

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Nos. 02-1615 & 02-1616

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NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BREDE, INC.

Respondent

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ON APPLICATIONS FOR ENFORCEMENT OF ORDERS OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the applications of the National Labor Relations Board to enforce two Board orders issued against Brede, Inc. (“the Company”). The Board had subject matter jurisdiction over the unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s decisions and orders were issued on August 24, 2001, and are reported at Brede, Inc., 335 NLRB

No. 3, 2001 WL 986873 (2001), and Freeman Decorating Co. and Brede, Inc., 335 NLRB No. 4, 2001 WL 986874 (2001). (A 1-35, 36-68.)<sup>1</sup> The orders are final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Minneapolis, Minnesota. The Board filed its applications for enforcement of its orders with respect to the Company on March 8, 2002.<sup>2</sup> Those filings were timely because the Act imposes no time limits on the institution of proceedings to enforce Board orders. On the Board's unopposed motion, the Court consolidated these proceedings (No. 02-1615 and No. 02-1616) for briefing and oral argument.

#### STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(5), (2), and (1) of the Act.

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<sup>1</sup> The Court ordered the parties to file separate appendices. As of the time of preparing this brief, however, the Company had not yet filed its appendix. Therefore, all "A" references are to the Board's Separate Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>2</sup> The Board has not initiated enforcement proceedings against the other respondents below, Freeman Decorating Company and United Food & Commercial Workers International Union, Local No. 653. Although the Board found that they also engaged in unfair labor practices, those parties are currently complying with the Board's orders to the satisfaction of the Board.

Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982);

NLRB v. Vought Corp.-MLRS Sys. Div., 788 F.2d 1378 (8th Cir. 1986).

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally taking its job referral system in-house, and by unilaterally implementing other changes in the criteria and procedures for hiring unit employees.

NLRB v. Katz, 369 U.S. 736 (1962);

Porta-King Bldg. Systems v. NLRB, 14 F.3d 1258 (8th Cir. 1994);

Radisson Plaza Minneapolis v. NLRB, 987 F.2d 1376 (8th Cir. 1993);

RBE Electronics of S.D., Inc., 320 NLRB 80, 82 (1995).

3. Whether the Board acted within its broad remedial discretion in ordering the Company to bargain with Local 17U over the terms and conditions of employment of extras referred by the Stagehands Union.

Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944);

Pace Indus., Inc. v. NLRB, 118 F.3d 585 (8th Cir. 1997);

United Food & Commercial Workers Local 304A v. NLRB, 772 F.2d 421 (8th Cir. 1985).

#### STATEMENT OF THE CASE

The Board's General Counsel issued consolidated complaints after an investigation of unfair labor practice charges filed by employee Dan Brady and

Drapery, Slip Cover, Window Shade, Venetian Blinds, Exhibition, Flag and Bunting Decorators Union, Local 17U, which is affiliated with United Steelworkers of America, AFL-CIO, CLC. (A 100, 112.) After conducting hearings in two separate proceedings, the administrative law judges issued decisions finding that the Company engaged in unfair labor practices. (A 8-35, 39-68.) The Board affirmed the bulk of the judges' findings and adopted, with modifications, their recommended orders. The facts supporting the Board's orders are summarized below, followed by a summary of the Board's conclusions and orders.

## STATEMENT OF FACTS

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

#### A. Background; Local 653 Represents the Company's Regular Employees, but Not Its Extras

The Company supplies equipment, materials, and decorator labor to trade show and convention promoters. (A 1, 9; 100, at ¶ 2(a), 106, at ¶ 2.) At its facility in Minneapolis, Minnesota, the Company employs approximately 25 "regular decorators," who set up and dismantle exhibits at trade shows and conventions. When the number of decorators needed for a show exceeds the Company's pool of "regulars," it hires "extras." (A 1, 9; 173-75.)

United Food & Commercial Workers International Union, Local No. 653 ("Local 653") has at all pertinent times represented the Company's regular

employees, but not its extras. Nevertheless, prior to the events giving rise to this case, Local 653 had negotiated the wage rate for the Company's extras into the regulars' contract. (A 1, 12; 120, 261-62, 266.)

B. The Company Agrees To Let Local 653 Handle the Referral of Extras; Local 653 Operates a Referral System Based on Length of Service with the Company

In 1991, while negotiating a successor contract for the regulars, the Company agreed to let Local 653 establish and operate a referral system for hiring extras in place of its own in-house system. (A 1, 12, 19; 175, 191, 258-60.) Gene Schultz, Local 653's shop steward, devised a procedure for assigning work to the extras; they were ranked on a list by the number of hours they had previously worked for the Company. (A 9, 10, 15, 17; 175-76, 179-80.)

Schultz, or one of his family members, would call Operations Manager Michael Johnson at the Company at 4:00 p.m. each day to find out how many extras were needed for the next day. From 5:00 to 8:00 p.m., Schultz would telephone extras for work according to their rank on the list. Extras remained on the list as long as they paid a \$15 monthly fee. If extras did not want to work when called, or if they wanted to take time off, their position on the list would not be affected. (A 9, 10, 15, 17; 153-59, 160-65, 167, 192, 203-04, 230-32.) When the Company's hiring needs for some of the larger trade shows exceeded the number of available extras on the referral list, the Company would hire extras who were

members of Local 13 of the International Alliance of Theatrical Stage Employees (“the Stagehands Union”). (A 15; 239).

C. The Extras Decide To Seek Representation, and Choose Local 17U To Be Their Bargaining Representative; the Parties Begin Bargaining and Local 17U Proposes Operating a Seniority-Based Referral System

In January 1995, Local 653 and the Company began negotiating for the next successor contract for the regulars. Soon thereafter, some of the extras decided to seek representation, because they were concerned that Local 653 might sacrifice their wage rate to bolster the wage rate of the regulars. (A 2, 9, 15; 180-81, 232-36.) On September 11, Drapery, Slip Cover, Window Shade, Venetian Blinds, Exhibition, Flag and Bunting Decorators Union, Local 17U (“Local 17U”) won a Board-conducted election in the stipulated unit of “[a]ll on-call, casual, extra employees employed by the [Company] . . . excluding . . . all other employees currently covered by other collective-bargaining agreements . . . .” (A 2, 13; 122.) On September 18, the Board certified Local 17U as the extras’ bargaining representative. (A 2, 13; 123.)

In a letter dated September 26, Local 17U requested that the Company negotiate a collective-bargaining agreement for the extras, and stated its desire to immediately begin handling “all labor calls [or] requests” for extras. (A 2, 13; 124.) On September 29, the parties met and exchanged some proposals and documents, and briefly discussed their bargaining positions on the referral system.

Union attorney Jack Cerone stated that Local 17U proposed to run a referral system by seniority. Company attorney Joe Nierenberg stated that the Company had previously used its own in-house system. A second negotiating session was scheduled for October 24. (A 2, 13; 218-21.)

D. A Jurisdictional Dispute Arises Within the Steelworkers Union; Local 17U Informs the Company that Negotiations Will Need To Be Put on Hold Temporarily, but that It Is Not Waiving Its Position on Its Proposal To Operate a Referral System

Shortly after the September 29 meeting, a jurisdictional dispute arose within the Steelworkers Union between District 11, the district covering Minnesota, and District 7, the district covering Illinois. District 11 contended that Local 17U did not have jurisdiction to organize in the Minneapolis area because it was a member of District 7, and that District 11 therefore had jurisdiction over the Company's extras. (A 2, 13; 222-23.)

In a letter dated October 10, the Company agreed with Local 17U that the current referral system "require[d] substantial reform," but that it preferred to return to an in-house system. The Company further stated that it would not agree to allow Local 17U to handle the referral of extras on an interim basis during negotiations, and that "if the union wishes to discuss this matter further, it should be addressed . . . on October 24" at the next bargaining session. (A 2, 13; 125.)

About October 15, Cerone telephoned Nierenberg and informed him that negotiations would have to be put on hold temporarily because of the jurisdictional

dispute. Nierenberg agreed to postpone the October 24 bargaining session, and stated that the Company still wanted to take the referral system back in-house.

Cerone replied that Local 17U's position was that the referral system was one of its major proposals and that it was not waiving its position on operating its own referral system. (A 2, 14; 224-26.)

On October 25, Nierenberg wrote a letter to Cerone stating that the Company remained willing to bargain with Local 17U. (A 2, 14; 127.) On November 8, Steelworkers District 11 wrote a letter to the Company asserting its alleged jurisdiction and requesting bargaining. In a reply letter on December 7, the Company refused, stating that Local 17U was the certified bargaining representative of its extras. (A 2, 14; 129.)

E. The Company, Without Notifying Local 17U, Takes the Referral System Back In-House, Changes the Criteria for Hiring Extras, and Implements Numerous Changes in Referral Procedures

On December 1, the Company began directly operating the referral system without informing Local 17U. (A 2, 24, 25; 130.) The Company did not directly notify the extras of that change, relying instead on "word-of-mouth" to spread the news. (A 2, 11, 22; 137, 212-13, 273.)

The Company altered the criteria used for hiring extras and implemented a number of changes in the referral system's procedures. Typically, Operations Manager Johnson would determine the number of extras the Company needed for

the next day, and compile a list of extras he preferred to hire based on his personal assessment of who was suited for the available job. Johnson's criteria for determining whether an extra was qualified included his view of the extra's strengths and limitations drawn from his personal knowledge of past reliability and job performance. Johnson's preferred list included not only some of the extras on Local 653's list, but also Stagehand extras. (A 11, 21, 22, 24-25; 131, 143, 274-75,)

The Company installed a separate phone line to administer the referral system, and required extras to call that number daily between 3:00 and 4:30 p.m. if they wanted to work the next day. If extras on Johnson's preferred list called, they were immediately given job assignments. If not enough extras on his preferred list called, Johnson would then call those extras he considered qualified from among those who had called in their availability. If no one at Johnson's office answered the phone, a recording would inform callers that there was no work, or would instruct them to call back later. Johnson's office did not retrieve messages from voice mail, so if extras did not speak to someone directly, their availability would not be known and they would not receive work. (A 11, 21, 22, 24-25; 131, 143, 167-68, 188-90, 272.) If extras failed to call in, even for a day, the Company no longer considered them employees. (A 16; 254-55.)

Extras who wanted time off were required to get Johnson's advance approval. If they asked for time off, however, they sometimes were not returned to work promptly. (A 17; 244, 167.) In late December, when extra Dan Brady gave Johnson 2-days' notice that he would be unable to work for 2 days because he would be attending contract negotiating sessions, Johnson became upset about it, and did not give him work for several weeks. (A 15; 252-53, 256-57.)

F. The Jurisdictional Dispute Is Settled in Favor of Local 17U; the Company and Local 653 Execute a Letter of Understanding Purporting To Authorize the Company To Handle In-House the Referral of Extras Represented by Local 17U; the Company Increases Its Hiring of Stagehands and Teamsters; Senior Unit Members Find It Difficult To Get Work

In late December 1995, the Steelworkers Union resolved its internal jurisdictional dispute in favor of District 7 and Local 17U. (A 2, 13-14, 15; 223-24, 228-29.) On January 4, 1996, the Company executed a letter of understanding with Local 653, which extended the regulars' contract and stated that "[e]ffective December 1, 1995, [the Company] will handle extra labor in-house." (A 27; 130.) The Company did not give Local 17U notice of that agreement. (A 27.)

About that same time, the Company began increasing its hiring of members of the Stagehands Union to work as extras. (A 15, 17, 21, 24-26; 170, 240, 245-46.) During 1996, the Company hired Stagehand extras for a total of 4250 hours of work, which was an increase from 1410 hours the previous year. (A 23; 146, 270-71.) The Company also began regularly hiring members of Local No. 544 of the

International Brotherhood of Teamsters, AFL-CIO (“the Teamsters Union”) to do extra decorating work. (A 16, 17; 169, 237-38, 246-48.)

Many senior unit employees who had worked regularly under Local 653’s referral system found it very difficult to obtain work. (A 17, 18, 19; 171-72, 185-88, 192-202, 205-08, 241-43.) In February and March, 1996, Local 17U and employee Brady filed unfair labor practice charges against the Company alleging that it had unilaterally changed the referral system and increased its reliance on Stagehand extras. (A 8; 97, 99.)

G. The Company Hires Employee Prouty Under Terms Different from Those of Unit Extras, and Uses Him, Instead of Senior Unit Members, To Perform Unit Work at Lower Wage Rates; the Company Recognizes and Bargains with Local 653 as Representative of the Extras; the Company Refuses Local 17U's Request To Bargain over Wage Rates Paid to Extras Referred by the Stagehands Union

In summer 1996, Operations Manager Johnson began hiring Lenny Prouty, an employee of Exhibits Plus, a business affiliated with the Company, to do extra decorating work whenever Exhibits Plus had no work for him. When Prouty was available, Johnson used him to do extra decorating work before hiring unit employees. The Company paid Prouty \$8.00 or \$9.00 an hour, rather than the \$12.00 it was required to pay extras. (A 11, 15; 213-17, 249-51.) On February 4, 1997, employee Brady filed an unfair labor practice charge against the Company concerning the Company’s use of Prouty to do unit work. (A 8; 98.)

In spring 1997, unit employee Richard Gustafson contacted Warren Hartman, the business agent for Local 653, and asked him for some authorization cards, stating that some of the Company's extras were interested in joining Local 653. In October, Gustafson returned cards that had been signed by unit employees. Between October 1997 and May 1998, Local 653 obtained additional authorization cards from the Company's extras. (A 45; 290-94.)

On May 11, 1998, Local 653 submitted those signed authorization cards to the Minnesota Bureau of Mediation Services, along with a card-check agreement executed by the Company. Local 17U was never notified of or offered an opportunity to participate in that state proceeding. On May 12, the Bureau of Mediation Services conducted a count of the cards and issued a "Unit Determination and Certification of Exclusive Representative," stating that Local 653 was certified as the bargaining representative of extra helpers engaged in decorating work for the Company. (A 45; 279, 283-86.) Thereafter, the Company recognized Local 653 as the representative of its extras and, in June, participated in two bargaining sessions. (A 45; 283.)

In a letter dated April 11, 1998, Local 17U requested that the Company bargain over the "rates for extra employees you get from all other sources," and explained its concern that, although it had agreed to the Company's "use of stagehands at historical rates," it requested bargaining "to negotiate limits on

[their] use.” (A 44; 276.) The Company refused to bargain with Local 17U on that issue. (A 44; 277.)

## II. THE BOARD’S CONCLUSIONS AND ORDERS

On August 9, 1999, the Board (Chairman Hurtgen, and Members Liebman and Truesdale) issued two decisions and orders against the Company, the Freeman Company, and Local 653. In Brede, Inc., 335 NLRB No. 3, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing changes in its procedures for hiring unit employees, including taking the referral system back in-house, without providing Local 17U notice and an opportunity to bargain. The Board also found that the Company violated Section 8(a)(5) and (1) by substantially increasing its reliance on sources of unit employees other than its traditional list of on-call employees, by substantially increasing its use of nonunit employees to perform unit work, and by refusing to treat employee Prouty as a unit member and using him, rather than senior unit employees, to perform unit work at lower wage rates. (A 1-3, 4.)

In Freeman Decorating Co. and Brede, Inc., 335 NLRB No. 4, the Board found that the Company violated Section 8(a)(2) and (1) of the Act (29 U.S.C. § 158(a)(2) and (1)) by granting recognition and rendering unlawful assistance and support to Local 653 at a time when Local 17U was the lawful bargaining representative of the unit employees. The Board also found that the Company

violated Section 8(a)(5) and (1) by withdrawing recognition from Local 17U, and by refusing to bargain with Local 17U over the terms and conditions of employment for extras referred to the Company by the Stagehands Union.

(A 36, 64.)

The Board's orders require that the Company cease and desist from the unfair labor practices found and, in any like or related manner, from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the orders require that the Company resume recognizing and bargaining with Local 17U; rescind, at Local 17U's request, all unilateral changes made after Local 17U's certification as bargaining representative of the unit employees and bargain with Local 17U over how referrals will be handled; make whole any unit employee who lost work because of the Company's unlawful conduct; and make whole employee Prouty for any loss he suffered as a result of the Company's failure to treat him as a unit employee. Finally, the orders require that the Company post remedial notices. (A 4, 64.)

#### SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of the numerous findings that the Company did not contest, either before the Board, or in its opening brief to this Court. The Board also should be granted affirmance of its findings that the

Company violated Section 8(a)(5) and (1) by making unilateral changes in the criteria and procedures for hiring unit employees because, in its brief to this Court, the Company has failed to contest the Board's finding that it acted without bargaining over the changed criteria and procedures, and fails to provide any specific argument or defense with regard to them.

The Company similarly does not dispute that it acted without bargaining to impasse in taking the referral system in-house, an action that the Board found to be unlawful. The only issue remaining for the Court to decide in passing on that finding is whether the Company has carried its heavy burden of demonstrating a defense under the two limited exceptions--an economic exigency that compelled prompt action, and a union's tactics designed to delay bargaining--to the general rule that an employer may not take unilateral action during contract negotiations in the absence of an overall impasse on bargaining for the agreement as a whole. This it has failed to do. As a threshold matter, the Company failed to provide Local 17U with notice and an opportunity to bargain, which is a prerequisite to any defense against an allegation of unlawful unilateral action. On that basis alone, the Board should be granted enforcement. In support of its claim that it did provide notice, the Company relies only on statements that it made during contract negotiations that constitute mere expressions of the Company's bargaining

position, and not notice to Local 17U of its intention to implement an in-house system on December 1.

The Company has failed to carry its heavy burden of demonstrating the existence of an economic exigency that compelled it to promptly implement an in-house referral system. The company president's own testimony demonstrates that the Company took the referral system in-house pursuant to a longstanding determination that it desired to do so, and not due to any exigency requiring immediate action. Also belied by Casey's testimony is the Company's claim that it was compelled to act promptly due to customer complaints about the quality of employees hired under the Local 653 referral system; rather, Casey testified that those customer complaints were "an ongoing problem" that developed between 1991 and 1995. Those complaints were an ordinary business problem, and therefore cannot constitute a legally recognizable justification for the Company's unilateral action. The Company's second claimed exigency, that it was compelled to act "to avoid the prospect of an unfair labor practice charge," was reasonably found by the Board to be "speculative at best." Casey's own testimony shows that his liability concern was confined to the sense that the situation "didn't sound . . . good" to him.

The Company has similarly failed to carry its burden of demonstrating that Local 17U engaged in tactics designed to delay bargaining. As the Board

reasonably found, the hold in negotiations precipitated by the Steelworkers Union's bona fide internal jurisdictional dispute was not such a tactic. Moreover, the Company agreed to the hold, and at no time attempted to contact Local 17U to initiate bargaining over the referral system change. The Company's additional contention that Local 17U waived its bargaining rights also fails. Without notice there can be no waiver, and waiver must, in any event, be "clear and unmistakable; here, there is substantial evidence that the Company did not provide Local 17U with notice and an opportunity to bargain, as well as record evidence of union attorney Cerone's express statement of non-waiver.

Finally, the Board did not abuse its discretion in ordering the Company to bargain with Local 17U over the Company's use of Stagehand extras. As the Board found, the Company's bargaining obligation, which it violated, extended to the Stagehand extras doing unit work because those extras are unit employees. Accordingly, the Board's order has the goal of effectuating the purposes of the Act, and must be upheld.

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5), (2), AND (1) OF THE ACT

Before the Board, the Company did not contest a number of findings made by the administrative law judges. Specifically, the Company did not contest the

findings that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by substantially increasing its reliance on sources of extras other than its traditional list of on-call employees, by substantially increasing its use of nonunit employees to perform unit work, and by refusing to treat employee Prouty as a unit member and using him, rather than senior unit employees, to perform unit work at lower wages. (A 1 n. 4, 31.)

The Company also did not contest the finding that it violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 17U over the terms and conditions of the employment of the extras referred to the Company by the Stagehands Union. (A 36 & n. 5, 62.) In addition, the Company did not contest the findings that it violated Section 8(a)(2) and (1) of the Act (29 U.S.C. § 158(a)(2) and (1)) by granting recognition to Local 653 at a time when Local 17U was the bargaining representative of the unit employees and, concurrently, violated Section 8(a)(5) and (1) by withdrawing recognition from the Local 17U. (A 36 n. 2, 62.)

Because the Company did not file exceptions with the Board to those findings of the administrative law judges, the Company is now jurisdictionally barred from obtaining appellate review of them. See Section 10(e) of the Act (29 U.S.C. § 160(e)); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982); NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1077 (8th Cir.

1992). For that reason, the Company has waived any defense to those findings, and the Board is entitled to summary enforcement of those portions of its orders. See NLRB v. Vought Corp.-MLRS Systems Div., 788 F.2d 1378, 1380 n.1 (8th Cir. 1986). Those uncontested unfair labor practices, however, remain relevant to the contested violations and do not disappear from the case. See Radisson Plaza Minneapolis v. NLRB, 987 F.2d 1376, 1381-82 (8th Cir. 1993). Accord NLRB v. Clark Manor Nursing Home Corp., 671 F.2d 657, 660 (1st Cir. 1982) (uncontested findings “remain, lending their aroma to the context in which the [contested] issues are considered”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY TAKING THE REFERRAL SYSTEM IN-HOUSE, AND BY IMPLEMENTING OTHER UNILATERAL CHANGES IN THE CRITERIA AND PROCEDURES FOR HIRING UNIT EMPLOYEES

A. Standard of Review and Applicable Principles

The findings of fact underlying the Board’s decision are “conclusive” if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). “Where either of two inferences may reasonably be drawn from the facts, the [Court] is bound by the Board’s findings . . . .” Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991). Therefore, the Board’s order is entitled to “great deference” and will be enforced by the Court “if the Board correctly applied the law and if its

findings of fact are supported by substantial evidence on the record as a whole, even if [the Court] might have reached a different decision had the matter been before [it] de novo.” King Soopers, Inc. v. NLRB, 254 F.3d 738, 742 (8th Cir. 2002). See also Porta-King Bldg. Systems v. NLRB, 14 F.3d at 1258, 1261 (8th Cir. 1994).

“Congress made a conscious decision” to delegate to the Board “the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.” Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979). Accord Kirkwood Fabricators, Inc. v. NLRB, 862 F.2d 1303, 1305-06 (8th Cir. 1988). Accordingly, “if [the Board’s] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.” Ford Motor Co., 441 U.S. at 496. Rather, “[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts.” Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 200 (1991) (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987)).

In this case, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the bargaining representative of its employees. As defined in Section 8(d) of the Act

(29 U.S.C. § 158(d)), collective bargaining is “the performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good-faith with respect to wages, hours, and other terms and conditions of employment.” See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209-10 (1964).

An employer violates Section 8(a)(5) of the Act not only by an outright refusal to bargain, but also by making “a unilateral change in conditions of employment under negotiation . . . , for [a unilateral change] is a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal.” NLRB v. Katz, 369 U.S. 736, 743 (1962). As the Supreme Court has explained, such unilateral action by an employer “minimizes the influence of organized bargaining” and “interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” May Dep’t Stores v. NLRB, 326 U.S. 376, 385 (1945).

Accordingly, an employer violates Section 8(a)(5) and (1) of the Act when it makes a unilateral change “in the terms and conditions of employment in an area that is a compulsory subject of collective bargaining without giving the bargaining representative both reasonable notice and an opportunity to negotiate about the proposed change.” Porta-King Bldg. Systems v. NLRB, 14 F.3d 1258, 1261 (8th

Cir. 1994). See also Technicolor Gov't Servs., Inc. v. NLRB, 739 F.2d 323, 327 (8th Cir. 1984). Systems for the referral and hiring of unit employees are such mandatory subjects of bargaining. NLRB v. Southwest Security Equipment Corp., 736 F.2d 1332, 1337 (9th Cir. 1984); Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 977 (6th Cir. 1982).

Moreover, where, as here, the parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes encompasses the duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. Visiting Nurse Servs. of Western Mass, Inc. v. NLRB, 177 F.3d 52, 59 (1st Cir. 1999).<sup>3</sup> See NLRB v. Katz, 369 U.S. 736, 741-43 (1962); Litton Microwave Cooking Prods. v. NLRB, 949 F.2d 249, 251 (8th Cir. 1991) ("The Board and the courts have long recognized that an employer's unilateral change in conditions of employment under negotiation is an unfair labor practice," and that "until parties reach impasse in negotiations over labor matters, an employer must maintain the status quo.").

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<sup>3</sup> Accord Citizens Publishing & Printing Co. v. NLRB, 263 F.3d 224, 233 (3d Cir. 2001); Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 997 (7th Cir. 2000); Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000); NLRB v. Triple A Fire Protection, Inc., 136 F.3d 727, 739 (11th Cir. 1998).

The Board has recognized two limited exceptions to that general rule: “[W]hen economic exigencies compel prompt action,” and when a union engages in tactics designed to delay bargaining. Bottom Line Enters., 302 NLRB 373, 374 (1991) (“Bottom Line”), enforced sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994). Accord Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000); NLRB v. Triple A Fire Protection, Inc., 136 F.3d 727, 739 (11th Cir. 1998). Even if an employer might ultimately carry its burden of establishing one of those two limited exceptions, the employer is not relieved of “its statutory obligation [of] providing the union with adequate notice and an opportunity to bargain.” RBE Electronics of S.D., Inc., 320 NLRB 80, 82 (1995). See Porta-King Bldg. Systems v. NLRB, 14 F.3d 1258, 1261 (8th Cir. 1994) (an employer must provide “the bargaining representative both reasonable notice and an opportunity to negotiate”).

B. The Board Reasonably Found that the Company’s Unilateral Changes Were Unlawful

Applying the foregoing principles, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the criteria and procedures for hiring unit employees, and by unilaterally taking the referral system in-house. (A 1-3.) The Company does not contest the Board’s findings that it made unilateral changes in the hiring criteria and procedures, including using subjective rather than objective, longevity-based criteria for hiring, changing the

call-in hours, shifting the burden of calling from the hall operator to the employees, not using an answering machine to allow for messages, and penalizing employees for requesting time off. (A 1 n. 5.). Nor does the Company present any specific argument defending any of those changes.<sup>4</sup> Accordingly, the Board's finding that those changes in the referral system violated Section 8(a)(5) of the Act is entitled to affirmance.

The Company similarly concedes that it took the referral system in-house without bargaining to impasse, but claims that it was legally justified to do so. As we now show, the Board acted reasonably in rejecting the Company's defenses, and therefore properly found that the Company further violated Section 8(a)(5) and (1) by unilaterally taking the referral system in-house.

1. The Company failed to provide Local 17U with notice and an opportunity to bargain, which are prerequisites to its claimed defenses against the Board's unilateral change finding

The Company claims that its liability for unilaterally taking the referral system in-house should be excused under one of the Bottom Line exceptions to the general rule against unilateral changes in the absence of an overall impasse on

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<sup>4</sup> It appears, however, that the Company might have assumed that its defense for those unfair labor practices would be covered by its claimed intent "to restore the process in-house *as it had been previously performed.*" (Br 18, emphasis added.) Such a vague assertion, however, provides no basis for disturbing the Board's findings, particularly in light of the lack of record evidence demonstrating the specifics of how the Company operated its prior in-house system.

bargaining for the agreement as a whole. As the Board found, however, the Company failed to make the threshold showing that it provided Local 17U with notice and the opportunity to bargain, which, as shown, is a prerequisite to any such defense. On that basis alone, the Company must be found liable for that unilateral change.

As the record evidence shows, the Company did not contact Local 17U on December 1, when it took the referral system in-house, nor had it informed Local 17U at any time prior to December 1 that it intended to implement an in-house system on that date. In fact, the Company had not even attempted to communicate with Local 17U since October 15, when the parties had discussed their bargaining positions on the issue. Thus, the Board reasonably found (A 2) that the Company failed to provide Local 17U with notice or an opportunity to bargain over that unilateral change.

The Company contends (Br 19) that it gave Local 17U 2-months' notice, which "was first provided in the bargaining session on September 29, reiterated in a letter on October 10, and confirmed subsequently in a telephone conversation," apparently the conversation between Nierenberg and Cerone on October 15. (Br 19 n. 4.) To the contrary, those statements were all made in the context of ongoing contract negotiations and were merely expressions of the Company's bargaining position. As such, those statements cannot constitute notice of the

intent to make a unilateral change. As this Court has held, evidence that an employer “bargained over changes before it made them” and that “the parties had generally discussed” them during contract negotiations, “without more, . . . is not the equivalent of notice.” Radisson Plaza Minneapolis v. NLRB, 987 F.2d 1376, 1381 (8th Cir. 1993). Accordingly, the Company’s further contention (Br 18) that it gave Local 17U sufficient time to respond before implementing the in-house referral system is of no consequence.

In contending (Br 18) that its statements of bargaining position were adequate notice because “a more detailed notice” was not required, the Company distorts (Br 18) NLRB v. Pinkston-Hollar Constr. Servs., Inc., 954 F.2d 306, 311 n. 4 (5th Cir. 1991), by omitting a paragraph of text at the ellipses, thereby connecting two unrelated discussions. Even so, that case otherwise provides no support for the Company’s notice contention because, there, the employer had given notice (id. at 312), and an issue arose concerning the adequacy of that notice. Id. at 311 n. 4. In contrast, here, no notice was given, so the adequacy of notice is not at issue.

2. The Company has failed to demonstrate that an economic exigency compelled its unilateral changes

The Board found that the Company “failed to establish an economic exigency justifying its unilateral action.” (A 2.) That finding is reasonable and consistent with law. As stated, one of the limited exceptions that the Board recognized to the general rule against unilateral changes in the absence of an

overall impasse on bargaining for the agreement as a whole is “when economic exigencies compel prompt action.” Bottom Line Enters., 302 NLRB 373, 374 (1991), enforced sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994), and cases cited at p. 23.

To establish such a defense, an employer must show not only that an economic exigency demanded prompt action, but also that the exigency was “caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.” RBE Electronics of S.D., Inc., 320 NLRB 80, 82 (1995). Accord Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000). The employer’s burden of establishing such a defense is a “heavy” one. RBE, 320 NLRB at 81; Our Lady of Lourdes Health Ctr., 306 NLRB 337, 340 n.6 (1992).

The Company has failed to carry its heavy burden of establishing an economic exigency. As a general matter, the Company has failed to demonstrate that a change in referral systems needed to be implemented promptly. Indeed, President Casey’s own testimony belies any such need. Casey testified that the Company “pretty much made up [their] minds before the negotiations with [Local] 653 . . . in January of ’95 to go back to the old system” (A 268), and that he was simply “waiting until the end of the contract to change it back.” (A 267.)

Nevertheless, the Company raises two concerns that it claims are economic exigencies. First, it contends (Br 20-21) that it was compelled to take the referral

system in-house because it had received customer complaints about the quality of employees hired under the referral system as it was run by Local 653. To the contrary, Casey testified that the customer complaints about unqualified employees referred by Local 653 was “an ongoing problem” that developed between 1991 and 1995. (A 267.)

Moreover, as the Board explained in affirming the administrative law judge’s findings on this point, “President William Casey’s testimony regarding customer dissatisfaction was uncorroborated and . . . the record contained no evidence of the magnitude of the problem, when it started, how long it had been going on, who was involved, and why it could only be remedied by taking the referral system in-house.” (A 2 n. 10.) Accordingly, the Company has presented only an unfounded claim.

Moreover, the Company has failed to show that such customer complaints were anything other than an ordinary business problem. As the Board has explained, “business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, [an employer] faced with a gloomy economic outlook could take any unilateral action it wished . . . simply because it was being squeezed financially.” Farina Corp., 310 NLRB 318, 321 (1993). See Triple A Fire Protection, Inc., 315 NLRB 409, 414, 418 (1994) (operation at a competitive disadvantage did not relieve employer of its duty to bargain), enforced,

136 F.3d 727 (11th Cir. 1998); Angelica Healthcare Servs., 284 NLRB 844, 853 (1987) (foreseeable loss of a significant customer account representing 14 percent of the employer's revenue did not constitute a compelling economic exigency).

Second, the Company contends (Br 20-21) that it was compelled to act unilaterally in taking the referral system in-house “to avoid the prospect of an unfair labor practice charge” (Br 21) due to employee complaints of harassment and discrimination under Local 653’s operation of the referral system. The record, however, supports the Board’s finding that “[the Company’s] liability concern was speculative at best.” (A 2 n. 10.) The only evidence presented by the Company in support of its contention that it was motivated by liability concerns was Casey’s testimony (A 268-69), that he felt that the Company “might have some liability for not working people involved in [Local 17U]” (A 269), because they had stopped paying the \$15.00 referral fee to Local 653. Casey admitted that he “didn’t know whether it was legal or good or bad,” but that he knew it “didn’t sound that good to me.” (A 269.) In addition, as the Board emphasized (A 2-3 n.10), the Company failed to explain why, even assuming it was acting out of concern for its bargaining obligation to Local 17U, it was compelled to address those concerns unilaterally, rather than through negotiations with the union whose rights it was purporting to vindicate.

3. The Company has failed to demonstrate that Local 17U engaged in tactics designed to delay bargaining

The second of the limited exceptions to the general rule against making unilateral changes in the absence of a bargaining impasse is when a union engages in tactics designed to delay bargaining. Bottom Line, 302 NLRB at 374, and cases cited at p. 23. Again, the employer's burden of establishing such a defense is a "heavy" one. RBE, 320 NLRB at 81.

The Company has failed to carry its burden of demonstrating that Local 17U engaged in tactics designed to delay bargaining. Rather, as the Board reasonably found (A 2-3), the hold in negotiations precipitated by the Steelworkers Union's internal jurisdictional dispute was not a tactic "designed to delay bargaining." There is no dispute that there was a valid dispute between the two Steelworkers districts, that the purpose of the hold in negotiations was to provide time to resolve that dispute, and that the Company agreed to the hold in negotiations.

Nonetheless, the Company contends (Br 16-18) that it should be allowed cover under this exception because "from the perspective of the [Company], [Local 17U was] simply unavailable for bargaining." (Br 18.) Rejecting that contention, the Board reasonably found that "the parties' agreement to a temporary hold in negotiations" was not "a license to make unilateral changes in terms and conditions of employment." (A 3.) As the Board explained, "Local 17U sought a temporary delay in negotiations while it resolved an internal union jurisdictional

dispute,” but “did not disclaim interest in the unit, and . . . gave no indication that it was unable to bargain on its behalf. . . . [The Company] neither objected to the hold on negotiations, nor gave any indication that the referral system was a pressing concern that needed to be addressed immediately.” (A 3.) Moreover, the Company “never attempted to find out if Local 17U could bargain,” but “simply acted unilaterally, and in our view unlawfully, by taking the referral system in-house.” (A 3.)

The Company further contends (Br 18-19) that under traditional principles of waiver, that Local 17 waived its right to bargain over taking the referral system in-house. Such a waiver of statutory bargaining rights, however, must be “clear and unmistakable.” Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 & n. 12 (1983). Accord King Soopers, Inc. v. NLRB, 254 F.3d 738, 743 (8th Cir. 2001); Metromedia v. NLRB, 586 F.2d 1182, 1189 (8th Cir. 1978). The Board reasonably rejected the Company’s assertion of waiver (A 2-3), finding it contrary to the record evidence. As the Board explained, “Local 17U never ceased objecting to [the Company] taking the referral system in-house and never ceased requesting that [it] bargain over this issue.” (A 2.)

Moreover, the record evidence contains union attorney Cerone’s express statement of non-waiver, as well as substantial evidence that the Company did not provide Local 17U with notice. See discussion at pp. 24-26. Absent notice, no

clear and unmistakable waiver of a union's bargaining rights is possible. As this Court has explained, "'mere suspicion or conjecture cannot take the place of notice where notice is required,' and will not be sufficient to support a finding of waiver." Porta-King, 14 F.3d at 1262-63 (quoting Warehouse & Office Workers, Local 512 v. NLRB, 795 F.2d 705, 711 (9th Cir. 1986)); Ladies Garment Workers v. NLRB, 463 F.2d 907, 918-919 (D.C. Cir. 1972) (same). Similarly, this Court has consistently required evidence of a specific waiver, and rejected the notion that waiver can be assumed. Technicolor Gov't Servs., Inc. v. NLRB, 739 F.2d 323, 328 (8th Cir. 1984) (stating that waiver cannot be assumed, and rejecting contention that waiver can be established "on inferences which might be drawn from the [u]nion's failure to bring the subject up before the change in policy was made"); Metromedia, Inc. v. NLRB, 586 F.2d 1182, 1189 (8th Cir. 1978) (stating waiver cannot be assumed, and rejecting contention that waiver could be inferred from the union's "failure to seek negotiations . . . even though it was aware that the . . . contract was to be renegotiated that spring and that the [subject of the unilateral change] was likely to be at issue").

4. The Company's remaining contentions are meritless

The Company appears to contend (Br 16-17) that this Court should adopt the Fifth Circuit rule that, during contract negotiations, an employer may implement unilateral changes "even in the absence of an impasse, if the employer notifies the

union that it intends to institute the change and gives the union the opportunity to respond to that notice.” NLRB v. Pinkston-Hollar Constr. Servs., Inc., 954 F.2d 306, 311 (5th Cir. 1991) (“Pinkson-Hollar”). That rule is contrary to the law of this Circuit. As this Court has explained, “The Board and the courts have long recognized that an employer’s unilateral change in conditions of employment under negotiation is an unfair labor practice,” and that “until parties reach impasse in negotiations over labor matters, an employer must maintain the status quo.” Litton Microwave Cooking Prods. v. NLRB, 949 F.2d 249, 251 (8th Cir. 1991). See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) (“The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”). In any event, that Fifth Circuit rule does not further the Company’s position because, as shown, the Company failed to provide Local 17U with notice and an opportunity to bargain.

The Company further mistakenly represents (Br 16-17) that the Board has “accepted and adopted” (Br 17) that Pinkson-Hollar holding. To the contrary, the Board has repeatedly rejected that approach, as have other courts. See Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 997-98 (7th Cir. 2000) (Posner, J.) (noting the Board’s disagreement, collecting cases, and rejecting that approach); Visiting Nurse Servs. of Western Mass, Inc. v. NLRB, 177 F.3d 52, 57-59 (1st Cir.

1999) (explaining its rejection of that approach). See also cases cited at p. 22 & n. 3. As the D.C. Circuit has reasoned, “[s]uch a view is mischievous, because it would both ‘permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items’ and ‘undercut the role of the [u]nion as the collective bargaining representative.’” Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000) (quoting Visiting Nurse Servs., 177 F.3d at 59). See also Duffy Tool & Stamping, 233 F.3d at 995, 998 (explaining how that approach “would empty the duty to bargain of meaning”).

Contrary to the Company’s argument (Br 21), NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962), does not stand for the proposition that an employer is entitled to take unilateral action with respect to mandatory subjects of bargaining. In that case, the employer’s decision to completely close its plant was not a decision over which it had an obligation to bargain, but one within its “untrammeled prerogative.” Id. at 700-01. Rather, the issue there was whether the employer’s decision to close the plant had been unlawfully motivated, and not whether the employer had satisfied its bargaining obligation, for it had none. In that context, the court discussed the parties’ bargaining history only insofar as it constituted evidence of the employer’s motivation.

The Company also appears to contend (Br 21) that it should be relieved of liability for its unilateral changes because it subsequently bargained with Local 17U over the referral system, and therefore its period of unilateral action was only “temporary.” To the contrary, an employer’s bargaining after already making changes is insufficient to undo the effects of the unfair labor practices and does not satisfy its duty to bargain in good faith. Porta-King Bldg. Systems v. NLRB, 14 F.3d 1258, 1264 (8th Cir. 1994). As this Court explained, “[i]f [an employer] were allowed to unilaterally alter material terms and conditions of employment and offer to bargain afterwards, [t]his power would subvert the bargaining process *ab initio*.” Id. (quoting NLRB v. Plymouth Stamping Div. Elec. Corp., 870 F.2d 1112, 1117 (6th Cir. 1989)).

**III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE COMPANY TO BARGAIN WITH LOCAL 17U OVER THE TERMS AND CONDITIONS OF EMPLOYMENT OF THE EXTRAS REFERRED BY THE STAGEHANDS UNION.**

Where the Board finds that unfair labor practices have been committed, it is authorized under Section 10(c) of the Act (29 U.S.C. § 160(c)) to require the offending party to, among other things, “take such affirmative action . . . as will effectuate the policies of th[e] Act.” The Board’s responsibility is to require those who have committed unfair labor practices to take “such action as will dissipate the unwholesome effects of violations of the Act. . . . It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be

expunged.” Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944). Accord United Food & Commercial Workers, Local 304A v. NLRB, 772 F.2d 421, 426 (8th Cir. 1985).

The Board’s remedial authority is “a broad discretionary one, subject to limited judicial review.” Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964). Accord North Star Steel Co. v. NLRB, 974 F.2d 68, 70 (8th Cir. 1992) (“When fashioning a remedy under [Section] 10(c), 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.”). Accordingly, the Board’s order should not be disturbed “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 Electric Power Co. v. NLRB, 319 U.S. 533, 540 (1943). Accord Pace Indus., Inc. v. NLRB, 118 F.3d 585, 593 (8th Cir. 1997).

The Board did not abuse its discretion in ordering the Company to bargain with Local 17U over its use of Stagehand extras. The Company contends (Br 23) that the Board’s order is inconsistent with the administrative law judge’s decision and is broader than the violation found. In rejecting that contention, the Board explained (A 36 & n. 5) that, indeed, the judge found that “[the Company’s] bargaining obligation extended to ‘all’ extra employees performing decorating work,” and that the Board agreed with the judge’s conclusion that “when [the

Company] uses Stagehands to perform [unit] work, those Stagehands fall within the unit's broad inclusionary language." (A 36 & n. 5, 61.) Accordingly, the Board's order requiring the Company to bargain with Local 17U over the terms and conditions of the Stagehand extras is consistent with the judge's findings, and has the goal of effectuating the purposes of the Act. See Kirkwood Fabricators, Inc., v. NLRB, 862 F.2d 1303, 1307 (8th Cir. 1988) ("Ensuring meaningful bargaining comports with the primary objective of the Act.").<sup>5</sup>

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<sup>5</sup> The Company fails (Br 23) to cite any specific portion of the administrative law judge's discussion in arguing that the Board's order is inconsistent with the judge's decision. Rather, the Company sweepingly contends that the Board's order is inconsistent with "the preceding [40] pages of the opinion, as well as the testimony at hearing." (Br 23.) Insofar as the Company might be implicitly referencing the judge's dicta with regard to the identically worded language defining the Company's and Freeman's units of extras, we note that the Board disavowed much of that language. (A 1-2.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's orders in full.

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