Nos. 12-70516 & 12-70934

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCK-TENN SERVICES, INC. formerly known as SMURFIT-STONE CONTAINER ENTERPRISES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

TEAMSTERS DISTRICT COUNCIL NO. 2, LOCAL 388-M

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Rock-Tenn Services, Inc., formerly known as Smurfit-Stone Container Enterprises, Inc., to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Company. In this unfair labor practice case, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 151, 158(a)(5) and (1), by conditioning an effects-bargaining agreement on the Union's acceptance of early cancellation of the collective-bargaining agreement, a permissive subject of bargaining.

The Board's Decision and Order issued against the Company on December 22, 2011, and is reported at 357 NLRB No. 144. (ER 1-10.)[1] The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f).

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in

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[1] Citations are to the Excerpts of Record filed with the Company's brief and to the Board's Supplemental Excerpts of Record filed simultaneously with this brief. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. The Company filed its petition for review on February 17, 2012. The Board filed its cross-application for enforcement on March 22, 2012. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board reasonably found that the Company unlawfully refused to bargain in good faith by impermissibly conditioning a plant-closure effects agreement on the Union's agreement to mid-term cancellation of the collective-bargaining agreement when premature termination is a permissive, rather than mandatory, subject of bargaining.

2. Whether the Board abused its broad discretion to fashion a remedy for the Company's unlawful refusal to bargain in good faith by ordering a limited backpay remedy for all 92 unit employees the Company terminated as a result of its decision to close its Fresno plant.

3. Whether the Board possessed a quorum when it issued the decision on review.

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutes.

STATEMENT OF THE CASE

Acting on charges filed by Teamsters District Council No. 2, Local 388-M, the Board's General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by conditioning a plant-closure effects agreement on mid-term cancellation of the parties' collective-bargaining agreement. (SER 1-8.) Following a hearing, an administrative law judge issued a decision recommending that the complaint against the Company be dismissed. (ER 1, 15-16.)

After considering the parties' exceptions, the Board issued a Decision and Order, finding that the Company violated Section 8(a)(5) and (1) of the Act by conditioning its acceptance of the parties' plant-closure effects agreement on the mid-term cancellation of the collective-bargaining agreement. (ER 1.) The Board found, contrary to the judge, that the Company's proposal to terminate the collective-bargaining agreement early—a permissive subject of bargaining—did not have a "sufficient nexus" to mandatory subjects under negotiation and did not "become" mandatory by virtue of its being proposed together with mandatory subjects. (ER 3.) The Board's findings are set forth below, followed by a summary of the Board's conclusions and order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. In Bargaining Over the Effects of Closing the Fresno Plant, the Parties Agree to a Severance Pay Formula Like the One Used at San Jose, Which Did Not Include Early Contract Termination While Unit Employees Remained Working

The Company operates plants in California that build and distribute corrugated boxes, and the Union represents employees at many of them. (ER 1.) The Company's Fresno plant is at issue in this case, and the Union has represented Fresno's production and maintenance employees for about 40 years. (ER 1.)

In 2004, with the prior collective-bargaining agreement about to expire, the Union and the Company bargained a new agreement for Fresno and other facilities. Anticipating that Fresno might close, the Union proposed a severance-pay formula for that plant. (ER 1.) The Company responded with proposed contract language recognizing the Union's right to discuss severance pay in the event Fresno closed, along with a separate memorandum of agreement in which it stated its "intent in future plant closures, if any, to bargain a severance/impact bargaining formula that is not inconsistent" with the agreement previously reached regarding the closure of the Company's San Jose facility. (ER 80.) (*See also* ER 1-2.)

The San Jose agreement referenced in the Company's memorandum of understanding provided, among other things, that the collective-bargaining agreement would continue in full force and effect until all operations ceased or no

bargaining unit employee remained, whichever occurred later. In addition, the San Jose agreement included provisions suspending seniority; providing severance pay of 40 hours for each year of seniority, with a maximum of 26 weeks and a minimum of 1 week; and continuing medical benefits for 4 months. (ER 1; ER 58-60.)

During the Fresno negotiations, the Union agreed to the Company's proposal to bargain a severance pay formula "not inconsistent" with the San Jose agreement. As a result, the Union dropped its demand for a specific severance pay formula. (ER 2; ER 42-43, 46, SER 40.) The resulting contract language stated that the Company "recognizes the right of the Union to discuss severance pay in the case of permanent plant closing for economic reasons and not for reasons such as labor disputes, Acts of God, War, etc." (SER 9-10.) The parties reached agreement and signed a contract effective from March 1, 2005, through February 28, 2011. (SER 11.) The contract contained no reopener provision, which would have allowed mid-term bargaining. (ER 4.)

B. The Parties Begin Bargaining Over the Effects of the Fresno Closure, but the Company Conditions Agreement on the Union's Acceptance of Mid-Term Contract Termination

On September 25, 2008, the Company informed the Union by letter that it intended to close the Fresno facility and permanently lay off all unit employees by November. (ER 94.) The parties immediately began bargaining over the effects of

the closure and met six times between September 26, 2008, and April 1, 2009. (ER 2, 12; SER 19.) Their bargaining centered on four issues: severance pay, medical benefits, seniority, and early contract termination. (ER 13.) At each of the six meetings, the Company demanded that the contract terminate while unit employees remained working.

At the first bargaining session in September 2008, the Company presented a written proposal. In that proposal, the Company demanded that the collective-bargaining agreement be terminated when the complement of bargaining employees fell to five or fewer and that seniority be suspended. The Company offered to pay one week of severance pay for each full year of service and to continue medical benefits for four months. (ER 13; ER 97-102, SER 20.) The Company also told the Union that the target closure date had moved from November 2008 to October 2009. (ER 12.)

At the next session in November 2008, both the Union and the Company presented written proposals. (ER 103-05, SER 12-18.) The Union's offer included counter-proposals regarding severance pay and medical benefits. The Union also proposed continuing, rather than suspending, seniority, as well as continuing the contract through its expiration date of February 28, 2011. (ER 13; ER 103-05.) The Company's proposal again included early termination of the contract. (SER 13-14.) In addition, at this session the Company informed the Union that while

manufacturing operations would cease on or about January 31, 2009, some bargaining unit shipping and handling employees would continue to work in the warehouse "indefinitely." (ER 12-13; SER 13, 21, 46.) The Company reiterated that it wanted the contract to terminate before all employees were laid off, and that without early contract termination, "there would be no settlement." (ER 13; SER 22.) Specifically, the Company would refuse to pay severance to employees unless the Union agreed to terminate the contract early and suspend seniority. (SER 42.) The Union stated that it would not agree to terminate the contract while employees remained working at the facility. (SER 42.)

On December 10, the parties met again, and the Union presented another proposal in which it reduced its demand for severance pay. (ER 13; ER 106-08, SER 24.) In a side-bar discussion, the Union's negotiator informed the Company's negotiator that unless the Company gave up its demand for early termination of the contract and other issues the Union considered to be permissive, the Union would file unfair labor practice charges. (ER 13; SER 25.) The Company's negotiator replied, after checking with company officials, that the Company would not change its position. (SER 25.)

The fourth meeting occurred on January 6, 2009, with a federal mediator. (ER 13; SER 26.) The Company, continuing its insistence that the contract terminate before the facility closed and all remaining employees were discharged,

reduced the number of employees who would remain when the contract ended from five to three or fewer. (ER 13; ER 109-15, SER 27-28.) Each side listed its "sticking points" in the negotiation; the top issue for both was contract termination. (SER 28-29.)

The next meeting took place in March. At this meeting, the Company acknowledged that the closure date of the facility was uncertain because the facility was for sale and stated that the four employees then currently working would continue to work until the property was sold. (ER 13; ER 116-20, SER 30.) The Company again proposed that the contract terminate when there were three or fewer bargaining unit employees and stated that it would not agree to any severance agreement unless the Union agreed to terminate the collective-bargaining agreement early. (ER 116-20, SER 31.) In addition, the Company stated that any future proposal would contain this condition, but that it was "flexible about the number of employees involved" when the contract was terminated. (ER 13; SER 32.)

The Union asked if the Company would be willing to enter another collective-bargaining agreement to cover those remaining employees. (SER 31.) The Company said no, that the severance agreement would be "conditioned upon the Union agreeing to waive bargaining rights." (SER 31.)

The Union then asked for the Company's last, best, and final proposal. On April 1, the Company presented its final offer. (ER 13; ER 20-21, 121-27.) In that proposal, the Company continued its insistence that the contract terminate before all employees were laid off, but reduced the number of employees to remain working at contract termination from three to one. (ER 13; ER 20-21, 121-27.)

The Union responded by agreeing to accept all parts of the Company's last, best, and final proposal, except those that were permissive subjects of bargaining. The Union then sent the Company a copy of the final offer with the permissive subjects—including early contract termination—crossed out. (ER 13; ER 128-35, SER 33-34.) The Company rejected the Union's proposal. (ER 13; ER 136, SER 34.) On May 4, the Company withdrew its offer, and bargaining ceased. (ER 13-14; ER 136-37, SER 34-35.) In September 2009, the Company sold the Fresno facility and laid off the remaining four employees. (ER 13-14; SER36.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Becker, Member Hayes, dissenting in part) found, in disagreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by

conditioning a plant-closure effects agreement on the Union's consent to mid-term cancellation of the parties' collective-bargaining agreement.[2] (ER 1.)

The Board's Order requires the Company to cease and desist from refusing to bargain collectively with the Union by demanding, as a condition of reaching an agreement on the effects of its decision to close the Fresno facility, that the Union consent to a permissive bargaining proposal, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157).

Affirmatively, the Order directs the Company to undertake certain specific actions. First, the Company must, on request, bargain in good faith with the Union about the effects of its decision to close the Fresno plant and terminate the unit employees. The Company must reduce to writing and sign any agreement reached. The Company must also make whole the 92 terminated employees at the Fresno facility for its failure to bargain in good faith over the effects of the facility's closure, a traditional remedy of the Board intended "to restore some measure of

[2] The Board also rejected two alternative arguments: 1) the Company's rationale that the Union waived its right to bargain only over mandatory subjects, and 2) the judge's rationale that the Company did not bargain to impasse. (ER 4-5.)

economic strength to the union."[3] (ER 5-6.) Finally, the Company must mail copies of the Board's remedial notice to any unit employee employed at any time since November 21, 2008. (ER 7.)

SUMMARY OF THE ARGUMENT

1. It is settled that an employer may not condition agreement about mandatory subjects of bargaining on the union's acceptance of proposals addressing permissive bargaining topics. The Company abrogated this principle and violated Section 8(a)(5) and (1) of the Act by conditioning agreement about the effects of closing the Fresno plant on premature termination of the parties' collective-bargaining agreement, a permissive subject of bargaining. The Company erroneously contends that once it packaged early contract termination with mandatory subjects of bargaining such as severance pay and continuation of medical benefits, it could then insist that the Union agree to terminate the contract early. But calling a proposal a package deal or a *quid pro quo* does not excuse the Company from the rule laid out in *NLRB v. Wooster Div. Borg-Warner Corp.*, 356 U.S. 342, 344 (1958): it is an unfair labor practice to insist upon a permissive subject of bargaining "as a condition precedent" to an agreement.

[3] Member Hayes dissented on that portion of the Board's remedy which ordered backpay for 92 employees. Member Hayes would have limited the remedy to the four employees terminated when the Fresno plant closed. (ER 7.)

In a few, unique circumstances, the Board has found that a permissive subject of bargaining had a "sufficient nexus" or became "inextricably intertwined" with a mandatory subject of bargaining. In such a case, the permissive subject is effectively converted into a mandatory subject and could be insisted upon as a condition to reaching agreement. Here, however, the Company did not even attempt to demonstrate that early contract termination had a sufficient nexus with severance pay or medical benefits. Thus, the Board reasonably concluded that early contract termination remained a permissive subject of bargaining.

2. The Board appropriately exercised its broad discretion in ordering limited backpay to remedy the Company's unlawful refusal to bargain with the Union over the effects of plant closure. Indeed, the Company does not dispute that the Board's remedy—which makes employees whole for their losses and restores some measure of bargaining power to the Union—is appropriate in this case. Rather, the Company contests the Board's decision to apply that remedy to all 92 unit employees who were terminated as a result of its decision to close the Fresno facility. The Board's decision was appropriate in this case, where each of the Company's bargaining proposals covered all 92 employees, and all 92 employees were deprived of severance pay and continued medical benefits by the Company's unlawful refusal to bargain in good faith.

3. Contrary to the Company's position, Member Becker's recess appointment did not expire on December 17, 2011. (Br. 16-17.) Rather, Becker's appointment expired when the Senate's annual Session ended at midday on January 3 by operation of the Twentieth Amendment, and without regard to prior *pro forma* sessions. The Senate and Executive Branch agree on this point, and there is no basis to disregard the political branches' congruent views.

STANDARD OF REVIEW

"Congress made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). The Board's construction of Section 8(d) and the concomitant duty to bargain in Section 8(a)(5) must be upheld if it is "reasonably defensible," and "it should not be rejected merely because the courts might prefer another view of the statute." *Id.* at 497. *Accord Retlaw Broad. Co. v. NLRB*, 172 F.3d 660, 664 (9th Cir. 1999). Whether an employer unlawfully conditioned agreement upon a permissive subject of bargaining is a "determination . . . that the Congress has assigned in the first instance to the Board." *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1401 (D.C. Cir. 1988).

The Court will uphold the Board's underlying factual findings if they are supported by substantial evidence. *See* Section 10(e) of the Act (29 U.S.C. §

160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 490 (1951); *Retlaw Broad.*, 172 F.3d at 664 (citation omitted). The Court may not displace those factual findings on review even though it might justifiably have reached a different conclusion had the matter been before it *de novo*. *See Universal Camera*, 340 U.S. at 488.

Where the Board and its administrative law judge have drawn different legal conclusions from the same facts, the Court should accord no special significance to the judge's contrary findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). *See also Cheney Cal. Lumber Co. v. NLRB*, 319 F.2d 375, 377 (9th Cir. 1963) ("[T]he examiner's conclusions, although they differ from the Board's, are not entitled to special weight. The Board was free to draw its own conclusions."); *NLRB v. So-White Freight Lines. Inc.*, 969 F.2d 401, 405 (7th Cir. 1992) (the standard of review "is not modified in any way when the Board and the ALJ disagree as to legal issues") (citations omitted).

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CONDITIONING A PLANT-CLOSURE EFFECTS AGREEMENT ON THE MID-TERM CANCELLATION OF THE COLLECTIVE-BARGAINING AGREEMENT

A. Under Well-Settled Law, Parties Cannot Condition an Agreement on a Permissive Subject of Bargaining

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees.[4] As defined in Section 8(d) of the Act, collective bargaining is the mutual obligation of the employer and the union "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." And in accordance with Section 8(d) of the Act, "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). On such matters, parties are obligated to bargain in good faith, but "neither party is legally obligated to yield." *NLRB v. Wooster Div. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). *Accord First Nat'l Maintenance*

[4] A violation of Section 8(a)(5) of the Act also produces a "derivative" violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *NLRB v. Swedish Hosp. Med. Ctr.*, 619 F.2d 33, 35 (9th Cir. 1980).

Corp. v. NLRB, 452 U.S. 666, 675 (1981). Indeed, a party may insist to "impasse" on a mandatory subject of bargaining—impasse being "that point at which there is a sufficient disagreement over a mandatory subject of bargaining to permit unilateral action by one of the parties on that subject." *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3rd Cir. 1980).

Other subjects that are appropriate for bargaining but are not included within the phrase "wages, hours, and other terms and conditions of employment" are permissive, rather than mandatory, subjects. Regarding permissive subjects, parties are "free to bargain or not to bargain, and to agree or not to agree." *Borg-Warner*, 356 U.S. at 349. *See also First Nat'l Maintenance*, 452 U.S. at 674-75 and n.13. But, unlike a mandatory subject, parties are "not permitted to insist on a non-mandatory subject as a condition or a prerequisite to an agreement." *Latrobe Steel*, 630 F.2d at 175. *See also Borg-Warner*, 356 U.S. at 349. Moreover, while either party may propose that a permissive subject be included in an agreement, the other side can, at any time, refuse to bargain over it. *Laredo Packing Co.*, 254 NLRB 1, 19 (1981). Accordingly, a valid impasse cannot be based on disagreement over a permissive subject of bargaining. *Retlaw Broad.*, 172 F.3d at 664; *Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990).

Consistent with the recognized distinctions between mandatory and permissive subjects of bargaining, an employer violates Section 8(a)(5) and (1) of

the Act by conditioning agreement on the union's acceptance of a permissive subject of bargaining. *See Borg-Warner*, 356 U.S. at 349; *Vanguard Fire & Supply*, 468 F.3d 952, 960 (6th Cir. 2006); *Retlaw Broad.*, 172 F.3d at 665; *NLRB v. Greensburg Coca-Cola Bottling Co., Inc.*, 40 F.3d 669, 673 (3d Cir. 1994); *Inland Tugs*, 918 F.2d at 1309; *The Idaho Statesman*, 836 F.2d at 1400; *Associated Gen. Contractors of N. Dakota v. NLRB*, 637 F.2d 556, 559-60 (8th Cir. 1980). An employer cannot "refuse to enter into [an] agreement[] on the ground that [the agreement] do[es] not include some proposal which is not a mandatory subject of bargaining[,]" as "such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *Borg-Warner*, 356 U.S. at 349.

This distinction between mandatory and permissive subjects of bargaining can be important during bargaining over the effects of a plant closure as well. The Board requires employers to bargain over a plant closure's effects on wages, hours, or terms and conditions of employment—mandatory subjects of bargaining.[5] *See, e.g., First Nat'l Maint.*, 452 U.S. at 681; *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 50 n.8 (2d Cir. 1983) (noting the "duty to bargain over the *decision's effects* on unit employees") (emphasis in original). Thus in effects bargaining,

[5] Employers are not obligated to bargain about decisions to close a facility for economic reasons. *First Nat'l Maint.*, 452 U.S. at 686.

parties must bargain about mandatory subjects of bargaining such as severance pay and continued medical benefits.

In contrast, parties may, but are not required to, bargain about permissive subjects, nor could they insist on those subjects as a precondition to agreement. *See Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996) (citations omitted). One such permissive subject is relevant here—namely, the Company's proposal to modify the parties' existing collective-bargaining agreement during its term by ending it prematurely. It is settled that where, as here, the parties' agreement lacks a provision allowing it to be reopened during its term, a proposal to modify it mid-term, or to end it prematurely, is a permissive subject of bargaining. *See Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1315 (5th Cir. 1988); *New Seasons, Inc*., 346 NLRB 610, 610 n.3 (2006). *See also* Section 8(d) of the Act (providing that the duty to bargain "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 . . . ."). Accordingly, during effects bargaining, neither party can insist on modifying the duration clause of an existing collective-bargaining agreement, absent a reopener provision covering that topic.

As we now show, the Board, applying these principles, reasonably found that the Company violated the Act by insisting that it would only agree to a plant-closure effects agreement that included mid-term cancellation of the existing collective-bargaining agreement, a permissive subject of bargaining. The Company attempts to get around the principle of *Borg-Warner*—that a party cannot condition an agreement on a permissive subject of bargaining—by erroneously arguing that it could insist on early termination of the contract because it linked that subject to mandatory subjects in a "package proposal." Calling a proposal a "package" is not enough. The Company must, as it failed to do here, show a sufficient nexus between the permissive and mandatory subjects that the permissive subject essentially becomes mandatory. Moreover, the Company's argument that the Board erroneously found that an impasse occurred here is based on a misreading of the Board's decision. The Board instead properly found that an impasse could not occur because the Company refused to bargain in violation of the Act by insisting that the Union agree to early contract termination.

B. The Board Reasonably Found that the Company Preconditioned Agreement to Its Effects-Bargaining Proposal on Early Termination of the Collective-Bargaining Agreement, a Permissive Subject of Bargaining

As shown above, while the Act requires employers to bargain over the effects of a plant closure, it prohibits them from conditioning a plant-closure effects agreement on a permissive subject of bargaining. The Board reasonably

found that by insisting that the Union agree to early termination of the collective-bargaining contract as a precondition to any agreement, the Company violated its duty to bargain in good faith.

In this case, the Company not only proposed a permissive subject of bargaining—that the existing contract, which lacked a reopener provision, terminate before its scheduled expiration date—but made the Union's acceptance of that term a condition of overall agreement on mandatory subjects addressing the effects of plant closure. (ER 5; SER 42-45.) From the beginning of the negotiations, the Company demanded early contract termination. Indeed, the Company's negotiator told the Union that the Company would not agree to severance pay for displaced employees if the Union did not agree to early contract termination. (ER 13; SER 42.)

The Union was free to discuss the Company's proposal—or not. But once the Union indicated that it did not want to bargain over early contract termination, the Company could no longer insist on that permissive subject of bargaining.[6] The Company nevertheless insisted there would be no plant-closure effects agreement without the Union's consent to early contract termination. By conditioning

[6] The Company does not argue before this Court, as it did before the Board, that the Union waived its right to withhold consent to early contract termination. Any argument "not raised clearly and distinctly in the opening brief . . . has been waived." *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009) (citation omitted).

acceptance on mid-term cancellation of the contract, the Company refused to bargain in good faith in violation of the Act. *See Borg-Warner*, 356 U.S. at 344.

C. Conditioning Agreement on a Mandatory Subject to Agreement on a Permissive Subject Does Not Make the Permissive Subject Mandatory

The Company argues (Br. 22) that by linking contract termination with mandatory subjects in a "package proposal," it was allowed to condition the entire agreement on the Union's consent to early contract termination. This argument, that a permissive subject will always be converted to a mandatory subject whenever an employer offers the terms as a "package" deal, was reasonably rejected by the Board because "pairing the two would become 'a device to circumvent the general rule that one may not insist on [a permissive subject] to impasse.'" (ER 3, quoting *Dependable Storage, Inc.*, 328 NLRB 44, 50 (1999)). As shown below, the Board's decision is rational and consistent with the Act and should therefore be affirmed by this Court.

Contrary to the Company's claim (Br. 22-29), its attempt to "package" severance pay and early contract termination did not convert that issue into a mandatory subject of bargaining. To be sure, a party may offer a "package" proposal in which it links permissive and mandatory subjects of bargaining. For example, in *Dependable Storage*, 328 NLRB 44, 50 (1999), the employer offered union security (a mandatory subject) in exchange for the union bargaining

committee's recommendation of ratification of the entire package (a permissive subject). Such a proposal is not unlawful. It is, however, unlawful for a party to insist on that package proposal as a precondition to the entire agreement. *Id*.

Moreover, there is "no legal impediment to the linking of mandatory and nonmandatory or permissive subjects of bargaining, at least so long as the inclusion of the permissive subject was not a device to circumvent the general rule that one may not insist on such a provision to impasse." *Id*. As the Board noted in *Dependable Storage*, the employer there "did not condition its agreement to a contract on [a permissive subject], merely its agreement to union security." *Id.*

By contrast, here the Company conditioned the entire effects-bargaining agreement on the Union's acceptance of early termination of the contract while bargaining unit employees remained on the job. To the Union, this proposal was untenable and a possible violation of its duty of fair representation. (SER 39.) Throughout bargaining, the Union made clear that it would not agree to terminate the contract while bargaining unit employees remained. (ER 19, 38, 128-35, SER 24, 28, 31, 38.) But the Company was categorical, insisting that if the contract did not expire while employees remained, there would be no agreement. (SER 22-23, 31-32, 41, 43-44.)

Of course, once the Union refused to bargain over early contract termination, the Company was free to alter its proposal. As the Board explained in *Nordstrom,*

Inc., certain permissive subjects "can, as a function of cost, bear upon a party's [mandatory] proposals."[7] 229 NLRB 601, 601 (1977). If one party refuses to bargain about a permissive subject and that subject is removed from the proposal, its proponent is "permitted to alter" the mandatory subjects "in light of the removal of the nonmandatory subject." *Id.* But that party could not, as the Company did here, insist on agreement with a permissive subject of bargaining as the "price for its agreement to any contract at all." *Cmty. Television of So. California*, 312 NLRB 15, 15 (1993).

In a few, limited circumstances, the Board has found that a permissive subject of bargaining became a mandatory subject where it was "inextricably intertwined" with a mandatory bargaining topic. *See Regal Cinemas*, 334 NLRB 304, 305-06 (2001), *enforced* 317 F.3d 300 (D.C. Cir. 2003); *Borden, Inc.*, 279 NLRB 396, 399 (1986); *Sea Bay Manor Home for Adults*, 253 NLRB 739 (1980), *enforced mem*. 685 F.2d 425 (2d Cir. 1982). As the Board explained here (ER 3), only where there is a "sufficient nexus" between a permissive and a mandatory

[7] Nothing in *Nordstrom* is contrary to the Board's decision here. The issue in *Nordstrom* was whether the union could "effectively conclude negotiations by agreeing only to those demands of [the employer] which constitute mandatory subjects of bargaining." *Nordstrom*, 229 NLRB at 601. The Board decided that it could not. Once the permissive subjects are off the table, the employer could then modify its offer related to the mandatory subjects. *Id. See also Good GMC, Inc.*, 267 NLRB 583 (1983) (finding that "the Union was not entitled to pick and choose those contract proposals which suited its needs and demand execution of a collective-bargaining agreement limited to those proposals").

subject under negotiation may the permissive subject "become" mandatory. But "[s]uch cases are rare, and this case is not one of them." (ER 3.)

Sea Bay Manor was one of those rare cases. There the Board found that the employer violated the Act by repudiating an arbitration agreement (under which all outstanding bargaining issues would be settled)—a permissive subject of bargaining. 253 NLRB at 740. In making this finding, the Board determined that the arbitration agreement "was so intertwined with and inseparable from the mandatory terms and conditions for the contract . . . being negotiated as to take on the characteristics of the mandatory subjects themselves." *Id.* And in *Regal Cinemas*, 334 NLRB at 305, the Board found that severance pay and a specific liability release limited to "claims arising from the termination of the employees—the very same employment transaction that occasioned bargaining over severance pay," were so "inextricably intertwined" as to make the release a mandatory subject of bargaining. The Board explained that "severance pay and claims arising from the termination (such as discriminatory discharge claims) are properly viewed as reciprocal effects: benefits to employees, costs to the employer." *Id.*

Similarly, in *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003), the employer "combined offers with respect to a mandatory subject, union security, and with respect to a non-mandatory subject, the collection clause." The employer's alternative offers regarding the assessment and

collection of union security "represented two reasonably equivalent ways of accommodating its needs." *Id.* at 761. Moreover, the Court found that these intertwined offers "arose organically out of the economic relationship between the mandatory and non-mandatory subjects" and were "not an attempt to make an end-run around the distinction between mandatory and non-mandatory subjects." *Id.* In addition, the employer's proposals would have "preserved" the "status quo." *Id.*

Here, in contrast, the Company's proposal to terminate the collective-bargaining agreement prematurely was not so "inextricably intertwined" with the mandatory effects bargaining as to become a mandatory topic, and it certainly did not preserve the status quo. Like the broadly worded, general release of all future employee claims found to be a permissive subject of bargaining in *Borden*, 279 NLRB at 399, the Company's proposal to extinguish an entire collective-bargaining agreement, including the termination of contractual rights for the remaining employees, is not inextricably linked to its severance proposal. And unlike in *Regal Cinemas*, the termination of the agreement here is not solely linked to the employer's legitimate attempt to know its costs before it agrees to severance pay.

The Company concedes (Br. 18, 25-28) that the *Sea Bay Manor/ Borden/Regal Cinemas* analysis is correct, but it does not attempt to show that any nexus existed between early contract termination and severance pay or continued

medical benefits. Instead, the Company oversimplifies the issue by suggesting (Br. 28) that any time a permissive subject is linked to a mandatory subject, the proponent may condition agreement on that proposal. As the Eighth Circuit has explained, "[u]nder this theory, any term of a bargaining agreement could be transformed into a mandatory one if it was offered in exchange for a recognized mandatory subject." *Associated Gen. Contractors*, 637 F.2d at 560. *See also Borden*, 279 NLRB at 399 ("a permissive subject of bargaining would become mandatory whenever it was presented together with a mandatory subject").

Contrary to the Company's claim (Br. 14), simply offering severance pay as a "quid pro quo" for early contract termination did not make early contract termination a mandatory subject of bargaining upon which it had the right to insist. Rather, the permissive subject must "vitally affect[] the terms and conditions of employment for bargaining unit employees," *Associated Gen. Contractors*, 637 F.2d at 559, or have a "direct, significant, relationship to wages, hours or terms or conditions of employment," *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656 (10th Cir. 1981) (quoting *NLRB v. Massachusetts Nurses Ass'n*, 557 F.2d 894, 898 (1st Cir. 1977)).

The Company had to show—but made no attempt to do so here—that early contract termination is "so inextricably interwoven with the substance of a contract that it constitutes a term or condition of employment." *Bartlett-Collins*, 639 F.2d

at 656. Without that showing, the Board reasonably found that the Company violated the Act by conditioning the plant-closure effects agreement on a permissive subject of bargaining.

D. The Board Properly Found that a Good-Faith Impasse Could Not Be Reached Because the Company Conditioned Agreement on a Permissive Subject of Bargaining

The Company inexplicably contends (Br. 29-33) that the Board found that the parties bargained to impasse; the Company then argues that they did not. But the Board's decision made no determination as to whether an impasse occurred. Instead, the Board explained that impasse applies only in cases involving good-faith bargaining, and "a party *precludes* good-faith impasse when it insists on [a permissive subject of bargaining] as the price of an agreement." (ER 4-5 (emphasis in original), citing *Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990).)

As the Third Circuit explained in *Latrobe Steel Co. v. NLRB*, much "confusion over this issue is attributable to the talismanic invocation of the word 'impasse' to describe that level of insistence which triggers the *Borg-Warner* unfair labor practice." 630 F.2d 171, 179 (3rd Cir. 1980). When referring to bargaining over permissive subjects, impasse may "be used to refer to a breakdown in all negotiations over either one or several issues," and this definition "is relevant to the *Borg-Warner* question." *Id.* *See also Retlaw Broad.*, 172 F.3d at 666 ("[a]

valid impasse, accordingly, cannot be based on a permissive term"); *Inland Tugs*, 918 F.2d at 1310 (finding "impasse defense" irrelevant where employer "conditioned all meaningful bargaining" on permissive subjects).

Thus, the Company's argument that the Board improperly found impasse is misguided. The Board did not find that there was, or was not, an impasse, because the concept of a good-faith impasse simply cannot apply to situations such as this, where the Company refused to bargain in good faith. As the Board explained (ER 5), the "proper legal test for unlawful insistence under *Borg-Warner*" is a finding that agreement was conditioned on a permissive subject of bargaining. And conditioning the plant-closure effects agreement on a permissive subject of bargaining was "precisely what the [Company] did here." (ER 5.)

II. THE BOARD ACTED WITHIN ITS DISCRETION IN AWARDING ITS STANDARD REMEDY TO ALL UNIT EMPLOYEES FOR THE COMPANY'S REFUSAL TO BARGAIN IN GOOD FAITH

Having determined that the Company violated the Act by conditioning a plant-closure effects agreement on a permissive subject of bargaining, the Board was entitled to order a remedy that would effectuate the purposes of the Act. The remedy selected by the Board is one that it first adopted in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968), as the standard remedy for effects bargaining violations. In awarding a *Transmarine* in this case, the Board concluded that it was appropriately tailored to "recreat[e] a measure of balanced

bargaining power" and would "make whole the employees for losses suffered as a result of [the Company's] failure to bargain in good faith about the effects of its plant-closure decision." (ER 6.)

The Company does not dispute the propriety of a *Transmarine* remedy in this case. Instead, it argues only that the remedy should be limited to the four employees who remained when the plant closed. We show below that the Board reasonably rejected this argument and adopted the standard *Transmarine* remedy, which grants limited backpay to all unit employees who are adversely affected by the employer's unlawful refusal to bargain over the effects of plant closure.

A. The Board Has Broad Discretion in Determining Remedies, and the *Transmarine* Remedy Is the Typical Remedy in Effects-Bargaining Cases

The Board bears primary responsibility for devising remedies that effectuate the policies of the Act and its remedial authority is a broad discretionary one, subject to limited judicial review. *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969); *Fresh Fruit & Vegetable Workers Local 1096, United Fruit Commercial Workers Int'l Union v. NLRB*, 539 F.3d 1089, 1096 (9th Cir. 2008) As the Supreme Court has noted, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by the reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). Accordingly, the Board's choice of remedies is not to be disturbed unless

its order represents "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord Teamsters Cannery Local 670 v. NLRB*, 856 F.2d 1250, 1260 (9th Cir. 1988). In its brief, the Company does not come close to making the requisite showing.

The Supreme Court has held that bargaining 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." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). In *Transmarine*, the Board announced an appropriate remedy to address the peculiar difficulties of vindicating the policies of the Act in the context of an employer's unlawful failure to engage in effects bargaining. The Board concluded that a simple order to commence bargaining was inadequate to cure the violation because both the passage of time and the closure of the facility had made it "impossible to reestablish a situation equivalent to that which would have prevailed had [the employer] more timely fulfilled its statutory bargaining obligation." *Transmarine*,170 NLRB at 389. The Board therefore deemed it necessary to fashion a remedy that created conditions essentially similar to those that would have existed had good-faith bargaining occurred at the appropriate time. The solution the Board devised was to impose "a limited backpay requirement designed both to make whole the employees for losses

suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for [the employer]." *Id.* at 390.

A *Transmarine* remedy is the typical remedy in effects-bargaining cases. It provides unit employees with limited backpay, from 5 days after the receipt of the Board's decision, until the occurrence of one of four specified conditions. Bargaining must take place and backpay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. *Transmarine*, 170 NLRB at 390; *Melody San Bruno, Inc.*, 325 NLRB 846, 846 (1998).

Since the Board's decision in *Transmarine*, this limited backpay remedy has been applied in dozens of cases in which an employer has failed to bargain over the effects of a decision to close a facility. *See, e.g., NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 815 (5th Cir. 2009) (enforcing *Transmarine* remedy in effects-bargaining case); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1291 (7th Cir. 1989) ("[W]e believe that the Board acted within the bounds of its statutory discretion in imposing the *Transmarine* remedy" in effects-bargaining case.); *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1305, 1307

(8th Cir. 1988) ("The limited back pay remedy was imposed by the Board for the purpose of providing the Union some measure of bargaining strength which it would have had if [employer] had engaged in effects bargaining at the appropriate time.").

B. The Board Properly Awarded a *Transmarine* Remedy to All 92 Unit Employees

In ordering a *Transmarine* remedy for the 92 unit employees affected by the plant closure, the Board adhered to the principles underlying that remedy. As the Board noted (ER 6), "[a]ll 92 terminated employees have been denied the benefit of collective-bargaining representation concerning the effects of the Fresno closure," and a bargaining order, alone, would not have been "an adequate remedy for the unfair labor practice committed." The Board then determined that the *Transmarine* remedy would restore to the Union "a measure of balanced bargaining power." (ER 6.)

The Company concedes (Br. 34) that the *Transmarine* remedy is the appropriate remedy in this case. But it argues that the remedy should be applied only to the last four employees who were discharged. As the Board explained (ER 6), the parties clearly intended to address the impact of the Fresno closure on all 92 remaining employees. Indeed, each of the Company's five bargaining proposals applied to all 92 bargaining unit employees working as of the September 25, 2008 plant-closure announcement. (ER 6 n.41; ER 97-102, 109-27, SER 12-18.) The

Company failed to bargain over the effects of its plant closure on all 92 employees, and the Board, therefore, appropriately applied the *Transmarine* remedy to all of them.

In support of its argument, the Company relies on the Eighth Circuit's decision in *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598 (8th Cir. 1999). There, upon closure of the employer's facility, all but a small number of employees were hired immediately at another of the employer's facilities. *Id.* at 600. Under those circumstances, the court limited the *Transmarine* remedy ordered by the Board to allow backpay only for the employees who had not been rehired. *Id.* Nothing in the Eighth Circuit's decision in *Waymouth Farms* suggests that the Board's remedy in this case should be limited.

The limited backpay award under *Transmarine* serves, not only to compensate employees, but also to recreate the conditions that would give the employer "an incentive . . . to bargain in good faith" and "discourage premature impasse in the bargaining that is to ensue." *Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983). Here, the Company's unlawful insistence on early termination of the contract prevented the parties from reaching agreement on mandatory subjects of bargaining that would have affected all 92 unit employees, including severance pay and continuation of medical benefits. All 92 employees deserve redress for the Company's failure to bargain in good faith.

Even though the consolidated complaint only sought a remedy for the four employees remaining when the Fresno plant closed, the Board did not abuse its discretion in applying the remedy to all 92 employees. As the Board correctly noted (ER 6 n.42), the General Counsel's failure to seek a specific remedy is irrelevant since the Board has "full authority over the remedial aspects of [its] decisions." *Schnadig Corp.*, 265 NLRB 147 (1982). Because Section 10(c) of the Act "specifically empowers the Board" to remedy violations of the Act, if the Board finds that the Act has been violated, "it is unnecessary for the complaint to spell out the details of the relief to be requested." *NLRB v. Winchester Elecs., Inc.*, 295 F.2d 288, 292 (2d Cir.1961). *Accord NLRB v. Schwab Foods, Inc.*, 858 F.2d 1285, 1294 (7th Cir. 1988). Moreover, the Union requested a *Transmarine* remedy for all 92 unit employees, putting the Company on notice that the Board might grant the Union's requested remedy. Thus, the Board acted fully within its authority in ordering the *Transmarine* remedy for all 92 employees who were terminated because of the Company's decision to close the plant.

III. MEMBER BECKER'S RECESS APPOINTMENT DID NOT EXPIRE BEFORE DECEMBER 22, 2011

The Company cursorily asserts that the Board lacked a properly constituted quorum when it issued the December 22, 2011, order because Board Member

Craig Becker's recess appointment had expired on December 17, 2011.[8] Br. 16-17. That claim is baseless. Under the terms of the Recess Appointment Clause, Becker's "Commission[] . . . expire[d] at the End of their [*i.e.*, the Senate's] next Session." U.S. Const. art II, § 2, cl. 3. Because Becker was appointed during the Senate's Second Session of the 111th Congress (in March 2010), *see* National Labor Relations Board, *Members of the NLRB since 1935*, *available at* http://www.nlrb.gov/members-nlrb-1935, his term did not expire until January 3—the end of the Senate's First Session of the 112th Congress.

The Senate and Executive Branch have uniformly expressed the understanding that this First Session ended midday on January 3, 2012—after the challenged NLRB order was issued. *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"); *Entergy Mississippi Inc.*, 358 NLRB No. 99, slip op. at 1 (2012) (explaining that Becker exercised authority as a Member until noon on January 3, 2012); *see also* 157 Cong. Rec. H10036 (daily ed. Jan. 3, 2012) (House of Representatives declaring "the first session of the 112th Congress adjourned").

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[8] At the time the Board issued the decision here on December 22, it comprised only three members: Mark Pearce, Brian Hayes, and Craig Becker. 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.

The Company appears to suggest that each time the Senate adjourns, its annual Session terminates, *see* Br. 16-17, but that is contradicted by both the political branches' shared understanding and longstanding congressional practice. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("traditional ways of conducting business give meaning to the Constitution") (internal quotation marks omitted). As the Congressional Research Service explains, annual Senate Sessions are terminated by a specific kind of adjournment, known as an adjournment *sine die* (literally, "without day"). Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 1 (Jan. 9, 2012).[9] And in the absence of a concurrent resolution authorizing such an adjournment, *sine die* adjournment is accomplished automatically by the Twentieth Amendment, which sets noon on January 3 as the date and time for commencement of the next legislative Session (unless Congress establishes a different date by law). *Id.* at 1-2 & n.5; U.S. Const., amend. XX, § 2. Indeed, the Senate itself (via the presiding officer) has acknowledged that when there is no resolution authorizing adjournment *sine die*, one annual Session of the Senate automatically transitions into the next at noon on January 3. *See* 142 Cong. Rec. 1 (Jan. 3, 1996) ("The PRESIDENT pro tempore. The hour of 12 noon on January 3 having arrived,

[9] *See also R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1064 n.2 (9th Cir. 1997) ("Adjournment *sine die* means final adjournment for the session.").

pursuant to the Constitution of the United States, the 1st session of the Senate in the 104th Congress has come to an end . . . .”). And this practice applies not only to Sessions of the Senate, but to Sessions of Congress as well. *See* Wm. Holmes Brown, et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, § 13, at 11 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPOHPRACTICE-112.pdf (“Adjournments sine die . . . are used to terminate the sessions of a Congress . . . . A session terminates automatically at the end of the constitutional term.”).[10]

Contrary to the Company’s assertion, the cited opinion of the Office of Legal Counsel does not suggest that the Senate’s Session ended December 17, 2011. Br. 16-17. The opinion acknowledges that the Senate adjourned on that date, *see Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at *1 (Jan. 6, 2012), but a simple adjournment does not end an annual Session. *See, e.g.*, Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and*

[10] *See also* Deschler’s Precedents of the House of Representatives, H. Doc. 94-661,vol. I, § 2, at 8 (noting absence of *sine die* adjournment or relevant statute, and therefore concluding that “the 76th Congress, 3d session, terminated and the 77th Congress, 1st session, began at noon on Jan. 3, 1941, pursuant to the twentieth amendment”); General Accounting Office, *Matter of Commodity Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) (“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.”).

Practices, S. Doc. No. 101-28, at 1 ("An adjournment of the Senate concludes 1 legislative day . . . ."). Further, the opinion expressly states that "the Senate in fact adjourned pursuant to an order that . . . there . . . be 'no business conducted' *for the final seventeen days of the first session*." 2012 WL 168645, at *13 (emphasis added).

Nor does the adjournment of the Senate to a recess punctuated by a series of *pro forma* sessions affect the congressional practice of ending an annual Session of the Senate only through either an adjournment *sine die* or the commencement of the subsequent Session per the Twentieth Amendment. Indeed, the Senate held *pro forma* sessions at the end of its Second 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 previously enacted concurrent resolution. *See* 153 Cong. Rec. 36,508 (2007) ("Under the provisions of S. Con. Res. 61, as amended, the Senate stands adjourned sine die until Thursday, January 3, 2008."). The 112th Congress passed no concurrent resolution authorizing adjournment *sine die* of its First Session. Nor did the Senate purport to adjourn *sine die* on its own before January 3. Accordingly, the Senate's Session and Becker's term ended midday on January 3, and the Board had a quorum when it issued its December 22 order.

STATEMENT OF RELATED CASES

Board counsel are aware of one case currently in this Court that may raise a challenge to the expiration of Member Becker's term: *DirecTV v. NLRB*, 9th Cir. No. 12-71297 (initial brief to be filed November 13, 2012).

CONCLUSION

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

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November 2012

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCK-TENN SERVICES, INC., formerly known as SMURFIT-STONE CONTAINER ENTERPRISES, INC. Petitioner/Cross-Respondent	)	
v.	)	Nos. 12-70516 12-70934
NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	
and	)	Board case no. 32-CA-24480
TEAMSTERS DISTRICT COUNCIL NO. 2, LOCAL 388-M Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,167 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/Linda Dreeben
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Dated at Washington, DC
this 13th day of November, 2012

9th Circuit Case Number(s) 12-70516 & 12-70934

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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National Labor Relations Act

STATUTORY AND REGULATORY ADDENDUM
NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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 . . . .

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

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

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

> 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) [paragraphs (2) to (4) of this subsection] 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) [section 159(a) of this title], 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 [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. . . .

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

> (a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.
>
> * * *
>
> (c) 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 backpay, as will effectuate the policies of this Act. . . .
>
> (e) The Board shall have power to petition . . . for the enforcement of such order . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .
>
> * * *
>
> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in 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. . . .