

No. 13-70240

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

**National Labor Relations Board,  
Petitioner,**

v.

**OS Transport LLC**

and

**HCA Management, Inc.,  
Respondents.**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**NATIONAL LABOR RELATIONS BOARD,**

**Petitioner**

**v.**

**OS TRANSPORT LLC,**

**HCA MANAGEMENT, INC.,**

**Respondents**

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**ON APPLICATION FOR ENFORCEMENT OF  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Order against OS Transport LLC and HCA Management, Inc. (jointly, “the Company”). The Company committed unfair labor practices by threatening its employees, reducing their work assignments and hours, and discharging them. The Board had

jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended<sup>1</sup> (“the Act”). The Decision and Order, issued on August 31, 2012, and reported at 358 NLRB No. 117, is a final order.

On January 18, 2013, the Board applied for enforcement in this Court. The Court has jurisdiction over this application pursuant to Section 10(e) of the Act; the unfair labor practices occurred in San Martin, California. The application was timely filed, as the Act imposes no time limit for such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

(1) Whether the Board is entitled to summary affirmance of its numerous uncontested findings and summary enforcement of the uncontested portions of its Order.

(2) Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(3) and (1) of the Act by:

- a. reducing the work assignments and hours of
  - i. Efrain Gutierrez Najera,
  - ii. Primitivo Guzman, and
  - iii. Jose Urias and Ceferino Urias Velasquez, and
- b. discharging

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<sup>1</sup> 29 U.S.C. § 160(a).

- i. Jesus Garcia Marquez and
- ii. Alberto Pizano

in response to their protected activities.

(3) Whether the President's recess appointments to the Board were valid.

### **STATEMENT OF THE CASE**

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by Teamsters Local No. 350, International Brotherhood of Teamsters, Change to Win ("the Union"). (SER4-5;SER298-305,310-22.)<sup>2</sup> The allegations proceeded to trial before an administrative law judge.

On August 15, 2011, the judge issued his decision finding that the Company had violated Section 8(a)(3) and (1) of the Act by reducing the work assignments and/or hours of ten employees because of their union or other protected activities and by discharging two employees for the same reasons. (SER4-23.) The Company also committed numerous violations of Section 8(a)(1), the judge found, by implying that its employees' union activities were futile; promising or granting benefits to employees if they abandoned their support for the Union; and by threatening employees with termination, reduction in work assignments and hours,

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<sup>2</sup> "SER" refers to the Board's Supplemental Excerpts of Record, which the Board filed with its Brief. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

and business closure if they supported the Union or engaged in other protected activities. (SER17-18.)

After considering the Company's exceptions to the judge's decision, the Board rejected the judge's finding that the Company had unlawfully reduced the work assignments of two employees, Enedino Millan and Jose Velasquez. The Board also declined to pass upon the judge's finding that the Company threatened Miguel Reynoso, as it was cumulative of other violations of the Act. The Board otherwise affirmed the judge's findings, with some modifications to the judge's reasoning and to the order and remedy. (SER1-2&n.1,2.)

## **STATEMENT OF THE FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background and Interrelated Operations of OS Transport LLC and HCA Management, Inc.**

OS Transport LLC ("OST") is a Nevada limited liability company, and HCA Management, Inc. ("HCA") is a Nevada corporation. (SER5;SER306-09.) They jointly haul waste and recycling materials in the San Francisco Bay Area. (SER5-6;SER229-30.)

In 2009, Hilda Andrade, OST's owner, incorporated HCA and created a contractor-subcontractor relationship between HCA and OST, inserting HCA into the contractual relationships already existing between OST and its customers. (SER5-6;SER145-46,227.) Andrade admitted that she created HCA to shield OST

from tort liability. HCA has no employees and no trucks, and its sole owner, manager, and operator is Andrade. (SER5;SER226-28,230-31.)

OST employs roughly 15 drivers and owns a fleet of trucks, which it repairs, fuels, and maintains. (SER6;SER104-06,110,127-28.) Andrade manages OST's operations, handles financial and labor matters, and administers OST's contracts. (SER5,13-14;SER175,295.) The father of Andrade's children, Oscar Sencion, Sr., is a field supervisor for OST. (SER14-15;SER30,339-40,367-69.) Among other responsibilities, Sencion Sr. coordinates hauling with OST's customers, including Rigoberto Espinoza at GreenWaste, and on that basis daily assigns OST drivers to the various hauling routes. (SER15;SER147-49,151-63.) Prior to May 2010, Sencion Sr. directly conveyed assignments to drivers. (SER8,15;SER94.)

The assigned destinations for OST drivers include GreenWaste in San Jose, a recycling warehouse in Watsonville, and Potrero Hills Landfill in Fairview. (SER6; SER83,144,150.) OST pays its drivers per load hauled and pays more for some loads than others. Drivers prefer the Watsonville route, because it allows them to haul two loads (there and back) and correspondingly earn twice the amount of money. (SER6;SER202,209,637-64.) By contrast, drivers generally try to avoid the Potrero Hills route: the trip takes twice as much time but pays only slightly more than other routes. (SER6;SER45-46,175-76,202-03,209.)

Drivers generally work Monday through Friday. Saturday work is available, but there is not enough for all the drivers who seek it. Prior to May 2010, Sencion Sr. assigned Saturday work on a rotating basis by calling drivers the day before. (SER6;SER94.) Prior to May 2010, OST typically assigned a driver a spare truck if his usual truck needed repairs, because OST loses money when drivers stand idle. (SER9-10;SER133-34,186-87,210-11,261,266.)

**B. Andrade Announces “New” Ownership of OST; Andrade Compels Employees To Incorporate Individually or To Resign**

In January 2010, Andrade and Sencion Sr. assembled the OST drivers to announce that new investors had bought OST. Andrade did not mention that the “new owners” were herself and her two children. (SER7;SER25-26,75-76.)

Several days later, Andrade assembled the OST drivers once more, this time with an attorney present. (SER7;SER111-12.) The attorney handed the drivers forms which had been completed but left unsigned and which purported to establish a corporation in each individual’s name (e.g., “Alberto Pizano, Inc.”). (SER7;SER72,244,259.) The incorporation forms were in English – which most of the drivers could not read – and no one translated the forms. Nevertheless, Andrade demanded that every driver sign the forms or resign. (SER7;SER69-70,112,120,178.) Once signed, Andrade filed them with the California Secretary of State. (SER7;SER70-71,120.336-38.)

On April 30, Andrade and Sencion Sr. again assembled the drivers with an attorney present. Andrade distributed documents purporting to establish contractual relationships between OST and the drivers' individual corporations. Again, she demanded that every driver sign. (SER7;SER27-29,121-23.) One driver, Julio Escobar, refused to sign, and Andrade forced him to resign in front of his coworkers. (SER7;SER29-30,123,181.) Andrade did not translate the English-language documents. She did translate, however, when the attorney told the drivers that it was now impossible for them to form a union because they were the owners of their own companies. (SER8;SER31,113-14,121-26,137,164-65,179-83.)

Andrade thereafter issued OST drivers IRS Form 1099s in place of W-2s and ceased withholding income taxes, apparently in an effort to treat them as independent contractors. (SER7n.14,8;SER180-81,433-36.) The IRS rebuffed Andrade's attempt, however, and instructed her in an informational letter that she should treat them as employees for tax purposes. (SER7&n.14,17&n.52;SER341-52.)

### **C. The Drivers Concertedly Protest Their New Working Conditions in a Letter to the Company and Contact the Union; the Union Files a Representation Petition**

After Andrade's first meeting, the drivers discussed among themselves Andrade's reorganization of OST. (SER7;SER33-38.) They did not want to

incorporate and suspected that Andrade's actions were false or illegal.

(SER7;SER77-78,120-21,175-76,336-38.)

In April, OST drivers contacted the Union, seeking assistance for their workplace grievance. (SER7;SER34-36,175-76.) The Union collected signatures from OST drivers and on April 14 filed a petition with the Board to represent them. (SER7;SER73-74,333-35,415-32.)

Alongside these union activities, the drivers jointly composed a protest letter in which they stated, among other grievances, that they "were forced to sign a document of which we are not given a copy which indicates that we are owners of our own company – which is false." (SER7;SER336-38.) Eleven drivers signed the letter in late April: Marcial Barron Salazar, Primitivo Guzman, Miguel Reynoso, Alberto Pizano, Enedino Millan, Julio Escobar, Jose Velasques Guzman, Ceferino Urias Velasquez, Efrain Gutierrez, Jose M. Urias, and Jesus Garcia Marquez. (SER7;SER37-38,336-38.)

**D. The Board Holds a Hearing on the Representation Petition; Andrade Fails to Appear; Marquez Delivers the Drivers' Protest Letter to the Company**

To address the Union's petition, the Board initially scheduled a hearing for April 22, 2010, but later rescheduled because Andrade did not appear when summoned. (SER7;SER840,856-57.) The hearing recommenced on May 5, and Marquez, Reynoso, Guzman, and Escobar testified. (SER9;SER80-81,129-31,841-

42,844-45,850-51.) At the hearing, Marquez gave the Company the drivers' protest letter. (SER7-8;SER38-39.) Sencion Sr. testified but Andrade did not, despite having been subpoenaed. (SER9;SER847-48.) Instead, pursuant to another subpoena, Andrade sat for a deposition lasting five days and finally concluding on September 14. (SER9;SER863).

**E. In Response to OST Drivers' Protected Union Activities, Sencion Sr. Threatens OST Drivers with Reductions in Hours and Pay, Termination, and the Closure of the Company**

On May 6 – the day after the Company had received the drivers' protest letter and while the Board hearing was still underway – Sencion Sr. and Andrade met Reynoso at the OST yard. Sencion Sr. told Reynoso that he could drive the Watsonville route if he was not a union supporter. He also said that by the end of May the Company would terminate the drivers who signed the protest letter, including Reynoso; that the Company would close; that Sencion Sr. would hire new drivers; and that Julio Escobar would never be rehired. (SER8,18;SER82-87.)

In late May, Sencion Sr. had a similar conversation with Urias Velasquez. Sencion Sr. told Velasquez that OST would reduce its employees' hours and pay if they joined the Union; threatened to close the business; and threatened to terminate all of the Company's employees and replace them with owner-operators because of their support for the Union. (SER8,18;SER116-18.)

Except for these threats and promises, after the Board hearing Sencion Sr. ceased communicating with the drivers who had signed the protest letter. He continued to assign work but used mechanic Felipe Campos as a conduit for communicating his orders. (SER8;SER94-95,147-49,495-507,854-55,870-71.)

**F. The Company Reduces the Work Assignments and Hours of Union Supporters While Shifting Work Toward Employees Unassociated with the Union**

The Company quickly carried out Sencion Sr.'s threats to reduce employees' hours and pay. Starting around May 2010, the Company reduced the work assignments and/or pay of the following eight drivers, all of whom had signed the protest letter and many of whom had recruited the Union's help and participated in the Board hearing:

- **Jesus Garcia Marquez** – the Company eliminated Marquez's Saturday work, except for rare holiday weekends, and changed Marquez's routes, increasing the frequency that he drove the less profitable Potrero Hills route (SER9;SER40-47,799-802);
- **Alberto Pizano** – the Company eliminated Pizano's Saturday work, which previously had amounted to one-to-three Saturdays a month; reduced Pizano's workload from five-to-seven loads a day to two-to-four; deprived Pizano of his truck, under the pretense of making repairs, thereby causing Pizano to miss three weeks of work; changed Pizano's routes, taking away the profitable Watsonville route; and increased the frequency that Pizano drove the less profitable Potrero Hills route, from two-to-three times a month to 10-to-12 times a month (SER9-10;SER91-92,173-74,184-85,204-07,556-73,812-14);
- **Miguel Reynoso** – the Company reduced Reynoso's Saturday work, from every other Saturday to only one Saturday the rest of the year; changed Reynoso's routes, taking away the profitable Watsonville route;

deprived Reynoso of his truck, under the pretense of making repairs to it, causing him to miss 10-12 days of work; and forbade Reynoso from bringing his truck home after work – a perquisite that Reynoso had previously enjoyed (SER9-10;SER90-92,97-100,102-03,109,574-606,815-18);

- **Marcial Barron Salazar** – the Company reduced Salazar’s workload from five loads a day to two-to-three, reduced the frequency of his Saturday work, and on at least one occasion sent him home early despite the existence of additional work to be done (SER9;SER166-68,665-97,823-26);
- **Efrain Gutierrez Najera** – the Company changed Najera’s routes, taking away the Watsonville route (SER1n.4,9;SER91-92,173,517-55);
- **Primitivo Guzman** – the Company deprived Guzman of his truck, under the pretense of making repairs to the trailer, resulting in 15-20 days of lost work (SER1n.4,9-10;SER132-36,140-43);
- **Jose Urias** – the Company reduced Urias’s Saturday work, from working 12 Saturdays over the preceding 8 months to working 7 Saturdays over the next 8 months (SER1;SER698-730,827-30); and
- **Ceferino Urias Velasquez** – the Company reduced Urias Velasquez’s Saturday work, from working 13 Saturdays over the preceding 8 months to working 10 Saturdays over the next 8 months (SER1-2;SER119,763-94,836-39).

Conversely, beginning in May 2010, the Company granted additional and/or coveted work to employees Rafael Diaz Martines, Victor Vargas, Margarido Ruiz, and Rinaldo del Rio – who, in contrast to the drivers named above, had never attended a union meeting, did not sign the April protest letter, and were generally recognized as anti-union employees. (SER9;SER107-08,138-39,336-38.) Vargas, Ruiz, and Del Rio took over the profitable Watsonville routes (SER9;SER91-

92,607-64,731-62), and Vargas, Martines, Ruiz, and Del Rio began to work many more Saturdays (SER9;SER107-08,138-39,803-07,819-22,831-35). Furthermore, after Salazar apologized to Andrade and disavowed the Union, the Company restored his previous work assignments, including Saturday work. (SER9;SER170-72,665-97,823-26.)

**G. Andrade Terminates Marquez for Job Abandonment Though He Continuously Checked-In While Awaiting Truck Repairs**

Around August 29, 2010, Marquez requested two weeks unpaid paternity leave. Andrade granted his request but then canceled service to Marquez's company-issued walkie-talkie one week later, around the time of her Board deposition. (SER10;SER47-49,265,872-74.)

When Marquez returned to work on September 20, Campos informed him that his usual truck was being repaired and unavailable. Campos offered Marquez a choice: he could either extend his paternity leave by a week or drive Truck #12, a spare. Marquez chose to extend his leave, and Andrade approved his request. (SER10;Br.6,SER49-51,263-64,875-77.) Because Marquez's walkie-talkie no longer functioned, Campos and Marquez agreed that Pizano would check with Campos regarding the availability of Marquez's truck and relay what he learned to Marquez. Over the next two weeks, Pizano frequently checked with Campos and relayed to Marquez that his truck was still not available. (SER10;SER52-54,201.) Typically, the Company rapidly assigned spare trucks to drivers whose vehicles

were broken – a practice it continued with respect to employees who did not support the union, such as Martines and Vargas. (SER9;SER233-39.)

On September 30, Marquez went to the Company's lot himself to see whether his truck was ready. Marquez asked to drive Truck #12 – the spare truck Campos had offered previously – but this time Campos informed Marquez that Truck #12 needed repairs and was unavailable. (SER10;SER51,55-57.) Marquez left the yard. He continued to keep tabs on the status of his truck via Pizano, who reported that Marquez's truck was still unavailable. (SER10;SER62,201.)

On October 15, Marquez received a letter from Andrade stating that he was being terminated for job abandonment. Marquez immediately drove to the company lot and attempted to explain to Andrade what had happened, but she refused to reconsider her decision. (SER10;SER64-68,268,878.)

#### **H. Eighteen Months After An Accident for Which Pizano Was Not at Fault, Andrade Terminates Pizano**

Five weeks after discharging Marquez, the Company terminated Pizano, claiming he was uninsurable.

On April 25, 2009, a car collided with Pizano's truck, and California Highway Patrol (CHP) officers investigated the accident. Per her request, Pizano gave Andrade a written account of the accident in which he explained that the other driver was at fault. Several weeks later, CHP issued an accident report confirming that Pizano was not at fault. The same day it was issued, Pizano gave

Andrade a copy of the report. CHP never issued Pizano a citation. (SER10-11;SER191-98,357-65.)

On November 1, 2010, Andrade received a notice from the California Department of Motor Vehicles that Pizano had been cited for speeding the day before. On her own initiative, Andrade contacted the insurer of OST's drivers, Commercial Carriers, and requested that it declare Pizano to be uninsurable. (SER10;SER274-77,374-76.) Commercial Carriers in turn contacted its underwriter, which responded that Pizano would be uninsurable only if he was at fault for the April 2009 accident. (SER10;SER245-48,370-73,377-78.)

Cristina Betancourt of Commercial Carriers emailed Andrade a "driver's exclusion form" for Pizano to sign "unless he can provide proof that he was not at fault in the 4/25/09 accident." (SER11;SER278,379.) Andrade requested that Betancourt remove this quoted language from her email. Andrade frankly told Betancourt that she "didn't want to employ [Pizano] anymore" and "didn't want to give him the opportunity to provide proof." (SER11;SER278-79.)

On November 19, Andrade presented Pizano with the driver's exclusion form, which was written in English – a language Pizano cannot read. Pizano protested that his driver's license was still valid, but Andrade told Pizano that "it wasn't her problem." (SER11;SER188-89,353-56.) Pizano signed the form. The

same day, Andrade mailed a termination letter to “Alberto Pizano, Inc.,” stating that OST could no longer insure Pizano. (SER11;SER188-89,197-99,366.)

### **I. The Board Orders that a Representation Election Be Held**

On January 14, 2011, the Board’s Acting Regional Director ordered that a representation election be held for the Company’s drivers. (SER9;SER415-32.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

The Board (Chairman Pearce and Members Hayes and Griffin) adopted in part the administrative law judge’s findings and order. (SER1-2.) The Board affirmed the judge’s findings to which the Company did not except, including findings that OST and HCA formed a single employer under the Act; that Oscar Sencion, Sr. was a statutory supervisor; that Felipe Campos served as an agent of the Company; that the drivers were statutory employees (not independent contractors); and that the Company violated Section 8(a)(1) of the Act by threatening employees with termination, work reductions, and business closure if they engaged in protected activities, promising and granting employees benefits if they abandoned their support for the Union, and implying that employees’ support for the Union was futile. (SER1&n.1.) The Board declined to pass upon the judge’s finding that the Company had threatened Miguel Reynoso with retaliation because of his protected activities, because that finding was cumulative and did not affect the Board’s order. (SER1n.1.)

After considering the Company's exceptions, the Board ruled that there was insufficient evidence to establish that Enedino Millan and Jose Velasquez suffered a reduction in work assignments or hours. (SER2.) Otherwise, the Board adopted the judge's conclusions, with certain modifications in reasoning, that the Company had violated Section 8(a)(3) and (1) of the Act by reducing eight employees' work assignments and hours because of their protected concerted activities and by discharging Pizano and Marquez for having engaged in the same. (SER1,18-22.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (SER2-3.) Affirmatively, the Order requires the Company to offer full reinstatement to employees Marquez and Pizano; to remove from the Company's files any reference to the unlawful discharge of Marquez and Pizano and to notify Marquez and Pizano that the Company has done this; to make employees Marquez, Pizano, Reynoso, Salazar, Najera, Guzman, Urias, and Urias Velasquez whole for any loss of earnings and other benefits suffered because of the Company's unlawful discharge and/or reduction of their work assignments and hours; to post remedial notices, both written and electronic, as set forth in the Order; to have the notice read aloud to the Company's employees in the presence

of Andrade; and to give the Union, upon request, the names and addresses of the Company's drivers. (SER3.)

### **SUMMARY OF ARGUMENT**

The Company sought to convert its employees into independent contractors by forcing them to incorporate individually upon threat of termination, and under duress the employees signed incorporation papers written in a language they could not read. Confused and frustrated by the Company's actions, the employees then banded together, composing a joint letter of protest and soliciting the help of a union in combating their employer's overreach.

In response to these unquestionably protected activities, the Company unlawfully retaliated. The Company does not challenge the Board's finding that it threatened employees that, if they continued with their protected activities, it would reduce their hours and/or work assignments, terminate them, and shutter its operations. Similarly, the Company concedes that it punished four employees by reducing their hours, work assignments, and pay because they exercised their rights under the Act.

Against this vivid backdrop of unlawful and uncontested retaliation, this Court is left with the task of enforcing six additional violations of the Act, each of which carried out the Company's prior explicit threats of the same type of retaliation. All are supported by substantial evidence, and all should be enforced.

The Company defends itself by ignoring the record evidence, misconstruing its burden of proof, and repeatedly relying upon discredited witnesses.

The first set of contested violations is based upon the reductions in work suffered by employees Najera, Guzman, Urias, and Urias Velasquez. According to the Company, these employees did not actually suffer a work reduction or the evidence does not foreclose the possibility that they voluntarily refused the work offered them. Neither argument has merit. Substantial evidence demonstrates that each of these employees did indeed suffer work reductions after the Company learned of their protected activities. And it was the Company's burden to establish that these employees suffered these work reductions for reasons unrelated to their protected activities, not the Board's burden to foreclose every possible innocent explanation.

The Company's discriminatory discharges of Marquez and Pizano comprise the second set of violations. The testimony of credible witnesses supports the Board's conclusion that Andrade fired Marquez and Pizano because of their protected activities. The Company's explanations for its decision to terminate these two employees are unavailing because they are based upon discredited testimony.

Finally, Respondents challenge the Board's authority to issue its order, contending that the Board lacked a quorum because the President made invalid

recess appointments to the Board. Specifically, Respondents urge that the Senate was not in “recess” within the meaning of the Recess Appointments Clause when those appointments were made. That claim is mistaken, as demonstrated by the text, purpose, and historical understanding of the Recess Appointments Clause.

### **STANDARD OF REVIEW**

So long as they are supported by substantial evidence in the record, this Court will uphold the findings of fact underlying the Board’s conclusion that an employer discriminated against an employee in violation of Section 8(a)(3) and (1).<sup>3</sup> “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>4</sup> A reviewing court accordingly may not “displace the Board’s choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”<sup>5</sup>

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<sup>3</sup> See *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1290-91 (9th Cir. 1989); *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1131-32 (9th Cir. 1986).

<sup>4</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

<sup>5</sup> *Id.* at 488; accord *NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 908 (9th Cir. 1981).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY AFFIRMANCE OF ITS NUMEROUS UNCONTESTED FINDINGS AND SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

The Company's brief does not contest a number of findings made by the Board. Accordingly, the Board is entitled to summary affirmance of those findings and summary enforcement of the corresponding portions of its order.<sup>6</sup> Moreover, this Court lacks jurisdiction to consider any objection to these findings, given that the Company failed to except to them before the Board.<sup>7</sup>

First, the Board is entitled to summary affirmance of the following findings:

- that OST and HCA constitute a single employer under the Act<sup>8</sup> (SER1n.1,12-14);
- that Oscar Sencion, Sr. was a “supervisor” within the meaning of the Act<sup>9</sup> (SER1,14-15);
- that Felipe Campos was an “agent” of the Company within the meaning of the Act<sup>10</sup> (SER1,15-16); and

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<sup>6</sup> *Sparks Nuggets, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992). *See also* Fed. R. App. P. 28(a)(9)(A).

<sup>7</sup> *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

<sup>8</sup> *See Parklane Hosiery*, 203 NLRB 597, 612 (1973), *amended on other grounds*, 207 NLRB 991 (1973).

<sup>9</sup> *See* 29 U.S.C. § 152(11).

- that the drivers were “employees” within the meaning of the Act,<sup>11</sup> not independent contractors (SER1n.1,16-17).

Second, the Board is entitled to summary enforcement of its numerous findings that the Company violated Section 8(a)(1) of the Act<sup>12</sup> by:

- threatening employees because of their protected activities – telling employees that, because of their support for the Union, the Company would reduce employees’ hours and work assignments, terminate employees and replace them with owner-operators, and close the business (SER1&n.1,18);
- promising and granting employees benefits – promising Reynoso the lucrative Watsonville route if he abandoned his support for the Union (SER1n.1,18); and
- implying that employees’ support for the Union was futile – telling employees, after they had been forced to individually incorporate under threat of termination, that they could only unionize within their own individual corporation (SER17).

Third, the Board is entitled to summary enforcement of its finding that the Company violated Section 8(a)(3)<sup>13</sup> and (1) of the Act by:

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<sup>10</sup> See *id.* § 152(13).

<sup>11</sup> See *id.* § 152(3).

<sup>12</sup> See 29 U.S.C. § 158(a)(1) (“It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act].”). See also *id.* § 157.

<sup>13</sup> 29 U.S.C. § 158(a)(3) (prohibiting “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization”).

- reducing employees' work assignments and hours because they supported the Union or engaged in other protected concerted activities – specifically, penalizing Marquez, Pizano, Reynoso, and Salazar by drastically reducing or eliminating their Saturday assignments, assigning them to less lucrative routes, reducing the number of trips taken per day, and depriving them of the use of their assigned truck (SER1&n.3,9-10,18).

Finally, the Board is entitled to summary enforcement of the special remedies it imposed:

- having the Board's notice read aloud to the Company's employees in the presence of Andrade, and
- supplying the Union, upon request, with the names and addresses of OST drivers (SER2).

Despite being uncontested, the Company's many violations of Section 8(a)(1) and (3) listed above are no less unlawful and do not disappear from this case. To the contrary, they "lend[] their aroma to the context in which the remaining issues are considered"<sup>14</sup> and serve as a telling "background"<sup>15</sup> against which to understand the contested work reductions and discharges.

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<sup>14</sup> See *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); accord *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000).

<sup>15</sup> *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY REDUCING THE WORK ASSIGNMENTS AND HOURS OF FOUR EMPLOYEES AND BY TERMINATING MARQUEZ AND PIZANO BECAUSE OF THEIR UNION OR OTHER PROTECTED ACTIVITIES**

### **A. Applicable Principles**

Under Section 8(a)(3) of the Act – which prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization” – it is unlawful to discharge employees or reduce their work assignments and hours because they engaged in protected union activities.<sup>16</sup> A Section 8(a)(3) violation derivatively violates Section 8(a)(1).<sup>17</sup>

In *Wright Line, a Division of Wright Line, Inc.*,<sup>18</sup> the Board established a

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<sup>16</sup> 29 U.S.C. § 158(a)(3). *See also NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978) (discriminatory termination); *see also Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947 (D.C. Cir. 1999) (discriminatorily reducing working hours); *NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 388-89 (9th Cir. 1979) (discriminatorily allocating work).

<sup>17</sup> *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). *See also* 29 U.S.C. § 158(a)(1) (“It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act].”).

<sup>18</sup> 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983).

burden-shifting framework to determine motivation in discrimination cases.<sup>19</sup>

First, the General Counsel must present evidence “sufficient to support the inference that protected conduct was a ‘motivating factor’” in the employer’s adverse employment action.<sup>20</sup> “Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.”<sup>21</sup> This burden is substantial where the General Counsel has made a strong showing of discriminatory motivation.<sup>22</sup>

Because “employers rarely admit that they took adverse action against employees with the unlawful intent to discriminate,”<sup>23</sup> the General Counsel may carry its burden through the use of circumstantial evidence.<sup>24</sup> This can include the employer’s knowledge that the employees against whom it acted were involved in

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<sup>19</sup> *Airport Parking Mgmt. v. NLRB*, 720 F.2d 610, 613 (9th Cir. 1983) (quoting *Wright Line*, 251 NLRB at 1089).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

<sup>23</sup> *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 215 (4th Cir. 2005). *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (“Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving.”).

<sup>24</sup> *See Warren L. Rose*, 587 F.2d at 1008.

union activity,<sup>25</sup> the employer's hostility toward employees' union activities,<sup>26</sup> the timing of the adverse action,<sup>27</sup> and the employer's departure from established policies and practices.<sup>28</sup>

**B. The Company Has Waived Its Right To Challenge the Discrediting of Andrade, Sencion Sr., and Campos; In Any Event, Those Determinations Are Far from "Patently Unreasonable"**

Several of the Board's determinations concern issues where Andrade, Sencion Sr., and Campos gave testimony sharply conflicting with that of other witnesses. The administrative law judge resolved these conflicts against Andrade, Sencion Sr., and Campos, finding that they had fabricated facts and provided generally unreliable testimony (SER6n.11,11-12), and the Board affirmed (SER1n.1). As with the other uncontested findings in this case, the Company has waived any challenge to these adverse credibility determinations by not discussing them, much less challenging them, in its opening brief.<sup>29</sup>

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<sup>25</sup> *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001).

<sup>26</sup> *Blue Star Knitting, Inc.*, 216 NLRB 312, 318 (1975).

<sup>27</sup> *NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915-16, 918 (9th Cir.1982); *Warren L. Rose*, 587 F.2d at 1008.

<sup>28</sup> *Brooks Cameras*, 691 F.2d at 916.

<sup>29</sup> *See* Fed. R. App. P. 28(a)(9)(A). *See also NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000).

Regardless, those determinations are far from being “patently unreasonable.”<sup>30</sup> The administrative law judge appropriately relied upon “witness demeanor in testifying” (SER11), including Campos’ evasive behavior such as “look[ing] directly at . . . Andrade apparently for guidance or approval before remembering some fact in response to a question.” (SER12.) The judge also relied upon a myriad of conflicts between the witnesses’ trial testimony and prior sworn depositions,<sup>31</sup> reliable documentary evidence,<sup>32</sup> and the recollection of other witnesses who were unbiased<sup>33</sup> or testifying contrary to their own interests.<sup>34</sup> Accordingly, the judge properly discredited the testimony of Andrade, Sencion Sr., and Campos.<sup>35</sup> As discussed below, these determinations prove decisive in undermining the Company’s defenses to the unfair labor practices.

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<sup>30</sup> *Frankl v. HTH Corp.*, 693 F.3d 1051, 1063 (9th Cir. 2012).

<sup>31</sup> *Compare, e.g.*, SER858-62, *with* SER273.

<sup>32</sup> *Compare, e.g.*, SER379, *with* SER293-94.

<sup>33</sup> *Compare, e.g.*, SER240-43,270-71, *with* SER24. *Compare also, e.g.*, SER212-19,225,260,272, *with* SER147-49,151-63.

<sup>34</sup> *Compare* SER866-69, *with* SER232.

<sup>35</sup> *See, e.g., Underwriter Labs., Inc. v. NLRB*, 147 F.3d 1048, 1053 (9th Cir. 1998) (upholding adverse credibility determinations based upon discrepancies between sworn testimony at trial and on previous occasions).

**C. Substantial Evidence Supports the Board’s Conclusion that the Company Reduced the Work Assignments and Hours of Najera, Guzman, Urias, and Urias Velasquez Because of Their Protected Activities**

Applying the *Wright Line* framework, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by reducing employees’ work assignments and hours in retaliation for their protected union activities. (SER1-2.) Substantial evidence supports those findings. As the General Counsel showed, after the Company learned of the protected union activities of these drivers in late April 2010, it engaged in a flurry of unlawful activity against them. In particular, the Company explicitly threatened to reduce the drivers’ work assignments and hours, and almost immediately thereafter the drivers began to suffer the threatened reductions: in May 2010, eight employees lost Saturday work, lucrative hauling routes, or even the use of their trucks.<sup>36</sup> (SER18;SER116-18.) Tellingly, the Company allocated this work to employees who did not support the Union. In light of this extremely tight temporal and causal nexus, the Board found that the General Counsel had carried its burden of showing that the employees’ protected conduct was a motivating factor in the reductions in hours and pay that they suffered. The Company defended its actions by arguing that these employees

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<sup>36</sup> *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 887-88 (6th Cir. 1990) (describing as “strong evidence” of anti-union animus the fact that employer threatened employees with retaliation and then carried out threat); *Schlabach Coal Co. v. NLRB*, 611 F.2d 1161, 1161 (6th Cir. 1979) (same).

would have suffered work reductions even in the absence of their protected conduct, but the Board rejected the Company's defense, which was unsupported by the evidence. (SER1n.1,3-4,9-10,18.)

As discussed above,<sup>37</sup> the Company does not contest the Board's finding that it unlawfully reduced the work assignments and hours of Marquez, Pizano, Reynoso, and Salazar.<sup>38</sup> The Company limits itself to arguing that the four remaining drivers – Najera, Guzman, Urias, and Urias Velasquez – either did not suffer a work reduction at all or would have suffered these work reductions regardless of their protected activity. But as discussed below, these objections either overlook the record evidence or misconstrue the Company's burden under *Wright Line*.

### **1. Najera**

The Board found that Najera experienced a sudden and complete loss of the profitable Watsonville route shortly after Andrade learned of his union activities. (SER9;SER91-92,173.) In an effort to explain this undisputed (Br.10) loss of work, the Company claimed that Najera voluntarily refused to drive the Watsonville route beginning in May 2010. The Company presented absolutely no

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<sup>37</sup> See pp. 20-22, *supra*.

<sup>38</sup> See also *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 968 (8th Cir. 2005) (relying on uncontested violations of Act to establish anti-union motivation); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994) (same).

evidence in support of this affirmative defense, however, and so the Board rejected it. (SER1n.4.) These straightforward findings by the Board are supported by substantial evidence and should be affirmed.

The Company misapplies the relevant burden of proof under *Wright Line* when it argues (Br.10) that the Board erred because the record evidence does not foreclose the possibility that Najera refused the Watsonville route beginning in May 2010. The General Counsel can carry its burden using circumstantial evidence,<sup>39</sup> and it is immaterial that Najera did not take the stand.<sup>40</sup> Thus, once the General Counsel carried its burden of showing that Najera's protected activities were a motivating factor, the burden shifted to the Company to prove that Najera (improbably) refused to drive the profitable Watsonville route; it was not the Board's burden to disprove this or any other speculative explanation for Najera's loss of work.<sup>41</sup> Accordingly, substantial evidence supports the Board's finding that the Company failed to carry its burden under *Wright Line*.

The Company's second attack also fails, this time because it is against the weight of the evidence. Contrary to the Company's claim that Najera's pay was

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<sup>39</sup> *Warren L. Rose*, 587 F.2d at 1008.

<sup>40</sup> *Cutting, Inc.*, 255 NLRB 534, 534 n.1 (1981) (stating that if "the record sustains the allegations of unlawful discrimination against [the discriminatees], their testimony is not *a sine qua non* for relief under the Act").

<sup>41</sup> *See Wright Line*, 251 NLRB at 1089. *See also Airport Parking Mgmt.*, 720 F.2d at 613.

not “negatively affected” (Br.10) during the months following his protected activities, the Company’s payroll records show that Najera earned substantially less in May 2010 and thereafter:

**Monthly Earnings of Najera, 2009-2010**

	<b>2009</b>	<b>2010</b>	<b>Change in earnings</b>
<b>April</b>	\$4180	\$4755	+\$575
<b>May</b>	\$4125	\$3800	-\$325
<b>June</b>	\$4390	* <sup>42</sup>	N/A
<b>July</b>	\$3700	*	N/A
<b>August</b>	\$4215	\$2075	-\$2140
<b>September</b>	\$4315	\$3515	-\$800
<b>October</b>	\$3520	\$3235	-\$285
<b>November</b>	\$4540	\$3700	-\$840
<b>December</b>	\$4255	\$4070	-\$185

(SER517-55,808-11.) According to these records, Najera earned \$4575 less from May 2010 to December 2010 than he did during the same period in 2009 – a significant sum for an employee earning less than \$50,000 annually. Even

<sup>42</sup> Gaps in the Company’s recordkeeping for June and July 2010 made it impossible to establish at trial Najera’s exact earnings for those months. (SER296-97.) Given the Company’s failure to produce records for the second half of July 2010, there is no basis in the record for the Company’s assertion (Br.10) that Najera was absent from work for two weeks of that month.

ignoring the month of August when Najera was absent from work for seven days (Br.10), Najera still earned \$2435 less in 2010 than in 2009. Given the Company's largely undisputed retaliation and animus, its assumption that Najera's lowered earnings were mere coincidence is specious.

## **2. Guzman**

The Board additionally found that the Company deprived Guzman of his truck and trailer for 15-20 days around July 2010. (SER1n.4,9-10;SER134.) The Company's deprivation of Guzman's truck and trailer resembled almost exactly the manner in which the Company retaliated against Marquez, Reynoso, and Pizano by depriving them of their trucks – three undisputed violations of the Act. (SER9-10.) The Company does not dispute that Guzman had no vehicle for 15-20 days; it only disputes the reason.

Substantial evidence supports the Board's rejection of the Company's affirmative defense (Br.10-11) that Guzman's trailer was in the exclusive control of the customer GreenWaste. The Company relied upon testimony from Andrade and Campos, whom the Board generally discredited. (SER1n.1,11-12.) The Company therefore failed to meet its burden, and the Board was entitled to reject the Company's defense.<sup>43</sup>

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<sup>43</sup> See, e.g., *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1131-32 (9th Cir. 1986).

As discussed above,<sup>44</sup> in its brief the Company did not mention – and thereby waived – any challenge to the Board’s credibility determinations. In any event, the Company failed to introduce any evidence (whether credible or not) as to how long the trailer was actually in the possession of GreenWaste.<sup>45</sup> Conspicuously, the Company neglected to pose any questions on this subject to GreenWaste employee Ricardo Lopez, whom the Board found to be generally unbiased. (SER12.)

### **3. Urias and Urias Velasquez**

Finally, the Board found that the Company unlawfully reduced the work assignments and hours of Urias and Urias Velasquez, who regularly worked two-to-three Saturdays per month until the Company learned of their union activities. After that point, they rarely worked two or more Saturdays in any given month. (SER1-2;SER698-730,763-94,827-30,836-39.)

The Company’s attack upon these findings once again misapplies the burden of proof. The General Counsel carried its burden by showing *inter alia* that Urias and Urias Velasquez received noticeably less Saturday work after their protected activities than before, in a manner consistent with the Company’s larger pattern of retaliation and explicit threats to reduce work. (SER1-2.) At that point, the burden

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<sup>44</sup> See *supra*, pp. 25-26.

<sup>45</sup> SER262 (“[Company Counsel]: Do you know how long the trailer was at GreenWaste? [Andrade]: I don’t recall.”).

shifted to the Company to prove, as it now merely speculates (Br.12-13), that these drivers voluntarily refused to work Saturdays. The Company introduced no supporting evidence; its managers could have testified that these drivers declined work, but did not. It was therefore no surprise that the Board rejected the Company's defense. (SER1-2.)

The Company overlooks much record evidence when it additionally objects (Br.12-13) that the evidence does not support a finding that Urias Velasquez suffered any loss of Saturday work. Although Urias Velasquez initially testified that "there was no change" for him after he signed the protest letter (SER118), he clarified under further questioning that his Saturday work went to the "new drivers" – i.e., Del Rio, Ruiz, and Martines, none of whom supported the Union (SER119). Furthermore, the Company's own payroll records clearly indicate that Urias Velasquez worked noticeably fewer Saturdays after his protected activities than before. (SER836-39.) His momentary equivocation on the stand is therefore best understood as the act of an employee flustered by the presence at the hearing of his boss, Andrade. And Urias Velasquez was understandably flustered: Andrade was guiding witnesses (SER12), "intimidating to many of the drivers" (SER20), and clearly not squeamish about retaliating against her own employees.<sup>46</sup>

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<sup>46</sup> See pp. 20-22, 28-32 *supra*. See also pp. 34-38, *infra*.

**D. Substantial Evidence Supports the Board’s Conclusion That the Company Failed To Carry Its Burden of Showing That It Would Have Terminated Marquez and Pizano Regardless of Their Protected Activities**

**1. Marquez**

Substantial evidence supports the Board’s conclusion that the Company violated Section 8(a)(3) and (1) of the Act when it discharged Marquez. The General Counsel made a “strong showing of discriminatory motivation.” (SER20.) The Company had shown overt and pronounced animus toward Marquez’s protected union activities: it had discriminated against several union supporters, Marquez included, by reducing their hours and work assignments<sup>47</sup>; the Company had, via Sencion Sr., threatened to fire all union supporters<sup>48</sup>; and Andrade viewed Marquez as a union leader, a “complainer,” and a “whiner.” (SER19-20;SER858-62.) Furthermore, Andrade fired Marquez at a suspicious time, shortly after she was forced to testify in a Board deposition. (SER20;SER863.) In its defense, the Company claimed it would have fired Marquez for job abandonment even in the absence of protected activity. But Marquez’s persistent efforts to stay in touch and return to work wholly belied the Company’s explanation, and the contrary testimony of Andrade and Campos was non-credible. (SER20;SER49-68.)

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<sup>47</sup> See pp. 21-22, *supra*.

<sup>48</sup> See pp. 20-21, *supra*.

In attacking these findings, the Company wrongly claims (Br.13-14) that a six-month “gap in time” existed between Marquez’s protected activities and his discharge. Not so. The union organizational drive that Marquez had initiated was still underway when he was terminated. Indeed, Andrade’s deposition in the Board’s representation proceeding lasted until September 14, and the Regional Director did not issue his decision directing an election until January 14, 2011. (SER415-32,863.) Marquez’s October discharge therefore occurred while his effort to unionize company drivers was still unfolding. And in any event, anti-union employers do not always immediately fire an unwanted organizer.<sup>49</sup>

Next, the Company incorrectly argues (Br.14) that the Company’s retention of Reynoso and Guzman proves that the Company was *not* motivated by discriminatory intent because Reynoso and Guzman were union supporters, like Marquez. The Company’s failure to fire more union supporters proves nothing.<sup>50</sup> Moreover, the Company ignores that Andrade believed Marquez to be the leader of the union organizing drive and that Reynoso and Guzman did not escape

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<sup>49</sup> See *American Thread Co. v. NLRB*, 631 F.2d 316, 322-23 (4th Cir. 1980) (even after passage of years, “timing of the discharge is not fatal” to finding of anti-union animus since employer “was lacking a pretext to discharge [employee] until that time”).

<sup>50</sup> See *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (discriminatory motive not disproved by employer’s failure to “weed out all union adherents”).

retaliation: the Company reduced both drivers' work. (SER19;SER859.) Seen in this light, the Company's discharge of Marquez suggests a deliberate strategy to decapitate its employees' organizing drive and is entirely consistent with thoroughgoing anti-union animus.

Finally, the Company begs the question when it claims (Br.15-16) that Andrade was under no obligation to investigate the circumstances surrounding Marquez's unexcused absence before firing him. Ample credited evidence supports the Board's finding that Marquez's absence was not unexcused: he could not work because his truck was unavailable, and he stayed in constant contact with the Company in order to return to work as soon as possible. (SER10,20;SER49-68.) Andrade's and Campos' contradictory testimony was discredited by the Board and is of no weight. (SER11-12.)

## **2. Pizano**

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Pizano. Based on much of the same evidence adduced with regard to Marquez, the Board found the General Counsel to have made a similarly strong showing of discriminatory animus in Pizano's discharge: the uncontested retaliatory reduction of Pizano's work; Sencion Sr.'s direct threats of retaliation; Andrade's impression that Pizano was a "whiner and complainer"; and the fact that Pizano was discharged while the

representation proceeding was still underway and only 5 weeks after the Company fired Marquez. (SER19-20.)

Although the Company claimed that it discharged Pizano because its insurer would no longer cover him, the Board properly rejected that defense. Andrade proactively contacted the insurer to have Pizano deemed uninsurable. When she learned that the insurer would cover Pizano if given proof that he was not at fault for the April 2009 accident, she deliberately withheld this information from Pizano and never submitted the proof she herself had. Once more the Board discredited Andrade's fabricated version of events, upon which the Company exclusively relied. (SER11,21.)

The Company's objections – which are limited to the Board's rejection of its affirmative defense – are either flatly mistaken or nugatory. The Company is wrong (Br.16) that no evidence supports the Board's finding that Andrade possessed the CHP report exculpating Pizano. Pizano credibly testified that he gave a copy of the report to Andrade the same day he picked it up from the CHP. (SER11,21;SER195-96.) And the Company improperly impugns (Br.17) the Board's decision for mentioning that Andrade tolerated probationary drivers besides Pizano. Although not an exact comparison, Andrade's continued employment of other drivers whom the insurer had found to have problematic driving records (SER279-92,380-414) casts suspicious light on her crusade against

Pizano. And it bolsters the Board's conclusion that Andrade's reasons for discharging Pizano did not involve insurance coverage.

Finally, the Company only calls further attention to Andrade's damning admissions to Betancourt by unsuccessfully attempting to whitewash them (Br. 17). Andrade explicitly instructed Betancourt to remove language from an email because "she didn't want to give [Pizano] the opportunity to provide proof" that he was not at fault. (SER11;SER278). Andrade's explanation that Pizano "had too many points" is nonsensical: the insurer was still willing to cover Pizano (SER379), and Pizano's driver's license was still valid (SER190).

### **III. THE PRESIDENT'S RECESS APPOINTMENTS TO THE BOARD ARE VALID**

In addition to challenging the merits of the Board's determination, Respondents urge that the Board lacked a quorum when it issued its August 31, 2012 order, because two Board members sitting at the time were allegedly appointed in violation of the Recess Appointments Clause, Art. II, § 2, cl. 3.<sup>51</sup>

The President acted well within his constitutional authority in making these appointments during a twenty-day Senate recess. The Senate was closed for business between January 3 and January 23, 2012, per a Senate order adopted the

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<sup>51</sup> Respondents also challenge the recess appointment of a third Board member, Terrence Flynn, but he resigned July 24, 2012, before the Board issued its order here. *See* Members of the NLRB Since 1935, <http://www.nlr.gov/members-nlr-1935>.

previous December. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The Senate called its break “the Senate’s recess.” *Id.* And under its own 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 seconds, it expressly ordered that “no business” would be conducted even at those times.

At the start of this lengthy Senate absence, Board member Craig Becker’s term ended, and the Board’s membership fell below the statutorily mandated quorum of three members, leaving the Board with only two members and unable to fully carry out its congressionally mandated mission. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010). Accordingly, on January 4, 2012, the President invoked his Recess Appointments Clause authority to appoint three new members (Terrence Flynn, Sharon Block and Richard Griffin).<sup>52</sup>

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<sup>52</sup> Flynn’s nomination had been submitted to the Senate in January 2011. *See* 157 Cong. Rec. S68 (daily ed. Jan 5, 2011). Block’s nomination had been submitted on December 15, 2011, the same day the President withdrew his previous nomination of Becker, after the Senate had delayed action on Becker’s nomination for over two years. *See* 155 Cong. Reg. S7277 (daily ed. July 9, 2009); 157 Cong. Reg. S8691 (daily ed. Dec. 15, 2011). Griffin’s nomination was submitted that day as well, to fill a seat that had become vacant several months earlier. *See* 157 Cong. Reg. S8691 (daily ed. Dec. 15, 2011).

Respondents challenge the President’s appointments on three grounds. First, Respondents suggest that because the Senate convened periodic and purely “*pro forma*” sessions, the Senate’s twenty-day break from business was actually a series of shorter breaks, each individually too brief to constitute a “Recess of the Senate.” (Br. 20-21.) Next, they urge that the President could not make these recess appointments because the recess occurred during the Senate’s annual legislative session rather than after the conclusion of the session—that is, during an *intra*-session recess rather than an *inter*-session recess. (Br. 19-21.) Finally (and without acknowledging an *en banc* decision of this Court to the contrary) Respondents argue that the President may not use his recess appointment power to fill vacancies that first *arose* before the recess. (Br. 21-22.) Respondents’ arguments are meritless.

**A. The President Made the Challenged Appointments During a Twenty-Day Senate Recess**

1. 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. At the Founding, like today, “recess” referred to 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.” 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and

1706); 2 Samuel Johnson, *Dictionary of the English Language* 1650 (1755) (“remission or suspension of any procedure”). *See also Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (*en banc*) (citing various dictionary definitions).

The “main purpose” of the Recess Appointments Clause was “to enable the President to fill vacancies to assure the proper functioning of our government.” *Evans*, 387 F.3d at 1226. As the Federalist Papers explained, the Clause provides an “auxiliary method of appointment, in cases in which the general method”—Senate advice and consent—“was inadequate.” *The Federalist No. 67*, at 410 (Hamilton) (Clinton Rossiter ed., 1961). The Recess Appointments Clause thus plays a vital role in the constitutional design by supplying a mechanism for filling vacancies, and by maintaining the continuity of government operations when the Senate is unavailable. 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 of Senate absence, there may be vacancies that are “necessary for the public service to fill without delay.” *Federalist No. 67, supra*, at 410. The Clause addresses this public need by “authoriz[ing] the President, singly, to make temporary appointments” in such circumstances. *Ibid.*

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 in 1905, 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 stressed that “[t]he word ‘recess’ is one of ordinary, not technical, signification” and is used in the Recess Appointments Clause “in its common and popular sense.” *Id.* at 1. Accordingly, the report defined the constitutional phrase in functional terms, concluding that Senate recesses occur “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 Appointments Clause is in accord. Attorney General Daugherty explained in 1921 that the relevant inquiry is “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, the Attorney General 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).

The Clause’s meaning is also informed by “the construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced.” *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929); *see also Evans*, 387 F.3d at 1225. Since the Founding, Presidents have made thousands of recess appointments, including members of the President’s Cabinet, Supreme Court Justices, and other principal officers. Those appointments have occurred in a variety of circumstances in which the Senate was unavailable to provide advice and consent: during intersession and intrasession recesses of the Senate, at the beginning of recesses and in the final days of recesses, during recesses of greatly varying lengths, and to fill vacancies that arose both before and during recesses.<sup>53</sup> For example, President George W. Bush recess appointed William Pryor to serve as a court of appeals judge during a 10-day break in the Senate’s business. Hogue, *Intrasession Recess Appointments*, *supra*, at 32. The

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<sup>53</sup> *See, e.g.*, Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 28-32 (Apr. 23, 2004) (listing intrasession recess appointments in recesses as short as nine days); Hogue et al., Cong. Res. Serv., *The Noel Canning Decision and Recess Appointments Made from 1981-2013* (Feb. 4, 2013).

Eleventh Circuit, sitting *en banc*, upheld that appointment, *see Evans*, 387 F.3d 1220, and the Senate later confirmed Pryor to the post.<sup>54</sup> Indeed, Congress has generally acquiesced in these historical exercises of recess appointment power, including by authorizing the payment of recess appointees.<sup>55</sup>

Thus, when the Senate breaks from its usual business in such a manner and for such a duration that it is, as a body, unavailable to provide advice and consent, the Recess Appointments Clause lets the President make temporary appointments to ensure continuity of government functions. The President's exercise of that power (and judicial review thereof) must be guided by the purpose, historical understandings, and practical construction given the Clause throughout history.

2. The President properly determined that the Senate's 20-day break in January 2012 fits squarely within the Clause's traditional understanding. The break was not a brief intermission in business for a weekend, evening, or lunch. Instead, the Senate ordered that it would not conduct business during the entire

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<sup>54</sup> Federal Judicial Center, *Biographical Directory of Federal Judges: William Holcombe Pryor, Jr.*, at <http://www.fjc.gov/servlet/nGetInfo?jid=3050&cid=999&ctype=na&inststate=na>.

<sup>55</sup> *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 of the Attorney General as establishing the "accepted view" of the Recess Appointments Clause, and interpreting the Pay Act in a consistent manner).

period from January 3, the start of the second Session of the 112th Congress, until January 23. 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).<sup>56</sup> Under Senate procedures, because the order was adopted by unanimous consent, recalling the Senate to conduct business would have also required unanimous consent. 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).

By providing that “no business” could be conducted for 20 consecutive days, even during the intermittent *pro forma* sessions, this order created a 20-day break from usual Senate business. The *pro forma* sessions were the antithesis of regular working Senate sessions. They were (as the name confirms) mere formalities

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<sup>56</sup> This order also provided for an earlier period of extended Senate absence punctuated by *pro forma* sessions for the final weeks of the 112th Congress’s first Session. *Id.* On January 3, 2012, that Session ended and the second Session began, by operation of the Twentieth Amendment. *See* U.S. Const. amend. XX, § 2. We thus assume the Senate took two separate intrasession recesses, one on each side of this January changeover.

whose principal function was to allow the Senate to cease business. Because it could conduct “no business,” the Senate was unavailable to provide advice or consent as part of the ordinary appointments process. And this period of unavailability was twice as long as the period acknowledged by the Eleventh Circuit to constitute a Senate recess in *Evans v. Stephens*. The 20-day break from business thus constituted a recess under the ordinary, well-established meaning addressed above.

Consistent with the President’s understanding, the Senate *itself* specifically referred to its break as a “recess” and arranged its affairs accordingly. For example, when it scheduled the forthcoming *pro forma* sessions, the Senate arranged 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 legislative appointments “notwithstanding the upcoming recess or adjournment”). The Senate has taken similar steps before long recesses that did not contain *pro forma* sessions,<sup>57</sup> further indicating that the Senate viewed its January 2012 break as a comparable recess.

**3. a.** Nonetheless, in challenging the President’s appointments, Respondents invoke the Senate’s scheduling of periodic “*pro forma* sessions,” and

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<sup>57</sup> See, e.g., 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010).

appear to argue that they transformed the 20-day break into a series of shorter periods that each do not count as part of a 20-day “recess.” Respondents are incorrect. The *pro forma* sessions did not alter the continuity or essential character of what the Senate itself termed its “recess.” As explained, the Senate itself ordered that “no business [was] to be done” either during the *pro forma* sessions or between them.

Indeed, the *pro forma* sessions were not designed to permit the Senate to do business at any time during the 20-day recess, but rather to ensure that business was *not* done throughout that time. Historically, when the Senate wanted to break from regular business over an extended period, the House and Senate passed a concurrent adjournment resolution authorizing the Senate to cease business. *See* Brown, et al., House Practice, at 8-9 (2011). 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 winter and summer holidays. *See Sessions of Congress, Congressional Directory for the 112th Congress* 536-38 (2011) (“*Congressional Directory*”). These periodic *pro forma* sessions were undertaken in an effort to enable the Senate to break for an extended period without a concurrent adjournment resolution but still claim compliance with the constitutional requirement in the Adjournment Clause, U.S. Const. art. I, §5, cl.4, that neither House adjourn for more than three days without the other’s

concurrence. Whatever the efficacy of the *pro-forma*-session device for Adjournment Clause purposes—a provision that only impacts internal congressional affairs—it cannot control matters outside the Legislative Branch, *see Chadha*, 462 U.S. at 955 n.21, such as the President’s recess appointment powers or the official actions of federal Officers appointed under that Clause. *See* pp. 50-51, *infra*.<sup>58</sup>

That the Senate sought to facilitate its 20-day break from business by using one procedural mechanism (*pro forma* sessions) rather than another (concurrent adjournment resolution) makes no difference under the Recess Appointments Clause. For purposes of that Clause, adjournment orders directing *pro forma* sessions are indistinguishable from concurrent adjournment resolutions, because both are designed to enable the Senate as a body to cease business (including voting on nominations) for an extended period, thereby enabling Senators to return home without concern that business could be conducted in their absence. That one Senator gavel in and out the *pro forma* sessions, with no other Senator needing to

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<sup>58</sup> Respondents’ invocation of the Rules of Proceedings Clause, which provides that “[e]ach House may determine the Rules of its Proceedings,” U.S. Const. art. I, § 5, cl. 2, is particularly inapposite because the Senate itself described the relevant break as a “recess.” Moreover, Congress cannot unilaterally determine whether there is a recess within the meaning of the Recess Appointments Clause, as that question implicates the President’s Article II powers. *See INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (explaining that the Rules of Proceedings Clause gives Congress authority to establish rules only to govern the Senate’s “*internal* matters” and “only empowers Congress to bind itself”).

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.

Contrary to the suggestions in recent divided opinions of the Third and Fourth Circuits, this essential conclusion is not altered by the fact that the Senate passed legislation on December 23, 2011—during a session originally scheduled to be *pro forma*. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 231 (3rd Cir. 2013) (citing 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011)), *pet. for rehearing filed* (July 1, 2013); *NLRB v. Enterprise Leasing Co.*, 722 F.3d 609, 659 (4th Cir. 2013). By enacting that legislation, the Senate transformed a scheduled “*pro forma*” session into a regular working session. Indeed, messages the House had sent on December 19 were laid before the Senate after the legislation passed on December 23—something which did not happen during an earlier *pro forma* session. *Compare* 157 Cong. Rec. S8787 (Dec. 20, 2011), *with id.* at S8789 (Dec. 23, 2011)). Thus, if the passage of legislation on December 23 is relevant at all, it would mean at most that the Senate resumed its previously scheduled recess after that date; Respondents do not suggest that the Senate passed legislation or conducted any business of any kind during the 20-day break at issue here, which began January 3, 2012.

Even if the Senate had wanted to do business in January, it could have done so only by *unanimously* overriding its previous order, which prohibited business

during the January break. Thus, a single objecting Senator could have prevented the Senate from conducting any business, even if every other Senator wanted to override the Senate’s prior order. That is a *more* demanding standard than is ordinarily required to terminate other indisputable recesses in order to conduct business.

Indeed, that the Senate retained the ability to override its recess order to conduct business in a highly restricted manner provides no basis for distinguishing the January 2012 recess from many other recesses that even Respondents would concede constitute recesses for appointments purposes. Concurrent adjournment resolutions—including some that end a Senate session—often contain provisions allowing congressional leadership to reconvene either or both Houses to conduct business if the public interest so requires, before a recess’s end.<sup>59</sup> The mere possibility that leadership might reconvene the Senate to conduct business during a recess commenced through such a concurrent resolution does not render the President unable to make recess appointments.<sup>60</sup>

**b.** As noted, it is immaterial that the Senate may regard periodic *pro forma* sessions as fulfilling its obligations under the Adjournment Clause, U.S. Const. art.

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<sup>59</sup> See generally Brown, *supra*, at 9.

<sup>60</sup> The *New Vista* majority attempted to distinguish this situation by asserting that the Senate in some sense “has convened” during *pro forma* sessions. It is difficult to fathom what difference that makes, where the Senate is barred from conducting business during the *pro forma* sessions.

I, §5, cl.4, which gives each House the power to ensure the simultaneous presence of the other so that they can together conduct legislative business.<sup>61</sup> We may assume *arguendo* that, insofar as that matter concerns solely the interaction of the two Houses, Congress could have some leeway to determine whether a particular practice comports with the Clause. And each House has the ability to respond to, or overlook, any potential violation of the Clause.<sup>62</sup>

But the question presented here—whether the President appropriately determined that the Senate was in recess for appointment purposes—is answered by the plain meaning of the Recess Appointments Clause and the Senate’s own actions, including its explicit order that it would conduct “no business” during its January break, and its characterization of that break as “the Senate’s recess.” This Court need not and should not reach out to determine whether the Senate complied with the Adjournment Clause.<sup>63</sup>

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<sup>61</sup> 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”).

<sup>62</sup> 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*, *supra*, at 15.

<sup>63</sup> To resolve that issue, the Court would need to decide not only whether the Senate “adjourn[ed] for more than three days” within that Clause’s meaning, but whether it did so “without the Consent” of the House. Art. I, § 5, cl. 4. Since the

4. Respondents' reliance on *pro forma* sessions which were designed to ensure that Senate business was *not* conducted during the recess is further undermined by serious separation-of-powers concerns. The Supreme Court has condemned congressional action that "disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted). And this Court has eschewed an interpretation of the Recess Appointments Clause that would require offices to go unfilled for an extended period when the Senate was unavailable. *See United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir.1985) (*en banc*). Allowing "*pro forma* sessions" to disable the President from acting under the Recess Appointments Clause would cause both these problems.

First, Respondents' position would frustrate the constitutional design by creating prolonged vacuums of appointment authority in which there would be no means to fill vacancies that are "necessary for the public service to fill without

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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. The question of consent by the other House would ordinarily be an issue for resolution between the two Houses, not for the courts. And even if the question were judicially cognizable, its answer is not entirely clear. The House was aware of the Senate's adjournment order, but rather than objecting, 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).

delay.” *Federalist No. 67*, at 410.<sup>64</sup> Prior to 2007, the Senate had used *pro forma* sessions only on isolated occasions for short periods.<sup>65</sup> But since 2007, the Senate has regularly used *pro forma* sessions in an effort to allow for extended suspensions of business without the House’s consent under the Adjournment Clause.<sup>66</sup> Indeed, on at least five different occasions in the past few years, the Senate used *pro forma* sessions to facilitate breaks 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). And Respondents’ position would allow the Senate to use *pro forma* sessions to facilitate even longer breaks without triggering the Recess Appointments Clause. *See New Vista*, 719 F.3d at 261 (Greenaway, J., dissenting) (“[W]hat if the Senate remained in *pro forma* sessions while it broke for six to nine months, as was its routine at the time of ratification, hoping that this would prevent the President from making recess appointments?”).

Second, Respondents’ position would upend a long-standing balance of power between the Senate and President. The constitutional structure requires the

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<sup>64</sup> 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 this power as a sufficient solution.

<sup>65</sup> *See, e.g.*, 142 Cong. Rec. 2198 (Feb. 1, 1996).

<sup>66</sup> *See generally Congressional Directory, supra*, at 536-38; VanDam, Note, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 N.W.U. L. Rev. 374-78 (2012).

Senate to make a choice: *either* remain “continually in session for the appointment of officers,” *Federalist No. 67*, and so have the continuing capacity for advice and consent; *or* “suspen[d] . . . business,” II Webster, *supra*, at 51, and allow its Members to return home free from the obligation to conduct business during that time, whereupon the President can make temporary appointments to vacant positions. This understanding of the Senate’s constitutional alternatives is evidenced by, and has contributed to, past compromises between the President and the Senate.<sup>67</sup> Under Respondents’ view, however, the Senate would have had little, if any, incentive to so compromise, because it could always divest the President of his recess appointment power through the simple expedient of punctuating extended recesses of the Senate as a body with fleeting *pro forma* sessions attended by a single Member where no business was to be conducted.

History provides no support for that constitutional understanding. To the contrary, the Senate had never before 2007 even arguably purported to be in session for Recess Appointments Clause purposes, while being actually dispersed and conducting no business as a body. That historical record “suggests an assumed *absence* of such power.” *Printz v. United States*, 521 U.S. 898, 907-08 (1997).

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<sup>67</sup> 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 recess appointment power “while Congress [was] away.” Jesse Holland, Associated Press, *Deal made on judicial recess appointments*, May 19, 2004.

Indeed, the Senate’s “prolonged reticence” to assert that the President’s recess appointment power could be so easily nullified 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).

In contrast, upholding the appointments would not vitiate the advice and consent process. The Senate, as always, can remain in session to conduct business and thereby preclude recess appointments. In any event, the facts of *this* case are clear: the Senate took a twenty-day break during which it was unavailable for advice and consent. Under the practical construction given the Recess Appointments Clause by the Senate, and by Presidents of both parties for nearly a century, that period was a “Recess of the Senate.”

**B. The President’s Recess Appointment Authority Is Not Confined to Intersession Recesses**

Respondents also argue that the appointments here were invalid because they were made during an *intrasession* recess (a recess occurring after the start of the Congressional session) instead of an *intersession* recess (a recess *between* congressional sessions). Intersession recesses follow a specific type of adjournment known as an adjournment *sine die* (without day), which terminates an enumerated legislative “session.” Robert, *Robert’s Rules of Order* 109-10, 169-70 (1876). When a legislature instead adjourns to a particular day, the adjournment

does not end the session and the resulting recess is commonly referred to as an *intrasession* recess.

Although Respondents’ argument that the Recess Appointments Clause applies only to some recesses was accepted recently by the D.C. Circuit, and by divided panels in the Third and Fourth Circuits,<sup>68</sup> it was rejected nearly a decade ago by the *en banc* Eleventh Circuit in *Evans*. Indeed, restricting Presidential recess appointment authority to intersession breaks is textually unfounded, contrary to history and logic, and would invalidate at least 500 civilian appointments from 1867 onwards—including those of a CIA Director, a Federal Reserve Chair, fifteen Article III judges, and numerous other critical government officials.<sup>69</sup> This Court should follow *Evans* and the settled practices of political branches on which *Evans* relied.

1. The Recess Appointments Clause refers to “the Recess of the Senate,” Art. II, § 2, cl. 3, without differentiating “between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. That phrase would have been naturally understood at the Framing to encompass both types of recesses. As noted, the plain meaning of “recess” is a “period of cessation from usual work,” 13 *Oxford English Dictionary*

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<sup>68</sup> See *Noel Canning v. NLRB*, 705 F.3d 490, 499-507 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861; *New Vista*, 719 F.3d at 218-44; *NLRB v. Enterprise Leasing Co.*, 722 F.3d at 646-660.

<sup>69</sup> Hogue, *The Noel Canning Decision*, *supra*, at 4-28; Hogue, *Intrasession Recess Appointments*, *supra*, at 3-32.

322-23 (2d ed. 1989) (citing 17th and 18th Century sources), which is equally applicable to intrasession and intersession recesses. And in the specific context of legislative usage, the term “recess” encompassed both intrasession and intersession breaks—a point well illustrated by the British Parliament, whose practices formed the basis for American legislative practice.<sup>70</sup> And Founding-era legislative practice in the United States was similar. In the 1770s and 1780s, officials in Pennsylvania and Vermont understood state constitutional provisions referring to “the recess of [the legislature]” to encompass intrasession recesses, and in 1798 New Jersey’s governor similarly interpreted that phrase in the federal Constitution’s Senate Vacancies Clause. *New Vista*, 719 F.3d at 225-26 & n.16.<sup>71</sup> And, significantly, the Articles of Confederation empowered the Continental Congress to “appoint” a Committee of the States “in the recess of Congress” Arts. IX & X. The only time Congress did so was for a scheduled *intrasession* recess in 1784. *See* 26 *J.*

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<sup>70</sup> *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (1812) (describing a “recess by adjournment” as one occurring during an ongoing “session”).

<sup>71</sup> In addition to acknowledging this, the Third Circuit properly rejected *Noel Canning*’s attempt to counter with a North Carolina example. 719 F.3d at 224 n.14. *New Vista* also properly rejected a number of other textual points made in *Noel Canning*, and repeated in *Enterprise*. *Id.* at 223-24 (rejecting reliance on a supposed distinction between the Constitution’s use of the words “recess” and “adjournment”); *id.* at 227-28 (use of the word “the” is “uninformative”).

*Continental Cong. 1774-1789*, at 295-96 (Gaillard Hunt ed., 1928); 27 *id.* at 555-56.<sup>72</sup>

Although the Third Circuit in *New Vista* acknowledged this extensive evidence regarding the plain meaning of the constitutional text, it concluded that the term “recess” was ambiguous. 719 F.3d 227-28. But that conclusion was based solely on the erroneous assertion that the Framing-era constitutions of Massachusetts and New Hampshire used “recess” to refer only to intersession breaks. *Id.* at 224-25.

To support its reading, *New Vista* observed that both constitutions allowed the executive to “prorogue” or “adjourn” the legislature during “the session,” yet only “prorogue” the legislature when the legislature was “in recess.” *Id.* And after making an unstated assumption that “the session” referred to in those constitutions was the formal annual session of the state legislatures, *New Vista* reasoned that the term “recess” as used by these states could encompass only intersession breaks. *Ibid.* But that unstated assumption is historically inaccurate: in those constitutions “the session” generally referred to the shorter periods of time that the legislature was sitting during the annual legislative period, and not the annual legislative

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<sup>72</sup> *New Vista* thought this example lacked weight because Congress failed to reconvene on schedule, *see* 719 F.3d at 226 n.18, but when Congress appointed the Committee it could not have known of the future scheduling issue. Thus, it made its appointment for a planned intrasession recess.

period itself.<sup>73</sup> So “recess” in those constitutions referred to any period of time that the legislature was not sitting, including those that occur during the legislative year—what in the parlance of the Federal Constitution would be an *intrasession* recess.

Then-contemporaneous usage further refutes *New Vista*’s erroneous understanding. Indeed, Massachusetts legislators in the 1780s referred to periods after an “adjournment” as a “recess”—an impossibility if the Third Circuit’s historical understanding were correct.<sup>74</sup> And the Massachusetts Supreme Judicial Court recognized in 1791 that “recess” can encompass breaks during the annual legislative period, *see Opinion of the Justices*, 3 Mass. 565, 567 (1791).<sup>75</sup>

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<sup>73</sup> Indeed, the Massachusetts constitution provided for the reimbursement of legislators’ travel expenses “once in every session, and no more.” Mass. Const. of 1780, pt. I, ch. I, § 3, art. II, cl. iv. Members of the General Court were reimbursed for every sitting, including those following adjournments to a day certain. 1781-1782 Mass. Acts, 665, 755, 857, 991-92. The New Hampshire legislature used the term “session” similarly. *See, e.g., 20 Early State Papers of N.H.* 452, 4455 (A. Batchellor, ed., 1891) (discussing “communications received since the last session,” which were received during a recess precipitated by a non-*sine die* adjournment).

<sup>74</sup> Massachusetts legislative journals from the 1780s are available at the Massachusetts State Archives. As examples, we refer the Court to the entries in the Senate Journal from March 9, 1782; July 11, 1783; and October 18, 1783.

<sup>75</sup> In any event, constitutional provisions that (unlike the federal Constitution) drew distinctions between concepts like “adjournment” “prorogation,” and “dissolution,” shed no light on the language used in the Recess Appointments Clause.

*Noel Canning* also relied on a flawed, albeit different, historical analysis to support its erroneous ruling. It pointed to a provision of the North Carolina constitution that does not use the same language as the Recess Appointments Clause. See 705 F.3d at 501 (citing N.C. Const. of 1776, art. XX). And it cited *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819), for the proposition that this clause was interpreted to not apply to intrasession recesses. *Ibid.* But *Beard* was decided on unrelated procedural grounds, and the language on which *Noel Canning* relied came from a single judge’s summary of the defendant’s argument. See 7 N.C. 181. That analysis is no answer to the weight of historical evidence showing that the Framers would have naturally understood “the Recess of the Senate” to encompass inter- and intrasession recesses, and the “great regard” owed to Presidential practice, acquiesced in by the Senate, spanning at least ninety years. See *The Pocket Veto Case*, 279 U.S. at 690.

Interpreting the Clause to encompass all recesses, as the Executive long has done, and not to exclude intrasession recesses as the recent court rulings have done, also best serves the Clause’s purpose. The Senate is equally unavailable to provide advice and consent on nominations during intrasession recesses as during intersession recesses, and the need to fill vacancies can be identical during both. Indeed, 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, Respondents’ position would appear to empower the Senate unilaterally to eliminate the President’s recess appointment power, by recasting an adjournment *sine die* as an equally long adjournment to a date certain. For 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 Respondents’ theory. The Framers could hardly have intended such a result. Nor would the Framers have contemplated depriving the nation of a temporary appointment of a key military commander or national security official, for example, during such a period. Rather, the Framers must have intended the Senate’s practical unavailability to control in such a setting, despite the Senate’s efforts to elevate form over substance in the manner of adjourning and reconvening.

The settled practices and understandings of the political branches further support the government’s interpretation. Since 1867, Presidents have made over 500 civilian appointments during intrasession recesses, and Congress has long acquiesced in this practice.<sup>76</sup> *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[I]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”); *The Pocket Veto Case*, 279 U.S. at 689 (a “practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department ... is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning” (internal marks and citation omitted)).

The Third, Fourth, and D.C. Circuits dismissed this precept of constitutional analysis on the ground that no intrasession appointment had been documented before 1867, and on the belief that such appointments were relatively infrequent until the 1940s. *E.g.* 705 F.3d at 501-03.<sup>77</sup> But before the Civil War there were only five intrasession recesses in excess of three days, all of which occurred in the period around Christmas and New Year’s day, and none of which exceeded 14

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<sup>76</sup> *See* n.69, *supra*.

<sup>77</sup> The Third Circuit discounted President Johnson’s recess appointments in 1867 on the ground that he was later impeached. But Johnson was acquitted, and the key controversy related to a removal statute and not the Recess Appointments Clause. *See Myers v. United States*, 272 U.S. 52, 166-67, 175-76 (1926).

days. *Congressional Directory, supra*, at 522-25. And 1867, 1868, 1921, and 1929 were the only years before the 1940s that the Senate took lengthy intrasession recesses at times other than during the winter holidays. *Id.* at 525-28. All three Presidents in office during those recesses made documented intrasession recess appointments.<sup>78</sup> Thus, the early rarity of intrasession recess appointments likely reflects nothing more than the early rarity of lengthy intrasession recesses, and not any historical view of a lack of authority to make intrasession recess appointments.

2. Against all of the above, *Noel Canning, New Vista, and Enterprise* offered the observation that recess appointments expire at the end of the Senate’s “next Session” as evidence that the Framers must have intended to restrict the recess appointment power to intersession breaks. *E.g. New Vista*, 719 F.3d at 234. But the Framers’ provision of a specified termination point for recess appointments says nothing about whether a recess appointment can occur during an intrasession recess. Intrasession recesses were a common, recognized practice in the Framing Era for legislative bodies that predated the Senate. 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 appointments. *Cf. Whitman v. American Trucking*

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<sup>78</sup> At least 33 intrasession appointments predate 1947, significantly more than the Third and D.C. Circuits believed. Hogue, *Intrasession Recess Appointments, supra*, at 3 (listing 25 such appointments); 9 Comp. Gen 190, 190-91 (1929) (identifying eight additional appointees).

*Association*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

Moreover, there is nothing peculiar about the result that an intrasession recess appointee’s term lasts the remainder of the current session and terminates at the end of the next session. An intrasession recess appointee may be appointed during a recess that occurs at anytime during a session, including near the very end of one. Indeed, some intrasession recesses have extended almost to the end of the enumerated session itself. *See, e.g., Congressional Directory, supra*, at 528, 533, 536. In those situations, the Senate may not have an opportunity before the end of its current session to consider nominees appointed during an intrasession recess. Thus, it is perfectly sensible to have the end of the next session serve as a uniform terminal date for recess appointees, as it ensures that the Senate has a full opportunity to consider nominees regardless of when they receive their appointments.

Moreover, under the original schedule for legislative sessions prior to the Twentieth Amendment, intersession recess appointments could last a significant amount of time. For example, on April 18, 1887, President Grover Cleveland recess appointed William Allen as a district judge. Had he not been confirmed by the Senate, his commission would have lasted until October 20, 1888—a span of 552 days. *See Congressional Directory, supra*, at 526.

There is no reasonable basis to fear that Presidents will 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 intrasession recess appointments are constitutional, Presidents routinely seek Senate confirmation of nominations and have strong incentives to do so because recess appointments are only temporary. Indeed, *New Vista* and *Enterprise* misapprehended the government's arguments when they indicated that the government's position would permit appointments in intrasession breaks shorter than three days. *See* 719 F.3d at 230; 722 F.3d at 649. To be clear, intrasession breaks of such short duration during working Senate sessions do not trigger the President's recess appointment power, and the Executive has long disclaimed appointment power during such breaks. *See, e.g.*, 33 Op. Att'y Gen. at 24-25. Breaks of that duration are not a suspension of the Senate's usual business under the ordinary meaning of the Recess Appointments Clause because, rather than representing a meaningful suspension of ordinary Senate business, they account for those everyday activities such as meals, rest, and worship days that occur on a regular and recurring basis during the course of the Senate's ongoing business. And this standard is an administrable one, consistent with longstanding Executive practice. It is also textually based because it derives from the ordinary meaning of a legislative recess, and is informed by the Adjournment Clause's premise that certain breaks are *de minimis* and hence not

suspensions of ordinary business, as the Supreme Court has recognized in interpreting the Pocket Veto Clause. *See Wright v. United States*, 302 U.S. 583, 593-96 (1938).

**C. The President May Fill Vacancies During the Senate’s Recess that Arose Before that Recess**

Respondents also contend that because these vacancies first arose before the relevant recess, the President could not fill them with recess appointees. That theory has been considered and rejected by this Court *en banc*, and that decision controls here. *See United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*).

## CONCLUSION

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

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

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NATIONAL LABOR RELATIONS	)	
BOARD,	)	
Petitioner,	)	
	)	
v.	)	No. 13-70240
	)	
OS TRANSPORT LLC	)	
	)	
and	)	
	)	
HCA MANAGEMENT, INC.,	)	
Respondents.	)	
<hr/>	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 14,744 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, D.C.  
this 13th day of September 2013

## **RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS**

Relevant provisions of the United States Constitution are as follows:

### **Article I, Section 5**

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

### **Article II, Section 2, cl. 3**

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

### **Article II, Section 3**

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors

and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**Amendment XX, Section 2**

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

Relevant provisions of the National Labor Relations Act are as follows:

**Section 2(3), (11) & (13) of the Act, 29 U.S.C. § 152(3), (11) & (13):**

- (3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 161 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

...

- (11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

...

- (13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

**Section 7 of the Act, 29 U.S.C. § 157:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

**Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3):**

It shall be an unfair labor practice for an employer--

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

...

- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such

an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

**Section 10(a) of the Act, 29 U.S.C. § 160(a):**

[Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

**Section 10(e) of the Act, 29 U.S.C. § 160(e):**

[Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of

such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

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NATIONAL LABOR RELATIONS	)	
BOARD,	)	
Petitioner,	)	
	)	
v.	)	No. 13-70240
	)	
OS TRANSPORT LLC	)	
	)	
and	)	
	)	
HCA MANAGEMENT, INC.,	)	
Respondents.	)	
<hr/>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on September 13, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who are registered users:

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/s/ Linda Dreeben  
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Washington, D.C. 20570

Dated at Washington, D.C.,  
this 13th day of September 2013