmed that the Company had discussed a 1-year freeze. Other statements were simply taken out of context or mischaracterized. For instance, the Company asserts (Br. 31) that “[l]ike Troccoli, Cunningham admitted that he was not confused by, or did not understand the Company’s offer. (JA 211.)” But in the testimony cited by the Company, Cunningham merely acknowledged that he did not send a follow-up email to Epstein on October 30 or November 2 setting forth his confusion. Cunningham later testified (JA 225), however, as did Troccoli (JA 240-41, 263), that he was confused by the Company’s email.

The Company also argues (Br. 38-41) that because the Union’s negotiators were experienced, they should have understood what the Company was demanding to avert a lockout. But no amount of experience would have allowed the Union to

divine from the Company's October 30 email the terms that it expected employees to vote on. It was unclear which of the many proposed health care plans was being offered, whether the Company agreed to contribute \$400 towards employees' deductibles if family coverage were eliminated, and what would become of the issues in the Union's proposals other than wages and health care. This is far different from *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 689-90 (2007), relied on by the Company (Br. 38-41), where the Board found that the union's experienced negotiators were aware that they could avert a lockout by providing assurances that the employees would not strike.

In addition to finding that the Company's email was replete with "substantial" ambiguities, the Board reasonably found (JA 58) that the Company's October 30 email was not timely. The Company sent its email on Friday afternoon and gave the Union and employees only until the close of business on Monday, November 2 to enter into an agreement in order to avoid a lockout. The Board reasonably found (JA 58) that providing only 1 working day's notice in which to evaluate and understand the Company's uncertain, ambiguous, and confusing offer, and to vote to accept it, was not timely notice.

Though the Company argues (Br. 41-42) that the Board found 1 day was sufficient in *Boehringer*, there the employer provided clear and specific options for ending a lockout, which the union was able to consider, vote on, and ultimately

reject, before the deadline. Here, by contrast, the Board found it reasonable for the Union to spend that 1 day to consult with counsel, make the decision to have employees report to work the following day, and ask the Company to allow employees to continue working while the parties continued negotiations.

In short, substantial evidence supports the Board's finding (JA 58) that the Company's October 30 proposal created a "moving target" that "d[id] not satisfy [its] burden to afford the Union with a clear statement of the conditions that the employees [had to] accept to avert the lockout and the time to intelligently evaluate those conditions." *See Dayton Newspapers, Inc.*, 339 NLRB at 656, *enforced*, 402 F.2d 651 (6th Cir. 2005); *see also Dietrich Indus., Inc.*, 353 NLRB at 60. The Board thus reasonably found (JA 58) that, by locking out its employees without providing that notice, the Company violated Section 8(a)(3) and (1) of the Act.

C. The Board Determined that the Lockout Retained Its Unlawful Taint Until Terminated and Reasonably Ordered the Company To Make the Employees Whole; the Court Is Jurisdictionally Barred By Section 10(e) of the Act From Considering the Company's Attack on the Board's Remedy

On November 9, about a week after the lockout began, the Company provided the Union with a document entitled "Final Offer" (JA 123), in which the Company proposed a 1-year agreement, specified the health insurance plan that would be offered and at what contribution level, and stated that all other terms from the previous agreement would remain in effect. The administrative law judge

(JA 58) found that this offer constituted the first complete proposal submitted by the Company. Nevertheless, the judge also found (JA 58) that this proposal did not cure the Company's failure to provide such an offer prior to the lockout and concluded the lockout retained its initial taint of illegality until terminated and the affected employees are made whole. In so finding, the judge relied on two cases (JA 58), *Movers & Warehousemen's Association of Metropolitan Washington, D.C., Inc.*, 224 NLRB 356, 357 (1976), *enforced*, 500 F.2d 962 (4th Cir. 1977), and *Horsehead Resource Development Co.*, 321 NLRB 1404, 1415 (1996), where the Board also extended the make whole remedy until the employer first ceased the unlawful lockout and restored the *status quo ante*.

The Company did not file exceptions with the Board to the judge's remedy that employees be made whole until the Company ceased the unlawful lockout and restored the *status quo ante*. Nonetheless the Board, on its own, reiterated that the remedy was appropriate in this case. (JA 47 n.3.) The Board noted that the judge had not found that the Company had carried its burden, referenced in *Movers*, of showing that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining.⁴ The Board then also noted (JA 47 n.3) that the

⁴ In *Movers*, the Board explained that even when the employer takes action to cure the unlawful nature of the initial lockout, "without a cessation of the lockout and a restoration of the *status quo ante*, it is difficult to conclude that any bargaining which ensued [following the attempted cure] was not adversely affected" 224 NLRB at 358. If, however, an employer wished to argue that the back pay period

Company had not excepted to the judge's failure to make such a finding. In these circumstances, the Board concluded that further litigation in any compliance proceedings of the extent of the remedy that the judge had awarded was not warranted.

The Company now argues (Br. 47-50) that the Board erred by foreclosing its ability to establish, in a subsequent compliance proceeding, that its backpay liability should terminate as of November 9. But the Company failed to raise this objection before the Board. As a result, as we now explain, this Court is jurisdictionally barred, under Section 10(e) of the Act (29 U.S.C. § 160(e)), from considering this challenge.

Section 10(e) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” As a result, “the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); accord *Chevron Mining, Inc. v. NLRB*, 634 F.3d 1318, 1329 (D.C. Cir. 2012). This “is intended to further ‘the salutary policy . . . of affording the Board [the] opportunity to consider on the merits questions to be urged upon

should be ended at the time of the employer's attempted cure, “the burden must be on [the employer] to show that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining.” *Id.*

review of its order.”” *Chevron Mining*, 684 F.3d at 1329 (quoting *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990), and *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943)).

Once the judge found that the unlawful taint of the lockout continued until the Company terminated the lockout and made the employees whole, which is inconsistent with the argument that its backpay liability terminated as of November 9, the Company was obligated to challenge that finding in its exceptions to the Board in order to preserve that issue for judicial review. As the Company now concedes (Br. 50), it failed to do so. Furthermore, to the extent that the Company tries to argue that its right to address this issue in a compliance proceeding somehow survived the judge’s decision, that argument also must fail. Once the Board made explicit its holding that further litigation in compliance was unwarranted (A 47 n.3), the Company could have raised an objection in a motion for reconsideration before the Board. But again, the Company failed to do so. This underscores the Court’s lack of jurisdiction to consider the Company’s challenge. *See Woelke & Romero*, 456 U.S. at 665 (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party in a motion for reconsideration before the Board); *Chevron Mining, Inc.*, 684 F.3d at 1328.

Nonetheless, the Company argues (Br. 51) that, because the Board addressed this issue in footnote 3 of its decision, this was sufficient to satisfy the strictures of Section 10(e). But if mere discussion of an issue by the Board were sufficient, that would swallow the rule that a party must first object to a *sua sponte* finding of the Board by filing a motion for reconsideration with the Board. Indeed, in *Alwin Manufacturing Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999), the Court rejected this argument, explaining that Section 10(e) “bars review of any issue not presented to the Board, even where the Board has discussed and decided the issue.” *See also Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) (holding Court lacked jurisdiction to consider whether employer could present tolling argument in subsequent compliance proceeding, even when issue was addressed in the Board’s decision, because employer failed to challenge before the Board the finding that backpay was not tolled).⁵

⁵ Apart from being foreclosed by Section 10(e), the Company is wrong that the Board’s decision in *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022, 1029 (1993), *enforcement denied on other grounds*, 40 F.3d 669 (3d Cir. 1994), supports its argument that this is a matter that the employer should be able to litigate in a compliance proceeding. While it is true in that case that the administrative law judge expressly deferred the issue to compliance, the case does not stand for the proposition that such deferral is the preferred, or even an appropriate, course of action because, as the Board here noted (JA 47 n.3), it does not appear that any party in that case excepted to the judge’s direction that the issue be resolved in compliance. As a result, this aspect of the Board’s decision in *Greensburg* is without precedential value. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003).

The Company also incorrectly argues (Br. 45 n.3, 51-52) that the Company was not obligated to first present its objections to the Board because this issue is one of law. But this Court has firmly rejected that argument as well, holding that “the clear language” of Section 10(e) precludes a party from raising a point for the first time on review “regardless of whether the questions raised be considered questions of law, questions of fact, or mixed questions of fact and law.” *Puerto Rico Drydock & Marine Terminals, Inc. v. NLRB*, 284 F.2d 212, 215-16 (D.C. Cir. 1960).⁶

The Company had every opportunity to challenge before the Board the administrative law judge’s make whole remedy and the Board’s explanation that further litigation of this remedy in a subsequent compliance proceeding is not warranted. The Company failed to raise this objection before the Board. As a result, this Court is without jurisdiction to consider this objection now.

⁶ The Company also argues (Br. 51) that Section 10(e) is satisfied because the Company has briefed this issue to the Court. Plainly, this is not sufficient to satisfy the “jurisdictional condition[]” imposed by Section 10(e). *See Chevron Mining, Inc.*, 684 F.3d at 1328.

CONCLUSION

For the foregoing reasons, 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.

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

s/ Jeffrey W. Burritt
JEFFREY W. BURRITT
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2989

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

August 2012

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

ALDEN LEEDS, INC.)	
)	
Petitioner/Cross-Respondent	)	Nos. 11-1267, 11-1296
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-29188
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS LOCAL 1245)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,745 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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

Dated at Washington, DC
this 17th day of August, 2012

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

ALDEN LEEDS, INC.)	
)	
Petitioner/Cross-Respondent	)	Nos. 11-1267, 11-1296
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-29188
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS LOCAL 1245)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All parties or their counsel are registered users.

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

Dated at Washington, DC
this 17th day of August, 2012

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

ALDEN LEEDS, INC.)	
)	
Petitioner/Cross-Respondent	)	Nos. 11-1267, 11-1296
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-29188
)	
and)	
)	
UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1245)	
)	
Intervenor)	

STATUTORY ADDENDUM

The following provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, et. seq., are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28(a)(5):

Section 1 (29 U.S.C. § 151).....	1
Section 7 (29 U.S.C. § 157)	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(3) (29 U.S.C. § 158 (a)(3)).....	2
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	3
Section 10(f) (29 U.S.C. § 160(f)).....	3
Section 10(j) (29 U.S.C. § 160(j)).....	3

Section 1 of the Act (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate

and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

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

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

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

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is

alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.