

**10-3448, 11-0247**  
**11-0329**

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

**LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

\_\_\_\_\_  
**ROCHESTER GAS & ELECTRIC CORPORATION**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

\_\_\_\_\_  
**ON PETITIONS FOR REVIEW AND APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

These cases are before the Court on the petitions of Local Union 36, IBEW, and Rochester Gas & Electric Corporation (RGE) to review an Order of the National Labor Relations Board issued on August 16, 2010, and reported at 355 NLRB No. 86.<sup>1</sup> The Board has cross-applied for enforcement of that Order against RGE. The Board's Order is final with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.<sup>2</sup>

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act,<sup>3</sup> which empowers the Board to prevent unfair labor practices. The Union's petition was filed in this Court on August 26, 2010. RGE's petition was initially filed in the D.C. Circuit on August 20, 2010; RGE's petition was transferred to this Court on January 24, 2011. The Board's cross-application was filed on January 26, 2011. Both petitions and the Board's cross-application were timely; the Act places no time limitations on such filings. This Court has jurisdiction over both the petitions for review and the cross-application for

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<sup>1</sup> A-236. "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>2</sup> 29 U.S.C. § 160(e) & (f).

<sup>3</sup> 29 U.S.C. § 160(a).

enforcement pursuant to Section 10(e) and (f) of the Act<sup>4</sup> because the unfair labor practices occurred in New York.

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

1. Effects bargaining. An employer is obligated to bargain over the effects of any decision that impacts bargaining-unit employees' terms and conditions of employment. RGE stopped allowing unit employees to take their work vehicles home, which impacted employee compensation, but it refused to bargain over the effects of its decision. Does substantial evidence support the Board's finding that RGE's refusal to engage in effects bargaining violated Section 8(a)(5) and (1) of the Act?

2. Information request. An employer must provide a union all information relevant to the union's duties as exclusive bargaining representative. The Union requested a variety of information related to RGE's service-vehicle practice to help it prepare for effects bargaining, but RGE refused to provide the information. Did the Board reasonably find that the requested information was relevant and therefore that RGE's refusal to provide it to the Union violated Section 8(a)(5) and (1) of the Act?

3. Prosecutorial Discretion. The Board's General Counsel has unreviewable discretion to determine which issues to include in a complaint. The General

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<sup>4</sup> 29 U.S.C. § 160(e).

Counsel specifically chose not to allege that the refusal to bargain over the decision to stop the service-vehicle practice, itself, violated the Act. Did the Board properly decline to decide an issue not alleged in the case?

4. Remedy. The Board's discretion in fashioning remedies is broad. The Board ruled that the standard effects-bargaining remedy would appropriately restore bargaining power to the Union and effectuate the purposes of the Act. Did the Board reasonably reject the Union's request for additional remedies?

### **STATEMENT OF THE CASE**

After RGE refused to bargain over its decision to end its service-vehicle practice and the effects of that decision and refused to provide the Union with requested information, the Union filed an unfair labor practice charge in the Board's Regional Office in Buffalo, New York. On October 31, 2006, the Regional Director, on behalf of the General Counsel, issued an unfair labor practice complaint alleging that RGE violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union over both the decision to end its practice and the effects of that decision, and by refusing to provide the requested information.<sup>5</sup> On January 24, 2008, the Regional Director amended the complaint to delete the allegation that RGE violated the Act by refusing to bargain over the decision itself. The amended complaint therefore alleged that RGE violated the

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<sup>5</sup> A-9.

Act by refusing to engage in effects bargaining and by refusing to provide information to the Union.<sup>6</sup>

On February 11, 2008, an administrative law judge tried the case. On June 12, 2008, the judge issued a decision finding merit to the complaint allegations and issuing a recommended remedy.<sup>7</sup> RGE and the Union filed exceptions. On August 16, 2010, the Board issued its decision agreeing that RGE violated the Act as alleged.<sup>8</sup> However, the Board modified the remedy recommend by the judge. The Board's findings are set forth below, followed by a summary of the Board's decision.

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<sup>6</sup> A-24.

<sup>7</sup> A-239.

<sup>8</sup> A-236.

## STATEMENT OF FACTS

RGE is a utility company servicing both gas and electric customers in north-central New York.<sup>9</sup> RGE's trouble-maintenance and repair department includes a low voltage group with seven technicians and one inspector.<sup>10</sup> These employees are responsible for meter installations and changes, as well as trouble-shooting work for single buildings.<sup>11</sup> Trouble shooting makes up about forty percent of the low-voltage group's work.<sup>12</sup>

Since at least 1990, employees in the low-voltage group have been using RGE's service vehicles to commute to and from work, and keeping the vehicles at their homes during off hours.<sup>13</sup> This permitted employees to respond rapidly to emergency calls without having to travel to headquarters to pick up a service vehicle before proceeding to the location where emergency services were needed; however low-voltage employees rarely responded directly to the service location from their homes.<sup>14</sup> RGE paid for the vehicles, maintenance, and gasoline.<sup>15</sup>

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<sup>9</sup> A-240; A-91.

<sup>10</sup> A-240; A-94, A-97-98.

<sup>11</sup> A-240; A-98.

<sup>12</sup> A-240; A-98.

<sup>13</sup> A-240-41; A-79, A-86.

<sup>14</sup> A-240-41; A-81-82.

Because the Internal Revenue Service considers use of a service vehicle for commuting purposes to be taxable income,<sup>16</sup> RGE withheld taxes on the value of the vehicle from each employee's pay.<sup>17</sup>

In March 2003, before the Union's certification, RGE promulgated a policy governing employee use of service vehicles.<sup>18</sup> The policy states that all service vehicles must be returned to company property during off-duty hours unless other arrangements have been made. The policy further sets out certain circumstances when employees will be permitted to take service vehicles home:

Vehicles may be assigned alternative garage locations (Ex: Employee residence) when the following criteria is meet [sic]:

Responds to Emergency/Trouble Call-Outs (First Responder)

On-Call Status (Suitably trained and equipped)

...

No other alternative will meet the requirement(s) more economically.<sup>19</sup>

Pursuant to this policy, employees in the low-voltage group continued taking their service vehicles home at night.

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<sup>15</sup> A-241; A-79, A-86.

<sup>16</sup> See 26 C.F.R. §§ 1.61-2T(b)(4), 1.61-2T(c), 1.61-2T(f).

<sup>17</sup> A-241; A-79, A-87.

<sup>18</sup> A-181.

<sup>19</sup> A-182.

In April 2003, the Board certified the Union as the exclusive representative of a unit of 395 RGE employees.<sup>20</sup> The parties bargained and subsequently signed a contract that was effective from September 1, 2003, through May 31, 2008.<sup>21</sup> Although the contract did not specifically reference the service-vehicle policy, it did contain a management rights clause,<sup>22</sup> a section on benefits,<sup>23</sup> and a provision permitting RGE to modify safety and work rules.<sup>24</sup> The parties also signed a side agreement stating that “no arbitrator may infer any bargaining history waiver by either party where a mandatory subject has been discussed but has not been included in the final agreement.”<sup>25</sup>

On November 18, 2005, Richard Frank, company manager of regional operations, met with employees of the low-voltage group. He notified them that they would no longer be permitted to drive service vehicles to and from work, beginning January 1, 2006, because it costs too much.<sup>26</sup> Low-voltage employee Al Smith was present at the meeting and objected to the change, telling Frank that he

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<sup>20</sup> A-240; A-42-43.

<sup>21</sup> A-240; A-133.

<sup>22</sup> A-245; A-139.

<sup>23</sup> A-245; A-147.

<sup>24</sup> A-245; A-138.

<sup>25</sup> A-150.

<sup>26</sup> A-241; A-45-46, A-76-77.

believed use of the service vehicle to be part of his income.<sup>27</sup> Employees Steve Parnell and John Spratt were also at the meeting and felt the same way. Parnell lives 17 miles away from the office and had been driving a service vehicle to and from work since 1990.<sup>28</sup> Spratt lives 23 miles from the office and had been using a service vehicle for the commute since 1991.<sup>29</sup> Spratt was part of a hiring committee in early 2005, and the committee told applicants about the permitted use of service vehicles for commuting when discussing compensation.<sup>30</sup>

Frank later officially notified Union president, Richard Irish, of the change.<sup>31</sup> Irish objected, telling Frank that changes in terms and conditions of employment are mandatory subjects of bargaining. Frank responded that it was a good business decision that would save RGE money.<sup>32</sup> At no point did RGE offer to bargain over the effects of its decision.<sup>33</sup>

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<sup>27</sup> A-241; A-77-78, A-85.

<sup>28</sup> A-241; A-79.

<sup>29</sup> A-242; A-86.

<sup>30</sup> A-242; A-88-89.

<sup>31</sup> A-242; A-43.

<sup>32</sup> A-242; A-44.

<sup>33</sup> A-243; A-54.

On January 1, 2006, the change in the service-vehicle practice went into effect. On January 10, 2006, the Union filed a grievance.<sup>34</sup> The grievance pointed out that “[w]ages, benefits, hours and working conditions are mandatory topics of collective bargaining,” but that RGE “refused collective bargaining in this matter.” The Union requested “that all affected members [be] made whole.” At some point in January 2006, RGE and the Union met and discussed the grievance.<sup>35</sup> The Union pointed out that employees would have to spend thousands of dollars to arrange for alternative transportation. But RGE stated it had the right to make the change under the contract and that it made good business sense.<sup>36</sup>

On March 7, 2006, the Union sent a letter asking RGE to rescind the change and bargain with the Union. The Union also requested the following information from RGE related to the change in the service-vehicle practice: (1) a list of unit employees who are permitted to take service vehicles home at night; (2) an analysis of the cost to RGE in permitting employees to take the vehicles home; (3) a list of non-unit employees who are permitted to take vehicles home; and (4) whether any non-unit employees were similarly affected by the change.<sup>37</sup> The

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<sup>34</sup> A-242; A-123.

<sup>35</sup> A-242; A-48.

<sup>36</sup> A-242; A-49.

<sup>37</sup> A-240; A-124.

Union told RGE that it needed the information “to assess the significance of this benefit and its cost” to RGE, and it asked RGE to provide the information by April 4, 2006.

On March 17, 2006, RGE labor-relations manager Cathleen Frain responded by letter, refusing to rescind the change to the service-vehicle practice.<sup>38</sup> This letter did not contain any of the requested information. April 4 came and went, but RGE did not provide the requested information. On June 5, 2006, the Union again wrote to RGE to request the information.<sup>39</sup> The Union again explained that it needed the information to assess the significance and cost of the benefit and to “aid the Union in responding” to RGE.

On July 10, 2006, RGE responded to the Union’s first request for information, providing the Union with a list of bargaining unit members who had been permitted to take a service vehicle home at night.<sup>40</sup> However, RGE refused to provide the other information requested by the Union. Regarding the costs, RGE responded that it was “not obligated to provide [the Union] with financial information on company vehicle costs.” RGE asserted that the information related to employees who were not in the unit was not relevant or necessary to the Union’s

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<sup>38</sup> A-242-43; A-126.

<sup>39</sup> A-243; A-127.

<sup>40</sup> A-243; A-129.

duty as collective-bargaining representative.

RGE and the Union met again in July 2006 to discuss the pending grievance.<sup>41</sup> The parties repeated their positions, and no resolution was reached. The Union thereafter withdrew its grievance in order to pursue remedies under the National Labor Relations Act.<sup>42</sup>

On October 21, 2006, the Regional Director, on behalf of the General Counsel, issued a complaint and notice of hearing, alleging that RGE violated Section 8(a)(5) and (1) of the Act.<sup>43</sup> The complaint alleged that RGE stopped permitting employees to take service vehicles home after work; that the use of service vehicles for commuting relates to terms and conditions of employment and is a mandatory subject of bargaining; and that RGE failed to notify the Union before making the change and refused to bargain with the Union over the decision or the effects of the decision. The complaint also alleged that RGE violated the Act by refusing to provide the Union with requested information.

On January 24, 2008, the Regional Director, on behalf of the General Counsel, amended the complaint.<sup>44</sup> The amended complaint no longer alleged that

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<sup>41</sup> A-242; A-49.

<sup>42</sup> A-243; A-132.

<sup>43</sup> A-240; A-12.

<sup>44</sup> A-236 n.2, A-240 n.3; A-24.

RGE violated the Act by refusing to bargain over the *decision* to stop permitting employees to take service vehicles home. Instead, the amended complaint alleged that RGE violated the Act by refusing to bargain over the *effects* of that decision. The amendment did not affect the information request allegation.

### **THE BOARD'S CONCLUSIONS AND ORDER**

Based on the above facts, the Board (Chairman Liebman and Members Schaumber and Becker) found, in agreement with the administrative law judge, that RGE violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the effects of its decision to stop permitting employees to drive service vehicles to and from work.<sup>45</sup> The Board further found, also in agreement with the judge, that RGE violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information necessary and relevant to its collective bargaining duties.<sup>46</sup>

The Board's remedial order requires RGE to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.<sup>47</sup> Affirmatively, the Board's Order requires RGE to, on the Union's request, bargain with the Union concerning the effects of its changes to

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<sup>45</sup> A-236.

<sup>46</sup> A-236.

<sup>47</sup> A-238.

the service-vehicle practice, provide the requested information, and to post copies of a remedial notice.<sup>48</sup> The Board also ordered a limited make-whole remedy, generally referred to as a *Transmarine* remedy (because it originated in *Transmarine Navigation Corp.*<sup>49</sup>). It requires RGE to provide a make-whole remedy from the period beginning five days after the date of the Board's Order until one of four events occurs: (1) RGE bargains to agreement with the Union; (2) the parties reach bona fide impasse; (3) the Union fails to request bargaining within five days of receiving the Board's decision; or (4) the Union fails to bargain in good faith.<sup>50</sup>

### **SUMMARY OF ARGUMENT**

Both RGE and the Union challenge the Board's Order in this case. RGE disputes the Board's findings that it committed unfair labor practices. The Union, on the other hand, thinks the Board did not go far enough, and it urges this Court to force the Board to find a violation not alleged in the complaint. The Union is also dissatisfied with the Board's choice of remedy for the effects-bargaining violation that the Board did find. But the Board's Order is supported by substantial evidence, and its choice of remedy is within its discretion.

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<sup>48</sup> A-238.

<sup>49</sup> 170 NLRB 389 (1968).

<sup>50</sup> A-237.

RGE unlawfully refused – despite the Union’s timely requests – to bargain over the effects of its decision to change its service-vehicle practice. The duty to bargain over a decision and its impact are two distinct obligations; therefore, even if RGE had a contractual right to unilaterally change the practice, such a right does not encompass the right to avoid bargaining over the effects of that decision. The contractual language does not demonstrate that the Union agreed to forgo its statutory right to effects bargaining. Indeed, the contract is conspicuously silent regarding that right. Nor is there evidence showing that during negotiations the parties discussed the Union’s right to bargain over the impacts of management decisions, much less that the Union “consciously yielded” that right.

In addition to unlawfully refusing to bargain over the effects of the change to its service-vehicle practice, RGE also refused to provide information relevant to the Union’s efforts to engage in such bargaining. Substantial evidence supports the Board’s finding that the information sought by the Union – information about costs and who was impacted by the change in the service-vehicle practice – was relevant to its duties as collective-bargaining representative. The information sought was all related to the service-vehicle practice, and the requests made clear that the Union wanted the information to prepare for bargaining.

The Union argues that, in addition to the effects-bargaining violation, the Board should have found that RGE unlawfully refused to bargain over the decision itself. The Board found, however, that the complaint did not include such an allegation, and that finding is supported by the record. In fact, the initial complaint did include such an allegation, but the General Counsel amended the complaint to remove it. Because the General Counsel's decision about which violations to allege in a complaint is unreviewable, it would be improper for the Court to grant the Union's request for relief.

The Union also challenges the remedy the Board fashioned in response to the effects-bargaining violation. But the Board reasonably ordered a *Transmarine* remedy – the traditional remedy in effects-bargaining cases. The *Transmarine* remedy creates an incentive for RGE to meet its remedial obligation to bargain about the effects of its decision. The Board reasonably determined that this remedy restores some measure of bargaining power to the Union and best effectuates the purposes of the Act.

## STANDARD OF REVIEW

The Supreme Court has recognized that “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.”<sup>51</sup> For this reason, “[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.”<sup>52</sup> And courts must “give the greatest latitude to the Board when its decision reflects its ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management.”<sup>53</sup> The case for judicial deference is particularly appropriate here because of the Board’s expertise in determining whether an employer has satisfied its bargaining obligations.<sup>54</sup>

The Board also has great discretion in determining a remedy that effectuates the policies of the Act, and its remedies are subject to limited judicial review.<sup>55</sup> As the Supreme Court has noted, “the Board draws on a fund of knowledge and

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<sup>51</sup> *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

<sup>52</sup> *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991).

<sup>53</sup> *Id.* at 201-02 (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

<sup>54</sup> *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (“[T]he Board [is] the expert in this field.”)

<sup>55</sup> *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969); *Virginia Concrete Co. v. NLRB*, 75 F.3d 974, 988 (4th Cir. 1996).

expertise all its own, and its choice of remedy must therefore be given special respect by the reviewing courts.”<sup>56</sup> Accordingly, the Board’s choice of remedies is not to be disturbed unless its order represents “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.”<sup>57</sup> The Union in its brief does not come close to making the requisite showing.

As this Court has noted, the Board’s factual findings “should not be set aside ‘unless no rational trier of fact could have arrived at the Board’s conclusion.’”<sup>58</sup> The Board’s finding is entitled to deference, “and all reasonable inferences are drawn in [the Board’s] favor.”<sup>59</sup>

Although the Board is responsible for interpreting the Act, it is the General Counsel who has complete “discretion to decide whether or not to issue a complaint, and to determine which issues to include in that complaint.”<sup>60</sup> The

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<sup>56</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).

<sup>57</sup> *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord Teamsters Cannery Local 670 v. NLRB*, 856 F.2d 1250, 1260 (9th Cir. 1988).

<sup>58</sup> *NLRB v. Hebert Indus. Insulation Corp.*, 141 F.3d 1152, 1152 (2d Cir. 1998) (quoting *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994)).

<sup>59</sup> *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996).

<sup>60</sup> *Williams v. NLRB*, 105 F.3d 787, 791 n.3 (2d Cir. 1996) (citations omitted); *accord Beverly Health & Rehab. Servs. v. Feinstein*, 103 F.3d 151, 153 (D.C. Cir. 1996) (discussing complaint process and that the Act “does not authorize judicial review of the General Counsel’s decision to file or withdraw a complaint”);

General Counsel’s “refusal to include an issue in the complaint is final and unreviewable.”<sup>61</sup>

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT RGE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION OVER THE EFFECTS OF ITS DECISION REGARDING SERVICE VEHICLES**

The Board requires an employer to bargain over the effects of any decision that impacts wages, hours, or terms and conditions of employment. RGE argues that the Board should only be permitted to require bargaining over the effects of decisions that impact the availability of jobs. However, as shown below, the Board’s rule is rational and consistent with the Act. It is therefore entitled to great deference from this Court.

#### **A. The Board Reasonably Interprets the Act To Require an Employer To Bargain over the Effects of a Decision that Impacts Wages, Hours, or Terms and Conditions of Employment**

Under Section 8(a)(5) of the Act, an employer commits an unfair labor practice by “refus[ing] to bargain collectively with the representatives of [its]

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*Associated Builders & Contractors, Inc. v. Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979) (“The decision as to the scope of a complaint is for the General Counsel.”).

<sup>61</sup> *Williams*, 105 F.3d at 791 n.3.

employees.”<sup>62</sup> Section 8(d) defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>63</sup> These categories, “wages, hours, and other terms and conditions of employment,” are referred to as mandatory subjects of bargaining.

Even where an employer is not obligated to bargain about a decision, the Board requires it to bargain over the decision’s impact on wages, hours, or terms and conditions of employment.<sup>64</sup> It does not matter why the employer is not required to bargain over the decision itself. Sometimes the employer need not bargain over the decision because it does not involve a mandatory subject of bargaining;<sup>65</sup> sometimes the parties have agreed that the employer can make such

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<sup>62</sup> 29 U.S.C. § 158(a)(5) & (1); *see NLRB v. Katz*, 369 U.S. 736, 742 n.9 (1962) (noting that an 8(a)(5) violation derivatively violates Section 8(a)(1)).

<sup>63</sup> 29 U.S.C. § 158(d).

<sup>64</sup> *See e.g., First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981); *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 50 n.8 (2d Cir. 1983) (noting the “distinction between the employer’s duty to bargain over a particular business *decision* that affects unit employees and the duty to bargain over the *decision’s effects* on unit employees”) (emphasis in original).

<sup>65</sup> *See, e.g., North Star Steel Co.*, 347 NLRB 1364, 1371 (2006) (requiring bargaining over effects of decision to implement new scrap-handling system, but not decision itself, which was not mandatory subject of bargaining); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 257, 278 (2006) (noting employer

decisions unilaterally;<sup>66</sup> and sometimes the employer has no control over the underlying decision.<sup>67</sup> In all cases, however, the Board requires the employer to give the union notice and an opportunity to bargain over the effects of the decision if it impacts wages, hours, or terms and conditions of employment.

Nothing supports RGE's view<sup>68</sup> that the statute limits effects bargaining to managerial decisions that will lead to job loss. Certainly the D.C. Circuit's decision in *Enloe Medical Center v. NLRB* does not support such a claim; that case, discussed in more depth below on pages 25-26, held only that the collective-bargaining agreement included a waiver of the union's right to effects bargaining.<sup>69</sup> In fact, there is no case law supporting RGE's argument regarding effects

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was not required to bargain over its decision to close its operation but finding violation for failure to bargain over effects of its decision).

<sup>66</sup> See, e.g., *Natomi Hosp. (Good Samaritan Hosp.)*, 335 NLRB 901, 902 (2001) (finding union waived right to bargain over decision regarding scheduling but not effects).

<sup>67</sup> See, e.g., *Alan Ritchey, Inc.*, 354 NLRB No. 79, at 1 (2009) (contractor for postal service had no discretion about decision concerning holidays, which was forced by postal service, but was required to bargain over effects on employees); *United Parcel Serv.*, 336 NLRB 1134, (2001) (employer's landlord closed lot where employees had parked, but employer was obligated to bargain over effects of the decision on employees).

<sup>68</sup> RGE Br. 19.

<sup>69</sup> 433 F.3d 834, 838-39 (D.C. Cir. 2005) (agreeing with employer that contract "justifies its refusal to bargain over effects because the agreement authorized Enloe to 'implement' its mandatory on-call policy").

bargaining. RGE would have this Court rewrite the Act, which puts no limitation on its requirement that parties “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>70</sup> The Board’s determination that the Act requires effects bargaining is reasonable, consistent with the Act, and entitled to great deference. As noted above, the Board has “primary responsibility” for determining “the scope of the . . . statutory duty to bargain,” which this Court should “recognize without hesitation.”<sup>71</sup>

**B. Because RGE’s Decision Impacted Terms and Conditions of Employment, RGE Was Required To Engage in Effects Bargaining**

The record fully supports the Board’s finding that RGE’s change to its service-vehicle practice impacted terms and conditions of employment. As the Board noted,<sup>72</sup> RGE’s decision had a substantial monetary impact on the affected employees. Indeed, RGE’s withholding of income taxes on the value of the service vehicles demonstrates that RGE understood that use of the service vehicles for commuting purposes was part of each employee’s compensation package.<sup>73</sup> And employee John Spratt and supervisor Jim Connell told applicants for positions in

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<sup>70</sup> 29 U.S.C. § 158(d).

<sup>71</sup> *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

<sup>72</sup> A-246.

<sup>73</sup> A-79, A-86-87, A-158.

the low-voltage group about the service-vehicle practice when discussing RGE's compensation package.<sup>74</sup> Because wages are a mandatory subject of bargaining and RGE's decision impacted employees' income, RGE was required to engage in effects bargaining.

RGE attempts to confuse the issue by asserting<sup>75</sup> that the Board's decision requires it to bargain over commuting expenses, which RGE states is not a mandatory subject of bargaining. But it is the impact on employee *compensation* that RGE is required to bargain about. And, contrary to RGE's claim,<sup>76</sup> there is room for negotiation over the impact that does not call into question the ultimate decision itself. For example, the parties could negotiate for higher wages to compensate employees for the loss of income associated with RGE's decision. Such discussions in no way call into question RGE's decision to stop permitting employees to drive their service vehicles home. Moreover, RGE is not obligated to agree to anything.<sup>77</sup> The Board expresses no preference in the outcome so long as RGE fulfills its obligation to bargain in good faith.

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<sup>74</sup> A-89.

<sup>75</sup> RGE Br. 25, 30.

<sup>76</sup> RGE Br. 29-30 (“[T]here are no effects to bargain about that would not call into question the underlying decision.”).

<sup>77</sup> 29 U.S.C. § 8(d) (bargaining “obligation does not compel either party to agree to a proposal or require the making of a concession.”); *First Nat'l Maint. Corp. v.*

### C. The Union Did Not Waive Its Right to Effects Bargaining

RGE alternatively argues that the Union waived its right to effects bargaining. However, as this Court has noted, “national labor policy disfavors waivers of statutorily protected rights.”<sup>78</sup> Because of this, “[o]nly a ‘clear and unmistakable’ waiver will be recognized by the courts.”<sup>79</sup> This Court “will not thrust a waiver upon an unwitting party.”<sup>80</sup> RGE bears the burden of proving the Union’s waiver.<sup>81</sup> And because of “the Board’s expertise in labor matters, its decision on the question of waiver is accorded significant deference” by this Court.<sup>82</sup>

In determining whether the Union relinquished its right to effects bargaining, the Board properly looked to the wording of the contract itself.<sup>83</sup> The Board reasonably concluded that the language does not show that the Union agreed to

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*NLRB*, 452 U.S. 666, 678 n.17 (1981) (“The employer has no obligation to . . . agree with union proposals.”).

<sup>78</sup> *Olivetti Office USA, Inc. v. NLRB*, 926 F.2d 181, 187 (2d Cir. 1991).

<sup>79</sup> *Olivetti*, 926 F.2d at 187.

<sup>80</sup> *NLRB v. N.Y. Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991).

<sup>81</sup> *Olivetti*, 926 F.2d at 187; *N.Y. Tel.*, 930 F.2d at 1011 (“The employer bears the weighty burden of establishing that a “clear and unmistakable’ waiver has occurred.”).

<sup>82</sup> *N.Y. Tel.*, 930 F.2d at 1011; *accord Olivetti*, 926 F.2d at 187.

<sup>83</sup> *See N.Y. Tel.*, 930 F.2d at 1011 (“A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement.”).

waive its right to effects bargaining, even if it may have waived its right to bargain over the decision itself.<sup>84</sup> Contractual provisions that give it the right “to issue, amend, and revise” “work rules, customs, regulations, and practices,”<sup>85</sup> “reasonable policies, rules, regulations, and practices,”<sup>86</sup> and “any or all benefits and benefit plans”<sup>87</sup>; and the right “to regulate the use of machinery, facilities, equipment, and other property of the Company,”<sup>88</sup> do not clearly and unmistakably show that the Union also agreed to waive its independent right to bargain over the effects of a decision that impacts wages, hours, or terms and conditions of employment.

RGE’s repeated citations<sup>89</sup> to the D.C. Circuit’s decision in *Enloe Medical Center v. NLRB*<sup>90</sup> do not help its cause. The D.C. Circuit – unlike this Court – does not apply the Board’s unmistakable waiver standard, but instead applies a

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<sup>84</sup> As shown *infra* on pp. 39-42, the General Counsel did not allege that RGE violated the Act by refusing to bargain over the decision. Therefore the Board did not decide this issue.

<sup>85</sup> A-138.

<sup>86</sup> A-139.

<sup>87</sup> A-147.

<sup>88</sup> A-139.

<sup>89</sup> RGE Br. 27-34.

<sup>90</sup> 433 F.3d 834 (D.C. Cir. 2005).

“contract coverage” or “covered by” standard.<sup>91</sup> This Court, however, agrees with the Board that contractual waivers must be clear and unmistakable,<sup>92</sup> making *Enloe* inapplicable. Furthermore, the contract language in *Enloe* was different from the language at issue here and specifically permitted the employer to “implement” its policy change.<sup>93</sup> The contract in this case contained no such language. The Board properly applied the clear and unmistakable standard here and concluded that language regarding RGE’s right to evade effects bargaining is conspicuously absent from the contract.

Waiver may also be found by examining the parties’ bargaining history,<sup>94</sup> and RGE claims<sup>95</sup> that the bargaining history here shows such waiver. But to prove waiver in this manner, an employer must come forward with evidence that the issue “was thoroughly aired in past negotiations and the union ‘consciously

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<sup>91</sup> *Id.* at 838 (stating “questions of ‘waiver’ normally do not come into play. . . . Instead, the proper inquiry is simply whether the subject that is the focus of the dispute is ‘covered by’ the agreement”).

<sup>92</sup> *NLRB v. N.Y. Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991) (“A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement.”).

<sup>93</sup> *Enloe*, 433 F.3d at 838-39.

<sup>94</sup> *NLRB v. United Tech. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989).

<sup>95</sup> RGE Br. 34.

yielded' its rights in the matter.”<sup>96</sup> RGE has not come forward with a single piece of evidence suggesting the parties discussed effects bargaining and the Union “consciously yielded” its bargaining rights. Moreover, the parties specifically agreed that discussions on those mandatory subjects where no agreement was reached *would not* be construed as waiver.<sup>97</sup> To find a waiver based on bargaining history would therefore be contrary to the parties’ agreement.

Finally, RGE argues<sup>98</sup> that the Union waived its right to effects bargaining by failing to request such bargaining.<sup>99</sup> But as this Court has noted, a union’s request for bargaining “need take no special form, so long as there is a clear communication of meaning.”<sup>100</sup> Whether the employer should have understood a

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<sup>96</sup> *United Tech.*, 884 F.2d at 1575.

<sup>97</sup> A-150.

<sup>98</sup> RGE Br. 35.

<sup>99</sup> *But see NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992) (defense of waiver not available where employer presents its decision as *fait accompli*); *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (stating “[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated”).

<sup>100</sup> *Scobell Chem. Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959); *accord NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939) (union need only give “some indication . . . of [its] desire or willingness to bargain”); *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001) (“A union need utter no particular words to convey its demand for bargaining.”); *NLRB v. Fosdal*, 367 F.2d 784, 788 (7th Cir. 1966) (union request for bargaining sufficient “if there is a ‘clear communication of meaning’”); *Bierwer Wisconsin Sawmill, Inc.*, 306 NLRB 732, 732 n.4 (1992) (request need only “clearly indicate[] a desire to negotiate”).

request to constitute a demand for bargaining “must be determined from a review of all the circumstances.”<sup>101</sup> Here, RGE was well aware that the Union wanted to bargain over the effects of its decision to stop permitting unit employees to drive service vehicles home. In its information requests, the Union asked for information that would let it assess the cost of the prior practice to RGE so that it could better calculate a response on behalf of employees.<sup>102</sup> In its grievance, the Union specifically requested that “all affected members [be] made whole,”<sup>103</sup> which the Board reasonably interpreted as an attempt to negotiate over the effects the decision had on unit members. And during discussions with management about the grievance, the Union clearly discussed the impact of the change on employees’ compensation.<sup>104</sup> Under these circumstances, the “sequence of events should have left little doubt in the mind of a reasonable person that the Union was interested in . . . bargaining” over the effects of RGE’s change.<sup>105</sup>

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<sup>101</sup> *NLRB v. Barney’s Supercenter, Inc.*, 296 F.2d 91, 93 (3d Cir. 1961).

<sup>102</sup> A-124, A-54.

<sup>103</sup> A-123.

<sup>104</sup> A-48.

<sup>105</sup> *Armour & Co.*, 280 NLRB 824, 828 (1986).

RGE and the Union have an ongoing relationship.<sup>106</sup> While the collective-bargaining agreement sets out many rights and responsibilities that each party has, it inevitably does not address issues they did not anticipate.<sup>107</sup> When such issues arise, the Act requires the parties to sit down and talk about it. In no way does this requirement “emasculate[] the essence” of the parties contract.<sup>108</sup> Rather, the Board’s decision gives meaning to the statutory requirement that an employer and a union “confer in good faith with respect to wages, hours, and other terms and conditions of employment”<sup>109</sup> while respecting their contract rights.

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<sup>106</sup> See *Hendricks v. Airline Pilots Ass’n Int’l*, 696 F.2d 673, 677 (9th Cir. 1983) (“The collective bargaining relationship, moreover, is a continuing relationship.”).

<sup>107</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (“The collective bargaining agreement states the rights and duties of the parties . . . it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”); *Watson v. Int’l Bhd. of Teamsters*, 399 F.2d 875, 879 (5th Cir. 1968) (“A collective bargaining contract operates prospectively over a substantial period of time and the parties cannot be expected to foresee all the problems that will develop in an industrial establishment within the period of the contract.”).

<sup>108</sup> RGE Br. 24.

<sup>109</sup> 29 U.S.C. 158(d).

**II. THE BOARD REASONABLY FOUND THAT THE INFORMATION REQUESTED BY THE UNION WAS RELEVANT AND THEREFORE RGE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH IT TO THE UNION**

As this Court has noted, “[a]n employer’s obligation to provide information to a union extends to ‘all information necessary for the proper performance of its duties as the exclusive bargaining representative.’”<sup>110</sup> This obligation is rooted in recognition of the fact that access to information can prevent the conflicts that hamper the collective-bargaining process, which is the statutorily preferred means of resolving labor disputes.<sup>111</sup> Withholding such information violates the Act.<sup>112</sup>

The Union’s right to information and RGE’s duty to provide it depend on “the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.”<sup>113</sup> The Supreme Court has characterized the relevance standard as a “discovery-type standard,” permitting the union access to a broad scope of potentially useful

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<sup>110</sup> *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181,188 (2d Cir. 1991) (quoting *NLRB v. Pratt & Whitney Aircraft Div.*, 789 F.2d 121, 130 (2d Cir. 1986)); accord *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956).

<sup>111</sup> *Acme*, 385 U.S. at 435-36.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 437; see *Torrington Co. v. NLRB*, 545 F.2d 840, 841 (2d Cir. 1976) (“The duty to bargain in good faith obliges the employer to furnish information enabling the union to make an intelligent decision about processing grievances.”).

information for the purpose of effectuating the bargaining process.<sup>114</sup> The standard has been interpreted to mean that information is relevant if it is germane and “has any bearing on the subject matter of the case.”<sup>115</sup> Moreover, this broad disclosure rule is crucial to full development of the role of collective bargaining under the Act because “[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiations cannot occur.”<sup>116</sup> “[T]he Board’s determination as to whether the requested information is relevant in a particular case is given great weight by the courts.”<sup>117</sup>

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<sup>114</sup> *Acme*, 385 U.S. at 437; *accord Torrington*, 545 F.2d at 842 (“[T]he Union is entitled to the information under the ‘discovery-type’ standard . . . in order to judge for itself whether to press its claims before the arbitrator or the Board.”).

<sup>115</sup> *Local 13, Detroit Newspaper Printing & Graphic Commc’n Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).

<sup>116</sup> *Local 13*, 598 F.2d at 271; *accord Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 222 (2d Cir. 1996) (stating relevant information must be provided “both to reduce the likelihood of closed-mind bargaining and to enhance the chances that the parties will reach an agreement”).

<sup>117</sup> *San Diego Newspaper Guild Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *accord NLRB v. Brazos Elec. Power Co-op, Inc.*, 615 F.2d 1100, 1101 (5th Cir. 1980) (“The Board’s determination of the relevance of the information sought in a particular case must be given great weight by the courts.”); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315-16 (8th Cir. 1979); *Oil, Chem. & Atomic Workers Local No. 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983).

Information pertaining to the terms and conditions of employees within the bargaining unit is presumptively relevant.<sup>118</sup> In contrast, where the information sought concerns employees outside the bargaining unit, the union must demonstrate relevance.<sup>119</sup> While the burden of proof for non-unit information is different, the “ultimate standard of relevance is the same in all cases.”<sup>120</sup> More specifically, as the Supreme Court has explained, to establish the relevance of non-unit information, a union must only demonstrate “a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.”<sup>121</sup> It is beyond dispute that this standard requires employers to turn over information that would help a union assess the

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<sup>118</sup> *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 130 (2d Cir. 1986) (“Wage and other benefit material pertaining to bargaining unit employees must be produced by an employer as it is presumptively relevant to the union’s duties as exclusive bargaining agent.”); *see West Penn Power Co. v. NLRB*, 394 F.3d 233, 247-48 (4th Cir. 2005) (listing “broad range of legitimate subjects implicating the Union’s duty to represent its members” and therefore appropriate for information requests, including “pension coverage, safety issues and accidents, employee evaluations, disciplinary issues, underground training, workers’ compensation procedures, clothing issues, safety equipment costs, tool repair, and vacation and sick pay”).

<sup>119</sup> *Oil, Chem. & Atomic Workers Local No. 6-418*, 711 F.2d at 359-60 (union must demonstrate relevance of info concerning nonunit employees, but that standard requires only that the “information has a bearing on the bargaining process”).

<sup>120</sup> *Westwood Import Co.*, 251 NLRB 1213, 1226-27 (1980), *enforced*, 681 F.2d 664 (9th Cir. 1982).

<sup>121</sup> *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967).

merits of a grievance<sup>122</sup> or prepare for bargaining.<sup>123</sup>

Here, RGE does not contest that it refused to furnish the Union with requested information. Rather, RGE contends that some of the requested information did not exist and the rest of the information is not relevant to the Union's duties. As shown below, RGE's arguments have no merit.

**A. RGE Advances an Unreasonably Narrow Interpretation of the Union's Request for Cost Information**

The Union twice requested from RGE "Any Company analysis of the cost of this [permitting employees to take service vehicles home] to the Company."<sup>124</sup>

This information, which relates to wages and benefits of bargaining unit members,

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<sup>122</sup> *Acme*, 385 U.S. at 435-36; *NLRB v. Nat'l Broad. Co.*, 798 F.2d 75, 78 (2d Cir. 1986) (stating union is entitled to information "relevant not only to the pending arbitration but also to the continued enforcement of the bargaining agreement"); *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 442-43 (D.C. Cir. 2001) ("The duty to bargain includes the obligation to provide information that a union needs in order to perform its duties in grievance processing and collective bargaining negotiations."); *NLRB v. Associated Gen. Contractors*, 633 F.2d 766, 771 (9th Cir. 1980) ("It is sufficient that the information sought is relevant to possible [contract] violations where the union has established a reasonable basis to suspect such violations have occurred.").

<sup>123</sup> *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1017 (1st Cir. 1996) (requiring employer to turn over information to help union engage in effects bargaining); *see also EI Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1316 (D.C. Cir. 2007) ("[A]ny requested information that has a bearing on the bargaining process must be disclosed.").

<sup>124</sup> A-124, A-127.

is presumptively relevant.<sup>125</sup> The First Circuit stated in a case similarly involving effects bargaining that such information is “likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer’s decisionmaking process on persons within the bargaining unit.”<sup>126</sup>

At the hearing and before this Court, RGE claims<sup>127</sup> that there was no such information to provide because it had not done any analysis of the cost. However, RGE reads the Union’s request too narrowly. The Board reasonably concluded<sup>128</sup> that the Union was requesting general information on the costs to RGE of permitting employees to take home service vehicles, and that such information is available. RGE’s response to the Union at the time of the request demonstrates that RGE understood what the Union wanted. In refusing to provide the

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<sup>125</sup> See *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 130 (2d Cir. 1986) (“Wage and other benefit material pertaining to bargaining unit employees must be produced by an employer as it is presumptively relevant to the union’s duties as exclusive bargaining agent.”). See also *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 751-52 (2d Cir. 1969) (finding “inexcusable” employer’s refusal to disclose cost of pension and insurance programs and cost of giving another week of vacation to long-term employees); *West Penn Power Co. v. NLRB*, 394 F.3d 233, 247-48 (4th Cir. 2005) (requiring employer to turn over information on safety equipment costs, tool repair, and vacation and sick pay).

<sup>126</sup> *Providence Hosp.*, 93 F.3d at 1017 (requiring employer to turn over information to help union engage in effects bargaining).

<sup>127</sup> RGE Br. 37.

<sup>128</sup> A-247.

information, RGE did not tell the Union that such information did not exist. Instead, RGE stated that “it is not obligated to provide [the Union] with financial information on company vehicle costs.”<sup>129</sup> RGE’s response reveals that it understood exactly what the Union wanted, and it implied that such information did in fact exist.

In addition, while RGE may not have had an “analysis” of the costs of its service-vehicle practice, it certainly had information about the costs. This Court has held that an employer in possession of information in a slightly different form than that requested by the union is required to provide the information. In *NLRB v. General Electric*, the union asked how many unit employees had 20 or 25 years of continuous service. The employer knew how many employees *company wide* had such seniority, it did not know how many *unit employees* did. This Court held that the employer was obligated to turn over the information:

If we were to hold that because the information requested did not conform precisely to the data in the possession of the Company, an employer might refuse to provide any data at all, we would, in our view, be taking a step backwards. . . . GE seems to suggest that even an insignificant variance between the request and the available information would be a complete bar to the Union – even though [the union] was utterly unaware of the precise form in which the Company kept its records, and the Company refused to enlighten it.<sup>130</sup>

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<sup>129</sup> A-129.

<sup>130</sup> *Gen. Elec.*, 418 F.2d at 752.

Here, RGE was obligated to turn over information on the cost of its service-vehicle practice, even if there was “an insignificant variance between the request and the available information.”<sup>131</sup>

In any event, RGE never told the Union that the information did not exist until the hearing. As the Seventh Circuit stated in a similar case, that is “too late” to make such a claim.<sup>132</sup>

**B. The Information Related to Non-Unit Personnel Is Relevant to the Union’s Representational Duties**

The Union also requested a list of non-unit employees permitted to take service vehicles home, and asked whether RGE had made a similar change with respect to non-unit employees.<sup>133</sup> RGE refused to provide the information, claiming it is not relevant. But the Board properly found<sup>134</sup> that the Union’s request for information about non-unit personnel was relevant because it would

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<sup>131</sup> *Id.*

<sup>132</sup> *Mary Thompson Hosp. v. NLRB*, 943 F.2d 741, 746 (7th Cir. 1991) (finding violation where employer failed to tell union that information did not exist until hearing); *accord NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 958 (6th Cir. 1969) (finding violation where employer never told union that information did not exist, and stating employer “should supply that which it can and state under oath that it cannot furnish the rest”). *See Calmat Co.*, 283 NLRB 1103, 1106 (1987) (finding no violation where union did not explain relevance of information until the administrative hearing).

<sup>133</sup> A-127.

<sup>134</sup> A-248.

help the Union engage in effects bargaining.

The Union needed the information to bargain productively, which is sufficient to establish the relevance of the requested information under the applicable broad discovery standard.<sup>135</sup> Indeed, courts have many times enforced Board orders requiring the production of non-unit information to assist a union in bargaining. For example, in *Goodyear Aerospace Corp.*, the Fifth Circuit enforced the Board's decision that "[d]ata as to salaries and fringe benefits in comparable [non-unit] jobs would be relevant to the Union in framing contract proposals covering employees within the unit."<sup>136</sup> In *Curtiss-Wright v. NLRB*, the Third Circuit enforced the Board's determination that information on wage rates and other benefits of non-unit personnel "would act as a guide to the Union" in determining what "it could reasonably seek at the bargaining table."<sup>137</sup> And in *NLRB v. Brazos Elec. Power Co-op, Inc.*, the Fifth Circuit enforced the Board's finding that wage data concerning non-unit employees was relevant "for collective bargaining purposes in connection with preparation of written proposals to be used

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<sup>135</sup> See *Oil, Chem. & Atomic Workers Local No. 6-418 v. NLRB*, 711 F.2d 348, 359-60 (D.C. Cir. 1983) (stating "relevant" is synonymous with "germane" under "discovery-type standard").

<sup>136</sup> 157 NLRB 496, 503 (1966), *enforced*, 388 F.2d 673 (6th Cir. 1968).

<sup>137</sup> 347 F.2d 61, 69-70 (3d Cir. 1965).

in negotiating renewal of the contract.”<sup>138</sup>

RGE claims<sup>139</sup> that the Union never explained why it needed the information, thereby relieving RGE of its duty to provide it. But the Union’s two written requests for the information specifically state that the Union needed the information to “assess the significance” of the change and to allow the Union to “respond” to RGE’s actions.<sup>140</sup> Although RGE implies the Union was required to repeat its request for the information a third time,<sup>141</sup> the Union was under no obligation to make further requests to persuade RGE to comply with its statutory duty.<sup>142</sup> From the outset and twice in writing, the Union made clear why it wanted the information.

Furthermore, if circumstances surrounding a union’s information request “are reasonably calculated to put the employer on notice of the union’s relevant purpose,” then the employer must provide the information even if the Union does

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<sup>138</sup> 615 F.2d 1100, 1101 (5th Cir. 1980).

<sup>139</sup> RGE Br. 37-38.

<sup>140</sup> A-124, A-127,

<sup>141</sup> RGE Br. 38 (stating Union “never responded” to RGE’s refusal).

<sup>142</sup> *See Champion Enter., Inc.*, 350 NLRB 788, 788 n.7 (2007) (“The issue is whether relevant information was not supplied. Where, as here, it was not supplied, the Union need not make a second request.”); *see also Corson & Gruman Co.*, 278 NLRB 329, 334 (1986) (“[T]he requesting union . . . need only indicate the reason for its request.”), *enforced mem.*, 811 F.2d 1504 (4th Cir. 1987).

not explicitly set out the relevance.<sup>143</sup> This is because “the adequacy of the requests to apprise the [employer] of the relevance of the information must be judged, not from the communications alone, but in light of the entire pattern of facts available to [the employer].”<sup>144</sup> Not only did the Union set out its reasons for wanting the information in writing (twice), but RGE and the Union had discussed the service-vehicle practice many times. RGE knew perfectly well why the Union wanted this information, and its refusal to provide it violated the Act.

**III. THE BOARD’S FINDING THAT THE COMPLAINT DID NOT ALLEGE A VIOLATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THIS COURT HAS NO JURISDICTION TO REVIEW THE GENERAL COUNSEL’S PROSECUTORIAL DECISIONS**

The Union claims that RGE violated the Act not just by refusing to bargain over the effects of its service-vehicle decision, but also by refusing to bargain over the decision itself. The Union therefore asks that this Court compel the Board to find such a violation.<sup>145</sup> However, the Board reasonably found that the General Counsel did not allege that the decision itself violated the Act. Therefore the Union’s request would constitute an invasion of the prosecutorial discretion of the

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<sup>143</sup> *Brazos Elec. Power Co-op*, 241 NLRB 1016, 1018, *enforced*, 615 F.2d 1100 (5th Cir. 1080).

<sup>144</sup> *Island Creek Coal Co.*, 292 NLRB 480, 490 n.19 (1989), *enforced*, 899 F.2d 1222 (6th Cir. 1990).

<sup>145</sup> Union Br. 11-23.

General Counsel, discretion that this Court is without jurisdiction to review.

Although the initial unfair labor practice complaint included the allegation the Union seeks to raise here – that RGE had no right to unilaterally change its service-vehicle practice – the final version of the General Counsel’s complaint did not include any such allegation. The initial complaint alleged as follows:

### VIII

- (a) On or about January 10, 2006, Respondent discontinued the benefit of allowing certain Unit employees to take a service vehicle home after work.
- (b) The subject set forth above in paragraph VIII(a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.
- (c) Respondent engaged in the conduct described above in paragraph VIII(a) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to *this conduct and the effects of this conduct*.<sup>146</sup>

However, the Regional Director, on behalf of the General Counsel,<sup>147</sup> subsequently amended the complaint:

IT IS ORDERED . . . that paragraph VIII(c) of the Complaint is amended to read as follows:  
(c) Respondent engaged in the conduct described above in paragraph VIII(a) without affording the Union an opportunity to bargain *with respect to the effects of this conduct*, including but not limited to, the loss of compensation associated with the ability of employees to take a service vehicle home from work.<sup>148</sup>

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<sup>146</sup> A-12 (emphasis added).

<sup>147</sup> See, e.g., *West Penn Power Co. v. NLRB*, 394 F.3d 233, 241 (4th Cir. 2005) (noting that “the Board’s regional director, on behalf of the General Counsel, issued a complaint”).

<sup>148</sup> A-24 (emphasis added).

The Board reasonably concluded<sup>149</sup> that this modification of the complaint specifically eliminated any allegation that the decision itself violated the Act. This is the only decision the Board made related to this issue that is reviewable by this Court, as courts lack jurisdiction to reach beyond the findings actually made in the final Board order before the Court.<sup>150</sup> And the Board’s factual finding is entitled deference.<sup>151</sup>

Because of the General Counsel’s amendment, the issue the Union seeks to raise is not presented in this case. Under Section 3(d) of the Act, the General Counsel has the “final authority” over “the issuance of complaints.”<sup>152</sup> As this Court has recognized, the General Counsel has complete “discretion to decide whether or not to issue a complaint, and to determine which issues to include in that complaint.”<sup>153</sup> The General Counsel’s “refusal to include an issue in the

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<sup>149</sup> A-236 n.2.

<sup>150</sup> See 29 U.S.C. § 160(f); *Local 1545 United Bhd. of Carpenters v. Vincent*, 286 F.2d 127, 129 (2d Cir. 1960) (courts have “jurisdiction related only to ‘orders’ restraining unfair labor practices”).

<sup>151</sup> *NLRB v. The Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 861 (2d Cir. 1996) (“In reviewing an order of the Board, we must give considerable deference to the Board’s findings of fact.”).

<sup>152</sup> 29 U.S.C. § 153(d).

<sup>153</sup> *Williams v. NLRB*, 105 F.3d 787, 791 n.3 (2d Cir. 1996) (citations omitted); *accord Beverly Health & Rehab. Servs. v. Feinstein*, 103 F.3d 151, 153 (D.C. Cir. 1996) (discussing complaint process and that the Act “does not authorize judicial

complaint is final and unreviewable.”<sup>154</sup> It is a necessary corollary of that unreviewable authority that a charging party cannot expand the scope of the General Counsel’s complaint, and certainly cannot seek to litigate a violation the General Counsel expressly declined to allege.<sup>155</sup>

None of the cases cited by the Union<sup>156</sup> suggest that the Board can add to a complaint an allegation that the General Counsel specifically removed. Indeed, one of those cases points out that “the Board cannot entertain an amendment to the complaint which the General Counsel opposes.”<sup>157</sup> But this is exactly what the Union is attempting to force the Board to do. The General Counsel removed this allegation from the complaint, but the Union wants the Board to find that violation

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review of the General Counsel’s decision to file or withdraw a complaint”); *Associated Builders & Contractors, Inc. v. Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979) (“The decision as to the scope of a complaint is for the General Counsel.”).

<sup>154</sup> *Williams*, 105 F.3d at 791 n.3.

<sup>155</sup> *See Williams*, 105 F.3d at 790-91 n.3 (“A court has no power to order the General Counsel to issue a complaint and no power to order the Board to issue an order in a matter which is not before it”) (attribution omitted); *New England Health Care Emp. Union v. NLRB*, 448 F.3d 189, 193 (2d Cir. 2006) (refusing to address an argument the General Counsel did not assert); *Int’l Union of Operating Eng’rs, Local 150 v. NLRB*, 325 F.3d 818, 830 (7th Cir. 2003) (stating union’s argument, not pursued by General Counsel, was “not an issue in this case”); *Baker v. Int’l Alliance of Theatre & Stage Employees*, 691 F.2d 1291 (9th Cir. 1982) (discussing the unreviewability of decisions by the Board’s General Counsel not to pursue unfair labor practice allegations in a complaint).

<sup>156</sup> Union Br. 16.

<sup>157</sup> *George Banta Co. v. NLRB*, 686 F.2d 10, 23 n.17 (D.C. Cir. 1982).

anyway. To do so would interfere with the General Counsel's undisputed prosecutorial discretion.

As both the Board and the judge noted – and as the complaint on its face shows – the General Counsel did not allege that the service-vehicle decision itself was unlawful. The Board was therefore fully justified in refusing to decide the issue.

#### **IV. THE BOARD ACTED WITHIN ITS DISCRETION IN AWARDING ITS STANDARD REMEDY FOR AN EMPLOYER'S REFUSAL TO ENGAGE IN EFFECTS BARGAINING**

Having properly addressed only the effects bargaining violation alleged by the General Counsel, the Board was entitled to order a remedy that would effectuate the purposes of the Act. The *Transmarine* remedy is the Board's standard remedy for effects bargaining violations, and the Board in this case concluded that this remedy is “appropriately tailored to the violation and will better effectuate the policies of the Act.”<sup>158</sup> The Union's arguments to the contrary have no merit.

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<sup>158</sup> A-237.

**A. The Board Has Broad Discretion in Determining Remedies, and the *Transmarine* Remedy Is the Typical Remedy in Effects-Bargaining Cases**

The Board bears primary responsibility for devising remedies that effectuate the policies of the Act.<sup>159</sup> The Union concedes<sup>160</sup> that the Board’s remedial authority is a broad discretionary one, subject to limited judicial review. As the Supreme Court has noted, “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 the reviewing courts.”<sup>161</sup> Accordingly, the Board’s choice of remedies is not to be disturbed unless its order represents “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.”<sup>162</sup> The Union in its brief does not come close to making the requisite showing.

The Supreme Court has held that bargaining over the effects of a decision “must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.”<sup>163</sup> In *Transmarine*

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<sup>159</sup> See *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969); *Virginia Concrete Co. v. NLRB*, 75 F.3d 974, 988 (4th Cir. 1996).

<sup>160</sup> Union Br. 25.

<sup>161</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).

<sup>162</sup> *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *Teamsters Cannery Local 670 v. NLRB*, 856 F.2d 1250, 1260 (9th Cir. 1988).

<sup>163</sup> *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981).

*Navigation Corp.*,<sup>164</sup> the Board announced an appropriate remedy to address the peculiar difficulties of vindicating the policies of the Act in the context of an employer's unlawful failure to engage in effects bargaining. The Board concluded that a simple order to commence bargaining was inadequate to cure the violation because both the passage of time and the closure of the facility had made it "impossible to reestablish a situation equivalent to that which would have prevailed had [the employer] more timely fulfilled its statutory bargaining obligation."<sup>165</sup> The Board therefore deemed it necessary to fashion a remedy that created conditions essentially similar to those that would have existed had good-faith bargaining occurred at the appropriate time.

The solution the Board devised was to impose "a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for [the employer]."<sup>166</sup> Specifically, the remedy provides unit employees with limited backpay, from five days after the date of the Board's decision, until the occurrence of one of four specified conditions. Bargaining must

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<sup>164</sup> 170 NLRB 389 (1968).

<sup>165</sup> *Id.* at 389.

<sup>166</sup> *Id.*

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 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith.<sup>167</sup> Since the Board's decision in *Transmarine*, this limited backpay remedy has been applied with court approval in dozens of cases in which an employer has failed to engage in effects bargaining.<sup>168</sup>

In applying the remedy here, the Board simply followed its traditional practice. As the Board noted,<sup>169</sup> the employees here incurred economic losses as a result of RGE's decision, and these losses may have been minimized had RGE bargained with the Union over the effects of its decision. The Board then

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<sup>167</sup> *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968).

<sup>168</sup> See, e.g., *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 815 (5th Cir. 2009) (enforcing *Transmarine* remedy in effects-bargaining case); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1291 (7th Cir. 1989) (“[W]e believe that the Board acted within the bounds of its statutory discretion in imposing the *Transmarine* remedy” in effects-bargaining case); *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1305, 1307 (8th Cir. 1988) (“The limited back pay remedy was imposed by the Board for the purpose of providing the Union some measure of bargaining strength which it would have had if [employer] had engaged in effects bargaining at the appropriate time.”); *Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983) (“[T]he Board's choice of the limited backpay remedy in the instant case was well within the broad remedial discretion granted by the Act.”).

<sup>169</sup> A-237.

determined that the *Transmarine* remedy would restore to the Union “some measure of bargaining power.”<sup>170</sup>

**B. The Board Is Not Required To Provide “Complete Relief” for Every Unfair Labor Practice**

The Union contends,<sup>171</sup> essentially, that the Board was obligated to provide a more complete make-whole remedy rather than the limited *Transmarine* remedy. However, the Supreme Court has rejected that argument, stating that there is “nothing in the language or structure of the Act that requires the Board to reflexively order that which a complaining party may regard as ‘complete relief’ for every unfair labor practice.”<sup>172</sup> Instead, the Board is required to tailor its remedy to fit the circumstances of each case.<sup>173</sup> The cases cited by the Union merely demonstrate that the Board thoughtfully considers the appropriateness of the remedy in each case given the facts; they do not show, as the Union claims,<sup>174</sup> “an arbitrary departure” from Board precedent.

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<sup>170</sup> A-237.

<sup>171</sup> Union Br. 26-31.

<sup>172</sup> *Shepard v. NLRB*, 459 U.S. 344, 352 (1983).

<sup>173</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (Act requires that “remedy be tailored to the unfair labor practice it is intended to redress”).

<sup>174</sup> Union Br. 24.

In *Kiro, Inc.*, for example, the Board found an effects-bargaining violation and, rather than the *Transmarine* remedy, ordered the employer to “bargain . . . and to make whole any employee who suffered losses resulting from its unlawful conduct.”<sup>175</sup> However, the employees in *Kiro* may not have actually suffered financial losses as a result of the employer’s decision. The Board noted that the effects of the decision “resulted in increased hours, increased workloads, split shifts, and greater productivity demands for certain unit employees.”<sup>176</sup> And the judge’s recommended remedy in that case suggested that “[b]ackpay, *if any*,” be computed in a certain manner.<sup>177</sup> In cases where there are no financial losses, a *Transmarine* remedy may not necessarily be appropriately tailored to the violation.

The other case the Union primarily relies on, *Holly Farms Corp.*,<sup>178</sup> also involved very different facts. The employer there committed dozens of unfair labor practices, including withdrawing recognition from the union, interfering with a Board election, threatening employees with arrest for distributing union materials, coercively interrogating employees about their union sympathies, and telling employees it would be futile to support a union. The Board found that,

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<sup>175</sup> 317 NLRB 1325, 1329 (1995).

<sup>176</sup> *Id.* at 1327.

<sup>177</sup> *Id.* at 1342 (emphasis added).

<sup>178</sup> 311 NLRB 273 (1993).

“[b]y virtue of its unfair labor practices, the Respondents have attempted to undermine the Union’s majority status.”<sup>179</sup> It was completely reasonable for the Board to issue a broader remedy to restore the status quo in a case that involved numerous egregious violations of the Act. Nothing in *Holly Farms* calls into question the legitimacy of the *Transmarine* remedy in a more traditional effects-bargaining case.

To the extent the Union argues<sup>180</sup> that the amount of backpay employees will ultimately receive is insufficient, that argument is premature and provides no basis to deny enforcement of the Board’s Order. As the Union notes,<sup>181</sup> the Board’s established practice is to address contentions about the specific amount of backpay owed in a subsequent compliance stage.<sup>182</sup> If the Union is unhappy with the ultimate economic valuation of the use of the service vehicle, the Union may address that issue in a future compliance proceeding.<sup>183</sup>

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<sup>179</sup> *Id.* at 283.

<sup>180</sup> Union Br. 35.

<sup>181</sup> Union Br. 35 n.6.

<sup>182</sup> *Sure-Tan, Inc.*, 467 U.S. at 902.

<sup>183</sup> *See NLRB v. Katz’s Delicatessen*, 80 F.3d 755, 771 (2d Cir. 1996) (finding employer’s objection to remedy premature “because there has been no compliance proceeding in this case”).

The Union may disagree with the remedy the Board chose in this case, but the Board's decision was "deliberately and rationally made."<sup>184</sup> The "grounds given are all substantial and rational, well within the spectrum of the Board's authority," and therefore entitled to deference from this Court.<sup>185</sup> The Union has provided no grounds to disturb the Board's Order.

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<sup>184</sup> See *Amalgamated Local Union 355 v. NLRB*, 481 F.2d 996, 1006 (2d Cir. 1973).

<sup>185</sup> See *id.* at 1007.

## CONCLUSION

The Board respectfully requests the Court deny the petitions for review and grant in full its cross-application for enforcement against RGE.

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May 2011

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

LOCAL UNION 36, INTERNATIONAL	*
BROTHERHOOD OF ELECTRICAL WORKERS,	*
AFL-CIO	*
	*
Petitioner	* Nos. 10-3448,
	* 11-0247
v.	* 11-0329
	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 3-CA-25915
	*
Respondent	*

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ROCHESTER GAS & ELECTRIC CORPORATIONS	*
	*
Petitioner/Cross-Respondent	*
	*
v.	*
	*
NATIONAL LABOR RELATIONS BOARD	*
	*
Respondent/Cross-Petitioner	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,651 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

**COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS**

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the

Board's brief filed with the Court and served on the petitioner/cross-respondent.

The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC  
this 6th day of May, 2011

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all persons who have filed appearances are e-filers and will

receive service electronically.

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