Nos. 12-1018 & 12-1120

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WELLINGTON INDUSTRIES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INDEPENDENT UNION LOCAL ONE,
AN AFFILIATE OF LOCAL 174, INTERNATIONAL UNION,
UNITED AUTOMOBILEAEROSPACE, AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, AFL-CIO**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

RUTH E. BURDICK
Supervisory Attorney

TYLER JAMES WIESE
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2978
(202) 273-3847

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

WELLINGTON INDUSTRIES, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1018 & 12-1120
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	7-CA-53182
	)	
and	)	
	)	
INDEPENDENT UNION LOCAL ONE, AN AFFILIATE OF LOCAL 174, INTERNATIONAL UNION, UNITED AUTOMOBILE, AERO-SPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	
	)	
Intervenor	)	

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

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

A. Parties and Amici

1. Wellington Industries, Inc. was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court.
2. The Board is the Respondent/Cross-Petitioner.

3. Local 174 of the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO was the charging party before the Board.
4. Independent Union Local One, an affiliate of Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO is the intervenor before the Court.
5. The Board's General Counsel was a party before the Board.
6. There are no amici in the case.

B. Ruling Under Review: The ruling under review is a Board Decision and Order issued on December 9, 2011, and reported at 357 NLRB No. 135.

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

Respectfully submitted,

/s/Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC this 20th day of August 2012

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GLOSSARY

A.	Deferred Joint Appendix filed by Petitioner Wellington Industries, Inc. on August 16, 2012
Act	National Labor Relations Act
Br.	Opening Brief of Petitioner Wellington Industries, Inc.
the Board	National Labor Relations Board
the Union	Independent Union Local One, an affiliate of Local 174, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO
the Company	Wellington Industries, Inc.
UAW Local 174	Local 174, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO

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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 Wellington Industries, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Decision and Order of the Board that issued against the Company on December 9, 2011, and is reported at 357 NLRB No. 135. (A. 236–42.)[1] The Company filed its petition for review on January 9, 2012. The Board filed its cross-application for enforcement on February 27, 2012. Both filings were timely; the National Labor Relations Act ("the Act"), 29 U.S.C. § 151 *et seq.*, imposes no time limit on such filings.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, as amended (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties. The Court has jurisdiction over this case under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review may be filed in this Court, and Section 10(e) of the Act (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

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[1] "A" references are to the deferred joint appendix filed by the Company. "Br." references are to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE

Did the Company violate Section 8(a)(5) and (1) of the Act by conditioning bargaining with the Union for a successor collective-bargaining agreement on the absence of one of the Union's selected bargaining representatives?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by Local 174 of the International Union of United Auto, Aerospace, and Agricultural Implement Workers of America ("UAW Local 174"), 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 conditioning bargaining with the Union during contract negotiations on the absence of UAW Local 174 President John Zimmick, whom the Union had selected as a member of its bargaining committee. After a hearing, the administrative law judge issued a bench decision finding that the Company violated the Act as alleged. On May 2, 2011, the judge issued a final written decision affirming and clarifying his earlier bench decision. In doing so, the judge rejected the Company's defense that it was justified in excluding Zimmick from negotiations because, it claimed, the Union's affiliation with UAW Local 174 had been improperly conducted.

On December 9, 2011, the Board issued its decision affirming the administrative law judge's rulings, findings, and conclusions, but found it unnecessary to pass on the judge's analysis of the affiliation because the matter was irrelevant to showing an exceptional circumstance that would relieve the Company of its obligation to bargain with the Union's selected bargaining representative. The facts supporting the Board's Order are summarized below, followed by a description of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company operates several industrial plants that provide metal stampings for automotive manufacturers and suppliers. (A. 240; 24.) The Union represents the Company's production and maintenance employees at its Belleville, Michigan plant, and has done so in one form or another since the late 1970's. (A. 240; 24–25, 273.) The Union began its existence as a company bargaining committee and later evolved into a more traditional collective-bargaining representative. (A. 240; 25, 273, 281.) The Board formally certified the Union as the exclusive bargaining representative of the production and maintenance employees in August 2005. (A. 240; 282.)

B. The Company and the Union Begin Negotiations for a Successor Contract; the Union Attempts to Bring a Representative from UAW Local 174 to the Bargaining Table; the Company Refuses to Bargain with the Union if that Representative Participates in Negotiations

The parties initiated bargaining for their most recent contract in May 2010. (A. 240; 26.) A committee of five full-time employees of the Company, selected by the general membership of the Union, represented the Union in bargaining. (A. 237; 27, 37–38.) The Union also received bargaining assistance from its attorney, Robert Fetter. (A. 238; 27.) In turn, several upper-level managers and attorney Stanley Moore III represented the Company. (A. 238; 27.)

In early June, the parties established written ground rules for bargaining. (A. 33, 103, 383–84.) The written guidelines outlined the general procedures that the parties were to follow and established a bargaining schedule, but did not place any limits on either party's right to select its representatives at the bargaining table. (A. 33–34, 383–84.)

Early in negotiations, the Union began to consider the possibility of affiliating with UAW Local 174 in order to benefit from the organizational and financial resources provided by the larger labor organization. (A. 240–41; 28–31.) After several preliminary discussions between the Union and UAW Local 174 representatives, the Union held a meeting at the UAW Local 174 hall on August 8 to discuss the proposed affiliation with its membership. (A. 241; 27–29.) The

members present voted in favor of affiliation, and the unions memorialized the result in a signed affiliation agreement. (A. 241; 29–31, 388–89.)

After reaching the affiliation agreement with UAW Local 174, the Union contacted the Company to resume contract negotiations. (A. 241; 31.) The parties initially were unable to return to the bargaining table.[2] (A. 241; 81, 104.) After several discussions, however, the parties agreed to a new set of ground rules on November 3. (A. 240; 31–32, 379.) The November 3 ground rules specifically stipulated that the parties would "return to the bargaining table and . . . put the issue of union recognition to the side." (A. 240; 379.) After the parties signed the new ground rules, they began preparations to head back to the bargaining table for a session on November 8. (A. 240; 33–34, 106–07.)

Leading up to the November 8 negotiations, the Union decided to have UAW Local 174 President Zimmick participate as a representative at the bargaining table in order to benefit from his knowledge of the industry and his experience in negotiating collective-bargaining agreements. On November 5,

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[2] Shortly after the affiliation vote, a group of employees sent a letter to the Company questioning the affiliation. (A. 403–04.) In response to this letter, the Company filed an election petition with the Board on September 28. (A. 408.) An employee later filed a decertification petition with the Board on October 18. (A. 409.) The Regional Director dismissed the Company's petition on December 30, 2010 and the decertification petition on January 13, 2011. (A. 236 n.1, 238.) The Company appealed the Regional Director's dismissal of its petition to the Board, and the Board summarily affirmed the dismissal on February 11, 2011. (A. 236 n.1.)

union attorney Fetter wrote an email to company attorney Moore informing him that the Union intended to bring Zimmick to the November 8 negotiations. On the morning of November 8, Moore responded to Fetter's email and stated that Zimmick's presence at the bargaining table would be seen as a violation of the November 3 bargaining guidelines. (A. 238; 34–35, 268–69.)

On the afternoon of November 8, the Union and the Company met for a formal bargaining session at the Company's Belleville plant. (A. 238; 34–35, 106–07.) Union attorney Fetter opened the negotiation session by asking the company representatives if they would cease bargaining if the Union brought Zimmick to the negotiating table. Moore, the Company's attorney, responded yes. (A. 238; 13–14, 35.) In order to avoid losing the chance of obtaining a new contract, the Union decided to forgo bringing Zimmick to the negotiations and to proceed with bargaining. (A. 241; 35.)

On November 12, the parties reached a proposed agreement over the terms of a new contract that would extend from November 2010 to November 2013. (A. 240; 98–99.) The parties met on November 18 to finalize the contract language, and the bargaining unit voted to ratify the agreement on November 23. (A. 240; 37–38, 79–80, 98–99, 343–78.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On those undisputed facts, the Board (Chairman Pearce and Members Becker and Hayes) found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by conditioning bargaining with the Union for a successor agreement on the absence of Zimmick from the negotiations. (A. 236 & n.1.) The Board's Order requires the Company to cease and desist from conditioning bargaining with the Union on the absence of any person designated by the Union as a negotiating representative, and in any like or related manner refusing to recognize or bargain with the Union as the exclusive representative of the bargaining unit employees, or from interfering with employees' rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company to bargain in good faith with the Union and post a remedial notice. (A. 236, 239.)

SUMMARY OF ARGUMENT

One of the basic freedoms guaranteed by the Act is employees' right to select their representatives for purposes of collective bargaining. Although this right is not absolute, an employer who wishes to interfere with its employees' freedom of choice in this regard bears the very heavy burden of establishing that bargaining with the representative would be futile. Here, it is undisputed that the Company conditioned bargaining during contract negotiations on the absence of

Zimmick, one of the Union's chosen members of its negotiating committee. In its defense, the Company fell woefully short of meeting its burden, and was unable to present any evidence whatsoever that the presence of Zimmick at the bargaining table would have rendered collective bargaining impossible.

Rather than attempting to meet its burden, the Company has tried to transform this case into a battle over the validity of the union affiliation. This attempt, however, is unavailing. First, the Company never filed a motion for reconsideration after the Board declined to adopt the administrative law judge's affiliation analysis, and therefore the affiliation issue is jurisdictionally barred from this Court's review. Second, the affiliation is irrelevant to the violation in this case, which turns on a party's right to select its representatives for contract negotiations, which is a right unaffected by the affiliation. Indeed, the Union could have lawfully selected Zimmick, or any other person, to serve on its bargaining committee without regard to their status as members of other labor organizations, affiliated or not.

STANDARD OF REVIEW

The Supreme Court has recognized that Congress "made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see* 29 U.S.C. § 158(d). "Determining whether a party has

violated its duty to 'confer in good faith'" is "particularly within the expertise of the Board," and the Board's determination that a party has violated its duty to bargain is "entitled to great deference." *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (quoting *Local 13, Detroit Newspaper Printing & Graphic Comm'ns Union v. NLRB*, 598 F.2d 267, 271–72 (D.C. Cir. 1979)). Accordingly, the Board's determination as to whether or not the parties had a statutory duty to bargain must be affirmed if it "is reasonably defensible." *Ford Motor Co.*, 441 U.S. at 497.

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488–91 (1951); *see* 29 U.S.C. § 160(e). If substantial evidence supports the Board's findings, the reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488; *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 28 (D.C. Cir. 2011) (same).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CONDITIONING BARGAINING WITH THE UNION ON THE ABSENCE OF ZIMMICK FROM THE NEGOTIATIONS

A. The Act Guarantees Parties the Right To Select Their Bargaining Representatives, Without Interference

Section 7 of the Act explicitly guarantees the right of employees to "bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. This right has been characterized as "fundamental to the statutory scheme." *Gen. Elec. Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969); *see Gen. Teamsters Local Union No. 174 v. NLRB*, 723 F.2d 966, 971 (D.C. Cir. 1983) (citations omitted). The Act therefore generally compels an employer to meet with a union's selected bargaining representative. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("collective action [of employees] would be a mockery if representation were made futile by interference with freedom of choice," *citing Am. Steel Foundries v. Tri-City Cent'l Trades Council*, 257 U.S. 184, 209 (1921)); *NLRB v. Ind. & Mich. Elec. Co.*, 599 F.2d 185, 190 (7th Cir. 1979); *Gen. Elec. Co.*, 412 F.2d at 516–17. As this Court has recognized, the Act prevents virtually all "employer . . . action that 'effectively chills its employees' right to select their own bargaining representatives.'" *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C.

Cir. 2006) (quoting *Procter & Gamble Mfg. v. NLRB*, 658 F.2d 968, 977 (4th Cir. 1981)).

Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by "refusing[ing] to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5), (1).[3] In all but the most limited circumstances, "either side can choose as it sees fit and neither can control the other's selection." *Gen. Elec. Co.*, 412 F.2d at 516. An employer who attempts to control a union's choice by conditioning bargaining on the absence of a union's selected representative at the bargaining table bears a "considerable burden." *Id.* at 517. As characterized by the Board, with court approval, this burden requires an employer to prove that "the presence of a particular representative . . . makes collective bargaining impossible or futile." *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1981), *enforced sub. nom, UAW v. NLRB*, 670 F.2d 663 (6th Cir. 1982); *see, e.g.*, *Ind. & Mich. Elec. Co.*, 559 F.2d at 190 (employer has to show existence of "extraordinary circumstances" to justify refusal to bargain with union's selected representative); *Gen. Elec. Co.*, 412 F.2d at 517 (in order to sustain defense, "presence of selected representative must

[3] Section 8(a)(5) of the Act states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." An employer who violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act. *See, e.g.*, *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164–65 (D.C. Cir. 2004).

present "a 'clear and present' danger to the collective bargaining process" (citing *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968))).

Only the most extraordinary circumstances, which are not present here, will satisfy that burden. For example, some, but not all, instances of unprovoked physical violence and threats of violence have been found sufficient. *Compare Pan Am. Grain Co.*, 343 NLRB 205, 206–07 (2004) (exception satisfied by death threat towards employer's president, coupled with other misconduct, justified refusal to bargain), *King Soopers, Inc.*, 338 NLRB 269, 269–70 (2002) (threats and displays of violence satisfy exception), *and Fitzsimmons Mfg. Co.*, 251 NLRB at 379, *with Claremont Resort & Spa*, 344 NLRB 832, 832, 835 (2005) (exception not satisfied where union representative merely pushed her way past employer representative into a meeting), *and Caribe Staple Co.*, 313 NLRB 877, 877, 888–89 (1994) (employer could not restrict union's chosen representative where physical misconduct occurred outside of negotiations and did not involve members of employer's negotiating team). The defense is also established when an employer can present persuasive evidence that the presence of an outside negotiator will expose confidential trade secrets to third parties. *IBEW v. NLRB*, 557 F.2d 995, 997–99 (2d Cir. 1977); *Pony Express Courier Corp.*, 297 NLRB 171, 173 (1989).

It is abundantly clear, however, that mere dislike or even antipathy towards a union's selected negotiator is not enough to justify interference with this fundamental right. *Victoria Packing Corp.*, 332 NLRB 597, 600 (2000) ("For better or worse the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of . . . rude and unacceptable behavior."); *People Care, Inc.*, 327 NLRB 814, 814, 824–25 (1999). As recently stated by the Board, "one party cannot legally refuse to bargain because it doesn't like who the other party has chosen as its bargaining representatives." *Ardsley Bus Corp.*, 357 NLRB No. 85, 2011 WL 4830121, at *3, *47 (Aug. 31, 2011).

Most germane to the present case, unions enjoy a wide latitude in selecting negotiators for contract bargaining. Unions can bring representatives from other employers or unions to the table, even when the chosen representatives do not directly represent employees in the bargaining unit or are employed by a competing employer. *Oil, Chem. & Atomic Workers v. NLRB*, 486 F.2d 1266, 1270 n.18 (D.C. Cir. 1973) ("Moreover, any . . . local unit can designate representatives of the [sister local] units to sit in as its bargaining representatives, and thus ensure full coordination."); *Minn. Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 178 (8th Cir. 1969) ("We do not feel that [the employer's] disapproval of the composition of the [u]nion bargaining committee justified its refusal to bargain even though the presence of two 'outsiders' permits an inference that there might

be cooperation among the various unions."); *Gen. Elec. Co.*, 412 F.2d at 520; *Milwhite Co.*, 290 NLRB 1150, 1151 (1988) (employer obligated to bargain with committee that included employee of direct business competitor).

B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Conditioned Bargaining on the Absence of Zimmick from Contract Negotiations

The Board's finding rests on the application of undisputed facts to well-settled principles of law. Citing "longstanding precedent," the Board explained (D&O 1 n.1) that in the absence of "exceptional circumstances" parties are free "'to choose whomever they wish to represent them in formal labor negotiations.'" *Palm Court Nursing Home*, 341 NLRB 813, 819 (2004) (quoting *Gen. Elec. Co.*, 412 F.2d at 516). Here, the stipulated facts establish that the union's attorney asked the company negotiators if they would refuse to negotiate if Zimmick were at the bargaining table, and the Company's attorney answered yes. Such a statement undeniably constitutes a refusal to bargain with the Union's selected bargaining representative and is unlawful unless the Company can present evidence of exceptional circumstances justifying its refusal to bargain. *See Ceridian Corp. v. NLRB*, 435 F.3d 352, 358–59 (D.C. Cir. 2006), and cases cited at pp. 12–13.

The Company fell far short of establishing such an exceptional circumstance because, as the Board noted, the Company presented no evidence that the presence

of Zimmick at the negotiating table would make collective bargaining "impossible or futile." (A. 236 n.1.) Indeed, the record contains no evidence of even mildly inappropriate verbal threats, let alone physical misconduct, by Zimmick towards the Company's bargaining representatives, as would typically be required. *Cf. Pan Am. Grain Co.*, 343 NLRB 205, 206–07 (2004), and cases cited at p. 14. Nor does this case involve sensitive trade secrets. *See IBEW v. NLRB*, 557 F.2d 995, 999–1000 (2d Cir. 1977); *Pony Express Courier Corp.*, 297 NLRB 171, 173 (1989).

The Company instead attempts to insinuate (Br. 16, 51–52) that the Union's efforts to bring Zimmick to the negotiating table were designed to "supplant[] and replace [the Union] as the exclusive bargaining representative of the employees." This argument flies in the face of the record evidence in this case and does not comport with established precedent.

The Union's undeniable purpose in having Zimmick at the bargaining table was to benefit from his expertise and experience. He would have been one of several members of the union bargaining committee, which also included five full-time company employees and union attorney Fetter. Indeed, the Union's own representatives intended to maintain an active role in negotiations even if Zimmick were allowed at the negotiating table. (A. 34–35, 268.) Further, the written affiliation agreement between the unions specifically established that the Union's "bargaining committee shall continue to represent the members of the unit for

purposes of collective bargaining and representation throughout the grievance procedure." (A. 388–89.) The Union and UAW Local 174 followed the terms of this agreement, both before and after the disputed bargaining session. (A. 36–38.)

Although the Board has excused, in limited circumstances, an employer's refusal to bargain where it was clear that another union usurped the certified union's bargaining responsibilities, (*see Goad Co.*, 333 NLRB 677, 677 n.1, 679–80 (2001)), such circumstances clearly are not present here. In this case, the record demonstrates that the Union added Zimmick to the bargaining committee in an advisory capacity and not in an attempt to abdicate its own statutory bargaining responsibilities.

The Company also attempts to argue, without legal support (Br. 10, 39–41), that the November 3 bargaining guidelines somehow limited the Union's right to select Zimmick as a representative at the bargaining table. The November 3 agreement, however, contains no limitation on the Union's or the Company's right to select bargaining agents. Moreover, the agreement expressly states that in signing the agreement, "no party is waiving any claim, cause of action, *right*, and/or defense." (A. 379 (emphasis added).) Plainly, under any reasonable reading of the guidelines, the Union did not waive its right to bring Zimmick to the bargaining table.

The Company's arguments ultimately all rest on Zimmick's status as an "outsider" from a different union. As this Court and other courts have recognized, this is not enough to justify the Company's refusal to bargain. *See, e.g., Oil, Chem. & Atomic Workers v. NLRB*, 486 F.2d 1266, 1270 n.18 (D.C. Cir. 1973) (noting that unions have right to "coordinate" bargaining by including representatives from other bargaining units in negotiations); *Gen. Elec. Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969). In sum, the Company has failed to establish any legitimate excuse for its failure to bargain with the Union if Zimmick were present at the bargaining table.

C. The Company's Arguments Are Jurisdictionally Barred from Review or Irrelevant

The Company's affiliation arguments, which make up nearly the majority of its lengthy brief (Br. 2, 20–21, 23–35, 41–50), rest on the incorrect proposition that the Board's underlying decision adopted the administrative law judge's analysis of the Company's affiliation defense. Although it recognizes this at one point in its brief (Br 16), the Company's affiliation contentions ignore the Board's explicit decision not "to pass on the judge's analysis of the affiliation between UAW Local 174 and [the Union]." (A. 236 n.1.) Further, because the Company did not challenge the Board's failure to address the affiliation in a motion for reconsideration to the Board, the Court is jurisdictionally barred from reaching its affiliation arguments by Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Woelke*

& Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665–66 (1982); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *Exxel/Atmos, Inc., v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998). As this Court has explained, "[w]here, as here, [an employer] objects to a finding on an issue first raised in the decision of the Board rather than of the ALJ, [the employer] must file a petition for reconsideration with the Board to permit it to correct the error (if there was one)." *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185 (D.C. Cir. 2006).

In fact, throughout this case, the General Counsel asserted that the underlying affiliation was not relevant to the instant violation. In the complaint, its opening and closing arguments at the hearing, and its brief to the Board in response to the Company's exceptions, the General Counsel consistently asserted that the affiliation question was irrelevant to finding a violation under the circumstances of this case. (A. 17, 132–33, 231–32, 259.) Counsel for the Union echoed this argument at the hearing. (A. 19, 145–46.) And the Board adopted that view. Despite its (presumed) awareness of these arguments, the Company chose to consistently ignore them before the Board, both before and after its decision issued.

In any event, the Board's decision not to pass on the Company's affiliation defense comports with precedent that demonstrates that a union has the right to select bargaining representatives who are officers of either an affiliated union or a

union with which it plans to affiliate, and that an employer violates Section 8(a)(5) by attempting to exclude them. *See, e.g., RCN Corp.*, 333 NLRB 295, 295, 309–10 (2001) (violation found where employer excluded two officers of an affiliated union who were chosen as bargaining representatives). And, as this Court has recognized, even when an affiliation question is not yet settled, the certified union can still utilize representatives from the union that it is seeking to affiliate with "for guidance, support or even active consultation and participation . . . during bargaining." *Garlock Equip. Co. v. NLRB*, 709 F.2d 722, 724 & n.2 (D.C. Cir. 1983) (per curiam) (citing *Gen. Elec. Co.*, 412 F.2d at 520). In other words, the status of the selected representatives, whether or not they are officers of a properly affiliated union, is not itself a matter consequence. Thus, the Union's affiliation with UAW Local 174, far from being the central focus of this case, is irrelevant and no defense to the violation found by the Board.

The Company's remaining contentions misstate existing law. For example, the Company's efforts (Br. 27–31, 35, 38–39, 52) to argue that its refusal to bargain was motivated by a desire to defend its employees' rights, miscomprehend an employer's role during a union affiliation. In *NLRB v. Financial Institution Employees of America, Local 182* (*"Seattle-First"*), 475 U.S. 192 (1986), the Supreme Court considered and rejected a similar argument, noting that employer interference with a union affiliation "gives the employer the power to veto an

independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference." *Seattle-First*, 475 U.S. at 209. The Company's further contention (Br 24, 52) that its refusal to bargain should be privileged by its desire to avoid recognizing a minority union under the doctrine announced in *Int'l Ladies' Garment Workers Union v. NLRB* (*"Bernhard-Altmann"*), 366 U.S. 731 (1961), is similarly misguided. That case involved an employer unlawfully extending *initial* recognition to a union that did not enjoy a presumption of majority status. *Id.* at 734–35. That scenario is wholly distinguishable from the present case, which involves an incumbent Union with a presumption of majority status. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 791 (1996) (distinguishing *Bernhard-Altmann* on the same grounds); *Levitz Furniture Co. of the Pac.*, 333 NLRB 717, 726 & n.52 (2001) (filing of an election petition creates a "safe harbor" during which an employer will not violate Section 8(a)(2) by continuing to recognize a certified union). The Company did not possess any credible evidence to rebut the presumption of majority status that the incumbent Union enjoyed.[4] Thus, by

[4] The two employee communications cited by the Company (Br. 34–35) in support of its refusal to bargain—the letter expressing dissatisfaction with the affiliation vote (A. 403–04) and the decertification petition filed with the Board (A. 409)—do nothing to further its argument. As the administrative law judge cogently explained, the affiliation petition expressed dissatisfaction with the manner in which the affiliation vote was conducted, not the representation provided by the Union. (A. 238.) As for the decertification petition, it is well-established that even

conditioning bargaining with the Union upon the absence of Zimmick from negotiations, the Company violated the Act.

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while a decertification petition is pending with the Board, the Act requires an employer to continue bargaining with a union unless it has objective evidence that the union has lost its majority status. *See, e.g., Allied Indus. Workers, Local 289 v. NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973) (bare existence of decertification petition does not privilege withdrawal of recognition, even under good-faith doubt standard later rejected by the Board); *see also Levitz Furniture Co. of the Pac.*, 333 NLRB at 723 (rejecting good-faith doubt standard and adopting stricter "actual loss of majority support" standard for an employer withdrawal of recognition); *Flying Food Group, Inc.*, 471 F.3d at 182 & n.3 (recognizing Board's adoption of new standard for withdrawal of recognition by employers). The Company did not possess such evidence.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's Order in full.

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

s/ Tyler James Wiese
TYLER JAMES WIESE
Attorney

National Labor Relations Board
1099 14th St., N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-3847

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

ADDENDUM

STATUTES

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

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

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

(a) 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;
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .
>
> ***

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

Sec. 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of

adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

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

setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WELLINGTON INDUSTRIES, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1018 & 12-1120
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	7-CA-53182
	)	
and	)	
	)	
INDEPENDENT UNION LOCAL ONE, AN AFFILIATE OF LOCAL 174, INTERNATIONAL UNION, UNITED AUTOMOBILE, AERO-SPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,026 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 20th day of August 2012

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	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

Robert G. Kamenec
Plunkett Cooney
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304

Robert D. Fetter
Miller Cohen PLC
600 W. Lafayette Blvd.
Detroit, MI 48226

/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 20th day of August 2012