Nos. 12-1032, 12-1122

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DODGE OF NAPERVILLE, INC. AND BURKE AUTOMOTIVE GROUP, INC., d/b/a NAPERVILLE JEEP DODGE
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

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

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DODGE OF NAPERVILLE, INC. AND BURKE AUTOMOTIVE GROUP, INC. d/b/a NAPERVILLE JEEP/DODGE, Petitioner/Cross-Respondent	)	
v.	)	Nos. 12-1032, -1122
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner	)	Board Case No.: 13-CA-45399

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. ***Parties and Amici***: Dodge of Naperville, Inc. and Burke Automotive Group, Inc., d/b/a Naperville Jeep/Dodge ("the Employer") is the petitioner before the Court; the Employer was the respondent before the Board. Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") was the charging party before the Board.

B. ***Ruling Under Review***: This case involves the Employer's petition to review, and the Board's application to enforce, a Decision and Order the Board issued on January 3, 2012 (357 NLRB No. 183), which adopted and incorporated with some modifications the ruling of the administrative law judge. The Board

found therein that Dodge of Naperville, Inc. and Burke Automotive Group, Inc. formed a single employer. The Board additionally found that the Employer committed numerous unfair labor practices in the process of relocating its operations, including refusing to bargain with the Union over the unit employees' terms and conditions of employment, repudiating the collective-bargaining agreement, withdrawing recognition from the Union, and providing an unreasonably delayed response to the Union's request for information.

C. ***Related Cases***: The ruling under review was not previously before this Court or any other court. Subsequent to the Employer's filing of the petition for review, the Board filed with the Court a Cross-Application for Enforcement of the Order.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 24th day of August 2012

GLOSSARY

1. Act ……..The National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)

2. Board .....……..The National Labor Relations Board

3. Br. ……..The Opening Brief of Dodge of Naperville, Inc. and Burke Automotive Group, Inc., d/b/a Naperville Jeep/Dodge

4. Employer ...…….Dodge of Naperville, Inc. and Burke Automotive Group, Inc., d/b/a Naperville Jeep/Dodge

5. Union ..……Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO

TABLE OF CONTENTS

Headings **Page(s)**

Statement of Jurisdiction....1

Statement of Issues Presented....3

Statement of the Case....4

Statement of Facts....5

I. The Board's Findings of Fact....5

A. Background....5

1. The Naperville and Lisle car dealerships....5

2. Interrelations between the Naperville and Lisle dealerships....7

B. In May-June 2009, the Employer Sacrifices the Naperville Dealership to Save the Lisle Dealership; It Strips the Naperville Mechanics of Their Union Representation and Contractual Benefits....9

1. The Chrysler bankruptcy proceeding....9

2. The Naperville dealership closes on June 20....10

3. The Union requests bargaining and information about the effects of the relocations....11

4. The Naperville mechanics begin work at Lisle; later, the Employer formally hires them with drastic benefit cuts and threatens them about union activity at Lisle....12

5. Mechanics Adams and Marjanovich cannot afford to work for reduced benefits and resign....13

6. The union's request for information....14

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

II. The Board's Conclusions and Order 14

Standard of Review 16

Summary of Argument 18

Argument 19

I. The Employer Waived Any Objection to Its Section 8(a)(1) Violations Not Challenged in Its Opening Brief; the Board is Entitled to Summary Enforcement of those Portions of its Order 21

II. Substantial Evidence Supports the Board's Finding that the Employer Relocated the Naperville Mechanics, and Did Not Discharge Them and Then Hire Them Anew, Where It Is Undisputed that the Naperville and Lisle Dealerships Constituted a Single Employer 22

III. Substantial Evidence Support the Board's Finding that the Employer Failed To Bargain Over the Effects of Relocating the Naperville Mechanics to Lisle, Including Their New Terms and Conditions of Employment There 24

IV. The Board Did Not Abuse Its Discretion in Finding Appropriate the Historical Bargaining Unit of Naperville Mechanics; the Union Never Lost Its Majority Status in That Unit 31

A. The Board properly disregarded unlawfully imposed terms of employment in determining whether the historical bargaining unit remained appropriate 32

B. The Board acted within its wide discretion in finding that the employer failed to prove compelling circumstances to overcome the continued appropriateness of the historical Naperville bargaining unit 34

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

C. The Employer's claims that the relocation rendered the extant unit inappropriate and stripped the union of its majority status are meritless 38

V. Since the Union Remained the Bargaining Representative of the Naperville Mechanics After the Relocation to Lisle, the Board is Entitled to Affirmance of the Remaining Unfair Labor Practices.....43

VI. The Board Acted Within Its Broad Discretion in Fashioning Remedies for the Employer's Numerous Unfair Labor Practices, Including the Issuance of an Affirmative Bargaining Order 45

VII. The Board Had a Quorum When It Issued the Decision on Review Because Member Craig Becker's Term Did Not End Until Noon on January 3, 2012 at the End of the First Session of the 112th Congress 53

Conclusion 59

TABLE OF AUTHORITIES

Cases **Page(s)**

ADT Security Services,
355 NLRB No. 223, slip op. at 1 (2010), *enforcement application pending* (6th Cir. No. 10-2549).....36

Allentown Mack Sales & Svc., Inc. v. NLRB,
522 U.S. 359 (1998) 17

Allied Mechanical Servs., Inc. v. NLRB,
668 F.3d 758 (D.C. Cir. 2012).....22

AMSC Subsidiary Corp. v. FCC,
216 F.3d 1154 (D.C. Cir. 2000).....23

Armco, Inc. v. NLRB,
832 F.2d 357 (6th Cir. 1988).....33

Ashley v. Keith Oil Corp.,
7 F.R.D. 589 (1947).....54

Banknote Corp. v. NLRB,
84 F.3d 637 (2d Cir. 1996) 34, 35

Batesville Casket Co.,
283 NLRB 795 (1987).....39

Bishop v. NLRB,
502 F.2d 1024 (5th Cir. 1974)……...41

Brewers & Maltsters, Local Union No. 6 v. NLRB,
414 F.3d 36 (D.C. Cir. 2005).....44

Brown Truck,
106 NLRB 999 (1953) 29, 30

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Cases – Cont'd **Page(s)**

Brown-McLaren,
34 NLRB 984 (1941) 29, 30

California Pacific Med. Ctr. v. NLRB,
87 F.3d 304 (9th Cir. 1996) 38

Caterair Int'l,
322 NLRB 64 (1996) ……...45

Caterair Int'l v. NLRB,
22 F.3d 1114 (D.C. Cir. 1994).....50

Children's Hosp.,
312 NLRB 920 (1993), *enforced*,
101 F.3d 111 (D.C. Cir. 1996).....39

Chrysler LLC,
No. 09-50002 (AJG) 9

Cincinnati Newspaper Guild, Local 9 v. NLRB,
938 F.2d 284 (D.C. Cir. 1991).....25

Citizens Inv. Svcs. Corp. v. NLRB,
430 F.3d 1195 (D.C. Cir. 2005).....16

**Comar, Inc.* (*Comar I*),
339 NLRB 903 (2003), *enforced*,
111 F. App'x 1 (D.C. Cir. 2004)..... 23, 28, 29, 32, 33, 42

**Comar, Inc*, (*Comar II*),
349 NLRB 342 (2007)..... 27, 39, 41

Comm. Hosps. of C. Calif. v. NLRB,
335 F.3d 1079 (D.C. Cir. 2003).....40

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Cooper Thermometer Co.,
160 NLRB 1902 (1966), *enforced*,
376 F.2d 684 (2d Cir. 1967)..... 27, 28

Corson & Gruman Co. v. NLRB,
899 F.2d 47 (D.C. Cir. 1990)..... 22, 44

Deaconess Medical Center,
314 NLRB 677 (1994).....33

Dean Transp., Inc. v. NLRB,
551 F.3d 1055 (D.C. Cir. 2009)..... 17, 41

Deming Hosp. Corp. v. NLRB,
665 F.3d 196 (D.C. Cir. 2011).....30

Evergreen Am. Corp. v. NLRB,
362 F.3d 827 (D.C. Cir. 2004).....17

Exxon Chem. Co. v. NLRB,
386 F.3d 1160 (D.C. Cir. 2004).....25

Exxel/Atmos, Inc. v. NLRB,
209 F.3d 727 (D.C. Cir. 2000).....51

Fall River Dyeing & Finishing Corp. v. NLRB,
482 U.S. 27 (1987) 16

Fibreboard Paper Products Corp. v. NLRB,
379 U.S. 203 (1964) 45

**First Nat'l Maintenance Corp. v. NLRB*,
452 U.S. 666 (1981) 25-27

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TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Ford Motor Co. v. NLRB,
441 U.S. 488 (1979) 25

Highlands Hosp. Corp. v. NLRB,
508 F.3d 28, 32 (D.C. Cir. 2007) ……..…...48

Holly Farms Corp.,
311 NLRB 273 (1993), *enforced*,
48 F.3d 1360 (4th Cir. 1995) 27, 28, 33, 42

K Mart Corp.,
323 NLRB 582 (1997), *enforced*,
174 F.3d 834 (7th Cir. 1999) 37

Lammart Indus. v. NLRB,
578 F.2d 1223 (7th Cir. 1978).....41

Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions,
2012 WL 168645 (Jan. 6, 2012).....57

Leach Corp. v. NLRB,
54 F.3d 802 (D.C. Cir. 1995).....44

Lee Lumber Bldg. & Material Corp.,
334 NLRB 399 (2001), *enforced*,
310 F.3d 209 (D.C. Cir. 2002)..... 49-51

Mistretta v. United States,
488 U.S. 361 (1989) 54

Nat'l Broadcasting Co.,
59 NLRB 478 (1944).....39

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

New Process Steel v. NLRB,
130 S. Ct. 2635 (2010).....53

**NLRB v. HQM of Bayside*,
518 F.3d 256 (4th Cir. 2008)……..47-48

NLRB v. Katz,
369 U.S. 736 (1962) 44

NLRB v. Marin Operating,
822 F.2d 890 (1987) 35

Packard Motor Co. v. NLRB,
330 U.S. 485 (1947) 17

Parsippany Hotel Mgmt. Co. v. NLRB,
99 F.3d 413 (D.C. Cir. 1996)..... 21, 44

Petrochem Insulation v. NLRB,
240 F.3d 26 (D.C. Cir. 2001).....45

Radio Station KOMO-AM,
324 NLRB 256 (1997).....38

RC Aluminum Indus., Inc. v. NLRB,
326 F.3d 235 (D.C. Cir. 2003).....23

S. Power Co. v. NLRB,
664 F.3d 946 (D.C. Cir. 2012)..... 17, 39, 40

S. Prairie Const. Co. v. Local No. 627,
425 U.S. 800 (1976) 17

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TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Scepter, Inc. v. NLRB,
280 F.3d 1053 (D.C. Cir. 2002).....39

SEC v. Banner Fund Int'l,
211 F.3d 602 (D.C. Cir. 2000).....23

**Serramonte Oldsmobile, Inc.*,
318 NLRB 80 n.67 (1995), *enforced*,
86 F.3d 227 (D.C. Cir. 1996)..... 32, 33, 34, 37, 38

Sundor Brands, Inc. v. NLRB,
168 F.3d 515 (D.C. Cir. 1999)..... 17, 32

Transmarine Navigation Corp.,
170 NLRB 389 (1968).....52

**Trident Seafoods, Inc.*,
318 NLRB 738 (1995).....34-36, 39

Tualatin Elec., Inc. v. NLRB,
253 F.3d 714 (D.C. Cir. 2001).....16

UFCW v. NLRB,
519 F.3d 490 (D.C. Cir. 2008)..... 17, 32

United States v. Zannino,
895 F.2d 1 (1st Cir. 1990) 21

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 16, 17

**Vico Products Co. v. NLRB*,
333 F.3d 198 (D.C. Cir. 2003)..... 26, 49

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Vincent Indus. Plastics, Inc. v. NLRB,
209 F.3d 727 (D.C. Cir. 2000)..... 46, 51

Virginia Elec. & Power Co. v. NLRB,
319 U.S. 533 (1943) 45

W.C. McQuaide, Inc. v. NLRB,
133 F.3d 47 (D.C. Cir. 1998).....43

Westinghouse Elec. Corp.,
174 NLRB 636 (1969)..... 27, 28

**Woelke & Romero Framing, Inc. v. NLRB*,
456 U.S. 645 (1982) 39, 48

Yorke v. NLRB,
709 F.2d 1138 (7th Cir. 1983).....28

* 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 1 (29 U.S.C. § 151) 50
Section 7 (29 U.S.C. § 157) 4, 15, 42, 49
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 4, 15, 21, 25, 43, 44
Section 8(a)(3) (29 U.S.C. § 158(a)(3)) 4, 15, 43, 44
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) 4, 14, 24, 25, 44, 45, 47
Section 8(d) (29 U.S.C. § 158(d)) 24
Section 9(b) (29 U.S.C. § 159(b)) 32
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(c) (29 U.S.C. § 160(c)) 45
Section 10(e) (29 U.S.C. § 160(e)) 2, 16, 39, 47, 48
Section 10(f) (29 U.S.C. § 160(f)) 2

Constitution and Statutes:

U.S. Const. art II, § 2, cl. 3 53
U.S. Const. art II, § 3 54
U.S. Const., amend. XX, § 2 ..... 53, 54

Regulations:

29 C.F.R. § 102.48(d)(2) 48

Legislative Materials:

86 Cong. Rec. 14,059 (Jan. 3, 1941) 54
142 Cong. Rec. 1 (Jan. 3. 1996) 56
153 Cong. Rec. 36,508 (Dec. 31, 2007) 57
157 Cong. Rec. H10035-36 (daily ed. Jan. 3, 2012) 56
158 Cong. Rec. H1 (daily ed. Jan. 3, 2012) 56

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Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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 Dodge of Naperville, Inc. and Burke Automotive Group, Inc., d/b/a Naperville Jeep/Dodge ("the Employer") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Order against the Employer. The Employer committed numerous unfair labor practices, including failing to bargain with

Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"). The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended[1] ("the Act"). The Decision and Order, issued on January 3, 2012, and reported at 357 NLRB No. 183 (A 4-29),[2] is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3]

The Employer petitioned for review of the Board's Order on January 18, 2012, and the Board cross-applied for enforcement of the Order on February 24. The Court has jurisdiction over the Employer's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act. Both the petition and cross-application were timely filed, as the Act imposes no time limit for such filings.

---

1 29 U.S.C. § 160(a).

2 "A" refers to the Corrected Joint Appendix, which the Company filed on August 21, 2012. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

3 29 U.S.C. § 160(e) & (f).

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the Board is entitled to summary enforcement of the portions of its Order remedying the Employer's violations of Section 8(a)(1) of the Act.

(2) Whether substantial evidence supports the Board's finding that the Naperville mechanics were relocated, not discharged and hired anew, where it is undisputed that the Naperville and Lisle dealerships constitute a single employer.

(3) Whether substantial evidence supports the Board's finding that the Employer failed to bargain over the effects of relocating the Naperville mechanics to Lisle, including their new terms and conditions of employment there.

(4) Whether the Board abused its discretion in finding appropriate the historical bargaining unit of Naperville mechanics where the Employer's unlawful unilateral changes to their working conditions must be disregarded.

(5) Whether the Board is entitled to affirmance of the remaining unfair labor practices where the Union remained the bargaining representative of the Naperville mechanics after their relocation to Lisle.

(6) Whether the Board acted within its broad remedial discretion in fashioning the remedies for the Employer's numerous unfair labor practices, including the issuance of an affirmative bargaining order.

(7) Whether the Board possessed a quorum when it issued the decision on review.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by the Union. (A 12-23; A 55-79.) After trial, an administrative law judge issued a decision on August 2, 2010. (A 12-29.) The judge found that Dodge of Naperville, Inc. and Burke Automotive Group, Inc. constituted a single employer for the purposes of the Act. The two corporations were therefore jointly and severally liable for their multiple violations of the Act, including Section 8(a)(5) and (1)[4] violations for refusing to bargain with the Union over the unit employees' terms and conditions of employment, repudiating the collective-bargaining agreement, withdrawing recognition from the Union, and providing an unreasonably delayed response to the Union's request for information. (A 20-25.) The administrative law judge additionally found that the Employer had violated Section 8(a)(1) by threatening its employees against exercising their protected Section 7 rights, and had violated Section 8(a)(3) and (1) by constructively discharging two employees who could

[4] 29 U.S.C. § 158(a)(5) & (1).

not afford to work under the Employer's unlawfully imposed terms and conditions of employment. (A 25-26.)

After considering the Employer's exceptions to the judge's decision, the Board agreed with the judge's conclusions, with some modifications in reasoning and to the order. (A 4-8.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

1. The Naperville and Lisle car dealerships

Ed Burke was the sole owner of two car dealerships in the suburbs of Chicago, Illinois: one located in Lisle (the "Lisle dealership") and one located several miles down the road in Naperville (the "Naperville dealership"). (A 13; A 307-09.) While separately incorporated, they were interrelated: the Naperville dealership, incorporated as "Dodge of Naperville, Inc.," was a wholly owned subsidiary of the Lisle dealership, which is incorporated as "Burke Automotive Group, Inc.." (A 13; A 307.)

Until the relevant events here, both dealerships sold Chrysler automobiles pursuant to franchise agreements. The Lisle dealership could sell both Jeep and Dodge vehicles; the Naperville dealership could only sell Dodge vehicles. (A 13-14; A 316-18.)

Both dealerships also employed mechanics to repair and maintain Chrysler vehicles. Until June 20, 2009, the Lisle dealership employed 14 mechanics, while the Naperville dealership employed 6. (A 13 n.4, 18; A 312-13.) The Lisle mechanics were not unionized. (A 13; A 314.) The Union has represented the Naperville mechanics since 1989. The most recent collective-bargaining agreement was in effect from August 1, 2005 until July 31, 2009. (A 13; A 80-131, 217, 285, 312-13, 493-95.)

Through their collective-bargaining agreement, the Naperville mechanics received a better wage and benefits package than the nonunionized mechanics in Lisle. The Naperville mechanics received family medical, dental, and vision insurance as a part of their compensation package, without any employee contributions. (A 16; A 300.) By contrast, to receive the same benefits, the Lisle mechanics paid $175 to $200 per week toward their premiums – a difference of as much as $800 per month. (A 18; A 300, 312-13, 417, 464.) The Naperville mechanics also enjoyed a guaranteed minimum of 34 paid work hours per week if they were available for a full 40-hour week. (A 16; A 115-22, 299-300, 465.) The Lisle mechanics only received pay for the hours they "booked" – that is, for the hours they could charge to a customer for making repairs. (A 16 & n.11; A 299.) Consequently, the Lisle mechanics' weekly wages could vary substantially, depending upon the volume of work available as well as the amount of time any

particular repair job took. (A 16; A 313, 465-67, 568.) The Naperville mechanics enjoyed a pension plan. (A 16; A 105-06, 312.) The Lisle mechanics, however, only had a 401(k) plan, for which the Employer provided $500 per year, maximum, in matching contributions. (A 18; A 312-13.)

2. Interrelations between the Naperville and Lisle dealerships

Although distinct corporate entities, the management and operations of the Naperville and Lisle dealerships overlapped in multiple and significant ways.

The corporate governance of the two entities was identical. Ed Burke was the president of both corporations and the sole shareholder of both companies, either directly (for the Lisle dealership) or indirectly (for the Naperville dealership, which was a subsidiary and was wholly owned by the Lisle dealership). (A 13; A 306-07, 598.) The only other corporate officer was Penny Squires, who was the corporate secretary for both dealerships and also served as the shared controller, accountant, and payroll official. (A 15 & n.10; A 306, 356, 362-63, 381.)

Until the closure of the Naperville dealership, most management roles also straddled the two dealerships. Sam Guzzino was the shared general manager and actively controlled labor relations at both locations. (A 18; A 314-16.) The two dealerships also shared one facilities maintenance manager, Ray Rossi. (A 15; A 315, 372.) For direct supervisors, the mechanics had two service managers: Rossi at the Lisle dealership and Russ Rochacz at the Naperville facility. (A 15; A 314-

15, 607-08.) Rossi would sometimes also work at the Naperville dealership, however. For example, he trained all of the mechanics at the Naperville facility upon the Employer's acquisition of that dealership in 2003; he occasionally resolved labor-related complaints at the Naperville dealership; and when the Employer closed that facility in 2009, he handled many of the personnel issues that arose. (A 15; A 370-71, 373, 375-76, 663-65.) The mechanics' terms and conditions of employment at both locations were set by Owner Burke: either unilaterally, at the Lisle dealership, or through collective bargaining, at the Naperville dealership. (A 20; A 286, 313-14.)

Finally, the two dealerships operated as if they were one joint enterprise. When the Employer needed to reduce the Naperville inventory, it transferred cars to the Lisle dealership. (A 21; A 422-24.) When the Lisle dealership's franchise was temporarily rescinded, it used the Naperville dealership's franchise to order spare parts and report warranty repairs. (A 21; A 336, 422-23, 523.)

B. In May – June 2009, the Employer Sacrifices the Naperville Dealership To Save the Lisle Dealership; It Strips the Naperville Mechanics of Their Union Representation and Contractual Benefits

1. The Chrysler bankruptcy proceeding

In 2008, Chrysler entered a Chapter 11 bankruptcy restructuring,[5] and on June 9, 2009, the Bankruptcy Court for the Southern District of New York authorized Chrysler to reject numerous franchise agreements, including the agreement permitting Burke to sell Chrysler vehicles at the Lisle dealership. (A 13; A 171-216, 316.)

Burke received notice of Chrysler's intentions to reject the Lisle dealership's franchise on May 13, 2009. (A 14; A 218-21, 317-19.) That same day, Burke also learned that Chrysler would permit him to retain his Naperville dealership franchise. (A 14; A 222, 316, 319-20, 332.)

Burke was especially dismayed to lose the Lisle franchise, which he considered more valuable because he could sell both Jeep and Dodge vehicles there. (A 14 n.7; A 329-32.) Burke therefore began to "prod" Chrysler into permitting him to retain his Lisle franchise and to rescind his Naperville franchise agreement instead. (A 14 & n.7; A 329-32.)

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[5] *In re Chrysler LLC*, No. 09-50002 (AJG) (Bankr. S.D.N.Y.).

In mid-June, Chrysler agreed to Burke's request and sent him a revised agreement allowing him to sell Jeep and Dodge vehicles in Lisle, provided that he remodel his Naperville facilities and eventually relocate his car dealership to Naperville permanently. (A 14; A 225-42, 329-30, 334.) Chrysler set a deadline of 17 months for Burke to relocate his Lisle dealership back to Naperville. (A 14; A 225-34, 520, 531.) Chrysler did not, however, specify when or even if Burke was required to cease operations at or vacate the Naperville site. (A 14; A 225-42.)

2. The Naperville dealership closes on June 20

On Saturday, June 20, the day after the revised Chrysler agreement was signed, Burke shut down the Naperville dealership. (A 14, 16; A 288, 403-04.) That morning, Burke, Guzzino, and Rossi informed the Naperville mechanics that the Naperville facility would close and all operations would move to the Lisle facility; if they wished to work at the Lisle facility, they could submit a job application and Burke would hire as many "as he could." (A 16; A 404-05, 557.) Burke had given neither the mechanics nor the Union any prior notice of the closure decision. (A 19; A 288-89, 337, 405, 540.)

That following Monday, June 22, three of the Naperville mechanics picked up their paychecks at Lisle. (A 17; A 406-07.) While they were there, Service Manager Rossi gave them job applications and informed them that, if hired, they would be treated as new hires, they would not earn the same benefits as at the

Naperville facility, and they would work evenings and weekends. (A 17; A 407-08.)

The next day, June 23, the Naperville mechanics each received a letter from General Manager Guzzino, who directed them to "show up for work immediately" at Lisle. (A 17; A 138, 389-92.) The letter also warned that "[s]hould you not come to work we will assume that you have no interest in a job at our dealership." (A 17; A 138.)

3. The Union requests bargaining and information about the effects of the relocation

Several of the Naperville mechanics gave the letter to the Union on June 23. The same day, the Union faxed a letter to Service Manager Rossi. (A 17; Tr. A 132-33, 294, 409-10.) The letter requested that the Employer and Union meet as soon as possible to bargain over the recent relocation of the Naperville mechanics; it also stated the Union's position on the issue, which was that the collective-bargaining agreement continued to apply to the Naperville mechanics, who, therefore, should continue to receive the benefits provided for in that agreement. (A 17; A 132-33.) The second letter, delivered by employee Robert Adams on June 24, requested information regarding the same topics outlined in the first letter. (A 17; A 139, 410.) On June 24, the Employer responded, providing none of the information requested but agreeing to meet with the Union on June 26. (A 18; A 134, 295.)

4. The Naperville mechanics begin work at Lisle; later, the Employer formally hires them with drastic benefit cuts and threatens them about union activity at Lisle

By June 24, all but one of the Naperville mechanics had begun work at the Lisle dealership. (A 18; A 134, 376-77.) Before that, the Employer told the employees that if they did not accept a job at Lisle, they would be considered to have quit and would be denied unemployment compensation. (A 20-21; A 447.) On Friday, June 26, Owner Burke called a meeting of the Naperville mechanics, where he extended an *en masse* formal offer of employment and explained their new terms and conditions. (A 18; A 503-04, 567, 613.) Burke told the mechanics that the Lisle dealership "was a non-union store," would "never be a union store," and if the mechanics "ever went out on strike it would mean that [they] quit and would not be able to collect unemployment." (A 18; A 448, 462-63, 503-04.) He also told the mechanics that they would no longer receive the benefits provided in the collective bargaining agreement. (A 18; A 504-08.) That is, they would have no pension plan; they would only be paid for the hours that they "booked" every week; and they would pay $175 to $200 per week for family health insurance. (A 18; A 504-08.) They would also receive only two weeks of annual vacation, instead of the four weeks per year they had received at Naperville. (A 18 n.16; Tr. A 501, 504.)

That same day, the Employer's attorney met with the Union. (A 18; A 296-97.) Over the Union's objections, the attorney stated that the Employer was withdrawing recognition from the Union because the Naperville bargaining unit had been merged with the unrepresented mechanics at the Lisle dealership and had consequently lost its majority status. (A 18; A 135-36, 297.)

5. Mechanics Adams and Marjanovich cannot afford to work for reduced benefits and resign

Not surprisingly, the Employer's elimination of contractual benefits caused financial distress for the Naperville mechanics. Two – Robert Adams and Mike Marjanovich – quickly realized that they could not afford to work as mechanics at the Lisle dealership without any guaranteed steady pay and with $600-$800 monthly health insurance premiums. (A 18; A 417-19, 468-69.) During the week of June 22, Adams and Marjanovich each worked 24 hours but could only "book" 15 and 12.1 work hours, respectively, given the limited work available. (A 19; A 438, 470.) Both mechanics realized that, between the pay cut and steep health insurance increase, neither would have sufficient take-home pay. (A 19; A 419, 465-66, 468-69.) Marjanovich concluded that his take-home pay would not even cover his mortgage payments. (A 19; A 469.)

On June 29, Adams and Marjanovich resigned from the Lisle dealership, explaining that they could not continue to work there under the new terms and conditions imposed upon them. (A 19; A 467-69, 613.) They both filed

unemployment compensation applications, and Burke hired a firm to oppose their claims. (A 19; A 613-14.)

6. The Union's request for information

After filing an unfair-labor-practice charge against the Employer, on July 9, the Union asked it for all correspondence between it and Chrysler concerning the terminated and existing franchise agreements. (A 18, 19, 25; A 55, 137, 254.) On September 8, the Employer responded to a substantially similar request from the Board and copied the Union on its response. (A 19; A 140-68.) It did not respond directly to the Union until March 4, 2010. (A 19; A 245.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) found, in agreement with the administrative law judge, that Dodge of Naperville and Burke Automotive Group constitute a single employer for purposes of the Act and are therefore jointly and severally liable for any violations of the Act. (A 5 n.5, 20-22.)

The Board also agreed that the Employer had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, repudiating its collective-bargaining agreement with the Union, failing to bargain with the Union concerning the effects of the bargaining unit's relocation from Naperville to Lisle,

unilaterally changing unit employees' terms and conditions of employment, and unreasonably delaying the provision of information to the Union. (A 5-6 & n.5.)

In addition, the Board ruled, in agreement with the judge, that the Employer had violated Section 8(a)(1) by threatening employees that their continued employment would be in a nonunion shop, that the shop would never be unionized, and that if the unit employees engaged in a strike their employment would be terminated and they would not be able to receive unemployment compensation. (A 5 n.5.) Finally, the Board concluded that the Employer violated Section 8(a)(3) and (1) by constructively discharging Robert Adams and Mike Marjanovich. (A 5 n.5.) Member Hayes dissented as to the findings of unlawful withdrawal of recognition, repudiation of the collective-bargaining agreement, unilateral changes, constructive discharges, and threat that the employees would work in a nonunion shop. (A 8-11.)

The Board's Order requires the Employer to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order requires that the Employer: upon request bargain in good faith with the Union regarding terms and conditions of employment and embody any understanding in a signed agreement; restore the terms and conditions of employment as they were under the most recent collective-bargaining agreement

and revoke the unilateral changes made since the repudiation of the agreement; make the bargaining unit members whole for any wages or other benefits lost as a result of the Employer's unfair labor practices; remit all payments to any employee benefit fund to which the Employer was required to contribute under the most recent collective-bargaining agreement; offer reinstatement to Adams and Marjanovich; and post and electronically distribute remedial notices to employees. (A 11-12.)

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law."[6] The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.[7] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[8] Thus, the Board's reasonable inferences may not be displaced on

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[6] *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

[7] 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Citizens Inv. Svcs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005).

[8] *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must

review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.[9]

Of particular relevance here, the Board's determination whether a bargaining unit is appropriate "require[s] a fact-intensive inquiry and a balancing of various factors," and "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'"[10] Consequently, "its decision is entitled to 'wide deference,'" [11] and "the Board 'need only select *an* appropriate unit, not *the most* appropriate unit.'"[12]

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decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion.").

[9] *See Universal Camera*, 340 U.S. at 488. *Accord Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004) ("[T]he court will uphold the Board's decision upon substantial evidence even if we would reach a different result upon *de novo* review.").

[10] *S. Prairie Const. Co. v. Local No. 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

[11] *UFCW v. NLRB*, 519 F.3d 490, 494 (D.C. Cir. 2008) (quoting *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999)).

[12] *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012) (quoting *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009)).

SUMMARY OF ARGUMENT

The Board found that the Employer committed multiple unfair labor practices over the course of its relocation of the Naperville mechanics to Lisle, and the Employer challenges two fundamental determinations made by the Board, upon which several of these unfair labor practices hinge. The Employer's challenges ignore, however, the well-established Board doctrines and substantial evidence upon which these two determinations rest.

The Board first reasonably determined that the Employer was obligated to bargain over the effects upon the Naperville mechanics of their relocation to Lisle, even if the Employer was not obligated to bargain over the decision to relocate itself, and that this obligation extended to bargaining over the terms and conditions of employment under which the mechanics would begin work at Lisle. The Employer clearly breached this duty.

Second, the Board did not abuse its "wide deference" in determining that the Naperville mechanics relocated to Lisle remained an appropriate bargaining unit. The Board followed precedent in refusing to let the Employer benefit from its effects-bargaining violation and in discounting the changes the Employer unlawfully made to the mechanics' working conditions. The Board then reasonably determined that the Employer failed to demonstrate compelling

circumstances to overcome the Naperville mechanics' 20-year history as a bargaining unit.

The Employer presents additional challenges, which this Court should also reject, to the affirmative bargaining order granted by the Board and the presence of a quorum of validly appointed Board members. The Court lacks jurisdiction to consider the Employer's objection to the Board's justification of the affirmative bargaining order. The Employer's challenge to the Board's quorum is based on the mistaken claim that the Senate's Session, and therefore Member Becker's commission, ended at some point before the Board issued its order. The Legislative and Executive Branches agree, however, that the Senate's Session ended at noon on January 3, after the Board's decision here was issued, and the Employer offers no sound basis for this Court to disregard the political branches' congruent views.

ARGUMENT

The contested issues in this case all ultimately concern the Employer's failure to bargain over the effects of its relocation of a bargaining unit of mechanics from Naperville to Lisle – a violation of the Act that rendered unlawful the Employer's subsequent attempts to unilaterally change the terms and conditions of employment of the Naperville mechanics, withdraw recognition from their Union, and repudiate the collective bargaining agreement.

Section I identifies the unchallenged violations by the Employer of Section 8(a)(1) of the Act, which are entitled to summary enforcement.

Section II then demonstrates that the transfer of the Naperville mechanics to Lisle was in fact an employer-initiated relocation of its operations to Lisle, despite the Employer's attempts to mischaracterize that transfer as a mass discharge and subsequent hire of those mechanics. As such, that relocation triggered the Employer's obligation to bargain over the effects of the relocation, including the mechanics' employment terms at Lisle. Section III explains this duty and the Employer's failure to fulfill it.

Section IV explains how, as a consequence, the Board correctly 1) disregarded the terms and conditions of employment wrongfully imposed upon the Naperville mechanics by the Employer and 2) relied upon the mechanics' prior terms and conditions of employment, combined with their 20 years as a bargaining unit, as a basis for determining that the Naperville mechanics remained an appropriate bargaining unit after their relocation to Lisle. Accordingly, the Union retained its status as those employees' representative. Section V then shows that, as a consequence, the Employer's unilateral changes, withdrawal of recognition, constructive discharges of Adams and Marjanovich, delay of information, and repudiation of the collective-bargaining agreement were all unlawful. These

conclusions in turn justify the scope of the Board's remedies, as demonstrated in Section VI.

Finally, Section VII explains that the most recently concluded Session of the United States Senate was not adjourned *sine die* prior to January 3, 2012, and therefore Member Becker's commission did not expire until January 3, 2012. This rebuts the Employer's claim that the Board lacked a quorum when it issued this Decision and Order on January 3, 2012.

I. The Employer Waived Any Objection to Its Section 8(a)(1) Violations Not Challenged in Its Opening Brief; the Board Is Entitled to Summary Enforcement of Those Portions of Its Order

In its brief, the Employer does not address, let alone challenge, the Board's findings that it violated Section 8(a)(1) of the Act by threatening its employees against exercising their rights under the Act. (A 5 n.5.) Specifically, the Employer threatened the Naperville mechanics that they would no longer receive union benefits, that their continued employment would be in a nonunion shop, that the shop would never be unionized, and that if they engaged in a strike their employment would be terminated and they would be denied unemployment compensation. (A 5 n.5.) By entirely failing to contest those findings, the Employer has waived its right for this Court to review them.[13] The Board is

[13] *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996) ("[E]ven had Parsippany raised the . . . issue before the Board, it would nonetheless be barred from consideration by this court, as it did not raise the issue

therefore entitled to summary enforcement of the portions of its Order remedying those violations.[14]

II. Substantial Evidence Supports the Board's Finding That the Employer Relocated the Naperville Mechanics, and Did Not Discharge Them and Then Hire Them Anew, Where It Is Undisputed That the Naperville and Lisle Dealerships Constituted a Single Employer

The record amply supports the Board's conclusion that the Naperville and Lisle dealerships, although separately incorporated, in fact formed a single employer. The Board relied on the common ownership of the two corporations and the substantial overlap in their control and operations. (A 5 n.5, 20-22.)

The Employer does not directly contest this finding by the Board, but states (Br. 4-6) in its Facts section that its Naperville and Lisle facilities represent separate and distinct companies and that the Naperville mechanics lost their jobs and were subsequently hired anew at the Lisle facility. Moreover, it wrongly claims (Br. 4) that the dealerships' similarities "have no legal consequence." With those limited statements, the Employer has not preserved a challenge to the Board's single-employer finding. This Court has "repeatedly held that [it] will not address an 'asserted but unanalyzed' argument because 'appellate courts do not sit

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in its opening brief."); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (holding issue waived before Court when not raised in opening brief).

[14] *See, e.g., Allied Mechanical Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties.'"[15] Accordingly, the Court has held arguments waived where, as here, they consist only of a claim "alluded to . . . in the statement of facts."[16] In any event, the undisputed facts showing the common ownership, control, and operations of the two dealerships (above, pp. 7-8) would amply satisfy this Court's substantial-evidence review of the Board's single-employer finding.[17]

Besides contradicting the Board's uncontested single-employer findings (A 5 n.5, 20-22), the Employer's statements mischaracterize what was, in fact, a relocation of its employees from one facility to another – the kind of action that triggers the Employer's duty to bargain over the terms and conditions under which its employees will work at the second facility.[18] Obscuring the true nature of its decision to relocate the Naperville mechanics to Lisle, the Employer states in its brief that the Naperville mechanics were told they "could apply for jobs at the

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[15] *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (collecting cases); *see also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (a party must do more than "merely mention a possible argument in the most skeletal way, leaving the court to do counsel's work").

[16] *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

[17] *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003).

[18] *See, e.g., Comar, Inc.*, 339 NLRB 903, 911 (2003) ("*Comar I*"), *enforced*, 111 F. App'x 1 (D.C. Cir. 2004).

Lisle facility" and were then "handed job applications" when they picked up their paychecks in Lisle. (Br. 5, 6.) Yet, it ignores that it permitted the Naperville mechanics to begin work at the Lisle facility before any one of them had submitted their job applications. Tellingly, the Employer also stated that if they did not accept work at Lisle, the Employer would deem them to have quit and would oppose their unemployment compensation application. (A 20-21; A 417.)

Substantial evidence therefore supports the Board's finding that the Naperville mechanics were relocated within the operations of an undisputed single employer rather than discharged and hired by a separate entity, as the Employer incorrectly suggests.

III. Substantial Evidence Supports the Board's Finding That the Employer Failed To Bargain Over the Effects of Relocating the Naperville Mechanics to Lisle, Including Their New Terms and Conditions of Employment There

Section 8(d) of the Act requires employers to bargain collectively before changing "wages, hours, and other terms and conditions of employment,"[19] and Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees."[20] "Because the Board has 'the primary responsibility of marking out the scope of the

[19] 29 U.S.C. § 158(d).

[20] *Id.* § 158(a)(5).

statutory language and of the statutory duty to bargain,' this court defers to the Board's 'reasonably defensible' construction of that duty."[21] Furthermore, a violation of this duty derivatively violates Section 8(a)(1), which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their statutory right to bargain collectively.[22]

The duty to engage in "effects bargaining" requires an employer to bargain over the effects on its employees of implementing a decision to reorganize its operations, even though the underlying decision itself may or may not be subject to the obligation to bargain. The Supreme Court explained the duty in *First National Maintenance Corp. v. NLRB,* a case in which an employer decided to cease operations at one of its facilities.[23] Although the closure decision itself was not subject to the duty to bargain because it "was akin to the decision whether to be in business at all," the union's valid interest in softening or altering the effects of the closure upon its members required that the parties bargain in good faith over how to implement its decision.[24] According to the Court, "under § 8(a)(5), bargaining

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[21] *Cincinnati Newspaper Guild, Local 9 v. NLRB,* 938 F.2d 284, 286 (D.C. Cir. 1991) (quoting *Ford Motor Co. v. NLRB,* 441 U.S. 488, 496-97 (1979)).

[22] 29 U.S.C. § 158(a)(1). *See also Exxon Chem. Co. v. NLRB,* 386 F.3d 1160, 1164 (D.C. Cir. 2004).

[23] *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 677 (1981).

[24] *Id*.

over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy."[25]

The effects-bargaining obligation extends to an employer's decision to relocate its operations, as this Court recognized in *Vico Products Co. v. NLRB.*[26] In *Vico*, the employer neither notified its employees' union of its decision to relocate production operations from Michigan to Kentucky nor bargained over the relocation's effects on those employees. This Court held that the employer had violated the Act, because "pre-implementation notice is required to satisfy the obligation to bargain over the effects of a decision that impacts conditions of employment."[27] By failing to bargain over the relocation's effects, the employer "denigrated the Union and the viability of the collective bargaining process itself, in the eyes of the unit employees."[28]

In this case, the Employer does not deny that it neither gave prior notice to the Union of its intention to relocate its operations nor bargained over the effects of that decision on the Naperville mechanics. It unilaterally relocated the six mechanics from Naperville to Lisle (A 16; A 138, 403-08); unilaterally imposed

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25 *Id.* at 681-82 (citations omitted).

26 333 F.3d 198 (D.C. Cir. 2003).

27 *Id.* at 208.

28 *Id.*

new terms and conditions upon the mechanics (A 18; A 504-08); and then, after the relocation was already complete, flatly denied the Union's explicit request to engage in effects bargaining (A 17-18; A 135-36, 297).

Given these uncontested findings, the Board reasonably concluded that the Employer had violated its duty to bargain over the effects of the relocation. Even if the Employer's decision to relocate the Naperville mechanics to Lisle was itself not a mandatory subject of bargaining, the many ways in which that relocation affected those mechanics most certainly *were* subjects of mandatory bargaining.[29] These included "the relocated workers' wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment at the new plant." (A 23, citing *Comar, Inc.*[30]) This is in addition to negotiating "such benefits as severance pay, payments into the pension fund, preferential hiring if the employer continues operating at other plants, and reference letters with respect to

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[29] *First Nat'l Maintenance Corp.*, 452 U.S. at 677 n.15, 681-82.

[30] 349 NLRB 342, 354 (2007) ("*Comar II*"). *See also Holly Farms Corp.*, 48 F.3d 1360, 1368 (4th Cir. 1995) (holding that company absorbing merged employees was under duty to bargain with employees' union over new terms and conditions of employment); *Westinghouse Elec. Corp.*, 174 NLRB 636, 637 (1969) ("[A]n Employer is required to negotiate not only respecting the shut-down, but also the bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed."); *Cooper Thermometer Co.*, 160 NLRB 1902, 1912 (1966) (finding violation of the Act where employer "refused to negotiate conditions of transfer [for employees being transferred from one plant to another] including such items as the carryover of seniority or other benefits"), *enforced*, 376 F.2d 684 (2d Cir. 1967).

other jobs."[31] The Employer denied the Union the opportunity to bargain over any of these facets of the relocation of the Naperville mechanics. In doing so, the Employer clearly violated the Act.

In the face of its failure to bargain over the relocation's effects, the Employer incorrectly argues that the effects-bargaining obligation does not encompass terms of employment at a new facility. (Br. 22, 24-25.) Yet, Board precedent firmly establishes that duty, including the Board's decision in *Comar, Inc.*, which this Court recently enforced.[32] In *Comar*, an employer relocated a bargaining unit of employees working in its Vineland, New Jersey facility ten miles away to its Buena Vista facility. The employer refused to bargain regarding the terms and conditions of employment that the Vineland employees would be subjected to at Buena Vista and unilaterally imposed upon the Vineland employees the same terms and conditions it already applied to the preexisting Buena Vista employees. The Board found this refusal to bargain unlawful, on the grounds that "the obligation to bargain over the effects of the move on unit employees includes the obligation to bargain concerning the terms and conditions of employment under

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31 *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983).

32 *Comar I*, 339 NLRB 903 (2003), *enforced*, 111 F. App'x 1 (D.C. Cir. 2004); *Comar II*, 349 NLRB 342, 354 (2007). *See also Holly Farms Corp.*, 48 F.3d at 1368; *Westinghouse Electric Corp.*, 174 NLRB at 637; *Cooper Thermometer Co.*, 160 NLRB at 1912.

which employees will initially be employed at the new location."[33] This Court affirmed the Board's findings and enforced the Board's Order commanding the employer to bargain over the Vineland employees' terms and conditions of employment at Buena Vista.[34] The Board applied that holding to the similar facts present in this case, where the Employer relocated one group of its employees – the Naperville mechanics – to another of its facilities.

The Employer's reliance (Br. 23-26) on *Brown Truck and Trailer Manufacturing Co., Inc.*[35] and *Brown-McLaren Manufacturing Co.*[36] to eliminate its effects-bargaining duty is misplaced since both concerned a union's attempt to represent employees it had never represented before. In both *Brown-Truck* and *Brown-McLaren*, an employer violated its effects-bargaining duty in relocating its operations from one facility to another. The union representing the employees at the first facility requested that the Board designate it as the bargaining representative of all employees at the second facility. The Board refused that remedy because few if any employees had relocated from the first to the second facility; therefore, there was no reason to believe that the union had been selected

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33 *Comar I*, 339 NLRB at 911.

34 *Comar, Inc. v. NLRB*, 111 F. App'x 1, 2 (D.C. Cir. 2004).

35 106 NLRB 999 (1953).

36 34 NLRB 984 (1941).

or would be selected as the bargaining representative of a majority of the merged unit at the second facility.[37] In contrast here, the Board ordered bargaining over only the six mechanics whom the Union has represented for over 20 years.

Given that the Employer wrongfully failed to engage in effects bargaining over the Naperville mechanics' terms of employment at Lisle, those unilaterally imposed terms were unlawful and, consequently, must be disregarded. The accepted remedy for an employer's unlawful refusal to bargain is for the Board to nullify any imposed terms of employment and return the employees to their *status quo ante*.[38] This *status quo ante*, and not the terms unlawfully imposed by the Employer, should therefore be examined to determine whether the relocated Naperville mechanics remained an appropriate bargaining unit. Accordingly, as

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[37] *See Brown Truck*, 106 NLRB at 1002 ("[W]e do not believe that we should attribute to the Union statutory representative status in the absence of affirmative evidence that a majority of the employees at the Monroe plant have, in fact, designated the Union as their bargaining representative."); *Brown-McLaren*, 34 NLRB at 1014-15 ("[I]n the absence of any claim or showing that the Union has been designated by a majority of employees at the Hamburg plant, we shall not order the respondent to bargain collectively with the Union.").

[38] *See Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 203 (D.C. Cir. 2011) ("Employers cannot force unions to come to the bargaining table in a position of weakness.… [With unilateral changes,] the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining."). *See also generally* THE DEVELOPING LABOR LAW 2764 (John E. Higgins, Jr. et al., eds., 2006) (stating that, when an employer wrongfully imposes a unilateral change in the terms or conditions of employment, "the Board usually will order that the status quo ante be restored and that employees be made whole for any benefits that the employer has unilaterally discontinued").

discussed in the next section, the Employer cannot rely on the terms it unlawfully imposed on the Naperville mechanics to justify stripping them of their longstanding union representation.

IV. The Board Did Not Abuse Its Discretion in Finding Appropriate the Historical Bargaining Unit of Naperville Mechanics; the Union Never Lost Its Majority Status in That Unit

The Employer's main defense to its multiple failure-to-bargain violations is that the only appropriate unit includes the Naperville and Lisle mechanics and the Union lacked a majority in that merged unit. Well-established precedent precludes the Employer from relying on unlawful unilateral changes to support its unit description. The Board did not abuse its discretion in concluding, after having set aside the unlawful terms, that the Naperville mechanics did retain a distinct community of interests and therefore remained an appropriate bargaining unit unto themselves, based on the presumption in favor of retaining historical bargaining units as well as the significantly superior benefits that the Naperville mechanics enjoyed. Under this Court's deferential standard of review, this bargaining-unit determination clearly lies within the ambit of the Board's discretion and should be upheld.

A. The Board Properly Disregarded Unlawfully Imposed Terms of Employment in Determining Whether the Historical Bargaining Unit Remained Appropriate

"Section 9(b) of the NLRA vests in the Board authority to determine 'the unit appropriate for the purposes of collective bargaining.'"[39] "Because the assessment requires a fact-intensive inquiry and a balancing of various factors, the Board has broad discretion in making the determination."[40] Accordingly, this Court has said that a bargaining-unit determination by the Board "is entitled to 'wide deference.'"[41] Importantly, this Court recognizes that "[t]he Board need only select *an* appropriate unit, not *the most* appropriate unit."[42]

When faced with a claim that a historical bargaining unit has been merged or relocated and thereby rendered inappropriate, the Board must assess the bargaining unit in the state it existed in prior to any unfair labor practices committed by the employer. The Board's approach is sound because "[t]o hold otherwise would allow Respondent to benefit from its own unlawful conduct."[43] Neither an

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39 *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (citing 29 U.S.C. § 159(b)).

40 *UFCW v. NLRB*, 519 F.3d 490, 494 (D.C. Cir. 2008) (quoting *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999)).

41 *UFCW*, 519 F.3d at 494.

42 *Serramonte Oldsmobile*, 86 F.3d at 236.

43 *Comar I*, 339 NLRB at 911.

employer nor a union can unilaterally modify the scope of a bargaining unit.[44] Accordingly, the Board has repeatedly disregarded as irrelevant to bargaining unit determinations any terms or conditions of employment wrongfully imposed upon employees, focusing instead upon the *status quo ante* in place prior to the employer's unfair labor practices.[45]

This Court agreed with that approach in *Serramonte Oldsmobile*, where the employer relocated a bargaining unit and, in the process, wrongfully and unilaterally imposed upon it a new health insurance plan, retirement savings plan, and hourly wage compensation system.[46] In finding that the bargaining unit remained appropriate, "rather than utilizing what was in effect under the legal

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44 *Serramonte Oldsmobile*, 86 F.3d at 234.

45 *See, e.g.*, *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1988) (disregarding "the uniformity in wages, hours, and terms of employment" between two groups of employees because "it is the result of the disputed conduct"); *Comar I*, 339 NLRB at 911 ("Respondent failed to fulfill [its duty to bargain over effects] and that consequently these changes were unlawful. Thus, these changes can be accorded little weight in determining whether the unit remained appropriate."), *enforced*, 111 F. App'x 1 (D.C. Cir. 2004); *Deaconess Medical Center*, 314 NLRB 677, 677 n.1 (1994) ("The Respondent's argument begs the question. The employees shared the same wage and benefit structure only because the Respondent has refused to bargain with the union representing the maintenance employees and unilaterally imposed on those employees the terms of its collective-bargaining agreement (with another union)."); *Holly Farms Corp.*, 311 NLRB 273, 279 (1993) ("[M]any of the factors relied on by the Respondents to support their contention that the bargaining unit no longer remained appropriate were unlawful changes."), *enforced*, 48 F.3d 1360 (4th Cir. 1988).

46 *Serramonte*, 318 NLRB at 104.

fiction of Respondents' unfair labor practices," the Board was "guided by what should have been in effect had no unfair labor practices been committed."[47] This Court enforced that portion of the Board's order, noting that "we can find no basis for disturbing the Board's finding."[48]

B. The Board Acted Within Its Wide Discretion in Finding that the Employer Failed to Prove Compelling Circumstances To Overcome the Continued Appropriateness of the Historical Naperville Bargaining Unit

Once the Board has determined the relevant terms and conditions of employment to examine, the Board considers whether those terms and conditions lend a distinct "community of interest" to the bargaining-unit members. More specifically, "the Board evaluates unit appropriateness based on 'the degree to which a group of employees share a 'community of interests' distinct from the interests of other employees of the company.'"[49] "Factors considered include whether, in relation to other employees, they have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not

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47 *Id.* at 104 n.67.

48 *Serramonte*, 86 F.3d at 162.

49 *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n.11 (D.C. Cir. 1996) (quoting *Banknote Corp. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996)).

integrated with those of other employees; and if they have historically been part of a distinct bargaining unit."[50]

The Board does not give equal weight to each of the factors, however: "[i]n deciding whether established bargaining units remain appropriate, the Board 'has long given substantial weight to prior bargaining history.'"[51] The Board applies a weighty presumption in favor of continued recognition of a historical bargaining unit, placing "a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate."[52] A party challenging the extant unit must present "compelling circumstances" sufficient to "overcome the significance of bargaining history."[53] Frequently, this compelling circumstances requirement proves determinative, and "[i]n most cases, a historical unit will be found appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time."[54] Thus, in *Trident Seafoods,* this Court affirmed that two historical bargaining units

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50 *Id.*

51 *Id.* at 118 (quoting *NLRB v. Marin Operating*, 822 F.2d 890, 893 (9th Cir. 1987)).

52 *Id.* (quoting *Banknote Corp. v. NLRB,* 84 F.3d 637, 647 (2d Cir. 1996)).

53 *Id*.

54 *Id*.

remained appropriate while simultaneously acknowledging that the respective communities of interest demonstrated by the two units "would not be sufficient to support the initial establishment of a new bargaining unit."[55]

Here, the Board applied to the Naperville mechanics the well-established presumption in favor of the continued recognition of historical bargaining units, according to which "'compelling circumstances' are required to overcome the significance of the Naperville mechanics' more than twenty years of bargaining history." (A 5, quoting *ADT Security Services*.[56]) In determining whether such "compelling circumstances" existed, the Board disregarded the newly imposed compensation and benefits that the Naperville mechanics shared with the fourteen unrepresented mechanics at Lisle, since these were "the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment" and "giving weight to such changes would reward the employer for its unlawful conduct." (A 5, citing *Comar II*.[57]) The Board therefore considered instead the superior wage structure and benefits in place prior to the relocation – *i.e.*, a minimum hours guarantee, a pension plan, contribution-

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55 *Id.* at 119.

56 355 NLRB No. 223, slip op. at 1 (2010), *enforcement application pending* (6th Cir. No. 10-2549).

57 349 NLRB at 357-58.

free health and vision insurance, and four weeks of annual vacation (A 5, 16, 18 & n.16; A 299-300, 312-13, 464-67) – which distinguished them from the unrepresented mechanics in Lisle.[58] With the original untainted terms of employment before it, the Board then concluded that "the Respondent has failed to show compelling circumstances to overcome the parties' 20-year bargaining relationship and the distinct terms and conditions of employment of the Naperville mechanics, and thus the existing unit remains appropriate at least until the Respondent, in full compliance with its duty to bargain, integrates the two sets of employees and standardizes their terms of employment." (A 6 n.9.)

In determining that the Naperville mechanics remained an appropriate bargaining unit after their relocation, the Board clearly identified "*an* appropriate unit," and the Court need not consider if it was the most or only appropriate unit.[59] The Board's approach followed its precedent that reflects reasonable policies: specifically, that prior bargaining history should be weighted heavily in any community-of-interest analysis and that wrongfully imposed terms and conditions

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[58] *See, e.g., K Mart Corp.*, 323 NLRB 582, 588 (1997) ("[I]t is clear that the meatcutters receive a wage substantially higher than other employees . . . and this is a significant factor in establishing the meatcutters['] separate community of interest from other employees."), *enforced*, 174 F.3d 834 (7th Cir. 1999); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 104 (1995) (considering employees' different terms and conditions of employment in community-of-interest analysis), *enforced*, 86 F.2d 227 (D.C. Cir. 1996).

[59] *See Serramonte Oldsmobile*, 86 F.3d at 236.

of employment should play no part in that analysis. Given the "wide deference" accorded the Board's unit determinations, the Board's conclusion that the Naperville mechanics remained an appropriate bargaining unit should be upheld.

C. The Employer's Claims That the Relocation Rendered the Extant Unit Inappropriate and Stripped the Union of Its Majority Status Are Meritless

The Employer levels several attacks against the unit determination, characterizing the Board's analysis as "novel" and speculative and the resultant order as violative of the Act. Each attack is without merit.

First, the Employer mistakenly claims that the Board "ignor[es]" "traditional community of interest factors" and instead applies a "new" and "novel" standard in which the Board asked "whether there are 'compelling circumstances' to overcome a history of bargaining." (Br. 20-21, 32.) Because the Employer never raised this argument to the Board, the Court lacks jurisdiction to consider it. The administrative law judge stated and applied the "compelling circumstances" requirement, with citation to Board precedent as well as precedent from this Court. (A 22-23.[60]) The Employer accepted that standard in appealing the judge's decision to the Board, arguing only that it had shown evidence of compelling

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[60] The judge cited: *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996); *Radio Station KOMO-AM*, 324 NLRB 256, 262-63 (1997); *Serramonte* Oldsmobile, 318 NLRB 80, 104 (1995), *enforced in relevant part*, 86 F.3d 227 (D.C. Cir. 1996); *Children's Hospital*, 312 NLRB 920, 929 (1993), *enforced sub nom.*, *California Pacific Med. Ctr. v. NLRB*, 87 F.3d 304 (9th Cir. 1996).

circumstances to the judge. (Employer Exceptions ¶50, A 45.) When the Board also applied that test, the Employer never filed a motion for reconsideration with the Board asserting that standard was a departure from precedent. Having twice failed to bring this argument to the Board's attention, the Employer is jurisdictionally barred from raising it to this Court.[61]

In any event, this "compelling circumstances" requirement is far from "new" or "novel": the Board announced the requirement at least 65 years ago,[62] and since that time the Board has periodically and consistently reaffirmed the requirement,[63]

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[61] *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). *Accord S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012); *see also Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1058 (D.C. Cir. 2002) (requiring that a party specifically urge its claim to the Board to preserve it for judicial review).

[62] *See, e.g., Nat'l Broadcasting Co.*, 59 NLRB 478, 483 (1944) ("In the absence of other compelling circumstances, we are of the opinion that the collective bargaining history is determinative of the issue in this proceeding.") (emphasis added).

[63] *See, e.g., Comar II*, 349 NLRB at 360 ("Absent 'compelling circumstances' the history of meaningful bargaining in this case is sufficient to establish the continued appropriateness of a separate unit, even if other factors support a contrary result."); *Trident Seafoods, Inc.*, 318 NLRB 738, 739 (1995) ("[C]ompelling circumstances are required to overcome the significance of bargaining history.") (quoting *Children's Hosp.*, 312 NLRB 920, 929 (1993)), *enforced*, 101 F.3d 111 (D.C. Cir. 1996); *Batesville Casket Co.*, 283 NLRB 795, 797 (1987) (refusing to clarify unit where employers "have not shown that there have been *recent*, substantial changes in their operations, or that other compelling circumstances exist which would warrant disregarding the long-existing bargaining history of the two-plant unit.").

as has this Court.[64] Furthermore, contrary to the Employer's suggestion (Br. 31), the compelling-circumstances requirement is not a separate test, but a well-established facet of the "community of interest" analysis, reflecting the fact that the Board weighs past bargaining history more heavily than other community-of-interest factors, creating a presumption of continued appropriateness for existing bargaining units.

Second, the Employer errs in characterizing the Board's analysis as "speculative" on the grounds that its analysis assumed that the Naperville mechanics would "have been able to maintain their union terms and conditions of employment" if the Employer had fulfilled its duty to bargain over effects with the Union. (Br. 19.) The Employer misses the Board's point: by considering only the untainted terms of employment in its bargaining-unit analysis, the Board was not speculating about the possible outcome of effects bargaining between the Employer and the Union; the Board was simply not permitting the Employer to

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[64] *See, e.g., S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012) (affirming Board's determination of appropriate bargaining unit because "[t]he Board appropriately attached significant weight to this group bargaining history, and *[the employer] presented no 'compelling circumstances' to overcome the resulting presumption of appropriateness*.") (emphasis added); *Comm. Hosps. of C. Calif. v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003) ("[A] group of employees with a significant history of representation by a particular union presumptively constitute an appropriate bargaining unit. *To rebut this presumption requires a showing of 'compelling circumstances' sufficient to overcome the significance of bargaining history.*") (emphasis added).

destroy the bargaining unit through its unfair labor practices and thereby profit from its unlawful conduct.[65]

Lastly, because the unit of Naperville mechanics remains appropriate and separate from the Lisle mechanics, the Union retained its majority status and the Employer's claims that the Board improperly requires bargaining with a minority union fail.[66] Its theory that the represented Naperville and unrepresented Lisle mechanics were "accreted"[67] into one unit to dilute the Union's support contravenes the established policy of applying accretion doctrine restrictively to avoid stripping employees of their choice of representative.[68] The Board has

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[65] *Cf. Comar II*, 349 NLRB at 357 ("[A]lthough one cannot know with any precision what the results [of effects bargaining] would have been, it is safe to assume that . . . they would have been more likely to bolster the distinct character of the unit than are the results that followed from [the Employer's unlawful unilateral changes].").

[66] *See generally Bishop v. NLRB*, 502 F.2d 1024, 1029 (5th Cir. 1974) ("[I]t would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing.").

[67] "Accretion is the addition of a group of employees to an existing union-represented bargaining unit without a Board election." *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1067 (D.C. Cir. 2009); *see also Lammart Indus. v. NLRB*, 578 F.2d 1223, 1225 n.3 (7th Cir. 1978) ("An accretion is simply the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity.").

[68] *Dean Transp., Inc.*, 551 F.3d at 1067; *see also Comar I*, 339 NLRB at 910 (noting that accretion is not required even if combined employees constitute an appropriate unit as long as the smaller unit itself is appropriate).

rejected similar accretion arguments, holding that employers engaged in operational integrations could not rely upon unlawful unilateral changes made without effects bargaining to claim that units had lost their separate identity.[69]

Likewise, when the Employer argues (Br. 12-15, 19) that the Board's order would force it to disregard the Section 7 rights of the original Lisle mechanics who have never chosen the Union as their collective-bargaining representative, it fundamentally mischaracterizes the scope of the Board's Order. The text of that Order makes clear (A 6, 27) that the Employer must recognize and bargain with the bargaining unit comprising only the six mechanics who formerly worked at the Naperville dealership. The Union has represented this bargaining unit since winning a Board-supervised election in 1989. (A 13; A 217, 490-92.) By requiring the Employer to bargain with the Union, the Board's Order therefore vindicates the Naperville mechanics' exercise of their Section 7 rights. (A 6, 27.) Conversely, the Order clearly does *not* compel the Employer to bargain over the other fourteen mechanics at the Lisle dealership. The Order leaves those fourteen mechanics free to exercise their Section 7 rights either to join or refrain from joining any union they choose.

The Employer's objections therefore each mischaracterize the Board's analysis or Order and do not warrant reversal of the Board's decision. The Board

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[69] *Comar I*, 339 NLRB at 903 n.2, 910-11; *Holly Farms Corp.*, 311 NLRB 273, 279 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1988).

determined that the relocated Naperville mechanics remained an appropriate bargaining unit on the basis of "the parties' 20-year bargaining relationship and the distinct terms and conditions of employment of the Naperville mechanics." (A 6 & n.9.) This conclusion was well within the Board's wide discretion.

V. Since the Union Remained the Bargaining Representative of the Naperville Mechanics After Their Relocation to Lisle, the Board Is Entitled to Affirmance of the Remaining Unfair Labor Practices

In its Brief, the Employer argues that the relocation of the Naperville bargaining unit to Lisle had the effect of rendering the unit inappropriate and merging the Naperville mechanics with the unrepresented mechanics at Lisle; that, as a result, the Union lost its status as the representative of the newly formed group of employees; and that therefore the Employer had no obligation to bargain with the Union in any way or to comply with the terms of its collective bargaining agreement with the Union. This argument is the only argument that the Employer offers to challenge the following unfair labor practices found by the Board:

1) that the Employer constructively discharged Robert Adams and Mike Marjanovich, in violation of Section 8(a)(3) and (1) of the Act[70] (A 5 n.5, 22-23),

2) that the Employer withdrew recognition from the Union, repudiated its collective bargaining agreement with the Union, and unilaterally changed the terms and conditions of employment for members of the

[70] *See, e.g., W.C. McQuaide, Inc. v. NLRB,* 133 F.3d 47, 52-53 (D.C. Cir. 1998).

Naperville bargaining unit, in violation of Section 8(a)(5) and (1) of the Act[71] (A 5 n.5, 19-22), and

3) that the Employer unreasonably delayed by two months the provision of information sought by the Union's July 9 information request, in violation of Section 8(a)(5) and (1) of the Act.[72] (A 5 n.5, 22.)

As demonstrated in Section IV above, this argument of the Employer is incorrect: the Naperville bargaining unit remained appropriate despite being relocated to Lisle; as a result, the Union remained the exclusive bargaining representative of those mechanics (and only those mechanics). Therefore, the Employer was under a continuing obligation to bargain with the Union regarding the terms and conditions of the Naperville mechanics' employment and to comply with the terms of its collective bargaining agreement. Consequently, the Board is entitled to affirmance of the portions of its Decision and Order finding these three categories of unfair labor practices and to enforcement of the corresponding parts of the Order.[73]

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[71] *See, e.g., NLRB v. Katz*, 369 U.S. 736, 745-48 (1962); *Leach Corp. v. NLRB*, 54 F.3d 802, 810 (D.C. Cir. 1995).

[72] *See, e.g., Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005).

[73] *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

VI. The Board Acted Within Its Broad Discretion in Fashioning Remedies for the Employer's Numerous Unfair Labor Practices, Including the Issuance of an Affirmative Bargaining Order

"Not only does the Board have broad discretionary power under [Section 10(c)] to fashion remedies that effectuate the policies of the Act, but the Board's exercise of its discretion is subject to quite limited judicial review."[74] Thus, this Court "will not disturb a remedy ordered by the Board 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"[75]

In its Decision and Order, the Board provides a detailed analysis of the circumstances justifying an affirmative bargaining order in this case. (A 6-7.) The Board noted that under *Caterair International*,[76] "an affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.'" (A 6, quoting *Caterair Int'l.*[77]) Nevertheless, the Board then acceded to this Court's requirement, stated in *Vincent Industrial Plastics*, that the Board provide a

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74 *Petrochem Insulation v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).

75 *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

76 322 NLRB 64 (1996).

77 *Id.* at 68.

justification for an affirmative bargaining order based upon "an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." (A 7, *quoting Vincent Indus. Plastics, Inc. v. NLRB.*[78]) After weighing each of these three factors, the Board decided that an affirmative bargaining order was necessary as a remedy, given the extent to which the Employer's unfair labor practices had undermined the Union's status as the employees' representative. (A 7.)

The Employer never presented any particularized objections to the issuance of an affirmative bargaining order; the Court therefore lacks jurisdiction to consider objections to that order (Br. 33-38). When the Employer excepted to the administrative law judge's recommendation of a bargaining order, it argued that the Naperville mechanics had been accreted and become an inappropriate bargaining unit. (Employer Exceptions ¶74, A 51.) The Employer's exception to the bargaining order therefore merely restates its defense to the Section 8(a)(5) violations it is charged with; it never argued that an affirmative bargaining order

[78] 209 F.3d 727, 738 (D.C. Cir. 2000).

would be an inappropriate remedy for those unfair labor practices. That is insufficient to preserve the argument it now raises.[79]

Insofar as the Employer's exception effectively stated only that it did not violate Section 8(a)(5) of the Act, that did not preserve any objection to the affirmative bargaining order, as the Fourth Circuit recently held in *NLRB v. HQM of Bayside*.[80] In that procedurally similar case, the administrative law judge found that the employer had violated Section 8(a)(5) and recommended the imposition of an affirmative bargaining order. The employer excepted to that order before the Board, but – like the Employer in this case – "never identified any basis for its exception to the remedy imposed other than its insistence that it had not violated the Act."[81] The *HQM of Bayside* Board affirmed the judge's bargaining order, after applying the three-factor *Vincent Industrial* analysis, whereupon the employer challenged the appropriateness of that order on appeal. The Fourth Circuit concluded that it was without jurisdiction to consider that challenge. The employer's "generalized exceptions . . . failed to provide the Board 'adequate

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79 29 U.S.C. § 160(e); *see Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (Court "has no authority to address" a challenge to the sufficiency of *Vincent* factors where the employer made non-particular objections to the Board).

80 518 F.3d 256 (4th Cir. 2008).

81 *Id.* at 263. *See also id.* at 262 ("[The employer] essentially asserted that, because the basis for the remedial order (the finding that [the employer] violated the Act) was unsound, so too was the order imposing a remedy.").

notice of the argument [the employer] seeks to advance on review'" and were "never fairly presented . . . to the Board."[82] Section 10(e) of the Act therefore precluded consideration of the employer's challenge.[83]

Similarly, the Employer here never asserted to the Board that an affirmative bargaining order is an improper remedy in these circumstances; it claimed only that it did not violate Section 8(a)(5). Moreover, even after the Board affirmed the imposition of an affirmative bargaining order with a *sua sponte* justification for it, the Employer never filed a motion for reconsideration to challenge the Board's application of the *Vincent* factors.[84] Where the Employer missed two opportunities to preserve its challenge to the affirmative bargaining order, this Court lacks jurisdiction to consider it.[85]

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82 *Id.* at 262-63 (quoting *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007)).

83 *Id.* at 263.

84 *See* 29 C.F.R. § 102.48(d)(2) ("Any motion [for reconsideration] pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order."). The Employer petitioned this Court for review before the 28 days expired. Petition for Review, filed by Dodge of Naperville, Inc. et al., Case No. 12-1032 (Dkt. #1353552) (D.C. Cir.).

85 *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (failure to file motion for reconsideration before the Board barred Court's consideration of argument); *HQM of Bayside*, 518 F.3d at 263 (insufficient exception to the Board barred challenge to affirmative bargaining order).

In any event, the Employer's objections to the Board's application of the *Vincent* factors are misplaced. The Board carefully considered each of the *Vincent* factors in explaining why an affirmative bargaining order was the appropriate means to remedy the Employer's failure to bargain and its unlawful withdrawal of recognition, both of which had "denigrate[d] the Union and the viability of the process of collective bargaining itself."[86] Considering the first *Vincent* factor, the Board noted that an affirmative bargaining order would restore collective bargaining, thereby vindicating the Naperville mechanics' exercise of their Section 7 rights to have the Union represent them. As the Board observed, restoring the employees' bargaining representative is "particularly appropriate" where the Employer relocated them and significantly changed their employment terms without a word to the Union. At the same time, an affirmative bargaining order would not unduly prejudice the rights of any "mechanic who may oppose continued union representation" because the bargaining order is in place only for a reasonable period[87] to allow employees to fairly assess the Union's effectiveness. (A 7.)

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[86] *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003) (describing effect upon union of employer's refusal to notify union of relocation decision or bargain over effects thereof).

[87] *See Lee Lumber Bldg. & Material Corp.*, 334 NLRB 399, 399, 401-05 (2001) (affirmative bargaining for a "reasonable time" is not less than six months but not more than one year), *enforced*, 310 F.3d 209, 215-16 (D.C. Cir. 2002).

Continuing its analysis under the second *Vincent* factor, the Board did not perceive any other purposes of the Act that would "override" the right of the Naperville mechanics to choose the Union as their bargaining representative. Instead, the Board noted that an affirmative bargaining order would in fact "serve[] the policies of the Act" since it would "remove[] the [Employer's] incentive to delay bargaining in the hope of discouraging support for the Union" and insulate the Union from the pressure to achieve immediate results at the bargaining table. Thereby, an affirmative bargaining order would "afford employees a fair opportunity to assess the Union's performance" before choosing whether they still wished to be represented by it.[88] (A 7.)

Finally, under the third factor, the Board explained that the alternative – *i.e.*, a cease-and-desist order – would be an inadequate remedy, since it would permit the filing of petitions to decertify the Union as the employees' representative during the order's duration.[89] (A 7.) The Union's representative status would then be subject to attack in the immediate aftermath of the Employer's unlawful

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[88] *See* 29 U.S.C. § 151 ("It is declared to be the policy of the United States to . . . protect[] the exercise by workers of full freedom of . . . designation of representatives of their own choosing.").

[89] *See Caterair Int'l v. NLRB*, 22 F.3d 1114, 1121-23 (D.C. Cir. 1994); *Lee Lumber Bldg. & Material Corp.*, 334 NLRB at 399, 401, *enforced*, 310 F.3d 209, 215-16 (D.C. Cir. 2002).

conduct, before the employees have had a reasonable time to "regroup and bargain" and exactly when the Union is most vulnerable. (A 7.)

While complaining that the Board "engage[d] in a discussion to appease the Circuit Court without attempting to balance anything" (Br. 36), the Employer fails to prove incorrect the Board's explicit and thorough analysis of the *Vincent* factors. The Employer does attempt to distinguish "the three cases cited by the [Board] majority" which, the Employer claims, "do not support [the Board's] position." (Br. 34-35.) The Board did not cite those cases to justify the remedy in these circumstances, however, but merely to explain why it was undertaking that specific analysis: "the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an [affirmative bargaining] order." (A 7, citing *Vincent Indus. Plastics v. NLRB*; *Lee Lumber & Bldg. Material v. NLRB*; and *Exxel/Atmos, Inc. v. NLRB*.[90])

Finally, the Employer's other challenges to the remedy fail. Its claim that the affirmative bargaining order would force the Employer to "bargain with a minority union" (Br. 37) misunderstands the scope of the Board's Order.[91] The Board's Order requires the Employer to recognize and bargain with the Union as

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[90] 209 F.3d 727 (D.C. Cir. 2000); 117 F.3d 1454, 1462 (D.C. Cir. 1997); 28 F.3d 1243, 1248 (D.C. Cir. 1994).

[91] *See* p. 42, *supra*.

the representative of only the six Naperville mechanics it has long represented. The danger of a minority union does not exist.

The Employer's claim (Br. 38) that a *Transmarine* remedy would suffice ignores the scope of its unfair labor practices. On the basis of the Employer's numerous violations of the Act, the Board ordered that the Naperville mechanics be made "whole for any losses of wages, health insurance benefits, vacation pay, pension benefits, and other benefits they may have incurred as a result of the unilateral changes." (A 27.) This remedy subsumes and therefore obviates the separate issuance of the Board's standard remedy for an employer's violation of its duty to bargain over effects, which as stated in *Transmarine Navigation Corp.*, requires the Employer to pay its employees at a minimum an amount equal to two weeks worth of wages at the rate to which they were entitled prior to the Employer's unfair labor practice.[92] Thus, a *Transmarine* remedy alone would suffice only if this Court were to solely affirm the effects-bargaining violation and not the rest of the contested violations. As shown, the Employer's attacks on those issues are meritless, however.

The Employer's objections to the Board's chosen remedy are thus either jurisdictionally barred or without merit, and the Board's Order should be enforced in full.

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92 *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968).

VII. The Board Had a Quorum When It Issued the Decision on Review Because Member Craig Becker's Term Did Not End Until Noon on January 3, 2012, at the End of the First Session of the 112th Congress

Finally, the Employer urges that the Board decision is invalid because the term of Member Becker, a recess appointee, allegedly expired on December 17, 2011, leaving the Board without a quorum when it issued the decision on January 3, 2012.[93] The Employer is mistaken. Under the terms of the Recess Appointment Clause, Becker's "Commission[] * * * expire[d] at the end of [the Senate's] next Session." U.S. Const. art II, § 2, cl. 3. That means that for Member Becker, who was appointed during the 2d Session of the 111th Congress, *see* National Labor Relations Board, *Members of the NLRB since 1935*, at http://www.nlrb.gov/members-nlrb-1935, his term expired at the end of the 1st Session of the 112th Congress. By operation of the Twentieth Amendment, a Session of Congress begins at noon on January 3 unless Congress passes a law specifying a different date. And the prior Session ends at the same time unless Congress passes a concurrent resolution of adjournment specifying a different adjournment date. Congress here did not pass any law specifying a different date for commencement of the new Session nor did it pass a concurrent resolution of adjournment.

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[93] At the time the Board issued the decision here on January 3, it comprised only three members: Mark Pearce, Brian Hayes and Craig Becker. *Id.* Under the Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2640 (2010), the Board cannot exercise its full authority when its membership falls below three.

Therefore, the new Session began at noon on January 3, and the 1st Session of the 112th Congress, and thus Becker's term, necessarily ended by operation of law at noon on January 3, 2012, which was after the Board issued the decision here.

Both the Executive and the Congress understood the 1st Session to end at noon on January 3, 2012, when the 2d Session began. That understanding is supported by decades of unbroken congressional practice. Since the ratification of the 20th Amendment in 1933, the regular, annual Sessions of Congress have commenced at noon on January 3—the time and date that are specified in the Amendment for the "meeting" of Congress—unless Congress has by law appointed a different date. *See* U.S. Const., amend. XX, § 2.[94] By default, the prior Session of Congress ends at that time as well.[95] *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("traditional ways of conducting business give meaning to the Constitution").

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[94] The President also has the constitutional authority to call Congress into session "on Extraordinary Occasions." U.S. Const. art II, § 3.

[95] *See* 86 Cong. Rec. 14,059 (Jan. 3, 1941) ("The third session of the Seventy-sixth Congress expired automatically, under constitutional limitation, when the hour of 12 o'clock arrived."); General Accounting Office, *Matter of Commodities Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) ("According to section two of the Twentieth Amendment to the United States Constitution, a new session of Congress begins at noon on January 3rd of each year. As a result, a previous session of Congress cannot continue beyond that time."), *available at* http://www.gao.gov/decisions/appro/288581.pdf; *Ashley v. Keith Oil Corp.*, 7 F.R.D. 589, 590 (1947) (same).

When Congress wishes to terminate a Session earlier than January 3, as the Employer suggests happened here, both Houses pass a concurrent resolution authorizing adjournment *sine die* ("without day") on that earlier date. Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 1–2 (Jan. 9, 2012); Deschler's Precedents of the House of Representatives, H. Doc. 94-661, vol. I, § 2, at 8. And the Congressional Research Service has explained that, "[i]n the absence of a concurrent resolution, adjournment *sine die* is determined by the arrival of the constitutionally mandated convening of a new session on January 3." Hogue, *supra*¸ at 2 & n.5.[96] We are unaware of any instance in which the Senate has purported to terminate its Session before January 3, without a concurrent resolution authorizing such *sine die* adjournment, at least since the enactment of the Twentieth Amendment. Instead, in the absence of a concurrent resolution for adjournment, Congress has always regarded its Session as ending on the date that the next session of Congress begins, usually January 3.[97]

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[96] *See also* General Accounting Office, *supra*, at 2-3 ("It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session *sine die* or (2) operation of law, immediately prior to the beginning of the next session of Congress.").

[97] *See, e.g.*, Deschler's Precedents, H. Doc. 94-661, vol. I, § 2, at 8 ("[T]he 76th Congress, 3d session, terminated and the 77th Congress, 1st session, began at noon on Jan. 3, 1941, pursuant to the twentieth amendment; neither a concurrent resolution providing for adjournment sine die nor a law changing the convening

In this case, Congress did not pass a concurrent resolution authorizing adjournment *sine die* of the 1st Session of the 112th Congress, and at no point did the Senate even purport to say it was adjourning *sine die* prior to January 3. To the contrary, the Senate has indicated that it regards the 1st Session as having ended on January 3, 2012. *See* Senate of the United States, Executive Calendar (Jan. 3, 2012), *available at* http://www.senate.gov/legislative/LIS/executive_calendar/2012/01_03_2012.pdf (indicating that the First Session "adjourned January 3, 2012"). The House too regarded the 1st Session as ending on January 3. 157 Cong. Rec. H10035-36 (daily ed. Jan. 3, 2012) (declaring "the first session of the 112th Congress adjourned"); 158 Cong. Rec. H1 (daily ed. Jan. 3, 2012). And finally, the Executive regarded the Senate's 1st Session as ending on January 3; as demonstrated here, Becker continued to exercise his authority as a Member of the Board until noon on January 3.

The Employer offers no sound basis for this Court to countermand the Executive and Legislative Branches' shared understanding that the Senate's Session ended at noon on January 3, and to deem that the 1st Session of the 112th

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date of the 77th Congress had been passed."). The Senate itself (via its leadership) has relatively recently expressed the view that one Session transitions into the next at noon on January 3 by operation of the Twentieth Amendment. *See*, *e.g.*, 142 Cong. Rec. 1 (Jan. 3. 1996) ("The PRESIDENT pro tempore. The hour of 12 noon on January 3 having arrived, pursuant to the Constitution of the United States, the 1st session of the Senate in the 104th Congress has come to an end and the 2d session commences.").

Congress in fact ended sometime before January 3. The Employer's view is rooted in a misunderstanding of the government's position with respect to the recess appointments made by the President on January 4, 2012—appointments whose validity is not at issue in this case. The opinion of the Office of Legal Counsel that the Employer cites (Br. 40) did not address the question of when the 1st Session of the 112th Congress ended. It, instead, addressed the separate question of whether the Senate's use of *pro forma* sessions "with no business to be conducted" interrupted, within the meaning of the Recess Appointments Clause, the Senate's recess during the first few weeks of the 2d Session of the 112th Congress. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at *1 (Jan. 6, 2012).

The fact that the Senate was engaged in *pro forma* sessions in the last few weeks of the 1st Session is irrelevant to the question of when the 1st Session ended and the 2nd Session began. At the end of 2007, the Senate was similarly engaged in *pro forma* sessions in the weeks leading up to the start of the 2nd Session of the 110th Congress, and when it adjourned the *pro forma* session on December 31, it expressly did so *sine die*, pursuant to a concurrent resolution. *See* 153 Cong. Rec. 36,508 (Dec. 31, 2007) ("Under the provisions of S. Con. Res. 61, as amended, the Senate stands adjourned *sine die* until Thursday, January 3, 2008."). That demonstrates that even when the Senate is engaged in *pro forma* sessions, a

concurrent resolution is still required to adjourn the Session *sine die* before January 3. Whether the Senate held *pro forma* sessions, business sessions, or no sessions at all during this period of time, its 1st Session could not have ended until noon on January 3 because Congress did not pass a concurrent resolution of adjournment specifying an adjournment *sine die* before January 3. Because the Session ended by operation of law on January 3, the Board had a quorum when it issued its decision in this case.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD
August 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DODGE OF NAPERVILLE, INC. AND BURKE AUTOMOTIVE GROUP, INC., d/b/a NAPERVILLE JEEP DODGE	)	
Petitioner/Cross-Respondent	)	Nos. 12-1032, 12-1122
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 13-CA-45399

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,618 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 24th day of August, 2012

ADDENDUM

Relevant provisions of the United States Constitution are as follows:

art. II, § 2, cl. 3

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

art. II, § 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

amend. XX, § 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 1. [29 U.S.C. § 151] The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages,

hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby 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.

Sec. 7. [29 U.S.C. § 157] 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 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 8(a)(3).

Sec. 8. [29 U.S.C. § 158] (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 7;

. . . .

(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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

. . . .

(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: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after

such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation or conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Sec. 9(b) [29 U.S.C. § 159(b)]

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) 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 or has received a construction inconsistent therewith.

. . . .

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided*

further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as

provided in such 2112 of title 28, United States Code. 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. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive . . . .

(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 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, United States Code. 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

DODGE OF NAPERVILLE, INC. AND BURKE AUTOMOTIVE GROUP, INC., d/b/a NAPERVILLE JEEP DODGE	)	
Petitioner/Cross-Respondent	)	Nos. 12-1032, 12-1122
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 13-CA-45399

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 24th day of August, 2012