

No. 12-60638

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

DRESSER-RAND COMPANY

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**

STUART F. DELERY
Principal Deputy Assistant Attorney General

LAFE E. SOLOMON
Acting General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

CELESTE J. MATTINA
Deputy General Counsel

**DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ**
Attorneys, Appellate Staff

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

JULIE B. BROIDO
Supervisory Attorney

**U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4052**

ZACHARY R. HENIGE
Attorney

**National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2996
(202) 273-2997**

STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board believes that oral argument is appropriate in this case. Petitioner/Cross-Respondent Dresser Rand Company is challenging the constitutionality of the President's appointment of several members of the Board pursuant to the Recess Appointments Clause. The constitutional challenges being raised by Dresser Rand involve a wide range of textual, structural, and historical issues, all of which are addressed in detail in this brief. The Board believes that oral argument will assist the Court in its consideration of these issues. In addition, Dresser Rand is challenging the Board's determinations that the company committed a wide range of unfair labor practices involving discrimination against strikers and failure to bargain over recall procedures and employment terms, and oral argument will assist the Court in understanding the Board's grounds for those determinations.

TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of issues.....	3
Statement of the case.....	4
Statement of facts.....	4
I. The Board’s findings of fact.....	4
A. After an economic strike, Dresser-Rand locks out former strikers but not other unit employees.....	4
B. The Company ends the lockout, immediately recalls the former crossovers, and unilaterally implements its process for recalling former full-term strikers.....	6
C. Dresser-Rand discharges Kelvin Brown.....	7
D. Dresser-Rand unilaterally changes employees’ paid lunch break for weekend overtime work.....	8
E. Dresser-Rand suspends Marion Cook.....	8
F. Dresser-Rand denies accrued vacation benefits to former strikers after they return to work.....	9
The Board’s conclusions and order.....	11
Summary of argument.....	12
Standard of review.....	14
Argument.....	15

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
I. The President's recess appointments to the Board were valid.....	15
A. The recess appointments clause preserves continuity of government functions when the senate is unavailable to provide advice and consent.....	15
B. The Senate was on recess at the time of the challenged appointments	18
C. Nothing in the recess appointments clause confines the President's appointment authority to intersession recesses.....	35
D. The President may fill all vacancies during a recess, not just vacancies that arise during that recess	47
II. Substantial evidence supports the Board's finding that Dresser-Rand committed a range of unfair labor practices in violation of Section 8(a)(3), (5), and (1) of the Act	55
A. Dresser-Rand violated Section 8(a)(3) and (1) of the Act by discriminatorily locking out employees who participated in a strike, but not other employees	55
B. Dresser-Rand violated Section 8(a)(3) and (1) of the Act by giving preferential recall rights to employees who crossed the picket line during the strike	61
C. Dresser-Rand violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a procedure for recalling employees from a strike or lockout.....	63
D. Dresser-Rand violated Section 8(a)(3) and (1) of the Act by suspending and discharging former strikers for engaging in union activity.....	66

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
1. The Court should summarily enforce the Board's finding that Dresser-Rand unlawfully suspended Cook for engaging in union activity	66
2. Because Dresser-Rand failed to show that Brown engaged in serious picket line misconduct, his discharge was unlawful	67
E. Dresser-Rand violated Section 8(a)(3) and (1) of the Act by unlawfully denying former strikers accrued vacation benefits.....	69
F. Dresser-Rand violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice regarding paid lunch breaks during weekend overtime shifts	73
Conclusion	75

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A.H. Belo Corp. (WFAA-TV) v. NLRB</i> , 411 F.2d 959 (5th Cir. 1969)	63
<i>American Ship Bldg. Co. v. NLRB</i> , 380 U.S. 300 (1965).....	56
<i>Bio-Science Laboratories</i> , 209 NLRB 796 (1974)	64
<i>Bonnell/Tredegear Industries, Inc. v. NLRB</i> , 46 F.3d 339 (4th Cir. 1995)	73
<i>CalMat Co.</i> , 326 NLRB 130 (1998)	68
<i>Ciba Geigy Pharm. Div.</i> , 264 NLRB 1013 (1982), <i>enforced</i> , 722 F.2d 1120 (3d Cir. 1983)	64
<i>Clear Pine Mouldings, Inc.</i> , 268 NLRB 1044 (1984)	68
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	18
<i>El Paso Elec. Co. v. NLRB</i> , 681 F.3d 651 (5th Cir. 2012)	66,73
<i>Evans v. Stephens</i> , 387 F.3d 1224 <i>cert. denied</i> , 544 U.S. 942 (2005).....	36,37,40,42,47
<i>Food Service Co.</i> , 202 NLRB 790 (1973)	64

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	73
<i>Grand Rapids Die Casting Corp. v. NLRB</i> , 831 F.2d 112 (6th Cir. 1987)	61
<i>Gulf States Mfg., Inc. v. NLRB</i> , 704 F.2d 1390 (5th Cir. 1983)	64
<i>Intersystems Design & Tech. Corp.</i> , 278 NLRB 759 (1986)	64
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	30
<i>K.W. Electric, Inc.</i> , 342 NLRB 1231 n.5 (2004)	59
<i>Laidlaw Corporation v. NLRB</i> , 414 F.2d 99 (7th Cir. 1969)	57-58,63
<i>Leveld Wholesale, Inc.</i> , 218 NLRB 1344 (1975)	58
<i>Linn v. Plant Guard Workers Local 114</i> , 383 U.S. 53 (1974).....	66
<i>Litton Fin. Printing Div. v. NLRB</i> , 501 U.S. 190 (1991).....	63
<i>Lynn's Trucking Co.</i> , 846 F.2d 72 (4th Cir. 1988)	59
<i>Marathon LeTourneau Co., Longview Div. v. NLRB</i> , 699 F.2d 248 (5th Cir. 1983)	57

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Medite of New Mexico</i> , 314 NLRB 1145 (1994), <i>enforced</i> , 72 F.3d 780 (10th Cir. 1995)	67
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	41
<i>Mobil Exploration & Producing U.S. Inc. v. NLRB</i> , 200 F.3d 230 (5th Cir. 1999)	14
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	32,44
<i>National Fabricators, Inc. v. NLRB</i> , 903 F.2d 396 n.1 (5th Cir. 1990)	56
<i>Newport News Shipbuilding & Dry Dock Co. v. NLRB</i> , 738 F.2d 1404 (4th Cir. 1984)	68
<i>New Process Steel v. NLRB</i> , 130 S. Ct. 2635 (2010).....	16
<i>NLRB v. Allied Aviation Fueling of Dallas LP</i> , 490 F.3d 374 (5th Cir. 2007)	15
<i>NLRB v. Allis-Chalmers Co.</i> , 388 U.S. 175 (1967).....	55
<i>NLRB v. Alamo Express, Inc.</i> , 420 F.2d 1216 (5th Cir. 1969)	72

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Brown</i> , 380 U.S. 278 (1965).....	56,57
<i>NLRB v. Delta-Macon Brick & Tile Co.</i> , 943 F.2d 567 (5th Cir. 1991)	63
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....	55
<i>NLRB v. Fleetwood Trailer Co.</i> , 389 U.S. 375 (1967).....	57
<i>NLRB v. Globe Mfg. Co.</i> , 580 F.2d 18 (1st Cir. 1978).....	65
<i>NLRB v. Great Dane Trailers</i> , 388 U.S. 26 (1967).....	56,69,71,72
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	63
<i>NLRB v. Mackay Radio & Telegraph Co.</i> , 304 U.S. 333 (1938).....	57
<i>NLRB v. Thermon Heat Tracing Servs., Inc.</i> , 143 F.3d 181 (5th Cir. 1998)	14
<i>NLRB v. Transport Co. of Tex.</i> , 438 F.2d 258 (5th Cir. 1971)	56
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013).....	35,36,42,43,44,45,47,49,50,52,53,54,55

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Nor-Cal Beverage Co.</i> , 330 NLRB 610 (2000)	66
<i>Peerless Pump Co.</i> , 345 NLRB 371 (2005)	62
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	35
<i>Postal Service</i> , 350 NLRB 441 n.14 (2007)	59
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	34
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	29
<i>R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.</i> , 703 F.3d 801 (5th Cir. 2012)	66
<i>Richmond Recording Corp. v. NLRB</i> , 836 F.2d 289 (7th Cir.1987)	67
<i>Overnite Transp. Co.</i> , 335 NLRB 372 (2001)	60
<i>Sara Lee Bakery, Inc.</i> , 514 F.3d 422 n.3 (5th Cir. 2008)	56
<i>Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.</i> , 342 NLRB 458 (2004)	59
<i>Strand Theatre of Shreveport Corp. v. NLRB</i> , 493 F.3d 515 (5th Cir. 2007)	63

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1974).....	65
<i>Swift Adhesives, Div. of Reichhold Chemicals, Inc.</i> , 320 NLRB 215 (1995), <i>enforced</i> , 110 F.3d 632 (8th Cir. 1997)	70,71
<i>The Pocket Veto Case</i> , 279 U.S. 655 (1929).....	37
<i>Texaco, Inc.</i> , 285 NLRB 241 (1987)	69,70,72
<i>Trans World Airlines v. Indep. Fed. of Flight Attendants</i> , 489 U.S. 426 (1989).....	62
<i>United States v. Allocco</i> , 305 F.2d 704 (2d Cir. 1962).....	47,49,53
<i>United States v. Smith</i> , 286 U.S. 6 (1932).....	22-23
<i>United States v. Sprague</i> , 282 U.S. 716 (1931).....	18
<i>United States v. Woodley</i> , 751 F.2d 1008 (9th Cir.1985)	47
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	14
<i>Valmont Industries, Inc., v. NLRB</i> , 244 F.3d 454 (5th Cir. 2001)	60
<i>Vesuvius Crucible Co. v. NLRB</i> , 668 F.2d 162 (3d Cir. 1981).....	72

United States Constitution:	Page(s)
Art. II, § 2, cl. 3.....	16,45
Art. I, § 3, cl. 2.....	39
Art. I, § 3, cl. 5.....	43
U.S. Const. amend. XX, § 2; <i>infra</i> pp.30-31.....	21,30
U.S. Const. art II, § 3.....	17,32
U.S. Const. art. I, § 5, cl. 2.....	29
U.S. Const., art. I, § 5, cl. 4.....	24,27,29,43,46
Pa. Const. of 1776, § 20; Vt. Const. of 1777.....	39

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
2 U.S.C. § 288b(c).....	29
Section 7 (29 U.S.C. § 157).....	passim
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	passim
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	passim
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	passim
Section 10(a) (29 U.S.C. § 160(a)).....	2
Section 10(e) (29 U.S.C. § 160(e)).....	2
Section 10(f) (29 U.S.C. § 160(f)).....	2
29 U.S.C. §§ 151, et seq.....	2
Pub. L. No. 79-289 (1945).....	31
Pub. L. No. 111-289 (2010).....	31

Rules:	Page(s)
FRAP 28(a)(9)(A).....	66

Opinion Attorney General:	Page(s)
1 Op. Att’y Gen. 631, 632 (1823).....	48,51
10 Op. Att’y Gen. 356, 356 (1862).....	18
12 Op. Att’y Gen. 32, 34-35 (1866)	49
12 Op. Att’y Gen. at 38-39	52
16 Op. Att’y Gen. 522, 531 (1880).....	54
33 Op. Att’y Gen. 20, 21-22 (1921)	20,30,36,47
41 Op. Att’y Gen. 463, 468 (1960).....	36
Office of Legal Counsel:	Page(s)
13 Op. O.L.C. 271, 272 (1989).....	20
Legislative Materials	Page(s)
<i>Congressional Directory for the 112th</i> (2011)	23,32,33,35,40,41,42,44
6 Annals of Cong. 1517 (1796).....	31
8 Annals of Cong. 2189 (1798).....	31
8 Annals of Cong. 2197 (Dec. 19, 1798)	40
8 Annals of Cong. 2417-18 (1798)	31
148 Cong. Rec. 21,138 (Oct. 17, 2002)	32
151 Cong. Rec. S9593 (daily ed. Sept. 1, 2005).....	26
156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010)	22
157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011)	21,22,29,37
157 Cong. Rec. S8,789 (daily ed. Dec. 23, 2011)	25
158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012)	33
H. Res. 493, 112th Cong. (2011)	29
S. Rep. No. 58-4389, at 2 (1905)	19

Other Authorities:	Page(s)
<i>Abandoning Recess Appointments?</i> , 26 <i>Cardozo L. Rev.</i> 443, 445-46 (2005)	52
Berg-Andersson, <i>Explanation of the Types of Sessions of Congress</i> , <i>The Green Papers</i> (Jun. 6. 2001) at http://www.thegreenpapers.com/Hx/SessionsExplanation.html#spe	32
<i>In re John D. Dingell</i> , B-201035, 1980 WL 14539,	30
<i>The Federalist No. 67</i> , (Clinton Rossiter ed., 1961).....	16,19,32,45
2 Samuel Johnson, <i>Dictionary of the English Language</i> 1650 (1755).....	19
3 Story, <i>Commentaries on the Constitution of the United States</i> § 1551, at 410 (1833)	17
3 <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787</i> , 409-10 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates)	17
4 Elliot’s Debates 135-36 (Archibald Maclaine)	17
Fabian, JOSEPH WRIGHT, <i>AMERICAN ARTIST, 1756-1793</i> , at 61 (1985)	50
Department of Justice, Office of Legal Counsel, <i>Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions</i> , 2012 WL 168645 (Jan. 6, 2012).....	25
Dep’t of State, <i>Calendar of Miscellaneous Papers Received By The Department of State</i> 456 (1897);.....	50,51
Hartnett, <i>Recess Appointment of Article III Judges: Three Constitutional Questions</i> , 26 <i>Cardozo L. Rev.</i> 377, 381-84 (2005).....	49,51
Henry B. Hogue & Maureen Bearden, Cong. Research Serv., <i>Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008</i> at 13-14 (2008)	26

Other Authorities-Cont'd:	Page(s)
Hogue, Cong. Res. Serv., <i>Intrasession Recess Appointments</i> 3-4 (2004); Hogue, et al., Cong. Res. Serv., <i>The Noel Canning Decision and Recess Appointments Made From 1981-2013</i> , at 22-28 (2013)	36
26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928)	38
Jesse Holland, Associated Press, <i>Deal made on judicial recess appointments</i> , May 19, 2004.....	34
Neal Goldfarb, <i>The Recess Appointments Clause (Part 1)</i> , LawNLinguistics.com, Feb. 19, 2013, at http://lawninguistics.com/2013/02/19/the-recess-appointments-clause-part-1/	46
Letter from James McHenry to Alexander Hamilton (April 26, 1799), <i>reprinted in</i> 23 THE PAPERS OF ALEXANDER HAMILTON 69-71	50,51
Letter from John Adams to James McHenry (April 16, 1799), <i>reprinted in</i> 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES (“ADAMS WORKS”) 632-33	50,51
Letter from John Adams to John McHenry (May 16, 1799), <i>reprinted in</i> 8 ADAMS WORKS.....	53
Oleszek, Cong. Res. Serv., <i>The Rise of Unanimous Consent Agreements</i> , in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008)	21
Oxford English Dictionary (2d ed. 1989)	18,37,45
Riddick & Frumin, <i>Riddick’s Senate Procedure: Precedents and Practices</i> , S. Doc. No. 101-28, at 947 & n.46 (1992) (“Riddick’s Senate Procedure”).....	20,21
S. Exec. J., 4th Cong., 2d Sess. 217 (1796)	50
Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979)	50

Other Authorities-Cont'd:	Page(s)
Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790) <i>d in</i> 17 <i>The Papers of Thomas Jefferson</i> 195-96 (Julian Boyd, ed. 1965)	27,37,50
II Webster, <i>An American Dictionary of the English Language</i> 51 (1828)	18

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

No. 12-60638

DRESSER-RAND COMPANY

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**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of the Dresser-Rand Company for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Dresser-Rand. IUE-CWA, AFL-CIO, Local 313, (“the Union”) has intervened on the Board’s side. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a)

(29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended (“the Act,” 29 U.S.C. §§ 151, et seq.). The Decision and Order, issued on August 6, 2012, and reported at 358 NLRB No. 97 (D&O1-40),¹ is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Dresser-Rand petitioned for review on August 13, 2012; the Board cross-applied for enforcement on October 4. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because Dresser-Rand is headquartered in Texas. The filings were timely; the Act imposes no time limit on the initiation of review or enforcement proceedings.

¹ “D&O” refers to the Board’s Decision and Order; “Tr.” to the transcript of the hearing before the administrative law judge; “GCX” (General Counsel’s), “RX” (Dresser-Rand’s), and “JX” (Joint) to exhibits introduced at that hearing. References preceding a semicolon are to Board findings; those following, to supporting evidence.

STATEMENT OF ISSUES

1. Whether the President's recess appointments to the Board were valid.
2. Whether substantial evidence supports the Board's finding that Dresser-Rand committed a range of unfair labor practices in violation of Section 8(a)(3),(5), and (1) of the Act (29 U.S.C. § 158(a)(3),(5), and (1)), specifically by:
 - a. discriminatorily locking out employees who participated in a strike, but not other employees;
 - b. giving preferential recall treatment to employees who crossed the picket line during a strike;
 - c. unilaterally implementing a procedure for recalling employees from a strike or lockout;
 - d. suspending and discharging former strikers because of their union activities;
 - e. denying former strikers accrued vacation benefits because of their union activities; and
 - f. unilaterally changing its practice regarding paid lunch breaks during weekend overtime shifts.

STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint against Dresser-Rand, alleging that Dresser-Rand unlawfully discriminated against strikers and failed to bargain over recall procedures and employment terms. (D&O1,5.) After conducting a hearing, an administrative law judge issued a decision, finding that Dresser-Rand committed numerous unfair labor practices. (D&O37-38.) After Dresser-Rand filed exceptions to the judge's decision, the Board (Chairman Pearce and Member Griffin; Member Hayes dissenting in part) issued a Decision and Order, affirming, with slight modifications, the judge's findings, conclusions, and proposed order. (D&O1.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. After an Economic Strike, Dresser-Rand Locks Out Former Strikers but Not Other Unit Employees

Dresser-Rand manufactures compressors that extract oil and natural gas. It has long had a collective-bargaining relationship with the Union, which represents production and maintenance employees at Dresser-Rand's facility in Painted Post, New York. In the spring of 2007, the parties began negotiations for a successor collective-bargaining agreement to replace one that was due to expire on August 3. (D&O5-6;Tr.843-44,JX1.) The negotiations failed to produce a new agreement,

and, on August 4, the Union commenced an economic strike. All of the approximately 417 bargaining unit employees initially participated.

(D&O6;Tr.172-74,926-27,952.)

Early in the strike, Dresser-Rand hired temporary replacements to continue operating the business. (D&O6;Tr.841,1143,RX59.) In late August or early September, thirteen of the strikers made an unconditional offer to return, crossed the picket line, and began working again. (D&O6;Tr.192-93.) In mid-September, Dresser-Rand also began hiring permanent replacements. (D&O6;Tr.961-63,RX36.)

During the strike, the parties met for bargaining three times. On November 19, the Union ended the strike, ceased picketing, and made an unconditional offer to return to work on behalf of striking employees. (D&O6-7;Tr.1004-06,GCX2).

On November 23, Dresser-Rand rejected the Union's offer to return to work and began a partial lockout. It locked out the employees who had participated in the strike, but not the employees who had been hired as permanent replacements, even though they were also bargaining unit members.

(D&O7;Tr.854,915,989,1023,GCX4.) During the lockout, the parties met twice for negotiations. (D&O8;Tr.1029.)

B. The Company Ends the Lockout, Immediately Recalls the Former Crossovers, and Unilaterally Implements Its Process for Recalling Former Full-Term Strikers

On Thursday, November 29, Dresser-Rand declared a bargaining impasse and announced that it was implementing its last offer. It simultaneously declared that the lockout was over and that the employees would be free to return to work if they did so under the terms of the implemented offer. (D&O8;GCX6.) That day, the Union made an unconditional offer to return to work, and reminded Dresser-Rand that it needed to negotiate over the process for returning them to work, preferably by seniority. (D&O9;Tr.783,1040,GCX9,13.)

Without negotiating, however, Dresser-Rand immediately brought back to work twelve of the employees who had abandoned the strike in August and September. Dresser-Rand returned the thirteenth former crossover employee the next morning. All of the former crossovers were reinstated before the employees who struck for the duration. (D&O10;Tr.193-96,JX4.)

On Friday, November 30, at 5:40 p.m., Dresser-Rand informed the Union that it would create a “preferential hiring list,” ranking the former full-term strikers based on a mixture of seniority and performance to recall them to work. (D&O10;Tr.271,1368-69,GCX14.) On Sunday, December 2, Dresser-Rand sent the Union a “process document” and recall list describing its procedure for

recalling the former full-term strikers based on unilaterally chosen criteria.

(D&O10;Tr.200-04,1371-72;GC17.)

The morning of Monday, December 3, before hearing back from the Union, Dresser-Rand began contacting former full-term strikers directly about returning to work pursuant to its unilaterally chosen criteria. Beginning on December 4, Dresser-Rand returned the first wave of former full-term strikers to work. The Union immediately sent Dresser-Rand a letter objecting to the manner of recall. Dresser-Rand continued to recall the former full-term strikers through April 2008 pursuant to its unilaterally chosen criteria. (D&O10-11;Tr.196,778,1377-78.)

C. Dresser-Rand Discharges Kelvin Brown

Before sending the recall list to the Union, Dresser-Rand decided that Kelvin Brown would not be on it. Brown, a 33-year employee with Dresser-Rand, was a union member who had participated in the strike by picketing on a regular basis. Dresser-Rand refused to reinstate Brown, effectively discharging him, claiming he engaged in picket line misconduct. (D&O16-17;Tr.551-52.)

The morning of the alleged incident, September 20, Brown and other strikers were picketing at a crosswalk in front of the facility's truck gate.

(D&O17;Tr.556,674-75.) A van stopped near the crosswalk for no apparent reason. A second van quickly arrived, pulling up behind the first van, and lightly striking it. The collision took place within inches of Brown. (D&O18;Tr.556-60.)

A police officer approached the scene after noticing traffic was stopped, and saw Brown on the second van's fender. He issued Brown a ticket alleging disorderly conduct, a misdemeanor in New York. Without questioning Brown, Dresser-Rand decided to discharge him based on a security guard report that described him as "jumping onto the front" of a vehicle and confirmation from the officer that it was Brown. (D&O16n.86,19;Tr.1240-42.)

D. Dresser-Rand Unilaterally Changes Employees' Paid Lunch Break for Weekend Overtime Work

Since at least the late 1980s, Dresser-Rand had a practice of providing a 20-minute paid lunch break to employees who worked weekend overtime shifts of 7 hours or greater. (D&O11n.44;Tr.332-34,354-56.) After the strike ended, Dresser-Rand stopped providing a paid lunch break for weekend work unless the employee was scheduled for 8.5 hours of work. Neither the expired collective-bargaining agreement nor Dresser-Rand's implemented terms specifically described the subject of paid lunch breaks during weekend overtime work. Dresser-Rand did not bargain with the Union regarding this change before implementing it. (D&O11-12;Tr.332-36,GCX27.)

E. Dresser-Rand Suspends Marion Cook

Marion Cook worked for Dresser-Rand for over 31 years. He was a union member who participated in the strike by regularly walking the picket line. On January 14, 2008, Dresser-Rand recalled Cook to a department in which employees

who had been hired as permanent replacements were working alongside employees who were former strikers. (D&O19;Tr.296-97,304,961-63.)

During a routine department meeting on April 30, Cook, responding to a manager's question, said that "there were too many salaried workers and too many 'scabs' for it to be safe to work." (D&O19-20;Tr.298-99.) The following day, Dresser-Rand suspended Cook without pay for "violating common decency or morality on company property," as punishment for saying "scabs" during the meeting. (D&O20;Tr.303,317,JX8.)

F. Dresser-Rand Denies Accrued Vacation Benefits to Former Strikers After They Return to Work

Under the collective-bargaining agreement in effect until the day before the strike began, employees accrued vacation time in the "calendar year," and they were due to be paid for the accrued time upon their return to work following a break in service. (D&O13,26;Tr.224,GCX25,JX1,p.14-16.)² Interpreting these provisions in a prior case involving the analogous situation of a layoff, an arbitrator determined that vacation eligibility should be calculated on the basis of the 12-month period preceding a break in service. He also determined that "an employee who had worked the requisite number of hours to be eligible for vacation

² Section 14N of the agreement provided: "Anything herein contained to the contrary notwithstanding, an employee who has worked 900 or more hours in any calendar year, [], shall at the end of such year be entitled, irrespective of any subsequent occurrence, to a minimum vacation with pay in the following calendar year" (JX1,p.14-16,GCX24.)

in the calendar year of the layoff will, upon recall in a subsequent calendar year, be immediately eligible to take vacation” (D&O28;GCX25.) Finally, he found that the accrued vacation benefit would remain frozen until the employee was recalled. *Id.*

After the lockout ended and former full-term strikers began returning to work, Dresser-Rand held meetings in which it told a number of them that they would not be eligible for vacation time if they had not been on the active payroll and worked 900 hours during the preceding 12-month period. (D&O12-13;Tr.344-49.) In August-September 2008, Dresser-Rand recalled approximately 23 former full-time strikers, none of whom had worked in the preceding 12 months because during that period they were on strike, locked out, or waiting on the recall list. But under the terms of the expired collective-bargaining agreement, these 23 former strikers had accrued vacation benefits before they went on strike. Even though they had worked the requisite hours and accrued vacation benefits before the strike, Dresser-Rand informed them, when they were recalled, that they were not qualified for the vacation time. (D&O12n.55;Tr.244-43,346-49,1296-99.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 6, 2012, the Board (Chairman Pearce and Member Griffin; Member Hayes dissenting in part) issued its Decision and Order. (D&O1-3.) The Board found, in agreement with the administrative law judge, that Dresser-Rand violated Section 8(a)(3),(5), and (1) of the Act (29 U.S.C. § 158(a)(3),(5), and (1)) by: discouraging membership in the Union by locking out employees who participated in the strike, while not locking out other bargaining unit employees; discriminating against former strikers by giving preferential recall treatment to employees who crossed the picket line; unilaterally implementing a procedure for recalling striking employees to work; suspending Marion Cook and discharging Kelvin Brown; denying accrued vacation benefits to former strikers; and unilaterally eliminating paid lunch breaks on voluntary weekend overtime shifts.

The Board ordered Dresser-Rand to cease and desist from engaging in those unfair labor practices and from, in any like or related manner, interfering with its employees' rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order directs Dresser-Rand to: make whole all employees who, but for the unlawfully discriminatory lockout, would have been recalled from the date of the Union's unconditional offer to return to work, including all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled but for Dresser-Rand's unilateral implementation of a

recall procedure; offer Brown full reinstatement and rescind Cook's suspension, and make them whole; make former strikers whole for accrued vacation benefits denied them because they participated in the strike; upon request, rescind the unilateral change in the practice of paid lunch breaks during weekend overtime shifts, and make whole all affected unit employees for any loss of earnings and other benefits. Dresser-Rand is also required to post a remedial notice and distribute it electronically, if appropriate. (D&O2.)

SUMMARY OF ARGUMENT

1. Dresser-Rand contends that the President's recess appointments to the Board in January 2012 were invalid and that the Board therefore lacked a quorum when it issued the August 6, 2012 order in this case. Acting pursuant to the Recess Appointments Clause, the President made these appointments during a 20-day period and the Senate had declared ahead of time that it would be closed for business during that entire period. The Recess Appointments Clause has long been understood by both the Legislative and Executive Branches to apply when the Senate is unavailable to give advice and consent on Presidential nominations because it has taken a break from doing business. The Senate's 20-day break in January 2012 unquestionably constitutes a "Recess of the Senate" under that well-settled standard. Indeed, the Senate itself issued orders that declared the January break to be a recess.

Dresser-Rand challenges the President's authority to make recess appointments during that January recess, but none of its claims has merit. They cannot be squared with the text, purpose, or firmly established historical understanding of the Recess Appointments Clause. Individually and collectively, they conflict with the Clause's basic object of ensuring that the President can fill vacant offices when the Senate is unavailable for advice and consent. If any one of these contentions were adopted by this Court, the result would upset the longstanding balance of constitutional powers between the President and the Senate.

2. Substantial evidence supports the Board's finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by discriminatorily locking out only employees who had struck, to punish them for exercising their Section 7 rights. In finding that unlawful motive animated the disparately harsh treatment of former strikers, the Board reasonably relied on Dresser-Rand's commission of numerous other unfair labor practices, all of which directly affected employees who struck, while leaving most of their non-striking coworkers alone.

To begin, upon ending the lockout, Dresser-Rand immediately committed an independent violation of Section 8(a)(3) and (1) of the Act by unlawfully granting a preferential right of recall to employees who had abandoned the strike by crossing the picket line. Just five days later, Dresser-Rand violated Section 8(a)(5)

and (1) of the Act by failing to bargain with the Union over the process for recalling former strikers to work. In addition, Dresser-Rand violated Section 8(a)(3) and (1) of the Act by unlawfully suspending and discharging former strikers, and by unlawfully denying them accrued vacation benefits. And Dresser-Rand again violated Section 8(a)(5) and (1) of the Act by unilaterally changing a long-standing practice regarding employees' paid lunch breaks. Substantial evidence supports the Board's finding that Dresser-Rand committed these independent unfair labor practices, which were all of a piece, stemming from the employees' exercise of their right to strike. These unfair labor practices also establish that Dresser-Rand harbored an unlawful motive for selectively locking out only those employees who had participated in the strike, in further violation of the Act.

STANDARD OF REVIEW

This Court recognizes “the Board’s expertise in labor law” and will “defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo.” *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998) (quotations omitted). The Board’s factual findings are conclusive “if supported by substantial evidence on the record considered as a whole.” *Mobil Exploration & Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999) (citing *Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 487-88 (1951)). As this Court has observed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978). Moreover, it is settled law that this Court “do[es] not make credibility determinations or reweigh the evidence” when reviewing the Board’s decisions. *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007).

ARGUMENT

I. THE PRESIDENT’S RECESS APPOINTMENTS TO THE BOARD WERE VALID

A. The Recess Appointments Clause Preserves Continuity of Government Functions when the Senate Is Unavailable to Provide Advice and Consent

From January 3 until January 23, 2012, a period of nearly three weeks, the Senate was closed for business by the Senate’s own order. Under the terms of its adjournment order, the Senate was unable to provide advice or consent on Presidential nominations. It considered no bills and passed no legislation. No speeches were made, no debates were held, and messages from the President were neither laid before the Senate nor considered. Although the Senate punctuated its 20-day break with periodic “*pro forma* sessions” conducted by a single Senator and lasting for literally seconds, it expressly ordered that “no business” would be conducted even at those times.

At the start of this lengthy Senate absence, the term of Board member Craig Becker came to an end, and the Board's membership fell below the statutorily mandated quorum of three members, leaving the Board unable to carry out significant portions of its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, the President invoked his constitutional authority under the Recess Appointments Clause to appoint three new members, bringing the Board to full membership.

The Recess Appointments Clause empowers the President 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, § 2, cl. 3. This provision plays a vital role in the constitutional design, by supplying a mechanism for filling vacant offices and maintaining continuity of government operations during periods in which the Senate is unavailable to provide advice and consent. The Framers recognized that “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers,” but that during periods when the Senate is absent, there may be vacancies that are “necessary for the public service to fill without delay.” *The Federalist No. 67*, at 410 (Hamilton) (Clinton Rossiter ed., 1961). The Clause addresses this public need by “authoriz[ing] the President, singly, to make temporary appointments” in such circumstances. *Ibid.*

Justice Story explained that the Clause was intended to achieve “convenience, promptitude of action, and general security,” and to avoid requiring the Senate to “be perpetually in session, in order to provide for the appointment of officers.” 3 Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833). The Recess Appointments Clause thus frees Senators to return to their constituents instead of maintaining “continual residence . . . at the seat of government,” as might otherwise have been required to ensure appointments could be made.³ At the same time, the Clause reflects the Framers’ understanding that the President alone is “perpetually acting for the public,” and so acting even when Congress is not, because the Constitution obligates the President, alone, and at all times, to “take Care that the Laws be faithfully executed.”⁴

The importance of presidential recess appointments to our system of government is demonstrated by the frequency with which they have been made. Since the founding of the Republic, Presidents have made hundreds of recess appointments, including members of the President’s Cabinet, federal judges, and other principal officers of the United States. Recess appointments have been made during intersession and intrasession recesses of the Senate, at the beginning of

³ 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 409-10 (Jonathan Elliot, ed., 2d ed. 1836) (Elliot’s Debates).

⁴ 4 Elliot’s Debates 135-36 (Archibald Maclaine); U.S. Const. art II, § 3.

recesses and in the final days (and hours) of recesses, and to fill vacancies that arose during the recesses and those that arose before the recesses.⁵ The regularity with which Presidents have invoked the Recess Appointments Clause confirms its critical role in the allocation of powers under the Constitution and the effective conduct of the government's business.

B. The Senate Was on Recess at the Time of the Challenged Appointments

1. The Supreme Court has repeatedly stressed that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931). Accordingly, a constitutional term's meaning “excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

At the Founding, like today, “recess” was used to mean a “[r]emission or suspension of business or procedure,” II Webster, *An American Dictionary of the English Language* 51 (1828), or a “period of cessation from usual work.” Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and

⁵ See generally Hogue, *The Noel Canning Decision*, *supra*, at 22-28 (identifying 408 appointments during recesses of greatly varying lengths); 10 Op. Att'y Gen. 356, 356 (1862) (noting the “continued practice of [the President's] predecessors” to use the Recess Appointments Clause to fill vacancies that existed while the Senate was in session).

1706); *see also* 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (“remission or suspension of any procedure”). The plain meaning of “Recess” as used in the Recess Appointments Clause is thus a break by the Senate from its usual business, such that it is unavailable to provide advice and consent.

That plain meaning accords with the purpose of the Recess Appointments Clause. It ensures that when the Senate makes itself functionally unavailable by whatever means to provide advice and consent, vacancies that are “necessary for the public service to fill without delay” can continue to be filled. *Federalist No. 67*, at 410.

The Executive Branch and the Senate have long shared an understanding of the constitutional language that conforms to its ordinary meaning and purpose. In a seminal report issued more than a century ago, the Senate Judiciary Committee carefully examined the constitutional phrase “the Recess of the Senate.” S. Rep. No. 58-4389, at 2 (1905). It explained that the Clause’s “sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.” *Ibid.* The report defined the constitutional phrase in explicitly functional terms, concluding that Senate recesses occur “when the Senate is not sitting in regular or extraordinary session,” *i.e.*, periods “when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive

communications from the President or participate as a body in making appointments.” *Ibid.* The Senate’s parliamentary precedents continue to cite this report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” See Riddick & Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 947 & n.46 (1992) (“Riddick’s Senate Procedure”).

The Executive Branch’s own firmly established understanding of the Recess Appointment Clause is consistent with the Senate’s understanding. Attorney General Daugherty explained in a 1921 opinion that the relevant inquiry is a functional one—“whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” 33 Op. Att’y Gen. 20, 21-22 (1921).

Paraphrasing the 1905 Senate report, Daugherty explained:

[T]he essential inquiry . . . is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

Id. at 25; see also 13 Op. O.L.C. 271, 272 (1989) (reaffirming this test).

2. The President properly determined that the Senate’s 20-day break in January 2012 fits squarely within this understanding of the term “Recess of the Senate.” The Senate had ordered that it would not conduct business during this entire period. The relevant text of the order provided:

Madam President, I ask unanimous consent . . . that the second session of the 112th Congress convene on Tuesday, January 3, at 12

p.m. for a *pro forma* session only, with no business conducted, and that following the *pro forma* session the Senate adjourn and convene for *pro forma* sessions only, with no business conducted on the following dates and times, and that following each *pro forma* session the Senate adjourn until the following *pro forma* session: [listing dates and times]

157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).⁶

By providing that “no business” could be conducted for 20 consecutive days, even during the intermittent *pro forma* sessions, this order rendered the Senate unavailable to provide advice or consent as part of the ordinary appointments process. Moreover, under Senate procedures, because the order was adopted by unanimous consent of the Senate, recalling the Senate to conduct business would have required unanimous consent as well.⁷ The 20-day break from business thus constituted a recess under the ordinary, well-established meaning addressed above.

Consistent with the President’s understanding, and contrary to Dresser-Rand’s claim that the Senate “determined that it was not in recess on January 4,” Br. 22-23, the Senate did not even purport to be in a *pro forma* session on January

⁶ This order also provided for an earlier period of extended Senate absence punctuated by *pro forma* sessions for the final weeks of the first Session of the 112th Congress. *Id.* On January 3, 2012, that Session ended and the second Session of the 112th Congress began, by operation of the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2; *infra* pp.30-31. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

⁷ Oleszek, Cong. Res. Serv., *The Rise of Unanimous Consent Agreements*, in SENATE OF THE UNITED STATES: COMMITTEES, RULES AND PROCEDURES 213, 213-14 (J. Cattler & C. Rice, eds. 2008); Riddick’s Senate Procedure, *supra*, at 1311.

4 in particular, and specifically and repeatedly referred to its break from business from January 3 to January 23 as a “recess” and arranged its affairs during the break based on that understanding. For example, at the same time it adopted the order that it would conduct no business during that period, the Senate made special arrangements for certain matters to continue during “the Senate’s recess.” *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that “notwithstanding the Senate’s recess, committees be authorized to report legislative and executive matters”); *see also ibid.* (allowing for appointments “notwithstanding the upcoming recess or adjournment”). The Senate has taken similar steps before long recesses without pro forma sessions,⁸ which further indicates that the Senate viewed its January 2012 break as another recess.

The President’s conclusion that the Senate was in recess is reinforced by the Senate’s own words: the order declaring that the Senate would conduct “no business” between January 3 and 23 was adopted only moments after others that referred to that January break as a “recess.” 157 Cong. Rec. S8783. The Supreme Court has explained that it is “essential . . . that each branch be able to rely upon definite and formal notice of action by another,” and warned against the “uncertainty and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning of Senate communications. *United States v.*

⁸ *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

Smith, 286 U.S. 6, 35-36 (1932). The President thus acted well within his constitutional authority by relying on that “definite and formal notice of action.”

3. The scheduling of periodic “*pro forma* sessions” did not alter the continuity or basic character of the Senate’s 20-day recess in January 2012, transform it into a series of periods that were not even recesses, or somehow remove the 20-day period from the scope of the Recess Appointments Clause. The sessions were not designed “to avoid a recess,” as Dresser-Rand claims. Br. 23. Instead, they were used to *facilitate* a recess—to ensure that business was *not* done. By the terms of the Senate’s adjournment order, “no business [was] to be done” during the *pro forma* sessions as well as in between them. The *pro forma* sessions thus preserve, rather than alter, the essential character of the 20-day January 2012 break as a single, extended recess of the Senate.

Historically, when the Senate wanted to take a break from regular business over an extended period of time the two Houses of Congress would pass a concurrent resolution of adjournment authorizing the Senate to cease business over that time. *See* Brown, *supra*, at 8-9. Since 2007, however, the Senate has begun to hold *pro forma* sessions during breaks when there traditionally would have been a concurrent adjournment resolution, like the winter and summer holidays. *See Sessions of Congress, Congressional Directory for the 112th Congress* 536-38 (2011) (“*Congressional Directory*”). These periodic *pro forma* sessions allow the

Senate to claim compliance with the constitutional requirement in the Adjournment Clause that neither House adjourn for more than three days without concurrence of the other.⁹ Whatever the efficacy of the *pro-forma*-session device for that purpose, it does not affect application of the Recess Appointments Clause. *See infra* pp.27-28.

The fact that the Senate sought to facilitate its 20-day break from business by using one mechanism (*pro forma* sessions) rather than another (concurrent adjournment resolution) makes no difference under the Recess Appointments Clause. For that constitutional purpose, adjournment orders providing for *pro forma* sessions are indistinguishable from concurrent adjournment resolutions, because both are designed to enable the Senate to cease business for an extended and continuous period, thereby enabling Senators to return to their respective States without concern that business could be conducted in their absence. That one Senator comes to the Senate Chamber to gavel in and out the *pro forma* sessions, with no other Senator needing to attend and “no business [to be] conducted,” does not change the fact that the Senate as a body is in “Recess” as the term has long been understood.

Dresser-Rand’s contention that the Executive Branch has conceded that *pro forma* sessions can interrupt a Senate recess misses the mark. The passing

⁹ U.S. Const., art. I, § 5, cl. 4.

reference by the Solicitor General in the course of a letter principally addressed to other subjects (Br. 27) was in no way aimed at definitively resolving the issue in this case. The Department of Justice has since conducted a thorough examination of the legal implications of the Senate's practice of providing for mere *pro forma* sessions at which no business is to be conducted. That analysis concludes that such *pro forma* sessions do not interrupt a Senate recess for purposes of the President's recess appointment power. *See* Department of Justice, Office of Legal Counsel, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645 (Jan. 6, 2012). The Department's position in this case is entirely consistent with that analysis.

Dresser-Rand's assertion that the Senate was, in fact, available to conduct business during the January break is likewise mistaken. Br. 23-24. Although the Senate enacted legislation on December 23, 2012, as explained above, it could do so *only* via a unanimous consent agreement. *See* 157 Cong. Rec. S8,789 (daily ed. Dec. 23, 2011). As a result, a single objecting Senator could have prevented the Senate from conducting any business during the January break. Thus, this argument does not distinguish the January 2012 recess from other recesses in which the President's recess appointment authority is unquestioned. Concurrent adjournment resolutions typically allow the leadership of the House and Senate to reconvene either or both Houses before the end of a recess if the public interest

warrants it. *See* Brown, *et al.*, *House Practice* § 10, at 9 (2011). But the mere possibility the Senate might conduct business during a recess through such extraordinary means—whether through unanimous consent or recall authority—does not mean that the Senate is performing its advise and consent role or is otherwise “available to conduct business,” and it does not render the President unable to make recess appointments. Thus, in August 2005, President Bush made a number of recess appointments during the Senate’s recess (including John Bolton to be the United States’ representative to the United Nations and Peter Schaumber to the NLRB). The validity of these appointments was undisputed even though Congress subsequently exercised its authority to return early from its scheduled recess to respond to Hurricane Katrina.¹⁰

Dresser-Rand’s claim (Br. 27) that the Senate “routinely convenes *pro forma* sessions to allow Senate committees to meet” is likewise unhelpful to determining whether the Senate was on recess. Standing Senate committees are authorized by Senate Rule to meet during Senate recesses.¹¹ Regardless, the relevant inquiry for Recess Appointments Clause purposes is not whether committees may meet; it is

¹⁰ H. Con. Res. 225, 109th Cong. (July 28, 2005); Henry B. Hogue & Maureen Bearden, Cong. Research Serv., *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008* at 13-14 (2008); 151 Cong. Rec. S9593 (daily ed. Sept. 1, 2005).

¹¹ *See* Senate Rule XXVI, paragraph 1; Stanley Bach and Betsey Palmer, Cong. Res. Serv., *Senate Rules Affecting Committees* 2 (2003).

whether the Senate as a body is available to conduct its regular business, including providing advice and consent on Presidential nominees.

4. To buttress its contention that the Senate's three-week break from business was not a recess, Dresser-Rand attempts to rely on a series of constitutional provisions *other* than the Recess Appointments Clause, but none of these other provisions is relevant here.

Dresser-Rand first asserts that the Senate and House of Representatives regard *pro forma* sessions as complying with the command of the Adjournment Clause that “[n]either House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days,” U.S. Const. art. I, § 5, cl. 4, and that this legislative determination cabins the President's powers under the Recess Appointments Clause. Br. 20-21. The Adjournment Clause, however, relates primarily to the internal operations of the Legislative Branch. It furnishes each House of Congress with the power to ensure the simultaneous presence of the other so that they can together conduct legislative business.¹² We may assume *arguendo* that, insofar as the matter concerns solely the interaction of the two Houses, Congress could have some leeway to determine whether a particular

¹² See Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790) *reprinted in* 17 The Papers of Thomas Jefferson 195-96 (Julian Boyd, ed. 1965) (explaining the Adjournment Clause was “necessary therefore to keep [the houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will”).

practice, like the purely “*pro forma* sessions” here, comports with the Clause. And each respective House has the ability to respond to, or overlook, any potential violation of the Clause.¹³

The question presented here concerns the power of the President under Article II, § 2 of the Constitution—specifically, whether he reasonably determined that the Senate was in recess, thereby permitting him to make a recess appointment. That question is fully answered by the plain meaning of the Recess Appointment Clause and the Senate’s own actions, including its explicit order that it would conduct “no business” during its January break, and its unambiguous characterization of that break as a “recess.”¹⁴ This Court need not and should not reach out to determine whether the Senate complied with the Adjournment Clause.¹⁵

¹³ The Senate has at least once previously violated the Adjournment Clause, and the only apparent recourse was to the House. *See* Riddick’s Senate Procedure at 15 (noting that “the Senate adjourned for more than 3 days” in June 1916 “without the concurrence of the House of Representatives, and it was called to the attention of the House membership but nothing further was ever done about it”).

¹⁴ To the extent the government has previously drawn upon the Adjournment Clause to impart meaning to the Recess Appointment Clause, see Br. 21 n.8, it was only to make the point, not at issue in this case, that a three-day break between ordinary working sessions of the Senate is generally not regarded as a sufficient break in business to be considered a recess. The recess at issue here, however, lasted for 20 days.

¹⁵ To resolve the issue of whether the Senate complied with the Adjournment Clause, the Court would need to decide not only whether the Senate “adjourn[ed]

Dresser Rand also urges (Br. 22-23) that treating the Senate’s 20-day break as a recess would conflict with the Rules of Proceedings Clause, U.S. Const. art. I, § 5, cl. 2, which provides that “[e]ach House may determine the Rules of its Proceedings.” But Dresser-Rand fails to cite any Senate rule that supports its position.¹⁶ To the contrary, the Senate by its own orders declared that its January break was a “recess” and that the purported “sessions” in that period were “*pro forma*” only, in which “no business” was to be conducted. 157 Cong. Rec. S8783. And, in any event, an officer of the Legislative Branch itself has recognized that it does not have sole authority to determine whether there is a recess within the meaning of the Recess Appointments Clause, because that question implicates the

for more than three days” within the meaning of that Clause, but whether it did so “without the Consent” of the House. Art. I, § 5, cl. 4. Given that the Senate was unavailable to do business between January 3 and 23, 2012, the better view is that the Senate did adjourn for more than three days within the meaning of the Adjournment Clause. The question of consent by the other House, however, would be an issue for resolution between the two Houses, not for the courts. And even if the question were judicially cognizable, its answer would be unclear. The House was aware of the Senate’s adjournment order, but rather than objecting to that order, the House adopted a corresponding resolution permitting the Speaker to “dispense with organizational and legislative business” over roughly that same period. *See* H. Res. 493, 112th Cong. (2011).

¹⁶ Individual Senators’ statements that *pro forma* sessions preclude recess appointments do not constitute a Senate determination on that score. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between Members of Congress asserting their individual interests and those “authorized to represent their respective Houses of Congress”); 2 U.S.C. § 288b(c) (authorizing the Senate Legal Counsel to assert the Senate’s interest in litigation as *amicus curiae* only upon a resolution adopted by the Senate).

President's Article II powers. *In re John D. Dingell*, B-201035, 1980 WL 14539, at *3 (Comp. Gen. Dec. 4, 1980) (“the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate” (quoting 33 Op. Att’y Gen. 20 (1921))); *see also INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (explaining that the Rules of Proceedings Clause gives Congress authority only to establish rules governing the Senate’s “*internal matters*” and “only empowers Congress to bind itself”).

Dresser-Rand also erroneously invokes (Br. 22-23) the Twentieth Amendment, which provides that “[t]he Congress shall assemble at least once in every year,” and that “such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.” U.S. Const., amend. XX, § 2. The January 3 *pro forma* session was not necessary to begin the second session of the 112th Congress, because absent a law appointing a different date, the congressional Session begins at noon on January 3. To hold otherwise would vitiate the Twentieth Amendment’s requirement that the starting date of the annual Session may be changed only “by law,” a requirement that entails presentment to

the President of a bill changing the date, rather than unilateral action of Congress or one of its Houses.¹⁷

Thus, whatever the significance of the *pro forma* session for the purposes of the Senate's own responsibilities under the Twentieth Amendment, the new Session began by operation of the Twentieth Amendment at noon on January 3 and the period of recess that the Senate had ordered commenced at that point and continued until January 23.¹⁸ In any event, Dresser-Rand's suggestion again inappropriately equates two different constitutional provisions. Like the Adjournment Clause, the assembly requirement of the Twentieth Amendment relates primarily to the internal operations and obligations of the Legislative Branch. Whatever sway a congressional determination about the effects of a *pro forma* session might hold in that context, it has no bearing where, as here, the powers of a coordinate Branch are concerned.¹⁹

5. The Supreme Court has condemned congressional action that “disrupts the proper balance between the coordinate branches by preventing the Executive

¹⁷ Congress sometimes has enacted legislation to vary the date of its first annual meeting, *see, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 79-289 (1945), but it did not do so here.

¹⁸ *See supra* n.6.

¹⁹ Congress's has occasionally failed to assemble a quorum on the day constitutionally set for the beginning of Congress's annual meeting. *See, e.g.*, 6 Annals of Cong. 1517 (1796); 8 Annals of Cong. 2189 (1798); 8 Annals of Cong. 2417-18 (1798).

Branch from accomplishing its constitutionally assigned functions.” *See Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). Allowing the use of “*pro forma* sessions” to disable the President from acting under the Recess Appointments Clause would do precisely that.

First, Dresser-Rand’s position would frustrate the constitutional design by leaving vacuums of appointment authority over potentially lengthy periods of times, during which nobody could fill vacancies that are “necessary for the public service to fill without delay.” *Federalist No. 67*, at 410.²⁰ Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods.²¹

²⁰ Although the President may convene the Senate “on extraordinary Occasions,” Art. II, § 3, the adoption of the Recess Appointments Clause shows that the Framers did not regard the President’s convening power as a sufficient solution to the problem of filling vacancies during recesses. Prior to the enactment of the 20th Amendment, which changed the starting date of Congress’s annual session from December to January, Presidents regularly exercised the convening power to call “special Senate sessions.” *See Congressional Directory, supra*, at 522-28. Those sessions were usually convened because newly elected Presidents first took office on March 4, nearly ten months before Congress was then required to convene. *See Berg-Andersson, Explanation of the Types of Sessions of Congress, The Green Papers* (Jun. 6. 2001) at <http://www.thegreenpapers.com/Hx/SessionsExplanation.html#spe>. Planning for such special sessions could be done well in advance, and nearly always took place within days of the end of the previous session of Congress, when members would not yet have departed the capital. *See Congressional Directory, supra*, at 522-28. It would be far more disruptive if the President had to call the Senate into session unexpectedly to deal with problems created by vacancies in the middle of a recess.

²¹ *See, e.g.*, 148 Cong. Rec. 21,138 (Oct. 17, 2002).

But since 2007, the Senate has regularly used *pro forma* sessions to allow for extended suspensions of business.²² Indeed, on at least five different occasions in the past few years, the Senate has used *pro forma* sessions to facilitate breaks from business lasting longer than a month. *See* 158 Cong. Rec. S5955 (daily ed. Aug. 2, 2012) (listing breaks of 31, 34, 43, 46, and 47 days punctuated by *pro forma* sessions). And Dresser-Rand’s position would allow the Senate to use the device of *pro forma* sessions to facilitate even longer breaks from business, and the absence of its Members from the Seat of Government, without triggering the Recess Appointments Clause.

Second, Dresser-Rand’s position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the Senate to make a choice: *either* remain “continually in session for the appointment of officers,” *Federalist No. 67*, and so have the continuing capacity to provide advice and consent; *or* “suspen[d] . . . business,” II Webster, *supra* at 51, and allow its members to return to their States free from the obligation to conduct business during that time, whereupon the President can exercise his authority to make temporary appointments to vacant positions. This understanding of the Senate’s constitutional alternatives is evidenced by, and has contributed to, past

²² *See generally Congressional Directory, supra*, at 536-38.

compromises between the President and the Senate over recess appointments.²³

Under Dresser-Rand's view, however, the Senate would have had little, if any, incentive to so compromise, because the Senate would always possess the unilateral authority to divest the President of his recess appointment power through the simple expedient of punctuating extended recesses of the Senate as a body, and the extended absence of its Members, with fleeting *pro forma* sessions attended by a single Member. Indeed, under Dresser-Rand's logic, early Presidents could not have made recess appointments during the Senators' months-long absences from the Seat of Government if only the Senate had one Member gavel in an empty chamber every few days.

History provides no support for that view of the Constitution. To the contrary, the Senate had never before 2007 even arguably purported to be in session for Recess Appointments Clause purposes, while it was actually dispersed and functionally conducting no business. That historical record "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). Indeed, the Senate's "prolonged reticence" to assert that the President's recess appointment power could be so easily nullified by "*pro forma* sessions"

²³ For example, in 2004, the political Branches reached a compromise "allowing confirmation of dozens of President Bush's judicial nominees" in exchange for the President's "agree[ment] not to invoke his constitutional power to make recess appointments while Congress [was] away." Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004.

would be “amazing if such [an ability] were not understood to be constitutionally proscribed.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

C. Nothing in the Recess Appointments Clause Confines the President’s Appointment Authority to Intersession Recesses

Dresser-Rand also challenges the recess appointments on the ground that the President may make such appointments only during recesses that occur between enumerated sessions of the Senate, commonly known as *intersession* recesses. Br. 20. In common parlance, intersession recesses occur when the Senate uses a specific type of adjournment known as an adjournment *sine die*, the long-accepted parliamentary mechanism to terminate a legislative session. *See* Henry M. Robert, Robert’s Rules of Order 148, 155 (1876) (legislative sessions terminate at the time the legislature adjourns “*sine die*”—literally “without [a] day” specified for reconvening).

When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session, and the resulting recess is commonly referred to as an *intrasession* one. Dresser-Rand contends that the President is powerless, however, to make recess appointments during intrasession recesses, even though such recesses are today far more common, and often longer, than intersession recesses. *See generally* *Congressional Directory*, *supra*, at 529-38. Although this argument was recently accepted in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), it was squarely rejected by the *en banc* Eleventh

Circuit in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005).

Dresser-Rand's position flies in the face of the constitutional text and history. Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. *See* Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The Noel Canning Decision and Recess Appointments Made From 1981-2013*, at 22-28 (2013). These intrasession recess appointments include three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See* Hogue, *Intrasession Recess Appointments*, *supra*, at 5-31. The practice has continued regularly since Attorney General Daugherty, relying on the Senate Judiciary Committee's own interpretation of the Clause, confirmed nearly a century ago that such appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); *supra* pp.19-20. The Legislative Branch itself has acquiesced in the President's power to make such appointments.²⁴ Nevertheless, Dresser-Rand urges that every one of these appointments was unconstitutional. This Court should reject that contention. *See*

²⁴ *See, e.g.*, 41 Op. Att'y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the "accepted view" of the Recess Appointment Clause, and interpreting the Pay Act in a consistent manner).

The Pocket Veto Case, 279 U.S. 655, 689 (1929) (“[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

1. Dresser-Rand’s argument founders at the outset on the text of the Recess Appointments Clause, because that text “does not differentiate between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. As explained above, the plain meaning of the term “recess” means a “period of cessation from usual work,” 13 *Oxford English Dictionary*, *supra*, at 322-23, and does not distinguish between those periods that are between sessions of the Senate and those that are within sessions. Consistent with that understanding, the Senate itself described the period at issue here as a part of its “recess.” 157 Cong. Rec. S8783.

Furthermore, at the time of the Framing, the term “the Recess of the Senate” would have naturally been understood to encompass both intrasession and intersession recesses. The British Parliament, whose practices formed the basis for American legislative practice, had used the term “recess” to encompass both intersession and intrasession breaks. *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (2d ed. 1812) (describing a “recess by adjournment” as one occurring during an ongoing session). Indeed, the Oxford English Dictionary, in defining the word “recess,” provides a usage example from Parliament in 1621 that refers to an *intrasession* recess. *See* 13 *Oxford English*

Dictionary, supra, at 322-23 (“They [the House of Commons] humbly desire to know the Time of the Recess of this Parliament, and of the Access again, as they may accordingly depart and meet again at the same Time as their Lordships shall.” (citing 3 H.L. Jour. 61 (Mar. 22, 1621))); 3 H.L. Jour. 74 (Mar. 27, 1621) (adjourning until April 17).

Founding-era legislative practice in the United States conformed to the Parliamentary understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States “in the recess of Congress” (Arts. IX & X). The only time Congress did so was for a scheduled *intrasession* recess.²⁵ And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”²⁶

²⁵ See 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. The scheduled recess was *intrasession* because new congressional terms began annually in November, *see* Articles of Confederation of 1781, art. V, but Congress had adjourned only until October 30.

²⁶ See, e.g., Letter from George Washington to John Jay (Sept. 2, 1787) (regretting his inability to come to New York “during the recess” due to a broken carriage), *reprinted in* 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76; 3 Farrand, *supra*, at 191 (recounting a 1787 speech by Luther Martin in which he discussed matters that occurred “during the recess” of the Convention); *see also* 2 Farrand, *supra*, at 128.

State legislatures employed the same usage. The Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes “in the recess” of the legislature. *See* Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during legislative recesses that were not preceded by *sine die* adjournment or its equivalent and that were therefore intrasession recesses in common parlance.²⁷ *See supra* p.36. And in 1775, the New York legislature appointed a “Committee of Safety” to act “during the recess” of the legislature; the referenced recess was a 14-day intrasession one.²⁸

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause, which allowed state governors to “make Temporary Appointments” of Senators “if Vacancies happen * * * during *the Recess* of the Legislature of any State.” Art. I, § 3, cl. 2 (emphasis added) . Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted

²⁷ *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (recessing from April 16, 1781 to June 13, 1781). In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, sec. 9; Vt. Const. of 1777, ch. II, sec. VII.

²⁸ 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

the commission without objection.²⁹ The absence of objection is telling, for the Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See generally* Butler & Wolf, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES: 1793-1990 (1995).

This interpretation also best serves the purpose of the Recess Appointments Clause. *See supra* p.16-18. The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the need to fill vacancies is just as great. Intrasession recesses often last longer than intersession ones. *See Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken “zero-day intersession recesses” as well as “intrasession recesses lasting months”). And in modern Senate practice, intrasession recesses account for more of the Senate’s absences than intersession recesses. *See Congressional Directory*, *supra*, at 530-37.

By contrast, Dresser-Rand’s position would apparently empower the Senate unilaterally to eliminate the President’s recess appointment authority even when the Senate is unavailable to advise and consent, simply by recasting an adjournment sine die as an equally long adjournment to a date certain. For

²⁹ *See* 8 Annals of Cong. 2197 (Dec. 19, 1798); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess between November 8, 1798 and January 16, 1799).

example, the 82nd Congress's second session ended on July 7 when Congress adjourned *sine die*, and the President was able to make appointments from then until January 3, when the next session of Congress began pursuant to the 20th Amendment. *Congressional Directory*, supra, at 529. If the Senate had adjourned from July 7 to a date immediately before the next congressional session (say, January 2), the break would have been equally long, but it would have constituted an intrasession recess, during which the President would have been powerless to make recess appointments under Dresser-Rand's theory. The Framers could hardly have intended such a result. Rather, the Framers must have intended the Senate's practical unavailability to control in that hypothetical setting, despite the Senate's efforts to elevate form over substance in the manner of adjourning and reconvening.

Finally, the longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further supports the government's interpretation. The Supreme Court has stressed that "[t]raditional ways of conducting government give meaning to the Constitution," and "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. at 689.

Instead of giving “great weight” to this vast and settled body of practice, the *Noel Canning* court looked to the fact that no intrasession recess appointment had been documented before 1867. 705 F.3d at 501-503. But until the Civil War, there were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See Congressional Directory, supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th Century. *See id.* at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of intrasession recesses beyond three days.

2. Dresser-Rand presents no argument on its own behalf, but relies entirely on the D.C. Circuit’s holding in *Noel Canning*. That decision, however, is flawed at several levels, and should not be followed by this Court.

Noel Canning held that the Clause’s reference to “*the* Recess of the Senate” confines the Clause to intersession recesses because it “suggests specificity.” 705 F.3d at 500. But as the *en banc* Eleventh Circuit explained, the word “the” can also refer generically to a *class* of things, *e.g.*, “The pen is mightier than the sword,” rather than a specific thing, *e.g.*, “The pen is on the table.” *See Evans*, 387 F.3d at 1224-25 (citing dictionary usages). In context, it is obvious that the

Framers used the word “the” in its former sense, as referring to *all* periods during which the Senate is unavailable to conduct business, than a *specific* one.³⁰

Contrary to *Noel Canning*’s suggestion, 705 F.3d at 505, this usage is not solely a modern one. The Constitution itself elsewhere uses “the” to refer to a class of things. For example, the Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days “during *the Session* of Congress.” Art. I, § 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to “the Session” cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President “in *the Absence* of the Vice President,” Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* p.38-40.

The fact that the Clause uses the singular “Recess” rather than the plural “Recesses,” *Noel Canning*, 705 F.3d at 499-500, 503, is equally inapposite. The

³⁰ Indeed, it is apparent that even the *Noel Canning* court could not have meant to use the definition of “the” on which it purported to rely. *See Noel Canning*, 705 F.3d at 500 (“‘the’ [is] an ‘article noting a *particular* thing’” (quoting Johnson, *supra*, at 2041)). *Noel Canning* did not read “the Recess of the Senate” as referring to a particular recess in the same way that “the pen on the table” refers to a particular pen. Instead, it read “the Recess” as referring generically to the *class* of all intersession recesses. Once that Rubicon is crossed, “the” provides no textual basis for drawing a constitutional line between a restrictive class of recesses limited to intersession ones, and a broader class that includes intrasession ones as well.

Senate is constitutionally required to have at least two enumerated sessions per Congress, *see* Amend. XX, and in the 18th and 19th Centuries, the Senate regularly had three or four enumerated sessions. *See generally Congressional Directory, supra*, at 522-26. Thus, the Senate regularly had at least two intersession “Recesses” per Congress.

At the same time as it engaged in this flawed textual analysis, *Noel Canning* rejected the long-standing functional definition employed by both the Senate and the Executive Branch (*see supra* at p.19-20)—a definition which includes both intersession and intrasession recesses—on the ground that its “inherent vagueness . . . counsels against it.” 705 F.3d at 504. But in the context of the Constitution’s provisions allocating powers among the Branches, there is nothing novel or objectionable about a test that may result in close cases at the margins. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 670-72 (1988) (applying a multi-factor test under which the distinction between principal and inferior officers under the Appointments Clause is “far from clear”).

Noel Canning also concluded that the Constitution treats a “recess” and a “session” as mutually exclusive, so that the Senate cannot have a recess during a session. *See* 705 F.3d at 500-501. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that recess appointments expire at the end of the Senate’s “next” session. But this provision says nothing about whether a recess

can occur *within* an enumerated session. *Noel Canning* viewed the specific termination point as conclusive evidence that the Framers anticipated that the recess appointment power could be invoked only during the recess between the enumerated sessions of Congress. *Ibid.* (citing Federalist No. 67). But as shown above, intrasession recesses were a recognized legislative practice at the time of the Framing. If the Framers meant to exclude them from the reach of the Recess Appointments Clause, they would hardly have expressed that intent in such an oblique manner, through the provision setting the termination date for the appointments. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

Because the Constitution sometimes uses the verb “adjourn” or the noun “adjournment,” rather than “recess,” the *Noel Canning* decision also inferred that the term “recess” must have a meaning narrower than “adjournment.” *Noel Canning*, 705 F.3d at 500. But to the extent that these terms were distinguished from one another in the Constitution, the distinction was not the one that *Noel Canning* perceived. The Framers used “adjournment” to refer to the “act of adjourning,” 1 Oxford English Dictionary, *supra*, at 157, and used “recess” to refer to the “period of cessation from usual work,” 13 *id.* at 322. Compare, e.g., Art. I, § 7, cl. 2 (Pocket Veto Clause) (“unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law”) with Art. II, § 2, cl. 3 (“[t]he

President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate”).³¹ Thus, when the Continental Congress convened a committee “during the recess,” it did so under an intrasession “adjournment.” 27 J. Continental Cong. 1774-1789, at 555-56. And to the extent that “adjournment” was used at the time to refer to breaks in legislative business, rather than to the act of adjourning, it was used interchangeably with “recess.” For instance, George Washington used the terms “recess” and “adjournment” in the same paragraph to refer to the same 10-day break in the Constitutional Convention. Letter from Washington to John Jay (Sept. 2, 1787) (expressing regret that he had been unable to come to New York “during the adjournment” because a broken carriage had impaired his travel “during the recess”), *reprinted in* 3 Farrand, *supra*, at 76.

In any event, the government’s position is consistent with the possibility that “recess” may be narrower than “adjournment,” and with the conclusion that the Recess Appointments Clause does not apply to the period following all adjournments. The Adjournment Clause makes clear that the action of taking even an extremely short break counts as an “adjournment,” *see* Art. I, § 5, cl. 4 (recognizing that breaks of less than three days are still “adjourn[ments]”), but the

³¹ That understanding is reinforced by the fact that, at the time of the Framing, the word “recess” was generally not used as a verb, as that function was instead performed by the word “adjourn.” *See* Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, at <http://lawlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1/>

Executive has long understood that such short breaks that do not genuinely render the Senate unavailable to provide advice and consent and do not trigger the President's authority under the Recess Appointments Clause. 33 Op. Att'y Gen. 20, 22 (1921). Indeed, Dresser-Rand's claim that the government's position would permit recess appointments during lunch breaks is pure hyperbole. Br. 28.

Finally, there is no basis for *Noel Canning*'s speculation that Presidents would use intrasession recess appointments to evade the Senate's advice-and-consent role. *See* 705 F.3d at 503. Despite the long-held understanding that Presidents may make intrasession recess appointments, Presidents routinely seek Senate confirmation, and they have a strong incentive to do so, because recess appointments are only temporary.

D. The President May Fill All Vacancies During a Recess, not Just Vacancies that Arise During that Recess

Dresser-Rand also asserts that the President lacked the authority to make the recess appointments on January 4, 2012, because they did not arise during that recess. Br. 20. The theory that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeals, two of them sitting *en banc*. *See Evans*, 387 F.3d at 1226-27 (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir.1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962). The recent contrary decision of the *Noel Canning* court is erroneous.

1. The Recess Appointments Clause states that “[t]he 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, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist during a recess, including those that arose beforehand. He pointed out that “happen” is an ambiguous term, which could be read to mean “happen to occur,” but “may mean, also * * * ‘happen to exist.’” 1 Op. Att’y Gen. 631, 632 (1823). He explained that the “exist” interpretation rather than the “occur” interpretation is more consonant with the Clause’s purpose of “keep[ing] these offices filled,” *id.*, and the President’s duty to take care of public business. Accordingly, “all vacancies which * * * *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled.” *Id.* at 633 (emphasis added).

Attorney General Wirt’s interpretation fits the durational nature of vacancies. While the event that *causes* a vacancy, such as a death or resignation, may “happen” at a single moment, the resulting vacancy itself continues to “happen” until the vacancy is filled. *Accord* Johnson, *supra*, at 2122 (defining “vacancy” in 1755 as the “[s]tate of a post or employment when it is unsupplied”);

see 12 Op. Att’y Gen. 32, 34-35 (1866).³² That durational usage accords with common parlance. For example, it would be conventional to say that World War II “happened” during the 1940s, even though the war began on September 1, 1939. And the durational sense of “happen” is all the more appropriate when asking if one durational event (a vacancy) happens in relation to another (a recess). Thus, although some eighteenth century dictionaries defined “happen” with a variant of “come to pass,” *Noel Canning*, 705 F.3d at 507, as applied to a durational event like a vacancy, that definition is consistent with Attorney General Wirt’s interpretation.

For nearly two centuries, the Executive Branch has followed the opinion provided by Attorney General Wirt to our fifth President, himself one of the Founding Fathers, and Congress has consistently acquiesced. *See Allocco*, 305 F.2d at 713-14. As noted above, such a longstanding and uncontroverted interpretation is entitled to “great weight” in “determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.” *The Pocket Veto Case*, 279 U.S. at 688-90.

This interpretation is also consistent with Executive Branch practice reaching back to the first Administration. President Washington made at least two

³² *See also* Hartnett, *Recess Appointment of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 381-84 (2005) (giving examples of events that “happen” over an extended period).

recess appointments that would have run afoul of the rule proposed by Dresser-Rand and adopted in *Noel Canning*. In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by a statute enacted in April 1792.³³ Under *Noel Canning*'s interpretation, the vacancy did not "happen" during the recess because it arose when the statute was first passed, and was then filled up during a later recess after at least one intervening session. And in October 1796, Washington recess appointed William Clarke to be the United States Attorney for Kentucky, even though the position had gone unfilled for nearly four years.³⁴ President Washington's immediate successor, John Adams, expressed the same understanding as the government does today³⁵ (as

³³ 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 1 Stat. 246. Scot's appointment was occasioned by Joseph Wright's death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in that office, and even if he had been, it would have also been during the same recess that Scot was appointed after at least one intervening session (in which case Wright's commission would have run afoul of *Noel Canning*). See 17 Am. J. Numismatics 12 (Jul. 1883); Fabian, JOSEPH WRIGHT, AMERICAN ARTIST, 1756-1793, at 61 (1985).

³⁴ Dep't of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 65-73 (1979).

³⁵ See Letter from John Adams to James McHenry (April 16, 1799), reprinted in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES ("ADAMS WORKS") 632-33; Letter from James McHenry to Alexander Hamilton (April 26, 1799), reprinted in 23 THE PAPERS OF ALEXANDER HAMILTON 69-71 (H.C. Syrett

did apparently the fourth President, James Madison, and possibly also the third, Thomas Jefferson³⁶).

This long-settled interpretation is also more consistent with the purpose of the Recess Appointment Clause. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, the slowness of long-distance communication in the 18th Century meant that the President might not even have *learned* of such a vacancy until after the Senate's recess began. *See* 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant for months during a recess merely because news of the death during the session had not reached the Nation's capital until after the Senate was already in recess. Dresser-Rand's position, by contrast, would make the President's ability to fill offices turn on the fortuity of when the previous holder left office. But "[i]f the [P]resident needs to make an appointment, and the Senate is not around, when the vacancy

ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, at 647-48.

³⁶ *Hartnett, supra*, at 391-401.

arose hardly matters; the point is that it must be filled now.” Herz, *Abandoning Recess Appointments?*, 26 *Cardozo L. Rev.* 443, 445-46 (2005).

2. Dresser-Rand’s position also creates serious textual difficulties. If, as Dresser-Rand suggests, the phrase “during the Recess of the Senate” were read to modify the term “happen” and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and would be unavailable to limit the *time* when the President may exercise his “Power to fill up” those vacancies through granting commissions. As a result, Dresser-Rand’s reading would mean that the President would retain his power to fill the vacancy that arose during the recess *even after the Senate returns from a recess*, an interpretation that cannot possibly be correct. *See* 12 *Op. Att’y Gen.* at 38-39 (criticizing the “happen to arise” interpretation for this reason). The government’s interpretation does not suffer from this defect. It allows for “during the Recess of the Senate” to delimit the President’s “power to fill up” all “Vacancies.”

Noel Canning contended that the government’s interpretation renders the words “that may happen” superfluous. *See* 705 F.3d at 507. But in the Framing era, the words “that may happen” could be appended to the word “vacancies” without signifying an apparent additional meaning. *See, e.g.*, George Washington, General Order to the Continental Army, Jan. 1, 1776 (“The General will, upon any Vacancies that may happen, receive recommendations, and give them proper

consideration[.]”). In any event, the government’s reading does not necessarily render any words superfluous. Without the phrase “that may happen,” the Clause could be read to enable the President to fill up known future vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing “that may happen” as the Executive has long read it confines the President to filling up vacancies in existence at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed the “happen to arise” interpretation. *See* 705 F.3d at 508-509. Randolph’s opinion has been thoroughly repudiated by a long line of Attorney General opinions dating back to 1823, *see Allocco*, 305 F.2d at 713, and it is not clear that any President ever found the advice wholly persuasive. As noted above, even George Washington, to whom Randolph gave his advice, departed from it on more than one occasion. At most, Randolph’s opinion shows an early “difference of opinion,” Letter from John Adams to John McHenry (May 16, 1799), *reprinted in* 8 ADAMS WORKS, *supra*, at 647, regarding an ambiguous constitutional provision. Any such early differences were resolved by Attorney General Wirt’s 1823 opinion, which has been adhered to consistently for nearly two hundred years.

Noel Canning also dismissed Congress’s longstanding acquiescence in the Executive Branch’s interpretation as a departure from a position supposedly expressed in an 1863 statute. *See* 705 F.3d at 509. But far from rejecting the Executive’s interpretation, the 1863 statute acknowledged it. *See* 16 Op. Att’y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1948, 54 Stat. 751.

Finally, *Noel Canning* attempted to minimize the damaging consequences of its decision by suggesting that Congress could more broadly provide for “acting” officials. *See* 705 F.3d at 511. The very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an “acting” capacity. Moreover, some positions (*e.g.*, Article III judgeships) cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions for an extended period of time, such as Cabinet level positions or positions on boards designed to be politically balanced.³⁷

³⁷ Even if the Recess Appointments Clause were confined to vacancies that arise during a recess, this Court would nevertheless be required to uphold the Board’s order, because under the facts found by *Noel Canning*, the appointment of the only

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT DRESSER-RAND COMMITTED A RANGE OF UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8(a)(3),(5), AND (1) OF THE ACT

A. Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Discriminatorily Locking Out Employees Who Participated in a Strike, but Not Other Employees

The Supreme Court has consistently recognized that the right of employees to engage in a legitimate strike is protected under the Act.³⁸ *NLRB v. Allis-Chalmers Co.*, 388 U.S. 175, 181 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). It is settled that an employer violates Section 8(a)(3) and (1) of the Act by discriminating against employees for “participat[ing] in concerted

recess appointee on the panel that issued the challenged order, Richard Griffin, met that purported requirement. The other two members of the panel, Mark Pearce and Brian Hayes, were Senate-confirmed members of the Board. Member Griffin was appointed to a seat that had become vacant on August 27, 2011, during an intrasession recess. *See Noel Canning*, 705 F.3d at 512. Even under *Noel Canning*’s “arise” interpretation, the Recess Appointments Clause plainly provides that so long as a vacancy arose “during the Recess of the Senate,” the President possesses the power to fill it. Although *Noel Canning* concluded that the President’s recess appointment power is limited to the *same* recess in which the vacancy arose, *id.* at 514, nothing in the text of the Clause imposes such a limitation.

³⁸ Section 7 of the Act grants employees the “right to self-organization, to . . . 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.” 29 U.S.C. § 157. Section 13 further provides that nothing in the Act “shall be construed so as to either interfere with or . . . diminish in any way the right to strike” 29 U.S.C. § 163.

activities, such as a legitimate strike.” *Id.*; accord *NLRB v. Transport Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971).³⁹

The Board relied on these settled principles in finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by selectively locking out only those employees who had previously exercised their statutorily protected right to strike. To be sure, an employer may lock out employees for the sole purpose of exerting economic pressure on the Union to accept its bargaining position, as Dresser-Rand claims to have done. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 315 (1965). However, as Dresser-Rand acknowledges (Br. 29), it is settled that even if an employer can show this type of legitimate business reason for a lockout, antiunion motivation will convert the action into an unfair labor practice. *NLRB v. Brown*, 380 U.S. 278, 287-88 (1965); accord *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32-34 (1967). To establish that such a lockout is unlawful, there must be independent evidence of antiunion motive.⁴⁰ *Brown*, 380 U.S. at 288. If direct

³⁹ Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any other term or condition of employment to encourage or discourage membership in any labor organization.” Violations of Section 8(a)(3), like the violations of Section 8(a)(5) discussed below pp. 63 and 73, result in derivative violations of Section 8(a)(1). See *Sara Lee Bakery, Inc. v. NLRB*, 514 F.3d 422, 426 n.3 (5th Cir. 2008); *National Fabricators, Inc. v. NLRB*, 903 F.2d 396, 398 n.1 (5th Cir. 1990).

⁴⁰ By way of background, “when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to

evidence of motive is unavailable, it can be inferred from the employer's commission of other unfair labor practices. *Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 253 (5th Cir. 1983).

In this case, the Board found that, even assuming the lockout was for the legitimate business purpose of exerting economic pressure on the Union, Dresser-Rand still violated the Act by locking out only employees who participated in the strike. This is so, the Board found, because independent evidence of union animus confirmed that Dresser-Rand selected former strikers for adverse treatment in retaliation for their Section 7 activity, namely, the strike. (D&O1n.1,31.)

To begin, the disparity in treatment makes the discrimination self-evident. Thus, on November 23, Dresser-Rand targeted employees along Section 7 lines by locking out only former strikers, who, of course, remained employees under the Act with reinstatement rights.⁴¹ By contrast, Dresser-Rand did not lock out the

establish a violation” *Brown*, 380 U.S. at 287. By contrast, “where, as here, the tendency to discourage union membership is [comparatively] slight, and the employers’ conduct is reasonably adopted to achieve legitimate business ends . . . we enter into an area where the improper motivation . . . must be established by independent evidence.” *Id.* at 287-88; accord *Great Dane Trailers*, 388 U.S. at 33-34. In the instant case, it is undisputed that the Board appropriately applied the latter analysis in examining Dresser-Rand’s conduct. (D&O1n.1,31.)

⁴¹ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967) (former strikers who make unconditional offers to return to work are entitled to immediate and full reinstatement, even if it requires dismissal of temporary replacements); *Laidlaw*

employees who were hired as permanent replacements during the strike, even though they became part of the bargaining unit before the lockout. *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975). (D&O5,33.) As the Board aptly observed, the partial lockout therefore represented a “perfect correlation,” in that all unit members who had at any time exercised their Section 7 right to strike were locked out, while unit members who had never gone on strike were not. (D&O31,37.)

The Board further found that independent evidence warranted an inference that Dresser-Rand was motivated by union animus in targeting for lockout only employees who had exercised their Section 7 right to strike. (D&O1n.1.) Substantial evidence supports this finding. As argued below, Dresser-Rand committed numerous unfair labor practices against the strikers and their livelihood that soundly demonstrated Dresser-Rand’s animus. Among other unlawful acts, Dresser-Rand immediately granted preferential recall rights to former crossovers when the lockout ended; suspended Cook and discharged Brown for engaging in union activity; and denied returning strikers vacation benefits they had accrued. Dresser-Rand also unilaterally implemented a procedure for recalling former strikers, and altered employees’ lunch breaks, without bargaining with the Union.

Corporation v. NLRB, 414 F.2d 99, 103 (7th Cir. 1969) (full reinstatement upon the departure of permanent replacements).

Contrary to Dresser-Rand (Br.31-32), these unlawful acts support the Board's finding of union animus even though they occurred at or after the lockout's conclusion. As the Board reasonably found, these unfair labor practices were not only linked to the strike and the lockout, they had "a pervasive effect" on employees, affecting the entire unit. (D&O1n.1.) As the Board emphasized, they were all "of a piece, a reaction to the employees' protected strike activity." *Id.* Viewing the pattern of retaliation and refusals to bargain in its entirety, it was eminently reasonable for the Board to conclude that the discriminatory lockout was the first salvo in a campaign to punish former strikers for their protected conduct. The subsequent unlawful acts, including the unilateral changes affecting former strikers, therefore strongly support the Board's finding that Dresser-Rand targeted former strikers for lockout because they had engaged in union activity by striking. *See, e.g., Postal Service*, 350 NLRB 441, 444 n.14 (2007) (relying on post-discipline threats and Section 8(a)(5) violation to establish motive); *K.W. Electric, Inc.*, 342 NLRB 1231, 1231n.5 (2004) (post-layoff statements); *Lynn's Trucking Co.*, 282 NLRB 1094, 1099 (1987) (same), *enforced mem.*, 846 F.2d 72 (4th Cir. 1988).⁴²

⁴² Dresser-Rand errs in suggesting (Br.32) that under *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458 (2004), unlawful motive cannot be inferred from later-occurring conduct. In that case, the Board merely stated that "[e]ven in the context of the other violations, we are persuaded that the motivation behind the lockout in this case was operational, not discriminatory." *Id.* at 462. In

Dresser-Rand also errs (Br.35) in relying on *Valmont Industries, Inc., v. NLRB*, 244 F.3d 454 (5th Cir. 2001), to support its assertion that other unfair labor practices cannot establish a Section 8(a)(3) violation if they do not involve union animus. In that case, the Court merely noted the general rule that a Section 8(a)(3) violation requires a showing of animus, which the Board does not dispute. Nothing in *Valmont* precludes the Board from relying on other independent unfair labor practices to infer motive, even if they involve Section 8(a)(1) or 8(a)(5) violations. *See, e.g., In re Overnite Transp. Co.*, 335 NLRB 372, 376 (2001) (union animus established based on circumstantial evidence such as unilaterally implemented policy that violated Section 8(a)(5)).

Further, Dresser-Rand wrongly asserts (Br.36) that the Board could not rely on the post-lockout violations because Vice President and Chief Administrative Officer Elizabeth Powers made the final decision to lock out the former strikers, and she played no part in subsequent events. Dresser-Rand overly minimizes undisputed evidence that Powers, far from acting alone, worked in consultation with a team of company officials and representatives, including Dresser-Rand's lead attorney, Louis DiLorenzo, Human Relations Project Manager Kevin Doane, Human Resources Manager Daniel Meisner, and other steering committee members, all of whom bore responsibility for the subsequent unfair labor practices.

other words, the Board did consider the other violations, but found them unpersuasive under the particular facts of that case.

(D&O9,10n.34,11,16,20;Tr.1074-75,1175.) The actions of these corporate officials and representatives are, of course, imputed to Dresser-Rand. *See, e.g., Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987).

B. Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Giving Preferential Recall Rights to Employees Who Crossed the Picket Line During the Strike

As noted above, under Section 8(a)(3) and (1) of the Act, it is unlawful for an employer by discrimination in regard to hire or tenure of employment to discourage employees from engaging in protected concerted activity such as a strike. Substantial evidence supports the Board's finding that Dresser-Rand committed this very unfair labor practice by immediately recalling, after the lockout, only employees who had abandoned the prior strike, while making employees who struck for the duration wait for reinstatement as they slowly moved up a recall list. (D&O34-35.)

The evidence of disparate treatment is undisputed. There were two classes of employees: the crossovers, who returned to work in August and remained employed during the strike; and the full-term strikers, who continued to strike until November 19 when the Union made an unconditional offer to return to work on their behalf. Dresser-Rand responded to the Union's offer with a lockout, which it ended on November 29. That same day, Dresser-Rand immediately contacted the 13 former crossover employees and returned all of them to work within a day.

Dresser-Rand took this preferential action before even sending the Union a proposal regarding the recall of full-term strikers. Indeed, Dresser-Rand did not begin to contact the former full-term strikers until December 2, after the former crossovers were safely reinstated. (D&O34-35.)

On this record, it is plain that Dresser-Rand treated employees who continued to exercise their Section 7 rights more harshly than those who had previously abandoned the strike by crossing the picket line. Substantial evidence therefore supports the Board's finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by giving a discriminatory recall preference to the former crossovers. *See Peerless Pump Co.*, 345 NLRB 371, 376 (2005) (“[O]nce a strike ends, all unreinstated strikers are entitled to be considered for recall on a nondiscriminatory basis, without regard to their previous relative levels of commitment to the strike.”).

Dresser-Rand (Br.38-39) errs in relying on *Trans World Airlines v. Indep. Fed. of Flight Attendants*, 489 U.S. 426 (1989), to support its position that it could give preference to the former crossovers. The facts in that case merely show that an employer is not required to displace crossover employees who have already returned to work with strikers who later make an unconditional offer to return. *Id.* at 433-37. That principle is inapplicable here because of the intervening lockout. When Dresser-Rand ended the lockout, neither group was working, and they all

should have been recalled on equal terms as co-bargaining unit members, regardless of whatever promises Dresser-Rand may have made to the crossovers. Dresser-Rand's claim that it was legally required to recall the crossovers first is simply wrong.⁴³

C. Dresser-Rand Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a Procedure for Recalling Employees from a Strike or Lockout

It is settled that an employer violates Section 8(a)(5) and (1) of the Act by altering employees' terms and conditions of employment without bargaining with their established representative.⁴⁴ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). *Accord Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007). Changing employment terms unilaterally "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Accord A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 971 (5th Cir. 1969).

In particular, an employer's bargaining obligation includes the duty to negotiate with the union, upon request, about the procedure for reinstating former

⁴³ Dresser-Rand also wrongly relies (Br.40) on *NLRB v. Delta-Macon Brick & Tile Co.*, 943 F.2d 567 (5th Cir. 1991), an entirely distinguishable case where the issue was whether layoffs of permanent striker replacements created vacancies entitling former strikers to reinstatement under *Laidlaw Corp.*, 414 F.2d at 103.

⁴⁴ Section 8(a)(5) provides in relevant part that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).

strikers. *Bio-Science Laboratories*, 209 NLRB 796, 796-97 (1974); *Food Service Co.*, 202 NLRB 790, 804-05 (1973). Substantial evidence supports the Board's finding that Dresser-Rand failed to meet this obligation. The credited testimony shows that, on Thursday, November 29, union officials told company representatives that they were requesting bargaining over the recall process, taking the position that recall should be based on employee seniority. (D&O35.) On Sunday, December 2, Dresser-Rand sent the Union documents setting forth its plan for recalling former strikers. The very next morning, before the Union responded, Dresser-Rand had already set its plan in motion by contacting former strikers and beginning to recall them based on criteria and procedures that it chose unilaterally. By taking this action without bargaining with the Union, Dresser-Rand acted unlawfully. (D&O36.)

As the Board explained, Dresser-Rand did not fulfill its duty to bargain in good faith by giving the Union fewer than 48 hours, over a weekend, to analyze its plan and offer counterproposals. Indeed, as the Board emphasized, Dresser-Rand "presented the return to work process to the Union as a *fait accompli*." (D&O37.) *See Intersystems Design & Tech. Corp.*, 278 NLRB 759, 759-60 (1986) (quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983)); *Ciba Geigy Pharm. Div.*, 264 NLRB 1013, 1017-18 (1982), *enforced*, 722 F.2d 1120 (3d Cir.

1983). Accordingly, Dresser-Rand violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its recall plan.

In asserting, incorrectly, that it allowed the Union a reasonable opportunity to present counter-proposals, Dresser-Rand erroneously cites (Br.43) distinguishable cases like *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 504-05 (5th Cir. 1964), where the bonus at issue was raised by the employer several months before it was implemented, and *Nabors Trailers, Inc. v. NLRB*, 910 F.2d 268, 270-72 (5th Cir. 1990), where the parties had several face-to-face negotiations and made multiple counter proposals. By contrast, Dresser-Rand, far from giving the Union a reasonable opportunity to present counter-proposals, implemented its Sunday proposal the very next morning. (D&O11,36.)

Dresser-Rand (Br.49-51) also errs in attacking the Board for deferring aspects of the recall remedy to the compliance stage of these proceedings (D&O2). It is the Board's normal, judicially-approved practice to bifurcate its proceedings, leaving the particulars of certain remedial obligations to the compliance stage. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1974) (approving the "Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances"); *NLRB v. Globe Mfg. Co.*, 580 F.2d 18, 21-22 (1st Cir. 1978) (upholding Board order leaving to compliance proceedings whether employee

would have been recalled absent the discriminatory recall policy). Contrary to Dresser-Rand (Br.50), this bifurcated procedure does not compel agreement between the parties. It simply allows them to present evidence showing what would have occurred if Dresser-Rand had not violated the Act by unilaterally implementing its recall plan.

D. Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Suspending and Discharging Former Strikers for Engaging in Union Activity

1. The Court should summarily enforce the Board’s finding that Dresser-Rand unlawfully suspended Cook for engaging in union activity

Dresser-Rand suspended Cook, a vocal and active union member and former striker, for calling former replacement employees and crossovers who abandoned the strike “scabs”—an utterance plainly protected under the Act. *See Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 60-61 (1974); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000). Dresser-Rand (Br.2) no longer challenges the Board’s finding that it violated Section 8(a)(3) and (1) of the Act by disciplining Cook for using this word. Accordingly, Dresser-Rand has waived any challenge to this finding, and the Court should summarily enforce the relevant portion of the Board’s Order. *See FRAP 28(a)(9)(A)*; *R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 806 (5th Cir. 2012) (party waived issues by not raising them in its opening brief); *El Paso Elec. Co. v. NLRB*, 681 F.3d 651,

658 (5th Cir. 2012) (summary enforcement granted where employer failed to challenge issue in opening brief).

2. Because Dresser-Rand failed to show that Brown engaged in serious picket line misconduct, his discharge was unlawful

As shown above, employees have a right to strike under Section 7 of the Act, and upon making an unconditional offer to return to work, former strikers, who remain employees, are entitled to reinstatement. Although an employer can refuse to reinstate an employee who engaged in serious misconduct while on strike, such misconduct “must have had a tendency to coerce other employees in the exercise of their protected rights.” *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 295 (7th Cir.1987). If the employer fails to meet its burden of showing serious misconduct, its refusal to return the employee to work where a vacancy exists violates Section 8(a)(3) and (1) of the Act. *Medite of New Mexico*, 314 NLRB 1145, 1146 (1994), *enforced*, 72 F.3d 780 (10th Cir. 1995).

Substantial evidence supports the Board’s finding (D&O26) that Dresser-Rand unlawfully refused to reinstate Brown, effectively discharging him for participating in the strike. As the Board explained, Dresser-Rand failed to meet its burden of showing that Brown engaged in serious misconduct that had a tendency to coerce employees. The evidence at most showed only that he either briefly stepped in front of a van, or leaned against its bumper for a moment. There was no damage to the van, no injury to person or property, and only a slight delay, if any,

in the van's accessing the facility. (D&O22.) Under Board law, this is not serious misconduct justifying discharge. *See Medite*, 314 NLRB at 1146. *Cf. Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984) (strikers who "carried clubs, tire irons, baseball bats, and ax handles," threatened to kill and beat up nonstrikers, and pounded on cars engaged in serious misconduct).

Dresser-Rand (Br.52-54) exaggerates the seriousness of Brown's conduct and embellishes the Board's findings. Contrary to Dresser-Rand, the record does not show, and the Board did not find, that Brown intimidated anyone or tried to damage property. Accordingly, Dresser-Rand errs in relying on distinguishable cases like *CalMat Co.*, 326 NLRB 130, 135 (1998), which involved an employee who deliberately put himself in front of a moving vehicle, and twice attempted to assault the driver and damage the truck. Brown engaged in no such misconduct.

Newport News Shipbuilding & Dry Dock Co. v. NLRB, 738 F.2d 1404, 1411 (4th Cir. 1984), cited by Dresser-Rand (Br.54), only bolsters the Board's position. As the court noted there, the test is not whether police intervene but whether the misconduct tends to coerce nonstrikers. *Id.* at 1409-11 (describing numerous examples of police intervention that did not constitute serious misconduct). Although the court, *id.* at 1411, upheld the discharge of one striker who actively blocked a gate and refused to move, preventing nonstrikers from entering the facility until police physically removed him, his conduct was qualitatively different

from Brown's. As the credited evidence shows, Brown did not attempt to prevent anyone from accessing the facility, and there were no findings that police intervention was necessary to correct any problem. Accordingly, Dresser-Rand violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Brown and effectively discharging him.

E. Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Unlawfully Denying Former Strikers Accrued Vacation Benefits

In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32-34 (1967), the Supreme Court held that refusing to pay striking employees vacation benefits that had accrued under a terminated collective-bargaining agreement is destructive of employee rights and "discrimination in its simplest form." In *Texaco, Inc.*, 285 NLRB 241, 245-46 (1987), the Board set out the test for analyzing such refusals. First, the Board must show that the benefit had accrued, i.e., that it was "due and payable on the date the employer denied [it]." *Id.* Proof of accrual will often turn on the interpretation of the relevant collective-bargaining agreement. *Id.* Second, the Board must show that the benefit was withheld on the apparent basis of employee participation in a strike. *Id.* Once such discrimination is shown, the employer then has the burden of establishing that the complained-of action was motivated by "legitimate objectives." *Great Dane Trailers*, 388 U.S. at 34. If discriminatory conduct is shown and the employer fails to present a legitimate business justification, the Board's finding of a violation will be upheld. *Id.* at 35;

Swift Adhesives, Div. of Reichhold Chemicals, Inc., 320 NLRB 215, 215-16 (1995), *enforced*, 110 F.3d 632, 634-35 (8th Cir. 1997).

Applying this accepted framework, the Board reasonably determined (D&O28) that, under *Texaco*, the vacation benefit had accrued to the 23 former strikers in question pursuant to the collective-bargaining agreement that expired the day before the strike began, and that Dresser-Rand withheld the benefit from them because they participated in the strike. With respect to the first issue, the Board appropriately relied on the findings of an arbitrator in a prior case involving the same contract language. Applying that language in the context of a layoff, the arbitrator ruled that vacation eligibility accrued prior to the break in service. He concluded that under the agreement, vacation eligibility should be calculated on the basis of the 12-month period preceding the break, and “an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of the layoff will, upon recall in a subsequent calendar year, be immediately eligible to take vacation. . . .” (D&O28;GCX25.) The arbitrator also determined that the accrued vacation benefit would remain frozen until a future recall. (D&O13.)

Applying the arbitrator’s interpretation of the relevant contract language to the analogous situation of a break in service caused by a strike, the Board reasonably found that the employees in question had likewise accrued the vacation

benefit under the terms of the prior agreement,⁴⁵ and that the accrual should have been frozen until they were recalled. (D&O28.) These facts constitute substantial evidence supporting the Board's conclusion that the vacation benefit was due and payable to the former strikers upon their recall. *See Great Dane*, 388 U.S. at 32 (vacation benefits were accrued because employees met conditions specified in expired employment contract, despite fact that strike created a delay in being able to claim them); *Swift Adhesives*, 110 F.3d at 634 (same).

Dresser-Rand (Br.55) misses the point in claiming that the 23 former strikers recalled to work in August and September 2008 had not worked 900 hours in the 12 months preceding their recall. *Of course* they did not work during that period—they were either on strike, locked out, or waiting to be recalled. This does not, however, negate the evidence, discussed above, that they had accrued vacation pay before commencing the strike, and that the accrued benefit remained frozen until they returned to work.

Accordingly, as the Board also found, it follows that Dresser-Rand's imposition of new employment terms at the start of the lockout did not cause the 23 former strikers to lose the benefit they had *previously earned*. (D&O28.) Dresser-Rand therefore errs (Br.55-56) in relying on its imposed terms as a basis for denying the 23 former strikers a previously accrued benefit.

⁴⁵ Testimony shows that all 23 employees had worked the requisite 900 hours in 2007 before going on strike, entitling them to the vacation benefit. (Tr.348-49.)

Moreover, as the Board found, Dresser-Rand failed to meet its burden of showing a substantial business justification for denying the accrued benefit to the 23 former strikers. *See Great Dane*, 388 U.S. at 34. Dresser-Rand (Br.57) offers little other than noting its disagreement with the Board's interpretation of the relevant contract terms, and does nothing to discount the independent arbitrator's interpretation of those terms. Dresser-Rand also errs in relying (*id.*) on *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981), where the employer took the view that no employee, striking or otherwise, accrued vacation under the expired contract. Unlike the employer in *Vesuvius*, it cannot be disputed that Dresser-Rand denied the 23 former strikers their accrued vacation benefit as a direct result of the strike. *See Texaco*, 285 NLRB at 246 (denial of accrued benefits on basis of strike warrants inference of unlawful conduct). But for the strike, the employees in question would have been deemed eligible for the vacation pay, and Dresser-Rand violated Section 8(a)(3) and (1) of the Act by denying them this accrued benefit.

Dresser-Rand (Br.58) also does not help itself by citing *NLRB v. Alamo Express, Inc.*, 420 F.2d 1216 (5th Cir. 1969), a factually distinguishable contempt case in which this Court upheld a special master's determination that benefits were not due to an employee who requested vacation pay *while he was on strike*. Unlike Dresser-Rand, the employer in *Alamo Express* offered the employee the benefits upon his return to work. In short, *Alamo Express* does not undercut the Board's

finding that Dresser-Rand unlawfully denied accrued vacation to 23 former strikers upon their recall.

F. Dresser-Rand Violated Section 8(a)(5) and (1) of the Act by Unilaterally Changing Its Practice Regarding Paid Lunch Breaks During Weekend Overtime Shifts

As noted above, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employees' terms and conditions of employment, which include lunch breaks. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). It is undisputed that for years Dresser-Rand gave employees a paid 20-minute lunch break period when they worked weekend overtime shifts of 7 hours or greater. This benefit existed as a past practice independent of the collective-bargaining agreement. *See Bonnell/Tredegear Industries, Inc. v. NLRB*, 46 F.3d 339, 344 (4th Cir. 1995) (employer's past practice can become an implied employment term that cannot be modified without the parties' mutual consent). It is also undisputed that Dresser-Rand changed that longstanding practice when its employees returned to work—immediately after the strike and lockout—by restricting the break to situations where employees worked at least 8.5 hours of weekend overtime. (D&O11.) These breaks are considered terms and conditions of employment, and before changing such terms, Dresser-Rand was required to notify and bargain with the Union, which it did not do. *See, e.g., El Paso Elec. Co. v. N.L.R.B.*, 681 F.3d 651, 659 (5th Cir. 2012).

The record does not support Dresser-Rand's claim (Br.58-59) that it notified the Union of the proposed change but the Union chose not to bargain over it.

Dresser-Rand merely cites testimony about general discussions concerning its implementation of the imposed terms that took place during an unspecified time period. (D&O12;Tr.343-48.) There is no credited evidence to support Dresser-Rand's assertion that during those general discussions, it notified the Union and provided an opportunity to bargain about this specific issue before implementing the change. (D&O26.)

Dresser-Rand additionally claims (Br.59) that it was privileged to make the change based on the terms that it implemented following impasse. But the Board reasonably found the implemented terms did not modify the parties' past practice. The imposed terms merely stated that a 20-minute break applied "to only those days where an employee worked 4 or more hours in addition to his regularly scheduled shift." (D&O26;JX1.) They said nothing about weekend work, all of which is overtime, let alone whether employees must work 7 or 8.5 hours of overtime to receive a paid lunch break. Accordingly, the Board reasonably found that the terms implemented after impasse did not privilege Dresser-Rand to change the established practice unilaterally. (D&O26.)

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

STUART F. DELERY
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

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

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

s/ Julie B. Broido
JULIE B. BROIDO
Supervisory Attorney

s/ Zachary R. Henige
ZACHARY R. HENIGE
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2997

March 2013

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

_____)	
DRESSER-RAND COMPANY)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	No. 12-60638
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	03-CA-026543,
Respondent/Cross-Petitioner)	026595, 026711,
)	and 026943
and)	
)	
INDUSTRIAL DIVISION OF THE)	
COMMUNICATIONS WORKER OF AMERICA,)	
LOCAL 313)	
)	
Intervenor)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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

Arthur T. Carter
Jeremy D. Kernodle
Haynes and Boone, LLP
2323 Victory Ave., Ste. 700
Dallas, TX 75219

A. John Harper III
Haynes and Boone, LLP
1221 McKinney Street, Ste. 2100
Houston, TX 77010

Thomas M. Murray
Kennedy Jennik & Murray, P.C.
113 University Place, 7th Floor
New York, NY 10003

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

Dated at Washington, DC
this 15th day of March, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 17,831 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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

Dated at Washington, DC
this 15th day of March, 2013