

No. 13-2307-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DOVER HOSPITALITY SERVICES, INC.
A/K/A DOVER CATERERS, INC., A/K/A DOVER COLLEGE SERVICES, INC., A/K/A
DOVER GROUP OF NEW YORK, A/K/A DOVER GROUP,
A/K/A QUICK SNACK FOODS, INC.

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of its Decision and Order issued on May 31, 2013, against Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc., a/k/a Dover Group of New York, a/k/a Dover Group, a/k/a Quick Snack Foods, Inc. (collectively, “Dover”), and reported at 359 NLRB No. 126. The Board had jurisdiction over the proceeding below under

Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices.

The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Board’s Decision and Order is final with respect to all parties. The unfair labor practices occurred in New York, where Dover provides retail food services for Suffolk County Community College. (A. 146; A. 36.)¹ The Board’s application for enforcement, filed June 12, 2013, was timely because the Act places no time limit on the initiation of enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether the President was authorized to make recess appointments to the Board when the Senate, for a 20-day period, was convening solely for *pro forma* sessions at which no business would be conducted.

2. Given Dover’s failure to raise its sole merits argument in the proceedings below, whether the Board is entitled to summary enforcement of its finding that Dover violated Section 8(a)(5) and (1) of the Act by failing to timely respond to the Union’s request for information and to provide the information.

¹ “A.” references are to the deferred appendix, and “Br.” references are to Dover’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case is the second time the Board has found that Dover failed to provide information requested by Local 1102 of the Retail, Wholesale & Department Store Union, United Food & Commercial Workers Union (“the Union”), which represents food service employees working for Dover at the Selden and Brentwood campuses of Suffolk County Community College. As the Board noted in both cases, Dover and the Union were parties to a series of collective-bargaining agreements covering those employees, the most recent of which expired in 2010. In the first case, *Dover I*, the Board found that Dover violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with information it requested in January 2011 during negotiations for a successor agreement.² In the instant case, *Dover II*, the Board found (A. 144-50) that Dover again violated the Act by failing to respond in a timely manner to the Union’s August 2011 request for similar information covering a subsequent time period, and by refusing to provide that information. The Board’s findings in *Dover I* and the procedural posture of that case are outlined below, followed by the procedural history, findings of fact, and conclusions of law in the instant case, *Dover II*.

² See *Dover Hospitality Servs., Inc. (“Dover I”)*, 358 NLRB No. 84, 2012 WL 2885990, at *1, *7-*11 (July 12, 2012), *application for enforcement filed*, No. 12-4144 (2d. Cir.) (Board’s motion for default judgment pending). (A. 64.)

I. THE PRIOR CASE: *DOVER I*

A. The Board's Findings

In *Dover I*, the Board found that during the negotiations for a collective-bargaining agreement to succeed the one that expired in 2010, the Union proposed increases in wages and benefits. *Dover I*, 2012 WL 2885990, at *3-*4. In response, Company Owner Isaac “Butch” Yamali asserted several times that Dover “could not afford the current union contract, let alone any increases in [the] new contract” proposed by the Union. *Id.* at *4. The Board based its finding that Yamali made these statements on the mutually corroborative testimony of multiple witnesses who attended the negotiations, including Dennis Romano, the Union’s director of collective bargaining. *Id.* at *5. The witnesses’ testimony went un rebutted because Yamali did not testify. *Id.*

In order to verify Dover’s assertion of an inability to pay, the Union sent a letter to Dover on January 5, 2011, requesting certain financial information.³ *Id.* at *5-*6. In its letter, the Union specified that the information was “needed to verify [Dover’s] continued position at the bargaining table that the current labor agreement is an impediment to your continued existence” at the college campuses. *Id.* at *6. Dover never responded to the Union’s letter or provided any of the

³ The Union requested the following information for 2005-2009: annual state and federal tax returns; audited income statements and balance sheets; and copies of all W-2 and W-3 forms. *Dover I*, 2012 WL 2885990, at *5-*6.

requested information. *Id.* The Board found that Dover violated Section 8(a)(5) and (1) of the Act by failing to provide the requested information. *Id.* at *7-*11.

B. The Pending Enforcement Action

Following the issuance of *Dover I*, the Board filed an application for enforcement of its Order in this Court on October 17, 2012. *See NLRB v. Dover Hospitality Servs., Inc.*, No. 12-4144 (2d Cir.). Dover subsequently failed to file an opening brief. Accordingly, on January 15, 2013, the Board filed a motion for default judgment, which remains pending before the Court.⁴

II. THE INSTANT CASE: *DOVER II*

A. The Board's Findings of Fact and Procedural History of the Case

Given Dover's continued failure to respond to the January 2011 request that was the subject of *Dover I*, the Union mailed a second request for information to Company Owner Yamali in August 2011. (A. 147; A. 21-22, 81.) In its letter, the Union requested the same categories of financial information that it was seeking *Dover I*, but covering a more recent time period, 2010. (*Id.*) In addition, the Union asked Dover to provide information concerning several "also known as"

⁴ The Court deferred consideration of the Board's motion pending the Supreme Court's decision in *NLRB v. Noel Canning* (No. 12-1281). *NLRB v. Dover Hospitality Servs. Inc.*, No. 12-4144 (2d Cir. Feb. 27, 2014).

entities that the Union had reason to believe were related to Dover.⁵ (*Id.*) The Union again clarified that it “needed [the information] to verify [Dover’s] continued position at the bargaining table that the current labor agreement is an impediment to [Dover’s] continued existence” at the Brentwood and Selden campuses. (*Id.*)

Dover did not respond to the Union’s request for approximately 13 months. (A. 145, 147; A. 23, 50.) During that time, the Union filed charges, and the Board’s General Counsel issued a complaint alleging that Dover violated the Act by failing to provide the information. (A. 145; A. 43.) Then, on September 19, 2012, the day before the unfair labor practice hearing, counsel for Dover contacted Romano, the Union’s director of collective bargaining, and promised to provide W-2 forms and state and federal tax returns for 2010. (A. 147; A. 23.) Romano explained that this information was not fully responsive to the Union’s request, and asked whether Dover would also provide the audited income statements. (*Id.*) Counsel replied that he did not have that information. (*Id.*) Romano stated that this was not acceptable. (*Id.*)

Later the same day, Dover emailed the W-2 forms and tax returns to the Board’s regional office, but not to the Union. (A. 147; A. 23, 72, 76, 83, 86.)

⁵ The Union requested the following 2010 information for Dover and the listed entities: annual state and federal tax returns; audited income statements and balance sheets; and copies of all W-2 and W-3 forms. (A. 147; A. 21-22, 81.)

Upon learning of this omission, the regional office told Dover that it had to send the information directly to the Union, and that this obligation would not be relieved by the Board providing a courtesy copy to the Union. (A. 147; A. 72, 76.) Despite this guidance, Dover did not send the information to the Union, which only received a courtesy copy from the Board. (A. 147; A. 23.)

That same evening, Dover emailed a letter to the Board stating that it would not appear at the hearing scheduled for the following day. (A. 147; A. 80.) In its letter, Dover added that it had “now complied with the Union’s request and respectfully submits that the instant matter should be closed.” (*Id.*)

The hearing took place as scheduled, without Dover’s presence, and with only Romano testifying. (A. 147; A. 5, 18.) Dover never gave any of the requested information directly to the Union. (A. 147; Tr. 23.) Nor did Dover provide to any party its audited income statements and W-3 forms, or any of the information regarding the “also known as” entities identified in the Union’s August 2011 letter. (A. 147; A. 23-28, 83, 86.) The one income tax return that Dover furnished to the Board’s regional office pertained to “Dover Gourmet Corp. & Subsidiary Dover Hospitality Services, Inc.,” an entity not mentioned in the Union’s letter. (A. 147; A. 26, 86.) Accordingly, the administrative law judge issued a decision finding that Dover’s failure to respond in a timely manner to the

Union's request, and to provide the information, violated Section 8(a)(5) and (1) of the Act. (A. 149.)

B. The Board's Conclusions and Order

On the foregoing facts, the Board (Chairman Pearce and Members Griffin and Block) affirmed the judge's finding that Dover violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to timely respond to the Union's August 2011 request, and by refusing to provide the information. (A. 144.) The Board's Order requires Dover to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 144, 150.) Affirmatively, the Order requires Dover to provide the Union with the information requested in its August 3, 2011 letter. (A. 150.) The Board's Order further requires Dover to post and electronically distribute a remedial notice, if Dover customarily communicates with its employees by such means. (A. 144, 150.)

SUMMARY OF ARGUMENT

Dover contends that the Senate was not in recess on January 4, 2012, for purposes of the Recess Appointments Clause, because the "*pro forma*" sessions it was holding every three days transformed what would have been a 20-day recess into a series of breaks too short to constitute a recess under the Clause. The Court

should reject that contention. The Senate expressly ordered that it would conduct “no business” during the entire 20-day period between January 3 and 23, 2012, and it proceeded to do exactly that. It cannot, through the stratagem of *seriatim pro-forma* sessions, extinguish the President’s express constitutional authority to make recess appointments while simultaneously being unavailable itself to provide advice and consent.

Since 1905 and 1921, respectively, the Senate and the Executive have formally recognized that a “recess” for purposes of the Clause exists during a period of time when the Senate’s members owe no duty of attendance and when, because of its absence, the Senate cannot receive communications from the President or participate as a body in making appointments. That was true throughout the 20-day period here, notwithstanding the periodic *pro-forma* sessions that were being held merely as a matter of form.

Dover notes that, at any *pro-forma* session, the Senate might have overturned its unanimous-consent order directing that “no business” be conducted. But the mere possibility that the Senate might be recalled early cannot prevent a substantial break from being a recess for recess-appointments purposes, because that would make the Clause inapplicable even during traditional recesses pursuant to conditional adjournment resolutions, which typically reserve to congressional leadership the power to recall either or both Houses if the public interest warrants.

Dover also contends that, for several decades, the House of Representatives and the Senate have used *pro-forma* sessions to comply with the Adjournment Clause, which prevents either House from adjourning for more than three days without the consent of the other. The better view, however, is that *pro-forma* sessions do not satisfy the Adjournment Clause. But even if they could—assuming *arguendo* that Congress would likely receive sufficient deference in construing a provision insofar as it principally involves internal legislative affairs—no such deference would be applicable in this circumstance. The deployment of *pro-forma* sessions in an effort to avoid application of the Recess Appointments Clause would disrupt the balance that Article II strikes between the President and the Senate. When the Senate is absent in fact but present only by virtue of a legal fiction, the President may use the auxiliary method of appointment that the Constitution expressly provides for circumstances when the Senate is unavailable to provide its advice and consent and there are vacancies that the public interest requires to be filled, even if only on a temporary basis.

Dover fares no better with its labor law challenges. In the course of negotiating for a successor collective-bargaining agreement, Dover claimed that it could not afford the current agreement's wage rates and benefits or the Union's proposed increases. Having made this assertion, Dover was obligated to provide requested financial information to the Union so that it could evaluate Dover's

claim. In *Dover I*, the Board found Dover violated the Act by failing to respond to the Union's first request for financial information in January 2011. In the present case, *Dover II*, the Board once again found that Dover violated the Act by failing to respond for 13 months to the Union's second request for similar information in August 2011, and by refusing to provide the information. The Board therefore found that Dover failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

On appeal, the Board's finding that Dover violated the Act effectively stands unchallenged. Although Dover asserts that Company Owner Yamali never claimed an inability to pay, it failed to raise that specific objection before the Board as required by Section 10(e) of the Act (29 U.S.C. § 160(e)). As a result, the Court lacks jurisdiction to consider Dover's assertion. In any event, uncontroverted testimony establishes that Yamali claimed Dover was unable to pay the Union's wage and benefit demands. And because Dover sets forth no other merits arguments in its brief, aside from a generic assertion that substantial evidence does not support the Board's decision, it has waived any other challenges to the Board's finding. Accordingly, if the Court rejects Dover's challenge to the recess appointments of Members Griffin and Block, then it should summarily enforce the Board's finding that Dover violated Section 8(a)(5) and (1) of the Act.

STANDARD OF REVIEW

When a party does not contest an issue on appeal, the Court will summarily enforce that portion of the Board's decision and order. *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1307 n.1 (2d Cir. 1990). With respect to contested issues, the Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; accord *G & T Terminal Packaging*, 246 F.3d at 114. The Board's reasonable factual inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*. *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). "This [C]ourt reviews the Board's legal conclusions to ensure that they have a reasonable basis in law." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001).

ARGUMENT

I. THE SENATE WAS IN “RECESS” AT THE TIME THE APPOINTMENTS WERE MADE

In December 2011, the Senate adopted an order by unanimous consent. The order provided that after the Second Session of the 112th Congress commenced at noon on January 3, the Senate would adjourn, reconvening only for *pro-forma* sessions, “with no business conducted,” on five specified dates from January 6 to January 20. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). The order also provided that each *pro-forma* session would be followed immediately by another adjournment, and stated that the Senate would resume business on January 23. *Ibid.* In another order entered the same day, the Senate referred to its impending absence as a “recess.” *Ibid.*

As the Senate’s own order recognized, the Senate was in recess from January 3 until January 23, 2012, a period of 20 days. And after the start of this recess—when the Board’s membership dropped below a quorum—the President invoked his constitutional authority under the Recess Appointments Clause, Art. II, § 2, cl. 3, to appoint new Board members on January 4, 2012.

Dover urges that two of these Board members were appointed in violation of the Recess Appointments Clause.⁶ It categorically asserts that the President may

⁶ Member Flynn, a third recess appointee, had left the Board by the time Dover’s case was decided. *See* National Labor Relations Board, *Members of the NLRB*

not make recess appointments when the Senate is convening every three days for *pro-forma* sessions. Although the issue is currently before the Supreme Court, *see NLRB v. Noel Canning*, No. 12-1281 (oral argument held Jan. 13, 2014), and this Court, *see NLRB v. 833 Central Owners Corp.*, Nos. 13-684 & 13-1240 (oral argument adjourned pending the Supreme Court's *Noel Canning* decision), to the extent the Court addresses it in this case it should reject Dover's argument.⁷

Indeed, Dover does not and cannot dispute the essential facts supporting the President's conclusion that the Senate was in recess under the ordinary and traditional understanding of the Recess Appointments Clause: throughout the 20-day period, the Senate had undertaken to conduct "no business" and was no more

Since 1935, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Mar. 4, 2014).

⁷ In *Noel Canning*, the Supreme Court is also considering whether Presidents may make intra-session recess appointments, and whether Presidents may use recess appointments to fill vacancies that first arose before the recess in question. In this Court, the latter issue has already been resolved in the government's favor. *See United States v. Alocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). The former issue is currently the subject of a circuit split. *Compare Evans v. Stephens*, 387 F.3d 1220, 1224-1226 (11th Cir. 2004) (en banc), *with Noel Canning v. NLRB*, 705 F.3d 490, 499-507 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (June 24, 2013), *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 218-44 (3d Cir. 2013), *petition for reh'g pending* (filed July 1, 2013; stayed July 15, 2013), and *NLRB v. Enterprise Leasing Co.*, 722 F.3d 609, 646-52 (4th Cir. 2013), *petition for cert. filed*, No. 13-671 (Dec. 4, 2013). Dover has elected to raise neither of these issues in its opening brief, even though that brief demonstrates that Dover is aware of the filings in the *Noel Canning* litigation. *Compare* Br. 1-13, 14-61, *with* Joint Brief for Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace at 1, 3, 4-13, 14, 15-20, 29-65, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115 & 12-1153) (brief filed Sept. 19, 2012), *available at* 2012 WL 4182205.

available to sit as a body than it is during a traditional intra-session recess. The Senate cannot unilaterally extinguish the President's constitutional authority to make recess appointments while simultaneously shirking its constitutional responsibility to be available to provide advice and consent.

A. The Senate Is in Recess When It Cannot Receive Communications from the President or Participate as a Body in the Appointment Process

Dover has not disputed that a 20-day recess would, under long-accepted standards, be a sufficient break in the Senate's ability to provide advice and consent to enable the President to make recess appointments. For more than 90 years, the Senate and the Executive have agreed on a functional understanding, under which short intra-session breaks of three or fewer days do not trigger the Recess Appointments Clause, but longer breaks can do so.

The Senate Judiciary Committee explained in 1905 that, for Recess-Appointments-Clause purposes, a "recess" exists during "the period of time when" the Senate's "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." S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905 Senate Report); see also S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 947 & n.46 (1992) (explaining that per Senate precedent, that report remains an authoritative

construction of the term “recess”). The committee thus rejected the proposition that there had been a “constructive” inter-session recess when the Senate was in active session at noon on December 7, 1903, and by operation of law one session automatically terminated and the next began. *Id.* at 3. Just as there was no such thing as a “constructive session” of the Senate, the committee concluded there can be no “constructive recess.” *Id.* at 2.

In 1921, Attorney General Daugherty relied on that report to conclude that the President may make recess appointments during a 28-day intra-session recess. 33 Op. Att’y Gen. at 24-25. He concluded it was reasonable for the President to determine that “there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.” *Id.* at 25. In a passage he described as “unnecessary” to his decision, Daugherty also suggested that an “adjournment for 5 or even 10 days” would not constitute a qualifying recess. *Id.* at 24, 25. Daugherty’s analysis has continued to govern the Executive’s approach, providing the basis for appointments by multiple Presidents during intra-session recesses as short as ten days. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___, at 5-9 (Jan. 6, 2012) (*OLC Pro Forma Op.*), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf; *id.* at 7.

In 1929, the Supreme Court adopted a similar approach with respect to the Pocket Veto Clause (Art. I, § 7, cl. 2), which addresses circumstances in which Congress renders itself unavailable to participate in the legislative process before the end of the ten-day period that the Constitution affords the President to review a bill. The Court held that the President is required to return a bill to the relevant House of Congress only when that House is “sitting in an organized capacity for the transaction of business.” *The Pocket Veto Case*, 279 U.S. 655, 683 (1929). As the Court explained, the House is not available in the constitutionally relevant sense “when it is not in session *as a collective body* and its members are dispersed.” *Ibid.* (emphasis added).⁸

B. Despite the *Pro Forma* Sessions, the 20-day Period at Issue Here Bore the Hallmarks of a Recess

Dover nonetheless contends that the January 2012 *pro forma* sessions were materially indistinguishable from the Senate’s regular sessions. But that is plainly not so. As the “*pro forma*” moniker indicates, the sessions were “[h]eld, made, or done (merely) as a matter of form.” *Oxford English Dictionary* (“*OED*”) s.v. “*pro forma*” (3d ed. June 2007), www.oed.com/view/Entry/238153; *see* 158 Cong. Rec.

⁸ The Court later held that an adjournment of only three days did not make the Senate unavailable for purposes of the Pocket Veto Clause. *Wright v. United States*, 302 U.S. 583, 598 (1938). But it stressed that the bill in question had in fact been “laid before the Senate” two days after the President returned it and that the Court’s holding did not apply to an adjournment for longer than three days. *Id.* at 593, 598.

S5954 (daily ed. Aug. 2, 2012) (Congressional Research Service report describing “‘pro forma’ sessions” as “held for the sake of formality”). In actuality, the entire period from January 3 to 23 bore the hallmarks of a single 20-day recess during which no work was done, no messages were laid before the Senate, and its members were dispersed.

a. The December 17, 2011, unanimous-consent order, *see* 157 Cong. Rec. S8783-S8784, addressed two periods: one at the end of the First Session of the 112th Congress, and one at the beginning of the Second Session. The division between the First and Second Sessions was effectuated automatically (and independent of any *pro forma* session) by Section 2 of the Twentieth Amendment at noon on January 3, 2012. *See* Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 166 (2d ed. 1812). The Senate’s order expressly provided that, throughout both periods, the Senate would “convene for pro forma sessions only, with no business conducted,” at specified times between December 19, 2011, and January 20, 2012. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). Then, according to the order, the Senate would convene on January 23, 2012, in a session that would include “the prayer and pledge,” “leader remarks,” “morning business,” and “executive session.” *Id.* at S8783-S8784. As relevant here, the December 17 order thus barred the Senate as a body from conducting any business—including

providing advice and consent on nominations—for the entire 20-day period between January 3 and 23.

During that 20-day period, the Senate conducted no business whatsoever. It considered no bills, passed no legislation, and voted on no nominees.⁹ No speeches were made, and no debates were held. Each *pro forma* session lasted no more than 30 seconds. *See* 158 Cong. Rec. S3 (daily ed. Jan. 6, 2012); *id.* at S5 (Jan. 10); *id.* at S7 (Jan. 13); *id.* at S9 (Jan. 17); *id.* at S11 (Jan. 20); *see also, e.g., Senate Pro Forma Session, Jan. 6, 2012, C-SPAN, www.c-spanvideo.org/program/303538-1.*

When the Senate finally convened for a regular session on January 23, it began with a prayer and the Pledge of Allegiance. 158 Cong. Rec. S13 (daily ed.). The Acting President pro tempore recognized the Majority Leader, who “welcome[d] everyone back after the long break we had.” *Ibid.* Messages from the President and the House of Representatives that had arrived on January 12 and January 18 were formally laid before the Senate, as were committee reports submitted on January 13. *Id.* at S37, S41.

Thus, just as its order had prescribed, before January 23 the Senate spent 20 days conducting “no business.” That period not only satisfied the plain meaning of the term “recess”: a “period of cessation from usual work” (13 *OED* 322-323), or

⁹ As discussed below (*see* p. 22 & n.10, *infra*), the Senate did pass legislation in the First Session on a day when it had been scheduled to hold a *pro forma* session.

a “suspension of business” (2 Noah Webster, *An American Dictionary of the English Language* 51 (1828)). It also satisfied the understanding of that term the political branches have operated under since 1905, under which Senators evidently understood that they “owe[d] no duty of attendance” and they were unable as a body to “receive communications from the President or participate as a body in making appointments.” *1905 Senate Report* 2.

b. The Senate’s own rules and procedures reinforce the conclusion that the *pro forma* sessions were a stratagem to paper over what was in substance a continuous Senate recess of 20 days. Senate Rule IV, para. 1(a), requires the recitation of a prayer and the Pledge of Allegiance at the start of each “daily session[]”; neither was said at the *pro forma* sessions. Similarly, under the terms of the Senate’s usual standing order, the Secretary of the Senate is authorized “to receive messages from the President” when “the Senate is in recess or adjournment.” 157 Cong. Rec. S14 (daily ed. Jan. 5, 2011). Messages are laid before the Senate only when it returns. Here, the Secretary invoked the standing order to receive messages from the President and the House on January 12 and 18, and those messages were not laid before the Senate as a body until January 23 (*see* 158 Cong. Rec. at S37), indicating that the intervening *pro forma* sessions had been indistinguishable from—rather than interruptions of—an ongoing recess.

Other orders the Senate adopted on December 17, 2011, further support the conclusion that the *pro forma* sessions did not interrupt the Senate's ongoing recess. By rule and practice, it is only while the Senate is in session in its chamber that committees may report bills and submit reports to the full Senate, that the Senate may make legislative appointments to certain boards and commissions, and that the President pro tempore may sign enrolled bills. Before lengthy recesses, however, the Senate regularly adopts orders allowing such acts to occur while the Senate is away. See *Riddick's Senate Procedure* at 427, 830, 925, 1023, 1193. On December 17, 2011, the Senate adopted such orders, notwithstanding the planned *pro forma* sessions. See 157 Cong. Rec. at S8783. And other orders tellingly characterized the upcoming break as "the Senate's recess" (*i.e.*, as a unitary recess, rather than a series of three-day breaks). *Ibid.* If Dover were correct that *pro forma* sessions are no different from any other sessions, those orders would have been unnecessary.

c. Under the circumstances, it was entirely reasonable for the President to rely on the Senate's order that no business would be conducted during its 20-day January break and its repeated descriptions of that impending break as "the Senate's recess." See *United States v. Smith*, 286 U.S. 6, 35-36 (1932) (explaining that "[i]t is essential to the orderly conduct of public business * * * that each branch be able to rely upon definite and formal notice of action by another");

warning against the “uncertainty and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning of a Senate communication).

C. The Mere Possibility that the Senate Might Suspend Its “No Business” Order During the 20-day Period Did Not Prevent that Period from Constituting a Recess

Dover observes that, at a *pro forma* session, the Senate might have overturned its unanimous-consent order directing that “no business” be conducted before January 23, 2012. In particular, Dover stresses that the Senate did conduct business, by passing a bill, during a December 2011 session that had been originally scheduled to be *pro forma*. But the remote possibility that unanimous consent to conduct business would be obtained, despite the December 17 order, cannot suffice to prevent an extended break from being a “recess” in the relevant sense. Indeed, the possibility of reconvening early exists during traditional intra-session—and even inter-session—recesses that take place pursuant to concurrent resolutions.¹⁰

A valid exercise of the recess-appointment power cannot depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess. Indeed, the Senate ordinarily retains the potential to

¹⁰ The Congressional Research Service identified 114 *pro forma* meetings between January 4, 2005, and March 8, 2012, and found only “two at which legislative business appears to have been conducted.” 158 Cong. Rec. at S5954; *see* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011); *id.* at S8789 (Dec. 23, 2011).

conduct business before the end of recesses effectuated by concurrent resolutions of adjournment.¹¹ Such resolutions typically provide—even for adjournments *sine die*—that the congressional leadership may require either or both Houses to resume business during the recess if the public interest warrants; those are, in legislative parlance, “conditional adjournment resolutions.”¹² In addition, the President may always require the Senate to terminate its recess and resume regular business “on extraordinary Occasions.” U.S. Const. Art II, § 3. But the mere possibility that congressional leadership or the President might require the Senate to resume business cannot mean that the Senate is not in recess, for then it could *never* be in recess.

The traditional and established understanding of the Recess Appointments Clause applies with equal force in this setting. The Senate here had unequivocally ordered a cessation of business between January 3 and January 23. To the extent the Senate had the ability to conduct emergency business during its break, it was not because the Senate expressed any intent to do so, or because of anything distinctive about the *pro forma* sessions. Rather, that result was merely a function

¹¹ See, e.g., H.R. Con. Res. 225, 109th Cong. (July 28, 2005) (providing for adjournment between July 29 and September 6, 2005, but allowing for early recall); 151 Cong. Rec. 19,417 (2005) (reconvening early from intra-session recess after Hurricane Katrina); *Riddick’s Senate Procedure* at 1082-1083 (listing instances when “[b]y order, adopted by unanimous consent, the Senate has transacted * * * business during recess”).

¹² See H.R. Doc. No. 111-157, John V. Sullivan, *Constitution, Jefferson’s Manual & Rules of the House of Representatives*, § 84, at 38 (2011).

of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent. The December 17 order thus created a state of affairs in the Senate identical to those produced by a conditional adjournment resolution: the Senate was in recess, but might have resumed business if the public interest required.¹³ In practice, a Senator need not even be in the Senate chamber to block a proposed unanimous-consent agreement.¹⁴ That attribute of the December 17 order was likely essential for its adoption, because it gave Senators some assurance that they could leave Washington, D.C., without concern that any business would be conducted without their consent.

¹³ Indeed, resuming business under unanimous-consent orders is likely to be more difficult than doing so under the usual terms of a conditional adjournment resolution. The latter can be done by congressional leadership, despite objecting members, while the former could be blocked by a single Senator. *See* Martin B. Gold, *Senate Procedure & Practice* 24 (2d ed. 2008).

¹⁴ Before a bill, resolution, or nomination is presented on the Senate floor for unanimous consent, it customarily passes through an extensive clearance process. *See* Christopher M. Davis, Cong. Res. Serv., *Memorandum re: Calling Up Measures on the Senate Floor* (2011); Gold, *supra*, at 15 & 236 n.12. Among other things, the Majority Leader contacts each Senator's office through "a special alert line called 'the hotline' that provides information on [the measure] the leader is seeking to pass through unanimous consent." Sen. Tom Coburn, *Holding Spending*, www.coburn.senate.gov/public/index.cfm/holdingspending. A Senator can invoke "his unilateral ability to object to unanimous consent requests" by imposing a "hold" on a measure or matter "in advance and without having to do so in person on the floor." Gold, *supra*, at 84-85 (citation omitted).

D. Historical Practice Does Not Support the Use of *Pro Forma* Sessions To Prevent the President from Making Recess Appointments

a. As Dover notes, there is prior history of the Senate's using *pro forma* sessions for short periods in an attempt to avoid adjourning for more than three days without the consent of the House of Representatives per the Adjournment Clause (Art. I, § 5, cl. 4), as a means of complying with the Twentieth Amendment's requirement to assemble when a new session begins on January 3, and to achieve other purposes wholly internal to the Legislative Branch. *See, e.g.*, 133 Cong. Rec. 15,445 (1987) (scheduling a single *pro forma* session to allow a cloture vote to ripen).

Since 2007, however, the Senate has often used *pro forma* sessions to paper over substantial breaks in Senate business, including at times (like the winter holidays and August) when, as a matter of traditional practice, there would have been a concurrent resolution of adjournment authorizing the Senate to cease business. *See* 158 Cong. Rec. at S5955 (describing breaks of 31, 34, 43, 46, and 47 days that included *pro forma* sessions); *Official Congressional Directory, 112th Congress 537-38* (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf. In such instances, the *pro forma*-session device has become an alternative means by which the Senate as a body ceases business—including the giving of advice and consent to appointments—for

an extended and continuous period, enabling Senators to return to their States without concern that business will be conducted in their absence without their consent.

b. In Dover’s view, the “explicit purpose” of the *pro-forma* sessions in December 2011 and January 2012 was not an internal legislative one, but a desire to deny the President the authority to make recess appointments. (Br. 53; *see also id.* at 7 (citing letter from 20 Senators asking the Speaker of the House to prevent the Senate from adjourning for more than three days, and letter from 78 Representatives urging prevention of recess appointments).)¹⁵

Dover attempts to trace the use of recess-appointment-preventing *pro-forma* sessions back to 1985, contending that Presidents Reagan and George W. Bush recognized the Senate’s authority to preclude recess appointments by convening in *pro forma* sessions. (Br. 10, 46.)

There is no basis for concluding that President Reagan recognized the validity of such a gambit. Dover invokes (Br. 46-47) a 1999 floor statement by Senator Inhofe purporting to describe the parameters of a 1985 compromise, in

¹⁵ To the extent that Members of the House of Representatives sought to prevent the President from making recess appointments, that only increases separation-of-powers concerns, as the Constitution gives the House no share of the appointment power. See *The Federalist No. 77*, at 519 (Hamilton) (the House’s “unfitness” for participating in the “power of making [appointments]” “will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons”).

which President Reagan agreed to give the Senate leadership advance notice of recess appointments. *See generally* 131 Cong. Rec. 27,686-27,689 (1985) (Sen. Byrd). But the agreement was not, as Dover believes, intended to give the Senate an opportunity to block the recess appointments “by convening pro forma.” (Br. 47 (quoting 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe)).) Instead, as indicated by contemporaneous documents that are now publicly available, the President “agreed only to advise [Senate leaders] of recess appointments before they were made, *not* before the Senate adjourned.”¹⁶ Thus, the arrangement did not reflect any acknowledgment that the Senate could legitimately use *pro-forma* sessions to block recess appointments.

Nor did President George W. Bush recognize the Senate’s authority to preclude recess appointments by convening in *pro forma* sessions. The fact that President Bush did not make recess appointments while the Senate was holding *pro-forma* sessions merely reflects the truism that the advice-and-consent process engages political leaders in a long course of repeated interactions, in which short-

¹⁶ Memorandum from Fred F. Fielding, Counsel to the President, to M.B. Oglesby, Jr., Assistant to the President, Dec. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf; *see also* Memorandum for the Files from Max L. Friedersdorf & Fred F. Fielding, Oct. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf (“At no time did we pledge to advise Senator Byrd of plans to recess appoint *before* the recess occurs. We did indicate that he (Byrd) would be advised *at the time* of the recess appointment.”).

term compromises can be made despite disagreements.¹⁷ Thus, after the recess appointments at issue here (but before the decision below), the President and the Senate reached another inter-Branch accommodation, in which the Senate agreed “to approve a slate of nominees,” while the President “promis[ed] not to use his recess powers” during the Easter recess. Stephen Dinan, *Congress Puts Obama Recess Power to the Test*, Wash. Times, Apr. 2, 2012, at A3. And, in July 2013, another political compromise led to the confirmation of nominees for all five positions on the Board.¹⁸

Dover also relies (Br. 44-45) on a post-argument letter that the Solicitor General filed in the Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (filed Apr. 26, 2010) (No. 08-1457). That letter principally explained that, for a variety of reasons, then-recent recess appointments did not affect prior Board decisions and orders and thus did not render the case moot. *Id.* at 1-3. The letter added that the Board might again have only two members at some point, making “the need for prospective guidance” from the Court important. *Id.* at 3. The letter observed that the Senate might foreclose the President’s use of recess-appointment

¹⁷ In October 2010, a former Acting Assistant Attorney General and Deputy Assistant Attorney General in the Bush administration wrote that “the Senate cannot constitutionally thwart the president’s recess power through *pro forma* sessions.” Steven G. Bradbury & John P. Elwood, *Recess is canceled: President Obama should call the Senate’s bluff*, Wash. Post, Oct. 15, 2010, at A19.

¹⁸ On July 30, 2013, the Senate confirmed four new Board members, and confirmed Member Pearce for an additional term. 159 Cong. Rec. S6049-S6051 (daily ed.).

authority by declining to go into recess for more than three days. *Ibid.* As an example, it added—in one sentence and without further analysis—that the Senate declined to recess for more than three days for an extended period beginning in late 2007, in evident reference to the Senate’s practice of convening *pro-forma* sessions during that period. *Ibid.* That observation, in the course of a letter principally addressed to other subjects, was not aimed at definitively resolving the issue in this case. Since then, the Office of Legal Counsel conducted a thorough examination of the implications of the Senate’s efforts to convene *pro-forma* sessions at which no business is to be conducted, and it concluded that such sessions do not interrupt a Senate recess for purposes of the President’s recess-appointment power. *OLC Pro Forma Op.* 9-23. The Board’s position here is consistent with that analysis.

In any event, the short period between the Solicitor General’s April 2010 letter and the President’s January 2012 appointments furnishes scarce material for the historical mantle that Dover attempts to don. To the contrary, this is an instance in which the Senate’s previous and “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).

E. Even Assuming the *Pro Forma* Sessions Could Satisfy the Senate's Other Constitutional Obligations, They Impermissibly Disrupt the Balance Struck by Article II

As noted above, there is prior history of the Senate's using *pro forma* sessions for short periods for various purposes. But whatever effect *pro forma* sessions may have vis-à-vis the Senate's other constitutional obligations, permitting them to preclude recess appointments would impermissibly disrupt the constitutional balance of powers.

a. The Adjournment Clause furnishes each House of Congress with the power to ensure the simultaneous presence of the other House so that they can together conduct legislative business.¹⁹ Insofar as the matter concerns solely the interaction of the two Houses, we may assume *arguendo* that they have some leeway to determine whether a particular practice comports with the Clause. And in any event each House has the ability as a practical matter to respond to, or overlook, an infringement by the other.²⁰

In the absence of considerable deference to Congress, however, a string of *pro forma* sessions at which no business will be conducted for 20 days cannot be seen as meaningfully compliant with the Adjournment Clause. Indeed, the Senate

¹⁹ See Jefferson's Opinion on the Constitutionality of the Residence Bill (July 15, 1790), in 17 *The Papers of Thomas Jefferson* 195-196 (Julian P. Boyd ed., 1965).

²⁰ When the Senate used a unanimous consent resolution to adjourn from a Saturday until a Thursday in 1916, "it was called to the attention of the House membership but nothing further was ever done about it." *Riddick's Senate Procedure* at 15.

appears to have concluded as much in December 1876. Senator Henry Anthony proposed to have the Senate meet every three days “[w]ithout the transaction of any business” to permit a nine-day holiday “recess.” 5 Cong. Rec. 333 (1876). Senator Roscoe Conkling objected, asking “[H]ow can it be that by an indirection so slight as that now proposed we can circumvent the [Adjournment Clause]?” *Id.* at 335; *see also id.* at 336 (Sen. Hamlin) (“If that is not in contravention of the plain meaning and intent of the Constitution, then I do not understand the force of language.”). The resolution was altered to avoid Conkling’s objection. *Id.* at 336, 337-338.²¹

b. Of course, even if the Court were to defer to the House and Senate’s belief that a series of *pro forma* sessions may satisfy their obligations to one another under the Adjournment Clause, such deference has no proper bearing on the Recess Appointments Clause’s meaning. Even assuming *arguendo* that the President has no direct interest in whether each House secures the other’s consent for an adjournment, he plainly has a direct interest in the balance that Article II

²¹ Dover also contends (Br. 36-37) that the Senate has recently used *pro-forma* sessions to comply with its obligation under Section 2 of the Twentieth Amendment to “begin” its annual “meeting” at noon on January 3 (unless that date has been changed by law). It is not clear whether a *pro-forma* session is adequate to that purpose, as Congress has long regarded that requirement (and its predecessor in Art. I, § 4, cl. 2) as being fulfilled even when it fails to attain a quorum on that date. *See, e.g.*, 6 Annals of Cong. 1517 (1796); 8 *id.* at 2189 (1798); 9 *id.* at 2417-2418 (1798). But a *pro-forma* session with a single member could hardly suffice to satisfy Congress’s other obligation under Section 2 of the Twentieth Amendment: to “assemble at least once in every year.”

strikes between his need to secure the Senate’s advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is unavailable.

That logic also helps explain why Dover misses the point when it relies on the Constitution’s Rules of Proceedings Clause (Art. I, § 5, cl. 2). The Court emphasized in *INS v. Chadha*, 462 U.S. 919 (1983), that the Rules of Proceedings Clause provides each House with authority to establish rules governing its *internal* processes but “only empowers Congress to bind itself.” 462 U.S. at 956 n.21. The Senate cannot, through that circumscribed authority, unilaterally control the interpretation of the Recess Appointments Clause. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) (explaining that the Rules of Proceedings Clause “may not” be invoked to “ignore constitutional restraints”); *United States v. Munoz-Flores*, 495 U.S. 385, 392 n.4 (1990) (“Where, as here, a constitutional provision is implicated, [*Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892),] does not apply.”).

Dover’s invocation of the Rules of Proceedings Clause is also flawed at a more basic level. The question before the Court in *Ballin*—whether the House of Representatives possessed a quorum when it passed certain legislation—was conclusively answered by a formal quorum call entered into the House Journal. 144 U.S. at 2-3. In that context, the Clause allows each House to prescribe how to establish that it “is in a condition to transact business.” *Id.* at 6. In contrast, the

Senate here did not issue a formal rule or resolution stating it regarded itself as not being in recess under the Recess Appointments Clause. To the contrary, the orders adopted by the Senate on December 17, 2011, support the conclusion that it was in recess. *See supra* pp. 18-20.

c. Dover’s view—under which the Senate may be absent in fact while present only by virtue of a legal fiction—would also upset the balance struck in Article II between the Appointments Clause and the “auxiliary method of appointment” that applies when the Senate is unavailable to provide its advice and consent but there are vacancies “which it might be necessary for the public service to fill without delay.” *Federalist No. 67*, at 455.

As discussed above, since 2007, the Senate has used *pro forma* sessions to string together breaks in business lasting as long as 47 days, *see* 158 Cong. Rec. at S5955, and Dover’s position provides no stopping point. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 261 (3d Cir. 2013) (Greenaway, J., dissenting). The Framers could not have anticipated or desired such a result. Nor is it justified by anything in the first two centuries of practice under the Appointments and Recess Appointments Clauses.

d. The significant separation-of-powers concerns raised by Dover’s position are illustrated here. If, as Dover urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on

nominations, the Board would have been disabled from carrying out significant portions of its statutory mission, thus preventing the execution of a duly passed Act of Congress and the performance of the functions of an office “established by Law,” U.S. Const. Art. II, § 2, cl. 2. That result would directly undermine the President’s duty to “take Care that the Laws be faithfully executed,” Art. II, § 3—which necessarily requires the “assistance of subordinates.” *Myers v. United States*, 272 U.S. 52, 117 (1926).

In contrast, upholding the Board members’ appointments will not vitiate the Senate’s powers or the ordinary process of advice and consent. The recess appointments were only temporary; the commissions were to “expire at the End of [the Senate’s] next Session.” Art. II, § 2, cl. 3. The Senate retained authority to vote on the President’s nominees when it returned. More fundamentally, the Senate retains the choice it has always had: to remain “continually in session for the appointment of officers,” *Federalist No. 67*, at 455, thereby removing the constitutional predicate for the President’s recess appointment power, or to cease temporarily the conduct of business (and potentially leave the capital) knowing that the President may make temporary appointments during that period. Because the Senate cannot choose to do both simultaneously, the Court should reject Dover’s request to “disrupt[] 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).

II. GIVEN DOVER’S FAILURE TO RAISE ITS SOLE MERITS OBJECTION BELOW, THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT DOVER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO TIMELY RESPOND TO THE UNION’S REQUEST AND TO PROVIDE THE INFORMATION

A. Overview of Applicable Principles and the Board’s Findings

Section 8(a)(5) of the Act, read in conjunction with Section 8(d), makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees.²² 29 U.S.C. § 158(a)(5) and (d). And the duty to bargain in good faith includes the obligation to provide relevant financial information to the union upon request where the employer claims it is unable to pay increased wages or other employment terms. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-53 (1956); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 188 (2d Cir. 1991); *Nielsen Lithographing Co.*, 305 NLRB 697, 699 (1991), *enforced sub nom. Graphic Commc’ns Int’l Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). As the Supreme Court has explained: “If such an argument is

²² Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore also results in a “derivative” violation of Section 8(a)(1). *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.” *Truitt Mfg.*, 351 U.S. at 152-53. Therefore a “refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.” *Id.* at 153; *accord Olivetti Office U.S.A.*, 926 F.2d at 188.

Applying the foregoing principles, and consistent with its earlier findings in *Dover I*, the Board reasonably found (A. 144) that Dover again violated Section 8(a)(5) and (1) of the Act by failing to respond in a timely manner to the Union’s August 2011 request for information, and by refusing to provide the information. In making this finding, the Board relied on Romano’s testimony—unrebutted here and in *Dover I*—that during negotiations for a successor collective-bargaining agreement, Company Owner Yamali asserted, in response to the Union’s proposals, that he could not afford to pay the wages and benefits set forth in the expired agreement, let alone the increases sought by the Union. (A. 146-48; A. 21-22, 64.) In August 2011, the Union sought to verify Yamali’s assertion by requesting updates on the same financial information that it had initially asked for in January 2011—information that Dover had yet to provide— as well as information regarding several “also known as” entities. (A. 21-22, 81.) The undisputed evidence shows that Dover did not respond to the Union’s August 2011 request for 13 months, and that when it replied, it did no more than offer some of

the information to the Board's regional office the day before the unfair labor practice hearing. (A. 22-23.)

Even after Dover eventually provided some of the requested information, the Board reasonably found Dover's belated and incomplete responses to be wholly inadequate. To begin, Dover never justified its lengthy delay in responding to the Union's August 2011 request. *See, e.g., Geiger Ready-Mix Co. of Kansas City, Inc.*, 315 NLRB 1021, 1033 (1994), *enforced in relevant part*, 87 F.3d 1363 (D.C. Cir. 1996) (employer must provide information in a timely manner). Further, although Dover belatedly provided some of the requested information, the undisputed evidence reveals that it sent the information only to the Board's regional office. (A. 23, 72, 76.) Despite being advised by the regional office that an employer must furnish requested information directly to the Union (A. 72), Dover failed to do so. (A. 23.) *See, e.g., id.* (employer's duty to furnish information to union not satisfied by providing it to Board). As for the information that Dover erroneously turned over to the regional office instead of the Union, it omitted the audited income statements and W-2 and W-3 forms that the Union was seeking. (A. 23-28, 83, 86.) Nor did Dover provide any documents regarding the "also known as" entities listed in the Union's August 2011 letter. (*Id.*) Based on this undisputed evidence, the Board reasonably found that Dover violated the Act by failing to timely respond to the Union's request and to provide the information.

B. Given Dover’s Failure To Raise Before the Board the Sole Claim It Asserts on Appeal, the Court Should Summarily Enforce the Board’s Decision and Order

Almost as an afterthought, Dover devotes just three paragraphs at the end of its brief (Br. 61-63) to challenging the merits of the Board’s decision. In the first paragraph, Dover generically asserts (Br. 61) that “substantial evidence [does] not support the Board’s determination that Dover refused to bargain with [the Union].” As this Court has explained, however, “[i]t is a ‘settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.’” *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (party must do more than “merely mention a possible argument in the most skeletal way”)).

Although Dover then asserts (Br. 61) one specific argument—it claims that Yamali never said Dover was unable to pay the Union’s proposals—it did not raise this objection before the Board as required by Section 10(e) of the Act. The Court therefore lacks jurisdiction to entertain its claim. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982) (a “Court of Appeals lacks jurisdiction to review objections that were not urged before the Board”).

In order to preserve this objection under Section 10(e), Dover would have had to raise it before the Board in accordance with the Board's Rules and Regulations, which require exceptions to a judge's decision to be specific and detailed.²³ *See New England Health Care Emps. Union v. NLRB*, 448 F.3d 189, 192 (2d Cir. 2006) (exception must be "specifically urged"). Yet, nowhere in its exceptions did Dover contend, as it does on review, that its owner never said Dover was unable to meet the Union's demands. (A. 141-43.) To the contrary, before the Board Dover took the position that it had satisfied its obligation under the Act by giving some of the information to the Board's regional office on the eve of the hearing. (A. 76.)

Dover presents (Br. 61-63) no extraordinary circumstances to excuse its failure to raise this objection before the Board. *See* 29 U.S.C. § 160(e) (failure to raise objection before Board may be excused only for extraordinary circumstances). Accordingly, the Court lacks jurisdiction to consider Dover's sole objection on appeal. *See* 29 C.F.R. § 102.46(b)(2) (any exception "not specifically urged" before Board is waived on appeal); *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 (2d Cir. 2009) (court lacks jurisdiction to consider claim not raised

²³ The Board's Rules and Regulations require exceptions to, *inter alia*, "set forth specifically the questions" of fact or law objected to, "designate by precise citation of page the portions of the record relied on," and "concisely state the grounds for the exceptions." 29 C.F.R. § 102.46(b)(1).

before Board); *NLRB v. GAIU Local 13-B, Graphic Arts Int'l Union*, 682 F.2d 304, 311-12 (2d Cir. 1982) (same).

Additionally, because Dover asserts only this single objection in its opening brief (which the Court lacks jurisdiction to consider), it has waived any other claim that it might have brought. *See* Fed. R. App. P. 28(a)(8) (opening brief must contain the appellant's contentions and the reasons for them); *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994) (argument waived if not raised until reply brief); *NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (employer's "failure to present this claim in its original brief before this court provides . . . ground for . . . refusal to hear [the] claim.").

In any event, there is no merit to Dover's assertion (Br. 61-62) that Yamali never claimed Dover was financially unable to afford the Union's wage demands, and that he simply stated he "did not want to pay." It is undisputed that Yamali did not testify at the unfair labor practice hearing, which Dover elected not to attend. (A. 2, 80.) Dover therefore missed its opportunity to introduce testimony from Yamali in support of its assertion. Instead, only Romano testified, and his uncontroverted testimony establishes that Yamali claimed Dover was unable to pay the Union's wage demands. (A. 21-22.)

Indeed, even the record in *Dover I*—which Dover cannot challenge here—would not support its assertion. As previously shown, Yamali also did not testify

in *Dover I*. *Dover I*, 2012 WL 2885990, at *5. Instead, three union witnesses, including Romano, testified in *Dover I* that Yamali specifically asserted on several occasions that Dover was unable to afford the Union's wage demands. *Id.* The Board therefore credited their mutually corroborative and uncontroverted testimony. *Id.* Although Dover argued in *Dover I* (as it does here) that Yamali merely had indicated he did not want to pay the Union's proposed increases, the Board squarely rejected this assertion, finding there was "simply no record testimony" to support it. *Id.* Dover therefore cannot support its bald assertion, and the Court should accordingly reject it.

In sum, the Board's finding that Dover violated the Act effectively stands unchallenged. Dover failed to raise its present objection before the Board, thus depriving the Court of jurisdiction to consider it. Further, Dover waived any other potential objections to the Board's findings by not raising them in its opening brief. Accordingly, if the Court rejects Dover's challenge to the recess appointments of Members Griffin and Block, then the Court should summarily enforce the Board's finding that Dover violated Section 8(a)(5) and (1) of the Act. *NLRB v. Enjo Contracting Co., Inc.*, 131 F. App'x 769, 770 (2d Cir. 2005) (Board is entitled to summary enforcement of uncontested findings); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 68 (2d Cir. 1992) (same); *Springfield Hosp.*, 899 F.2d at 1307 n.1 (same).

CONCLUSION

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

Respectfully submitted,

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April 2014

**UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD,)	
)	
Petitioner)	No. 13-2307
)	
v.)	
)	Board Case No.
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A/K/A DOVER CATERERS, INC., A/K/A)	
DOVER COLLEGE SERVICES, INC.,)	
A/K/A DOVER GROUP OF NEW YORK,)	
A/K/A DOVER GROUP, A/K/A QUICK SNACK)	
FOODS, INC.)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,303 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the respondent. Board counsel further certifies that the CD-ROM has been scanned for viruses.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 4th day of April, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system, and that this document was served on all parties or their counsel of record through the CM/ECF system.

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