

Nos. 14-10618, 14-11093

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

**TAFT COAL SALES & ASSOCIATES, INC.,
WALTER ENERGY, INC., and
WALTER MINERALS, INC.**

Petitioner/Cross-Respondent

and

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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I hereby certify that, to the best of my knowledge, the list contained in the Principal Brief of Petitioners is accurate and complete.

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Dated at Washington, DC
this 14th day of July, 2014

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts. Because the Company has requested oral argument, however, the Board also requests the opportunity. The Board believes that 15 minutes per side would be sufficient for the parties to present their views.

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NATIONAL LABOR RELATIONS BOARD

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition filed by Taft Coal Sales & Associates, Inc. (“Taft”), Walter Energy, Inc., and Walter Minerals, Inc. (collectively “the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, an Order finding that the

Company committed certain unfair labor practices. The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order was issued on January 10, 2014, and is reported at 360 NLRB No. 19. (V.3, D2.)¹ The Court has jurisdiction over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Order is final, and the unfair labor practices occurred in Birmingham, Alabama.

On February 10, 2014, the Company filed a petition for review. It was timely because the Act places no time limit on such filings. On March 10, 2014, the Board filed a cross-application for enforcement.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(1) of the Act.

¹ The Board adopts the Company’s record citation convention, with only slight modification: “V.1” references Volume 1 of the appendix (the hearing transcript), followed by a transcript page citation. “V.2” references Volume 2 (hearing exhibits), followed by a specific exhibit. “Jnt. Exh.”, “GC Exh.”, and “R. Exh.” refer to Joint Exhibit, General Counsel Exhibit, and Respondent Exhibit, respectively. “V.3” references Volume 3 (decision under review), followed by a citation to the Board’s Decision and Order (“D &O”).

2. Whether substantial evidence supports the Board's finding that Walter Energy, Walter Minerals, and Taft are a single employer for purposes of liability under the Act.

3. Whether the Board reasonably determined that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union over the decision to layoff 21 employees at Taft's Choctaw mine and over the effects of that decision.

4. Whether the Board properly exercised its broad remedial discretion in ordering reinstatement and make-whole relief for the 21 laid-off employees.

STATEMENT OF THE CASE

This case involves unfair labor practices committed by the Company during an organizing drive at Taft's Choctaw mine by the United Mine Workers ("the Union") and the subsequent unilateral action by the Company in laying off one-quarter of the Choctaw mine workforce. Shortly after the Union began organizing, a Taft supervisor threatened an employee with closure of the mine if the Union was certified and interrogated another employee as to whether he voted in favor of the Union.

After a neutral arbitrator designated the Union the exclusive representative of the employees at Taft's Choctaw mine, the Company became aware that a major customer wanted to reduce coal production and began negotiations with that

customer to address the decreased need. Thereafter, the Company decided to lay off 21 employees and failed to notify or bargain with the Union over its layoff decision or the effects of that decision. Instead, the Company notified the Union two days before the intended action. On the effective day of the layoff, the Company informed the affected employees. The Company then, without offering an opportunity to bargain, presented the layoff list to the Union, which, for the first time, identified the 21 employees.

Based on the unfair labor practice charges filed by the Union, the General Counsel issued a complaint alleging that the Company, through its agent, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening employees with shutting down the mine and with job loss if they supported the Union and by interrogating employees regarding their support for the Union. The complaint also alleged that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain collectively and in good faith over the layoff with the exclusive collective bargaining representative of its employees.

After the hearing, the administrative law judge issued his recommended decision and order finding that the alleged conduct violated the Act and ordering the Company to bargain in good faith and to make whole those unlawfully laid-off employees. On review, the Board affirmed the judge's rulings, findings, and

conclusions and adopted the recommended order, as modified. The subsections below summarize the Board's findings of fact and its conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the parties

Walter Energy is a publicly-traded Delaware corporation that produces coal. Walter Minerals is a wholly-owned subsidiary of Walter Energy and engages in a coal mining operation. Taft is a wholly-owned subsidiary of Walter Minerals and operates two surface mines in Birmingham, Alabama—the Reid School Mine and Choctaw Mine. (V.2 Jnt. Exh. 1.) Since 2012, the Union has represented a unit of mine employees at the Choctaw Mine. (V.2 GC Exh. 1.) The unit consisted of approximately 90 employees when the Union was originally designated as the exclusive representative. (V.1 205; V.2 R. Exh. 2.)

B. The Relationship Between Walter Energy, Walter Minerals, and Taft

1. The Three Entities Share Multiple High-Level Officers and Common Control of Labor Relations Issues

As the chart below illustrates, several individuals are officers and key leaders of Walter Energy, Walter Minerals, and Taft.

	Walter Energy	Walter Minerals	Taft
Walter Scheller	CEO and Director	Director	Director
Charles Stewart	Senior Vice President, Project Development	President	President
Robert Kerley	Vice President, Corporate Controller, and Chief Accounting Officer	Director	Director
Michael Hurley	Vice President, Tax	Vice President, Tax	Vice President, Tax
Earl Dopplett	Senior Vice President, General Counsel, and Secretary	Secretary	Secretary
Michael Griffin	Assistant Treasurer and Interim Treasurer	Assistant Treasurer	Assistant Treasurer

(V.2 Jnt. Exh. 2(a)).

Steve Dickerson, human resources manager for Walter Minerals, is responsible for labor relations and personnel matters for both Walter Minerals and Taft. (V.2 R. Exh. 11.) Dickerson reports to both Jan Kizziah, vice president of operations for Walter Minerals, and Thomas Lynch, senior vice president, human resources at Walter Energy. Lynch evaluates Dickerson's performance and directs his work. (V.1 229-30.)

2. The Entities Share Certain Common Operational Factors, But Have Distinct Wage and Benefit Structures and Maintain Separate Financial Matters

Walter Energy and Taft share a common address and phone number in Birmingham. (V.2 Jnt. Exh. 2(a).) Walter Minerals and Walter Energy use the same email system and share a web address. (V.2 Jnt. Exhs. 2(g), (j).) Walter Minerals has a separate Birmingham address and phone number. (V.2 Jnt. Exh. 2(a).)

Taft independently sets employee wages and directly sends its employees their paychecks and benefits. (V.1 165, V.2 R. Exh. 9.) Taft's wage, bonus and retirement system are distinct from Walter Energy's compensation system and Taft independently handles its unemployment insurance. (V.1 160-61, 164-66.) With respect to other insurance, Taft is responsible for paying its share of the master corporate policy. (V.1 169.) Each entity maintains a separate bank account and fiscal records. (V. 1 164-66.) Taft has its own employer identification number and handles its own payroll taxes. (V.1 162; V.2 R. Exh. 9.) Taft transmits monthly financial reports to Walter Energy. (V.1 162.)

C. Walter Energy and the Union Execute a Neutrality Agreement; the Union Begins an Organizing Drive at Taft; Taft Supervisor Hill Threatens and Interrogates Employees; Taft Voluntarily Recognizes the Union

On December 9, 2011, Walter Energy and the Union entered into a neutrality agreement that provided that Taft would remain neutral and use a card

check procedure to gauge employee support if the Union attempted to unionize Taft's mines, including the Choctaw mine. (V.2 Jnt. Exh. 2(b).) The agreement expressly prohibited the Union from relying on the agreement to establish single-employer status. Specifically, it states:

Nothing in this [agreement], its implementation . . . or the negotiations for the labor agreements . . . shall . . . be . . . offered as evidence . . . to create a . . . single employer . . . relationship between . . . [Walter Energy and the] mining operation.

(*Id.*)

In March 2012, the Union began its organizing campaign. Around March 22, a driver at the Choctaw mine had a conversation with Taft supervisor Nixon Hill about the Union's campaign. According to the driver's credited account, Hill warned that employees would lose their jobs and "they'll close the mine down" if the employees unionized. (V.1 29-30.) Around that same time, Hill interrogated another Taft employee, asking him how he voted. (V.1 45-46.)

On April 18, the Union notified Scheller, CEO of Walter Energy and Director of Walter Energy, Walter Minerals, and Taft, that it had obtained a majority of signed authorization cards at the Choctaw Mine. (V.2 Jnt. Exh. 2(c).) On May 24, an arbitrator reviewed the cards and affirmed the Union's majority status. (V.2 Jnt. Exh. 2(e).) Since the Union's designation as the exclusive representative, the parties have been negotiating a first contract for the unit. (V.2 Jnt. Exhs. 2(g), (l), (m).)

D. Taft Customer, Alabama Power, Notifies Taft of Its Reduced Coal Needs

In June, one of Taft's main customers, Alabama Power, informed Taft that it needed to reduce its future purchases due to cheaper fuel alternatives. (V.1 138-40.) Taft and Alabama Power engaged in negotiations for one or two weeks over how they could address the reduction. These negotiations eventually led the two parties to restructure their purchase agreement to provide for a significant reduction in the tons of coal that the power company would purchase from Taft. (V.1 139-40.) On June 21, Taft and Alabama Power completed their discussions and negotiations, and Taft amended Alabama Power's coal purchasing agreement to reflect diminished demand. (V. 2 Jnt. Exhs. 1, 2(h).) Under the amendment, Alabama Power reduced its purchase needs from the Choctaw Mine by 125,000 tons. (V.2 Jnt. Exh. 2(h).)

E. The Company Conducts a Layoff In Light of the Negotiations To Amend the Purchase Agreement

As much as two weeks prior to the layoff, and while Taft was negotiating with Alabama Power to reduce coal production at the Choctaw Mine, Taft decided to conduct a layoff at the mine to address the reduction. (V.1 140-41, 204.) During those two weeks, the Company analyzed how the reduction in coal would "affect production and [] what spreads of equipment [the mine] would need to operate." (V.1 205.) These analyses and calculations did not involve the Union.

Once the Company ascertained the “net results,” it decided to lay off 21 employees. (V.1 205-06.)

Also during the two weeks before the layoff, the Company undertook the process of deciding which employees it would lay off and which employees it would retain. (*Id.*) Specifically, Taft’s superintendant and Dickerson, the human resources manager for Walter Minerals, worked together to identify the employees who would be laid off, on the basis of skills, seniority, safety practice, and attendance. (V.1 196, 206.)

On June 25, after much internal discussion and decision-making, Lynch, Walter Energy’s top human resources officer, notified the Union, via letter, of Alabama Power’s reduced coal production. (V.2 Jnt Exh. 2(i).) Lynch’s letter, written on Walter Energy letterhead, stated “[a]s a result of these business developments, this week we will be announcing workforce reductions at the mine. A total of 21 represented positions will be eliminated, and [affected] employees . . . will be notified on . . . June 27. Walter Energy continues to have opportunities for experienced surface miners in Northeast British Columbia, and we are planning to . . . discuss these openings the week following notification.” (*Id.*) The layoff reduced the number of unit employees at the Choctaw Mine by 25 percent. (V.1 205.)

On June 26, in response to the letter, union vice president Daryl Dewberry requested the layoff list from Dickerson. (V.1 69.) Dickerson responded that he would provide the list after Taft notified the affected employees of their layoff. (V.1 209.) On June 27, Taft notified 21 Choctaw Mine employees that it was eliminating their positions, after which Dickerson emailed the list to Dewberry from his Walter Energy email account. (V.2 R. Exh. 12, GC Exh. 10.) The layoff list displayed the Walter Energy logo and website. (V.2 GC Exh. 10.) When Dewberry reviewed the list, he discovered that Taft intended to retain junior miners over qualified senior miners.² (V.1 79.) Dewberry contacted Scheller, the CEO of Walter Energy and Director of Taft, Walter Minerals, and Walter Energy, with his concerns about the layoff list and also informed Scheller about supervisor Hill's mine closure threat and interrogation. (V.1 73-74.) Scheller referred the layoff issues to Lynch and assured Dewberry that Scheller would personally fire Hill if the alleged conduct occurred. (V.1 64, 74.)

On July 5, Dewberry contacted Lynch to request a meeting about the layoffs. (V.2 Jnt. Exhs. 1, 2(k), 9.) On July 6, Lynch responded that he would be happy to meet with the Union to walk through the Company's methodology, stating that the "selections were based on individual skills, with additional considerations given to

² The Union filed a grievance over the layoff under another labor agreement, the Jim Walter Resources 2011 Coal Wage Agreement. (V.2 R. Exhs. 1, 13.)

seniority and age.” (V.2 R. Exh. 6.) Lynch also solicited additional details on Hill’s alleged unlawful conduct, stating that “Walter Energy, Inc. and its subsidiaries are committed to upholding the . . . Act.” (*Id.*)

On July 9, Lynch and Dickerson discussed with Dewberry Taft’s rationale for the layoff decisions. (V.1 76-77.) Dewberry objected to the Union’s ongoing exclusion from the layoff decision-making process, essentially asserting that every facet of the layoff was a *fait accompli* by the time the Union received notice. (V.1 75.) According to Dewberry, the Union was “not afforded the opportunity to go through the procedure prior to it happening [B]efore [the Company] made any decisions, [the parties] should sit down to discuss it.” (V.1 77.) The parties did not resolve their differences at the July 9 meeting. (V.1 79.)

II. THE BOARD’S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Johnson and Schiffer) found, in agreement with the administrative law judge, that Walter Energy, Walter Minerals, and Taft constituted a single employer. The Board then found, in agreement with the judge, that the Company, through its agent, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening plant closure and job loss if the mine became unionized and by interrogating employees about whether they supported the Union. The Board also found that the Company violated Section 8(a)(5) and

(1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain in good faith with the Union over the layoff at the Choctaw Mine.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. The Board also affirmatively ordered the Company to, upon request, bargain collectively in good faith with the Union as the exclusive representative of employees concerning both the decision to lay off employees at the Choctaw Mine and the effects of that decision, embody any resulting understanding in a signed agreement and, thereafter, comply with the terms of the agreement. The Order also directs the Company to offer full reinstatement to the 21 employees who were laid off at the Choctaw Mine on June 27, 2012, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, and to make whole the 21 laid-off employees. Finally, the Board directed the Company to post a remedial notice.

SUMMARY OF ARGUMENT

The Company has not challenged the findings by the Board that a supervisor improperly threatened and interrogated employees in violation of Section 8(a)(1). The Court must therefore summarily enforce the Board's Order with respect to these findings.

Substantial evidence supports the Board's finding that Walter Energy, Walter Minerals, and Taft constitute a single employer. The Board properly applied its standard four-prong test and relied on virtually uncontested facts to conclude that the interdependency of the three entities defeated any assertion that they were unintegrated, separate companies. The Board relied heavily on the critical factor of centralized control over labor relations. In particular, there was ample credited evidence that company officials from all three entities were substantively involved in the layoff at the Choctaw Mine. Indeed, several officers of the parent companies—Walter Energy and Walter Minerals—spearheaded and handled this important labor matter. The Board, after considering all of the factors, concluded that, on balance, the classic earmarks of single-employer status were present.

The Board then properly found that the Company, a single employer, had failed and refused to bargain with the Union in violation of Section 8(a)(5) and (1) when it presented the Union with a layoff notice two days before the Company effected the 21 layoffs. Company officials were on notice of a layoff as much as two weeks before the adverse action, during which time the Company had ample opportunity to notify the Union. Rather than timely notify the Union and offer to bargain, as it must under the Act, the Company internally devised its layoff plan. When the Company finally saw fit to notify the Union, the Company indicated that

the layoffs would be effective in two days. Moreover, the Company did not provide to the Union a specific list of names until *after* the Company notified the employees that it was eliminating their positions. This sequence of events is a textbook example of a *fait accompli*, such that the Union cannot be said to have waived its right to bargain.

By way of remedy, the Board exercised its broad discretion to effectuate the Act's goals and ordered the Company to offer reinstatement to the unlawfully laid-off employees and to make them whole. The Board imposed its standard remedy for this type of violation, and the Company has failed to meet the exacting burden of demonstrating that the Board abused its discretion.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

In its brief to the Court, the Company concedes (Br. 32 n.28) that it does not contest the Board's findings that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by Hill's threats and interrogation of employees.³ Because

³ Despite its clear statement that the Section 8(a)(1) violations are "not appealed to this Court," (Br. 32 n.28), the Company curiously takes issue with certain aspects of these findings to suggest that the judge acted not on the basis of record evidence, but out of some zeal to find the Company in violation of the Act. The Company's assertion is utterly devoid of support. The relevant admission remains: the Company does not appeal the Section 8(a)(1) violations to this Court.

the Company has not challenged the Section 8(a)(1) findings in its opening brief, it has waived the right to contest them. The Board is thus entitled to summary enforcement of the portion of its order that is based on the uncontested findings. *U.S. v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1427-28 (11th Cir. 1985) (summary affirmance of uncontested Board findings); *see also* Fed. R. App. P. 28(a)(9)(A) (argument must contain party's contentions with citation to authorities and record). Moreover, these uncontested violations do not simply disappear because the Company neglected to contest them; rather, they remain in the case, "lending their aroma to the context in which the [remaining contested] issues are considered." *Purolator*, 764 F.2d at 1429 (citation omitted).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT WALTER ENERGY, WALTER MINERALS, AND TAFT ARE A SINGLE EMPLOYER UNDER THE ACT

A. Applicable Principles and Standard of Review

The Board may treat nominally separate but closely related enterprises as a single employer under the Act. *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960); *United Tel. Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978); *Cimato Brothers, Inc.*, 352 NLRB 797, 798 (2008); *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007), *enforced* 61 Fed. Appx. 711 (D.C. Cir. 2003). The Board has found, and the courts have upheld, the finding of a single-employer relationship between

two such entities in a number of circumstances, including between parent companies and their subsidiaries. *See, e.g., Operating Eng'rs, Local 627 v. NLRB*, 518 F.2d 1040, 1042, 1047 (D.C. Cir. 1975), *aff'd in relevant part sub nom. S. Prairie Constr.Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800 (1976); *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957 (6th Cir. 2004); *Package Serv. Co. v. NLRB*, 113 F.3d 845, 847 (8th Cir. 1997); *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 748 (2d Cir. 1996); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983).

The Board has long held that entities constituting a single employer may be held jointly and severally liable to remedy unfair labor practices committed by one of the constituent entities. *See, e.g., Alaska Cummins Servs., Inc.*, 294 NLRB 1, 9 (1989); *Teckwal Corp.*, 263 NLRB 892, 893-94 (1982). The courts have long accepted this view. *See, e.g., Lihli Fashions*, 80 F.3d at 748; *NLRB v. Int'l Measurement & Control Co.*, 978 F.2d 334, 337, 340-41 (7th Cir. 1992).

The Board considers four factors in determining whether two or more companies constitute a single employer: (1) common ownership or financial control; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. *Radio & Television Broad. Technicians Local 1264, I.B.E.W. v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *accord McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 &

n.3 (11th Cir. 1987) (citing with approval the Board's four-factor test); *Cimato Brothers*, 352 NLRB at 798. No one factor is controlling; and not all factors need be present to establish single-employer status. *Operating Eng'rs*, 518 F.2d at 1045.

A determination of single-employer status ultimately depends on all the circumstances of the case and is often characterized by “an absence of an arm's length relationship found among unintegrated companies.” *Id.* at 1045-46. “[T]he fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Penntech*, 706 F.2d at 25; *accord NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1288 (7th Cir. 1989). This inquiry assesses whether nominally “separate corporations are not what they appear to be, [and] that in truth they are but divisions or departments of a single enterprise.” *Deena Artware*, 361 U.S. at 402.

Centralized control of labor relations is generally considered to be the most important factor in the Board's four-prong inquiry. *See, e.g., Mercy Hosp.*, 336 NLRB 1282, 1284 (2001); *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1337 (1988); *accord Int'l Measurement & Control*, 978 F.2d at 340 (“perhaps the ‘employer’ is he who calls the tune, and not just whoever pays the piper”); *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251, 255 (9th Cir. 1978); *NLRB v. Condenser Corp.*, 128 F.2d 67, 71 (3d Cir. 1942) (“[w]hat is important . . . is the degree of

control over the labor relations”). The Board’s finding that two entities constitute a single employer is essentially a factual determination and is entitled to affirmance when supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Reasonably Found that Walter Energy, Walter Minerals, and Taft Are a Single Employer

The record fully supports the Board’s finding that Walter Energy, Walter Minerals, and Taft constitute a single employer. The links between the three entities bear signature characteristics of a single-employer relationship, particularly with regard to the critical factor of centralized control of labor relations.

First, as the Company readily acknowledges (Br. 20), Walter Energy, Walter Minerals, and Taft have common ownership in that Walter Minerals and Taft are wholly-owned subsidiaries of Walter Energy. Therefore, the first factor supports a single-employer finding.

With respect to common management, the undisputed evidence establishes that Taft’s highest officials held comparable positions of authority in both Walter Energy’s and Walter Minerals’ management. Specifically, as the chart above outlines (at 6), Taft’s director, Walter Scheller, is also CEO of Walter Energy and director of Walter Minerals. Charles Stewart is president of both Walter Minerals and Taft and senior vice president of Walter Energy. Robert Kerley is the director of both Walter Minerals and Taft, as well as the chief accounting officer and vice

president, corporate controller for Walter Energy. Michael Hurley, Michael Griffin, and Earl Doplett are vice president of tax, assistant treasurer, and secretary, respectively, for all three entities. This factor too supports the Board's single-employer finding. *See Pathology Inst.*, 320 NLRB 1050, 1061-63 (1996) (substantial overlap between the board of directors of one entity and the board of trustees of the other entity is evidence of common management), *enforced sub nom. Alta Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997); *Royal Typewriter Co.*, 209 NLRB 1006 (1974) (career officials of parent company served as highest officials within subsidiary was evidence of common management); *enforced* 533 NLRB F.2d 1030 (8th Cir. 1976); *Soule Glass & Glazing Co.*, 246 NLRB 792, 795 (1979) ("flow of common management personnel from one corporation to another" supported single-employer finding), *enforced in relevant part* 652 F.2d 1055 (1st Cir. 1981).

With respect to interrelated operations, the uncontroverted record evidence demonstrates that Taft and Walter Energy share common addresses and that Walter Minerals and Walter Energy use the same email system and website and display the Walter Energy logo on communications. Indeed, all of the communications concerning the layoff, which represents a critical labor relations matter, were on Walter Energy letterhead. The Board, however, recognized that other evidence tended not to support a finding of single-employer status, such as separate bank

accounts and financial records, certain arm's-length transactions, unique tax identification numbers, and distinct compensation systems. The Board reasonably determined that this "mixed evidence . . . neither strongly supplements, nor greatly detracts from, single-employer status." (V.3 D&O at 5.)

The final and most important factor, centralized control of labor relations, strongly supports the Board's finding of single-employer status. Walter Energy and Walter Minerals exercise meaningful control over Taft's labor relations matters, and this involvement underscores the tightly-woven relationship between the three companies. For example, it is undisputed that Scheller, Walter Energy's CEO and director, preliminarily handled the Union's concerns about both the Taft layoff and Hill's conduct. Scheller never deflected these critical labor issues as outside his purview or otherwise uniquely within the province of Taft and its officials. Rather, Scheller, after considering the issues, ultimately assigned them to Lynch, but pledged that he would personally fire Hill if the allegations were true. The Board properly reasoned that "[t]hese actions [by Scheller] demonstrate a substantial wielding of labor relations power." (V.3 D&O at 5.) *See Pathology Inst.*, 320 NLRB at 1063-64 (finding single-employer status where one entity exercised "clout" over the labor relations of the other).

Further, the Board relied on the uncontested fact that Lynch, Walter Energy's top human resources official, was materially involved in Taft's labor

relations issues. Lynch notified the Union of the Choctaw Mine layoff, reviewed the layoff list before Dickerson transmitted it to the Union, and met with Dewberry to discuss the layoff and explain the methodology in identifying employees for layoff. The Board also found it significant that Lynch investigated the Union's allegations against Hill and offered laid-off Taft employees jobs with Walter Energy's Canadian mining operation in British Columbia. Lynch's intimate involvement with Taft's labor relations led the Board to conclude reasonably that his actions "similarly demonstrate a significant exercise of labor relations power over Taft's affairs." (V.3 D&O at 5.) *See Pathology Inst.*, 320 NLRB at 1063-64.

In addition to the Board's finding that Scheller and Lynch were substantively involved in Taft's labor relations matters, the Board also found that Walter Minerals' top human resources officer, Dickerson, similarly embroiled himself in these issues. Specifically, the uncontroverted record evidence establishes that Dickerson determined which Choctaw Mine employees would be laid off, communicated with the Union about the layoff, and negotiated the closure of the other Taft mine, the Reid School Mine.⁴

⁴ On March 29, 2013, the Union and Taft entered into a closure agreement for the Reid School Mine, which Dickerson signed. (V.2 R. Exh. 11.) The agreement provided that Taft employees could be recalled to open positions at Walter Minerals. (*Id.*)

In short, the foregoing evidence, most of which is undisputed, points to the clear absence of an arm's-length relationship that would exist among unintegrated companies. *NLRB v. DMR Corp.*, 699 F.2d 788, 791 (5th Cir. 1983); *Lebanite Corp.*, 346 NLRB 748, 748 n.5 (2006) (observing that the Board “sometimes treats single employer status and absence of an arm's-length relationship as essentially synonymous”). Consequently, the Board was fully warranted in finding that Walter Energy, Walter Minerals, and Taft constitute a single employer.

C. The Company's Challenges to the Board's Findings Are Meritless

The Company lodges several challenges to the Board's single-employer finding, none of which is persuasive. First, the Company asserts (Br. 17-18) that the Board improperly relied on the neutrality agreement in finding single-employer status. Nothing in the Board's decision remotely suggests that either the Board or the judge relied on the neutrality agreement. Indeed, the judge expressly notes that “no reliance was placed on the Neutrality Agreement . . . in finding single employer status.” (V.3 D&O 5 n.20.)

The Company then takes issue (Br. 21-25) with the Board's consideration of the interrelation of operations. In doing so, the Company merely emphasizes those factors that the Board already recognized as tending not to support a finding of single-employer status. As noted above, the Board observed that the evidence on this prong was “mixed.” The Company asks this Court to reweigh the facts; an

invitation that the Court must decline in light of the deferential standard of review. *See Universal Camera Corp.*, 340 U.S. at 488.

The Company next attacks (Br. 25-30) the Board's findings as to centralized control of labor relations, relying principally on the assertion that Taft handles its own "day-to-day employment, human resources, [and] labor relations matters." (Br. 25). The Company's claim falls short. Substantial evidence clearly supports the Board's finding that, while Taft may enjoy limited independence in some employment matters, Walter Minerals and Walter Energy were deeply involved in one of the most significant employment decisions—the decision to lay off 21 employees.

Relatedly, the Company misses the mark in asserting (Br. 28-29) that Lynch, Scheller, and other non-Taft employees who assisted in handling the layoff were only involved because the Union initiated contact with those individuals. It is of no moment whether the Union reached out to company officials; rather, the focus is on whether the company officials conducted themselves in a manner that suggests centralized control. Here, this is precisely how they behaved. Scheller never informed the Union that its inquiries were properly directed elsewhere. If Taft were truly a separate and distinct entity that had independent control over its

labor relations, Scheller's response and Lynch's conduct should have conveyed as much.⁵

The Company also errs (Br. 29) in claiming that non-Taft officials were involved in the layoff only to enforce the neutrality agreement. The evidence demonstrates that Lynch's and Scheller's dealings went well beyond ensuring that Taft remained neutral during the Union's March 2012 organizational drive, which led to the Union obtaining a majority of authorization cards in April. Lynch drafted the June 25 layoff notice, reviewed the layoff list, and met with the Union to discuss its concerns regarding the action.

Lastly, the Company wrongly asserts (Br. 30-32) that the Board relied strictly on titles to find that the three entities share common management. Contrary to the Company's suggestion, there is no evidence that this is a case of individuals holding only nominal titles. *See, e.g., Cimato Brothers*, 352 NLRB at 798. Rather, the record evidence establishes that the high-level officers, who overlap among the three entities, are actively involved in management and labor matters.

⁵ The Company misunderstands (Br. 29 n.25) the importance of Scheller's remark to the Union that he would personally fire Hill if the allegations proved founded. Hill is a Taft supervisor, and Scheller is Walter Energy's CEO and director of Walter Minerals, Taft, and Walter Energy. The judge observed that if Scheller had the authority to terminate a Taft supervisor's employment, then the three entities have significant overlap in control and chains of command. Scheller's firing threat is therefore significant in that it bolstered the finding of single-employer status.

In sum, the Board relied most heavily on the determination that high-level officers such as Walter Energy's CEO and senior vice president of human resources handled important employment matters at Taft to find that the three entities constitute a single-employer. The Board's conclusion is eminently reasonable and supported by substantial evidence.

III. THE BOARD REASONABLY DETERMINED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING AND REFUSING TO BARGAIN WITH THE UNION OVER THE DECISION TO LAYOFF 21 EMPLOYEES AT TAFT'S CHOCTAW MINE AND THE EFFECTS OF THAT DECISION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly-certified collective-bargaining representative of an appropriate unit of its employees. *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986). In the present case, the Company contends that the Union failed to demand bargaining with respect to the layoffs. The record evidence supports the Board's finding that the Company presented the Union with a *fait accompli*, therefore, the Company's defense fails and the Board is entitled to enforcement of its order. *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003); *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402-03 (5th Cir. 1981).

A. Applicable Principles

An economic layoff decision constitutes a mandatory subject of bargaining. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 213-14 (1964); *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004); *Toma Metals, Inc.*, 342 NLRB 787, 787 n.1 (2004). As the First Circuit explained, “[t]his requirement ensures that when an employer aims to reduce labor costs, employees are presented with the opportunity to negotiate concessions that reduce overall costs and thus spare jobs.” *Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 27 (1st Cir. 2009). In addition to the decision itself, an employer must bargain over the effects of the layoff. *Toma Metals, Inc.*, 342 NLRB at 788.

The Board has held that “when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.” *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988). An employer claiming that a union waived a statutory right to bargain over mandatory subjects bears the burden of demonstrating a clear and unmistakable relinquishment. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983). “[N]ational labor policy disfavors waivers of statutorily protected rights.” *Olivetti Office USA, Inc. v. NLRB*, 926 F.2d 181, 187 (2d. Cir. 1991). Given “the Board’s expertise in labor matters, its decision on the question of waiver is

accorded significant deference.” *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991).

An employer may not avail itself of a waiver defense where it presents the union with a *fait accompli*. In other words, an employer must give notice “sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain [I]f the notice is too short . . . [or] the employer has no intention of changing its mind, then the notice is nothing more than a *fait accompli*.” *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), enforced 722 F.2d 1120 (3d Cir. 1983); see also *Toma Metals*, 342 NLRB at 787 n.1 (announcement of layoffs on implementation date is unlawful).

Federal courts similarly decline to find waiver where the proposed change was a *fait accompli*. See, e.g., *Regal Cinemas*, 317 F.3d at 314; *NLRB v. Roll & Hold Warehouse & Distribution Co.*, 162 F.3d 513, 519-20 (7th Cir. 1998); *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1259-60 (6th Cir. 1995); *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983); *Crystal Springs Shirt*, 637 F.2d at 402-03; *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (*ILGWU*). The D.C. Circuit has explained:

[I]f it is clear that an employer will not negotiate, a union is not required to go through the motions of requesting bargaining, for the Board does not require futile gestures [A] union must only respond to a notice that allow[s] a reasonable scope for bargaining Otherwise, the notice constitutes nothing more than informing the union of a *fait accompli*.

ILGWU, 463 F.2d at 919 (internal quotations and citations omitted). In its simplest terms, “a union cannot be found to have waived bargaining when it never had an opportunity to bargain.” *Gulf States Mfg.*, 704 F.2d at 1397.

B. The Board Reasonably Determined that the Company Presented the Layoff Decision and Its Effects to the Union as a *Fait Accompli*

The Board relied on extensive record evidence to find that the Company presented the Union with a *fait accompli* when it notified the Union of the impending layoff. The Company decided unilaterally to conduct a layoff approximately two weeks before it advised the Union, during which time the Company had ample opportunity to involve the Union. Rather than notify and bargain with the Union, however, the Company internally analyzed how the reduction in coal needs would affect its workforce and then determined, without consultation or notice, how many and which employees it would layoff. The first contact with the Union came on June 25, when Lynch advised the Union that Taft would eliminate 21 unit positions a mere two days later. When Dewberry requested the layoff list on June 26, Dickerson advised Dewberry that he would release the list *after* Taft advised the affected employees on June 27.⁶ On the basis

⁶ The Company asserts (Br. 33 n.29) that this characterization of the evidence is “simply untrue.” Notably, the Company complains only about the characterization; it does not claim that Dickerson provided the list at any point *before* the layoffs were effected. Indeed, Dickerson himself testified that he told

of these uncontested facts, the Board reasonably concluded that the Company presented the Union with a *fait accompli*, which precluded any pre-implementation bargaining. Accordingly, the Company cannot assert that the Union waived bargaining when it never had an opportunity to bargain.

The Company “unilaterally decided to conduct the layoff, identified who would be laid off, and determined what transfer opportunities would be allocated to affected miners, without offering the Union any opportunity to bargain over these matters. Simply put, the Union was not even told who would be laid off, until after the layoff was enacted.” (V.3 D&O 6.) It is beyond serious contention that these facts establish a *fait accompli*. As such, they negate a waiver defense and demonstrate the Company’s unlawful refusal to bargain. The Board’s decision is fully supported by undisputed substantial evidence—much of it uncontested—and the Company offers no reason to disturb the Board’s order.

C. The Company’s Claims Have No Merit

In an attempt to defeat the Board’s determination that the Company presented the Union with a *fait accompli*, the Company erroneously asserts that it gave advance notice of the layoff “as soon as practicable under the circumstances.” (Br. 34.) The credited evidence puts the lie to this assertion. The Company knew when it began discussions with Alabama Power that a layoff was likely given the

Dewberry that the Union would receive the list after the Company had conducted the layoffs. (V.1 209.)

dramatic cut in purchases that Alabama Power had announced. According to the Company, these discussions began “one to two weeks” (Br. 5) before the June 21 amendment to the purchase agreement. Moreover, Dickerson acknowledged that he was “on notice” of an impending layoff as early as two weeks before the layoff. (V.1 204.) Therefore, the Company could have notified the Union of the layoff potential as early as June 7, when discussions with Alabama Power began; by June 13, when company officials were admittedly “on notice” of a layoff; or by June 21, when the Company had made its final layoff decisions.⁷ The Union did not receive notice until June 25. Given this sequence of events, the Company did not act “as soon as practicable under the circumstances.”⁸

⁷ The Board notes that Lynch was apparently not in the office on June 21, and only returned from vacation on June 25. The Company does not explain why another officer could not communicate the notice. Indeed, given the Company’s contention that Taft is an independent entity, it is curious to note that Taft chose not to allow any of its own officers to communicate the layoff notice. Taft waited instead for Walter Energy’s senior vice president of human resources to return from vacation before it informed the Union of the layoff. Further, in directing the Court to other possible notification dates, the Board is only refuting the Company’s assertion that it acted “as soon as practicable.” That is to say, the Board is not taking a position on whether any of those dates would have, in fact, been sufficient notice.

⁸ In advancing its argument, the Company cites (Br. 33 n.30, 34 n.31) to several cases that are decidedly off point or incorrectly summarized. In *Gulf States Manufacturing*, the court rejected the employer’s claim of impossibility of advance notice because the employer knew of the layoff two days prior to when it notified the union on the day of the layoffs. 704 F.2d at 1397. The court did not find that as a matter of law that two days was sufficient. Further, in *Jim Walter Resources*, the Board found that the employer had given at least ten days’ notice to the union

The Company also errantly contends (Br. 35-37) that the Union’s grievance, which alleges that there was an applicable bargaining agreement provision with respect to layoff procedures, precludes the Board from pursuing the unfair labor practices in this case. Specifically, the Company asserts that “if there is already a labor agreement in place governing the June 27 layoff procedure . . . then, as a matter of law, there can be no failure to bargain over that same layoff.” (Br. 36.) The Company’s assertion misses the mark. The Board found that the Company failed to bargain over not just procedures, but also the decision itself to conduct a layoff. Accordingly, the substance of the grievance has not preclusive effect over the broader complaint in this case.

The Company also advances (Br. 36), without any legal support, the related claim that the Board should not be permitted to pursue a position that is “inconsistent” with the Union’s grievance allegations. This claim suffers from the same misunderstanding noted above. The complaint in this case, which focuses on the Company’s failure to bargain with the Union over *both* the decision to lay off

and did not hold that two days, in that case, was sufficient. 289 NLRB at 1442. In *McGraw Hill Broadcasting Co.*, the employer gave the union three weeks’ notice. 355 NLRB 1283, 1283 (2010).

employees and the effects of that decision, is not inconsistent with the Union's grievance.⁹

IV. THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ORDERING REINSTATEMENT AND MAKE-WHOLE RELIEF FOR THE 21 LAID-OFF EMPLOYEES

A. The Board Is Afforded Broad Discretion in Formulating Remedies

The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods.*, 379 U.S. at 216; *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984) (“The Board’s remedial power in this regard is wide and discretionary[,] subject to scanty judicial review.”). Section 10(c) of the Act (29 U.S.C. § 160(c)) expressly authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies of th[e] Act.” The Board’s task in applying Section 10(c) is to restore the status quo ante—in other words, “to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1975). Moreover, in devising an appropriate remedy, the Board attempts to “both compensate the party wronged and withhold from the wrongdoer the ‘fruits of its violation.’” *Mead Corp. v.*

⁹ It bears noting that the Company cites (Br. 37 n.35) to non-record evidence in an attempt to explain its failure to seek deferral of the complaint.

NLRB, 697 F.2d 1013, 1023 (11th Cir. 1983) (citation omitted). “Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.” *Phelps Dodge v. NLRB*, 313 U.S. 177, 197 (1941).

Judicial review of the Board’s remedial order “is very limited.” *Mead*, 697 F.2d at 1022. The Board’s choice of remedy “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *Mead*, 697 F.2d at 1023. This deferential standard flows from the recognition that “[i]n fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); accord *NLRB v. Kaiser Agric. Chems.*, 473 F.2d 374, 381-82 (5th Cir. 1973) (“[T]he [B]oard’s judgment [must] be given “special respect by reviewing courts.”). Given both the diverse situations in which unfair labor practices arise and the need for flexibility in the Board’s remedial power, the “relation of remedy to policy is peculiarly a matter for [the Board’s] administrative competence” *Phelps Dodge*, 313 U.S. at 199. Here, the Company cannot meet this high burden

of showing that the Board abused its discretion in ordering make-whole relief and reinstatement for the 21 unlawfully laid-off employees.

B. The Board's Remedy Appropriately Prevents the Company from Benefitting from Its Failure and Refusal To Bargain with the Union over the Layoffs

As discussed in more detail above (at 9-11), the Company was on notice that a layoff was likely, during which time it negotiated with Alabama Power over decreases in purchases from its mines and then presented the Union with its plan to cut 25 percent of the Choctaw Mine unit a mere two days before it made the job eliminations effective. The Company notified the Union of the identity of those on the layoff list only *after* the Company had informed the employees. The Act imposes on the Company an obligation to notify and bargain with the Union before committing to a course of conduct, particularly when job positions were subject to elimination. Under these circumstances, the Board was well within its discretion to remedy the Company's unilateral actions by ordering the Company to offer reinstatement to the unlawfully laid-off employees and to order it to make those employees whole. Indeed, in the context of an unlawful layoff, where both the decision and the effects of the layoff were mandatory subjects of bargaining, the standard remedy is precisely that which the Board ordered here: make-whole relief and an offer of reinstatement. *See, e.g., Adair Standish Corp.*, 292 NLRB 890 (1989), *enforced in relevant part* 912 F.2d 854 (6th Cir. 1990).

Unless the back pay remedy is used punitively, “[t]he Board’s broad remedial power to order compensation for lost pay [may be] exercised not only to remedy the consequences of an unfair labor practice, but also in aid of the Board’s authority to deter unfair labor practices.” *NLRB v. United Marine Div., Local 333*, 417 F.2d 865, 868 (2d Cir.1969). Here, the back pay provides a compensatory remedy to the workers laid off at the Choctaw Mine before the Company offered the Union an opportunity to bargain.

In short, the Company cannot meet the exacting and heavy burden to show that the Board abused its discretion or that the remedy fails to effectuate the Act’s goals. Accordingly, the Court should not disturb the Board’s remedial order.

C. The Company’s Contentions Are Without Merit

The Company claims (Br. 38) that “even if there was a technical bargaining violation by Taft,” the Board should have ordered a different remedy than a traditional order of full reinstatement and backpay. The Company’s argument is wrong.

Contrary to the Company’s claim (Br. 38), the Board ordered a well-established remedy for the violation found. The Board found that the Company failed and refused to bargain in good faith with the Union “about both the decision to lay off unit employees and its effects.” (V.3 D&O 1 n.2.) Accordingly, the Board expressly adopted the judge’s recommendation of “a full reinstatement and

backpay remedy rather than the limited backpay remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).”¹⁰ (V.3 D&O 1 n.2.) In doing so, the Board relied on its long-standing precedent that “[t]he traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff.” *Plastonics, Inc.*, 312 NLRB 1045, 1045 (1993); *see also Adair Standish Corp.*, 292 NLRB at 890. These cases underscore that the Board’s ordered remedy here was neither “harsh” nor “severe” (Br. 38), but, rather, standard for the violation found.

The Company erroneously argues (Br. 38-40) that the *Transmarine* remedy is appropriate because the General Counsel sought it. It is axiomatic that the Board determines appropriate remedies not the General Counsel.¹¹ In *Transmarine*, the Board established a remedy to address the peculiar difficulties of vindicating the

¹⁰ Under a *Transmarine* remedy, unit employees receive limited backpay, from five days after the date of the Board’s decision, until the occurrence of one of four specified conditions. Bargaining must take place and backpay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within five days of the Board’s decision or to commence negotiations within five days of the employer’s notice of its desire to bargain; or (4) the union ceases to bargain in good faith. *Transmarine*, 170 NLRB at 390.

¹¹ To the extent that the Company asserts (Br. 38) that the General Counsel conceded that the Company had no obligation to bargain over the decision to conduct a layoff, the General Counsel explicitly informed the judge at the hearing that he was alleging a failure to bargain both the decision *and* the effects. (V.1 64.)

policies of the Act in the context of an employer's unlawful failure to engage in effects bargaining. Here, the Board found an entirely different violation—that the Company had failed and refused to engage in bargaining over the decision to lay off 21 employees, as well as the effects of that decision. The Board then exercised its broad remedial authority and fashioned a remedy to address the violations found.

The Company's next claim, that the judge rejected the *Transmarine* remedy based on an "erroneous and mistaken understanding" (Br. 39), falls short. The Board explicitly corrected the judge's analysis of *Transmarine*: "We correct the judge's analysis to the extent that it suggests a *Transmarine* remedy would only be applicable if [Taft] had laid off the entire unit." (V.3 D&O 1 n.2.)

Next, although the Company acknowledges that it may have violated the Act, it nevertheless claims (Br. 40) that the layoff was a "core" business decision falling outside the duty to bargain. The Company is incorrect. It is uncontroverted that the Company decided to lay off mine workers to reduce labor costs and not as part of a change in the scope and direction of its business. The Supreme Court has specifically held that decisions regarding such issues fall within the Act's imposition of a duty to bargain. *First Nat'l Maintenance*, 452 U.S. at 667; *see also Pan Am. Grain*, 558 F.3d at 27-28; *Toma Metals*, 342 NLRB at 787, 799. In a similar case involving bargaining over both the decision to lay off employees and

its effects, the Board noted that in addition to bargaining over procedures for layoffs, there are “a wide range of issues for potential discussion and bargaining as alternatives to reducing labor costs through use of a layoff.”¹² *Toma Metals*, 342 NLRB at 799. For example, the parties can bargain over “modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.” *Id.* In short, the decision to conduct a layoff at the Choctaw Mine was within the scope of mandatory bargaining.

Last, the Company erroneously posits (Br. 42) that the remedy should be limited to four employees because, it reasons, if the Company had followed strict seniority in terms of layoffs, 17 of the 21 laid-off employees would still have been terminated. The Company’s contention ignores that bargaining may have resulted in a very different outcome.¹³ As described above, if the Company had bargained

¹² The Company cites (Br. 40) inapposite cases for the contention that a *Transmarine* remedy was appropriate in this case. For instance, in *Bridon Cordage*, the Board limited its remedy because the employer made the layoff decision *before* the union was certified as the exclusive representative. 329 NLRB 258, 259 (1999). Given the timing of the layoff in *Bridon Cordage*, that case involved only effects bargaining. Similarly, in *North Star Steel Co.*, the Board ordered a limited remedy because the decision to lay off employees flowed directly from a previous decision to change operations—a decision the employer made *before* the plant unionized. 347 NLRB 1364, 1371 (2006).

¹³ Equally unpersuasive is the Company’s assertion (Br. 41) that the parties’ current negotiations for a first contract somehow render the Board’s remedy inappropriate. The current bargaining between the parties is irrelevant to the

over the decision itself, then the Union may have been able to reduce the number of layoffs by negotiating over, for example, modified work rules, nonpaid vacations, restricted overtime, job sharing, and a shortened workweek. The Company cannot establish that, had it carried out its statutory duty to bargain in advance of the layoffs, the situation at Choctaw Mine would have played out precisely as it did. Accordingly, the Court should reject the Company's attempt to limit its liability to four workers.

Company's earlier failure to negotiate over the decision and the effects of the layoff.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full.

Respectfully submitted,

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JULY 2014

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FOR THE ELEVENTH CIRCUIT**

TAFT COAL SALES & ASSOCIATES, INC.)	
WALTER ENERGY, INC., and WALTER)	
MINERALS, INC.)	
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Petitioner/Cross-Respondent)	Nos. 14-10618, 14-11093
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	10-CA-88599
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,372 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 14th day of July, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 14th day of July, 2014