

**Nos. 14-1163, 14-1175**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MIKE-SELL'S POTATO CHIP COMPANY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-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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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIKE-SELL’S POTATO CHIP COMPANY	*
	*
Petitioner/Cross-Respondent	* Nos. 14-1163
	* 14-1175
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 9-CA-072637
	*
Respondent/Cross-Petitioner	*
	*

**THE BOARD’S CERTIFICATE AS TO  
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

**A. Parties and Amici**

1. Mike-Sell’s Potato Chip Company (“the Company”) was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

**B. Rulings under Review**

References to the rulings at issue appear in the Company’s opening brief.

### **C. Related Cases**

This matter was previously before the Court in *Mike-Sell's Potato Chip Co. v. NLRB*, Case No. 13-1139, which was dismissed and remanded following the Board's motion. Board Counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben

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Dated at Washington, DC  
this 28th day of January, 2015

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## **GLOSSARY**

The Act	The National Labor Relations Act
The Agreement	The most recent collective-bargaining-agreement between Mike-Sell's Potato Chip Company and the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC, executed on November 15, 2010, and effective from August 5, 2010, until August 5, 2014.
The Board	The National Labor Relations Board
Br.	The opening brief of Mike-Sell's Potato Chip Company
The Company	Mike-Sell's Potato Chip Company
JA	The joint appendix
The Teamsters	The International Brotherhood of Teamsters
The Union	The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC

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BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Mike-Sell's Potato Chip Company ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order against the Company. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), which authorizes it to prevent unfair labor practices affecting commerce.

The Board's Decision and Order issued against the Company on August 15, 2014, and is reported at 361 NLRB No. 23. The Order is final with respect to all parties. The Company petitioned for review of the Board's Order on August 29, 2014, and the Board cross-applied for enforcement of the Order on September 11. The Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUE**

Whether substantial evidence supports the Board's finding that, during the term of a collective-bargaining agreement, the Company violated the Act by implementing changes to employee health care benefits without following contractually-required procedures and without obtaining the Union's consent.

### **RELEVANT STATUTORY PROVISIONS**

Relevant provisions of the Act are reproduced in the addendum to the Company's opening brief.

### **STATEMENT OF THE CASE**

The Company and the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC ("the Union") have enjoyed

a bargaining relationship for many years. (JA 9; 144-45.)<sup>1</sup> Their most recent collective-bargaining agreement requires the Company to provide specified health care benefits to unit employees and permits modification of those benefits during the contract term only if certain midterm reopening procedures are followed. (JA 9; 53.) After investigation of a charge filed by the Union, the Board's Regional Director issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by implementing changes to employees' health and welfare benefits without following those procedures and without obtaining the Union's consent. (JA 20-30.) Following a hearing, the administrative law judge found that the Company violated the Act as alleged. (JA 8-15.)

The parties filed exceptions to the judge's decision with the Board. On March 19, 2013, a three-member panel of the Board (Chairman Pearce and Members Griffin and Block) affirmed the judge's findings and adopted his recommended order, as modified. *See Mike-Sell's Potato Chip Co.*, 359 NLRB No. 86, 2013 WL 1144153 ("the 2013 Decision and Order"). (JA 7-15.) The Company petitioned this Court for review of the 2013 Decision and Order (D.C. Cir. No. 13-1139). Before the Board filed the record, the Court sua sponte issued

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<sup>1</sup> "JA" references are to the joint appendix. "Br." references are to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to supporting evidence.

an order placing the case in abeyance in view of its opinion and judgment in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block. Subsequently, a properly constituted Board exercised its authority under Section 10(d) of the Act, 29 U.S.C. § 160(d), and set aside the 2013 Decision and Order. (JA 3, 17.) On the Board's motion, the Court dismissed and remanded the case. On August 15, 2014, the Board issued the Decision and Order now before the Court, which incorporates by reference the prior 2013 Decision and Order and cites additional supporting precedent.<sup>2</sup> (JA 17-18 & n.1.)

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

### **A. Background; the Company and the Union Are Parties to a Collective-Bargaining Agreement**

The Company, a snack food manufacturer and distributor, employs approximately 183 individuals. (JA 9; 239-40.) The Union represents a bargaining unit of 22 maintenance and production employees who work at the Company's Dayton, Ohio facility. (JA 9; 38, 144-45.) The parties have enjoyed a

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<sup>2</sup> The Board subsequently issued two errata correcting inadvertent errors. (JA 16, 19.)

collective-bargaining relationship for approximately 50 years. (JA 9; 144-45.)

The Company and the Union's most recent collective-bargaining-agreement ("the Agreement"), which they executed on November 15, 2010, was effective from August 5, 2010, until August 5, 2014. (JA 9; 38, 53-54, 145-46.)

Locals of a different union, the International Brotherhood of Teamsters ("the Teamsters"), represent company employees in three other bargaining units at the Dayton facility. The Teamsters have separate and distinct collective-bargaining agreements with the Company covering those bargaining units. (JA 9; 240.)

**B. The Agreement Specifies Employee Health Care Benefits**

The parties' Agreement sets forth employee health care benefits which consist of a high-deductible insurance plan and a company-subsidized health savings account. (JA 9; 52-53, 241.) Under the insurance plan, the annual health care deductible for an individual is \$2000, and \$4000 for a family. Once an employee reaches the deductible amount, the Company pays all additional medical expenses. (*Id.*) The Company is also required to contribute \$500 to the health savings accounts of individual-plan participants, and \$1000 to family-plan participants. (*Id.*) These are the same benefits that all other employees of the Company (including those represented by the Teamsters) were receiving at the end of 2011. (JA 9; 241.) The Company is self-insured, and the plan is administered by a health insurance company. (*Id.*)

**C. The Agreement Contains a Procedure for Reopening Negotiations Over Health Benefits**

The Agreement permits either the Company or the Union to reopen negotiations over those benefits, provided that more than 1 year has passed since the Agreement's execution. (JA 9; 53.) Once negotiations are reopened, the parties have 10 days to reach agreement, after which the matter goes to mediation and, ultimately, binding arbitration. (*Id.*) The relevant portion of the Agreement reads:

Section 11.7 (Reopening Clause)—The company and union hereby agree that all health and welfare benefits defined in this agreement in article 11 shall remain in full force for one (1) year from the execution of this agreement. After one year, either the company or the union shall have the right to reopen this agreement and to redefine all health and welfare benefits by simply serving the other party with a written notice of its intention to reopen negotiations concerning all health and welfare benefits. Within ten (10) days after sending of said notice, the company and union shall begin negotiations for health and welfare benefits. If the company and union are unable to agree within ten (10) days after beginning negotiations for health and welfare benefits as to the health and welfare benefits, then, the matter shall be referred to Federal Mediation for resolution. If a resolution is not reached through Federal Mediation within ten (10) days after referral, then company and union agree the matter shall be submitted to binding arbitration. The binding arbitration shall be held and completed within thirty (30) days after the request of either party for binding arbitration.

(*Id.*)

The parties' previous contract included a similar reopening clause, which the Company invoked in 2008. In that instance, the Company and the Union failed to reach agreement on the proposed changes to employee health care benefits, and the

process of reopening, negotiating, mediating, arbitrating, and implementing the changes lasted about 1 year. (JA 9; 183, 244.)

Unlike the parties' Agreement, the Teamsters contracts permit the Company to unilaterally change employee health care benefits, so long as the benefits are the same as those provided to salaried and nonunion personnel. (JA 9; 109-12, 166.)

**D. The Company Decides To Reduce Employee Health Care Benefits**

In late 2011, the Company decided that increases in deductibles and decreases in reimbursement rates and health savings account contributions were needed to help save costs. (JA 9; 246.) With respect to the health insurance plan, the Company planned to pay only 80 percent—not 100 percent, as specified in the Agreement—of medical expenses after an employee met the applicable deductible. When the employee reached out-of-pocket expenses of \$4000 for an individual (instead of the contractual amount of \$2000) or \$8000 for a family (instead of the contractual amount of \$4000), the Company would then pay 100 percent of additional medical expenses. The Company also decided to cut its contributions to employee health savings accounts from \$500 to \$250 per year for individual-plan participants, and from \$1000 to \$500 for family-plan participants. (JA 9; 163, 248-49.)

On November 7 and 8, the Company sent letters to all its employees, except for the 22 unit employees represented by the Union, that informed them that the

Company would implement these benefit reductions on January 1, 2012. (JA 10; 109-12, 299.)

**E. The Company Informs the Union That It Wants To Reopen Negotiations over Health Care Benefits**

On November 8, 2011, Sharon Wille, the Company's human resources director, sent a letter to Vester Newsome, the Union's treasurer and financial secretary, stating:

The Company intends to reopen negotiations concerning all health and welfare benefits. This notice is in accord with Article 11, Section 11.7 of the collective bargaining agreement.

We are available November 10th, 14th, 16th and 17th to begin the negotiations. Please let me know what dates you can be available.

(JA 9; 62, 148.) Newsome discussed this letter with Stephen Campbell, the union steward. They agreed that they did not want any change "unless it was going to be for the better." (JA 9-10; 202-04.)

**F. The Company and the Union Correspond about the Proposed Negotiations**

In a November 10 letter, Newsome replied to Wille's letter, stating that the Union was prepared to reopen negotiations once the Company gave "a reason for reopening." (JA 10, 16; 63.) Over the course of the next several weeks, the parties exchanged letters and emails, with the Company trying to move the reopening process forward, and the Union challenging the Company's reason for reopening and declining the Company's proposed bargaining and mediation dates. (JA 10;

64-74, 117-26.) On November 29, Wille informed Newsome that she planned to move the reopening process to binding arbitration. (JA 10; 127.)

**G. The Union Informs the Company That Its Reopening Notice Was Premature and Void, and the Company Agrees; the Parties Set a New Bargaining Date**

On December 2, the Union emailed the Company stating that Wille's November 8 notice of reopening was premature and "void." (JA 10; 130-31.) The Union's email explained that such notice could not be made until 1 year after the Agreement's execution date of November 15, 2011, but that Wille had served the notice on November 8, 2011. (JA 10; 130-31.) The Union also stated that it "d[id] not agree with the proposal" to cut health care benefits. (JA 10; 130.)

On December 6, the Company responded, admitting that the Union had "identified a technical flaw in the Company's one-week premature notice to reopen." (JA 10; 129.) "Because of the technical flaw," the correspondence continued, "the Company is willing to once more invite the Union to negotiate over proposed changes to the insurance program during the next ten days, in accordance with Section 11.7 of the Labor Agreement." (*Id.*) The Company offered four bargaining dates, and the Union agreed to bargain on December 14. (*Id.*)

On December 12, 2011, Wille and a representative of the Company's health insurance broker held a meeting with 10 to 15 employees represented by the Union

to discuss the benefits cuts. (JA 10; 231, 301-02.) Wille told the employees that she would meet with Newsome and Campbell about the changes. (JA 10; 207.)

**H. The Parties Meet but Do Not Reach Agreement; the Company Does Not Move Forward with the Contractually-Prescribed Reopening Procedure**

On December 14, the Company and the Union met to negotiate over the proposed cuts. (JA 10; 162.) This was the parties' first and only meeting. Three individuals were present: Wille, for the Company, and Newsome and Campbell, on the Union's behalf. (*Id.*) The meeting lasted approximately 10 to 20 minutes. (JA 10; 162, 208, 266.)

Wille opened the session by describing the proposed reductions. (JA 10; 162-63, 209.) Newsome and Campbell responded by detailing the hardships that such cuts would impose on employees. They also reminded Wille of financial sacrifices that unit employees had made since 2006 in order to help the Company reduce costs. (JA 10; 164-66, 209-10.) Newsome and Campbell stressed that employees could not afford the reductions and stated that "[the employees] just can't give up any more." (JA 11; 165, 210.)

Newsome and Campbell also told Wille that while the Company's contracts with the Teamsters gave it the power to unilaterally alter benefits, the Agreement with the Union did not. (JA 11; 166, 210-11.) Campbell stated that the Union therefore "had a choice" over the reductions, unlike the employees represented by

the Teamsters. (*Id.*) Wille responded that “we all need to be on the same thing.” (JA 11; 211.) Newsome proposed some alternatives to the cuts, which Wille rejected. (JA 10; 163-64.)

During the meeting, Newsome and Campbell “never stated that they agreed with the proposed changes.” (JA 11; 168, 210, 273.) Indeed, the pair told Wille that the Union could not and would not agree to the cuts. (JA 10; 168, 210.) Wille stated that the Company was going to implement the reductions for other employees on January 1, but did not say it would do so for unit employees. (JA 11; 166, 210.) As the meeting drew to a close, Newsome told Wille that “[i]f she wanted to continue, she could go, we could go to the [a]rbitrator, let an [a]rbitrator decide.” (JA 11; 177.)

Generally, the parties’ practice over the years was to “sign off” on an agreement when one was reached. (JA 11-12 & n.5; 89, 92, 212, 274, 169-70, 174.) The December 14 meeting ended without any written or signed agreement. (JA 11-12; 169, 212, 274.) In the weeks after the meeting, the Company did not seek further negotiating sessions with the Union, nor did it contact the Union to move the bargaining process to mediation and arbitration, as the reopener provision required. (JA 11-13; 177, 201, 213, 275.)

## **I. The Company Implements the Reductions; Unit Employees and the Union Learn about the Cuts When Paychecks Are Issued**

The Company implemented the cuts on January 1, 2012. (JA 11; 96, 277.)

On January 12, when Campbell received his first paycheck showing the reduction, he immediately contacted Newsome. The next day, Newsome wrote to Wille, asking that the Company reinstate the prior benefits and stating that the Company had made the changes without the Union's consent or an arbitrator's ruling. (JA 11; 95, 105-07, 213-16.) On January 19, Wille replied that the "Union agreed to the proposed changes at the table" on December 14, and that the Company would not reinstate the benefits. (JA 11; 96.)

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

On August 15, 2014, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued its Decision and Order, which adopted the administrative law judge's conclusion that the Company violated Section 8(a)(5) and (1) of the Act by implementing the midterm changes to unit employees' benefits without following the procedures set forth in the Agreement's reopening clause and without obtaining the Union's consent. (JA 17-18.) The Board explained that it agreed with the rationale set forth in the previous decision and order, issued on March 19, 2013, and also noted additional precedent upon which it based its new decision. (JA 17-18 & n.1.)

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (JA 7.) Affirmatively, the Order requires that the Company restore to unit employees the benefits they enjoyed before the Company's unlawful modification, make all bargaining-unit employees whole, and post a remedial notice. (JA 7-8.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing changes to unit employees' health care benefits during the term of a collective-bargaining agreement without obtaining the Union's consent and without following the procedures set forth in the contractual reopening clause. It is undisputed that the Company, after initiating the reopening process, never moved the process forward to mediation or obtained an arbitrator's ruling.

While the Company attempts to defend the modifications by claiming the Union consented to the changes, the credited testimony of union witnesses, as well as an abundance of undisputed evidence, shows that the Union did not consent during the single, brief bargaining session on December 14. Before that meeting, the Union registered its opposition to the proposal and gave every indication that it

would not readily agree to the changes. At the negotiating session, the union representatives refused to agree to the changes and stressed the hardship employees would bear. Moreover, the meeting ended with no written agreement. After the meeting, the Company failed to follow up on any purported agreement or notify the unit employees of the changes, and the Union promptly objected when implementation of the reductions became evident.

The Company's multifarious challenges to the Board's decision are meritless. The many objections to the Board's credibility resolutions ignore the demanding standard of review that requires extraordinary circumstances in order for the Court to overturn an administrative law judge's credibility determinations that have been adopted by the Board, particularly given that many of those findings resolve conflicting testimony and are based on witness demeanor. Furthermore, the fault that the Company attributes to the Board's factual findings is largely based on discredited testimony and speculation, and thus it fails to present any basis for disturbing the Board's unfair labor practice finding. Likewise, the Company's arguments that the Board failed to properly take into account the parties' prior relationship and bargaining history misreads the Board's decision, which expressly considered that evidence and properly found it either lacking in probative value or contrary to the Company's position.

## STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). A reviewing court does not disturb these factual findings, even if it would have reached a different result reviewing the case *de novo*. *Universal Camera Corp.*, 340 U.S. at 488; *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004).

Because the Court “do[es] not retry the evidence,” it is now “long past the time” for arguments that challenge credibility resolutions. *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003). “[C]redibility of witnesses is a matter for Board determination, and not for th[e]court.” *Id.* (quoting *Joy Silk Mills v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950)). Consequently, “[t]he court will uphold the Board’s adoption of an [administrative law judge]’s credibility determinations unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.” *United Servs. Auto. Ass’n*, 387 F.3d at 913 (internal quotation marks omitted).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY IMPLEMENTATING CHANGES TO THE EMPLOYEES’ CONTRACTUAL HEALTH CARE BENEFITS**

#### **A. The Act Prohibits an Employer from Making a Midterm Modification to a Mandatory Subject of Bargaining Contained in a Collective-Bargaining Agreement, Absent Union Consent**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively” with a union that represents its employees. 29 U.S.C. § 158(a)(5). Section 8(d), 29 U.S.C. § 158(d), in turn, defines the 8(a)(5) duty to bargain, which includes “the duty to continue in full force and effect the terms and conditions of the existing contract.” *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *aff’d sub. nom. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007). These provisions thus prohibit an employer’s unilateral midterm modification of a collective-bargaining agreement. *C & S Indus., Inc.*, 158 NLRB 454, 458-59 (1966) (employer’s midterm implementation of new wage-incentive system “operated as a ‘modification’ of contract terms” and so “was in derogation of its statutory obligation under Section 8(d), and was therefore violative of Section 8(a)(5)”). Indeed, the Board has long held, with court approval, that “Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement

without obtaining the consent of the union.” *Nick Robilotto, Inc.*, 292 NLRB 1279, 1279 (1989); *see also Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 169 & n.2 (1971); *United Auto Workers v. NLRB*, 765 F.2d 175, 180 (D.C. Cir. 1985), *enforcing Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984) (when contract is in effect, “the employer must obtain the union’s consent before implementing the change”). As this Court long ago explained, “it is clear . . . that making unilateral changes in the terms and conditions of employment during the pendency of an existing collective bargaining agreement . . . violates the duty to bargain.” *Int’l Bhd. of Elec. Workers Local 1466 v. NLRB*, 795 F.2d 150, 152-53 (D.C. Cir. 1986).

In finding unilateral midterm modifications to be unlawful, the Board has explained that such behavior contravenes the Act because it amounts “to the striking of a death blow to the contract as a whole” and “a basic repudiation of the bargaining relationship,” which the statute is designed to foster. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1063-64 (1973), *enforced mem.*, 505 F.2d 1302 (5th Cir. 1974); *accord Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004) (noting the “fundamental importance to employees of wage and fringe benefit provisions” and that “an employer’s failure to comply therewith effectively guts the agreement of its meaningfulness to employees”).

**B. Substantial Evidence Supports the Board’s Finding That the Company Implemented Its Midterm Changes without Adhering To the Contractual Procedure and without Obtaining the Union’s Consent**

It is undisputed that the parties’ Agreement contained not only provisions requiring that the Company provide certain health care benefits to unit employees, but also a process for reopening and renegotiating those benefits. Pursuant to that process, the Company had two avenues by which it could have lawfully implemented the proposed midterm modifications. The first was to obtain the Union’s consent through negotiation. The second was to abide by the terms of the reopening clause, and, once it failed to reach consent through negotiation, to proceed to mediation, and, if necessary, obtain an arbitrator’s ruling. As we show below, the Board properly found (JA 13) that the Company reduced the unit employees’ benefits without obtaining the Union’s consent and without obtaining a mediated agreement or an arbitrator’s ruling, and therefore, the Company’s midterm reduction of health benefits was unlawful.

**1. The Company implemented the reductions without following the steps required by the reopener provision**

Pursuant to the parties’ Agreement, either party could reopen negotiations during the term of the contract and seek a resolution through mediation or binding arbitration if agreement could not be reached. “There is no dispute,” however, that the Company implemented the reductions “after initiating the contractual

reopening process . . . but without obtaining a decision from an arbitrator.” (JA 10.) The Company therefore bypassed both the Union and the requirements of the parties’ reopener provision and unlawfully modified the employees’ health benefits, effectively striking a “death blow” to the parties’ Agreement. *See Oak-Cliff Golman*, 207 NLRB at 1063-64.

Claiming that the reopener provision does not identify any particular party as being responsible for moving the process forward, the Company argues (Br. 33) the Board erred in finding that it had “the exclusive obligation to push the contractual reopener process forward from step to step if no agreement was reached.” The Board, however, made no such finding. Rather, as the Board reasonably explained (JA 6 n.7), “[s]ince the [Company] was the party that wished to change the contractual status quo, the Union reasonably saw it as up to the [Company] to move the reopening process forward.” Indeed, the Company was well aware of the requirement to fully utilize the steps of the reopener provision, as evidenced by its conduct in 2008, when the Company previously sought changes to the employees’ health benefits. In 2008, the Company initiated the reopening process, moved the process through mediation and then to arbitration, where it obtained its desired result. (JA 9.) Its failure to do so renders its unilateral modification of the employees’ health benefits contrary to the parties’ Agreement and therefore unlawful.

## **2. The Company failed to obtain the Union's consent to the modifications**

In defending its modification, the Company contends that the Union consented to the changes during the parties' December 14 meeting and an agreement was reached. The Board properly rejected that defense, finding (JA 13) instead that the undisputed and credited evidence showed that the Company "failed to secure the Union's agreement to the proposed reductions." The Board found (JA 13 n.8) that, because the December 14 meeting ended without the Union's consent and there was thus "no meeting of the minds between the parties," there was no enforceable agreement regarding the proposed health care modifications.

Whether parties reach a meeting of the minds "is determined not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776, 776 n.2 (1988). Put differently, "the crucial inquiry is whether there is conduct manifesting an intention to abide and be bound by the terms of an agreement." *NLRB v. Int'l Bhd. of Elec. Workers Local 22*, 748 F.2d 348, 350 (8th Cir. 1984) (internal quotation marks and citations omitted) (noting that "technical rules of contract do not control" this determination). The Board considers the parties' "words and actions," including their "tone and temperament" around the time of the purported agreement and whether the parties ended the meeting "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor."

*Teamsters Local No. 771 (Ready-Mixed Concrete)*, 357 NLRB No. 173, 2011 WL 6958623, at \*10 (2011) (citing *Bobbie Brooks, Inc., v. Int’l Ladies’ Garment Workers’ Union*, 835 F.2d 1164, 1169 (6th Cir. 1987)). Other relevant considerations include the parties’ bargaining history and circumstances surrounding the negotiations, *Cherokee United Super*, 250 NLRB 29, 32 (1980) (“The bargaining history and all other relevant circumstances surrounding the negotiations must be examined to determine if an enforceable agreement has been reached.”), and the parties’ subsequent course of conduct, *Bobbie Brooks*, 835 F.2d at 1169.

Ultimately, whether the parties reached an agreement “is a question of fact for the Board to determine,” and the Board’s resolution thereof is entitled to considerable deference. *NLRB v. Local 100, Int’l Bhd. of Teamsters*, 532 F.2d 569, 571 (6th Cir. 1976) (citing *Adams Potato Chips, Inc. v. NLRB*, 430 F.2d 90, 94 (6th Cir. 1970)). The Board properly examined the parties’ conduct before, during, and after the December 14 meeting and found that the Union never consented to the changes, and the parties therefore had no “meeting of the minds” regarding the proposed health care reductions. (JA 13 n.8.)

**a. The parties’ conduct before the December 14 meeting supports a finding that no agreement was reached**

The Board found (JA 11) that prior to the December 14 meeting, “the Union had been gearing up for a battle regarding the reductions.” On this score, it is

undisputed (JA 10) that, as early as December 2, the Union had informed the Company that it “did not agree” with the Company’s plan. It is likewise uncontested (*id.*) that prior to the meeting, Newsome and Campbell had “decided that they were not going to agree to the reductions.”

Additionally, the Union’s unhurried attitude toward setting an initial bargaining date and its objection to the Company’s premature notice of reopening—conduct the Company has characterized as “delay tactics” (Br. 31)—support the Board’s finding (JA 11) that the Union was “in no hurry to see th[e] process move forward.”<sup>3</sup> Thus, the Union’s obvious reluctance to meet about the change demonstrates that it did not want to agree to the modification and accords with its behavior at the December 14 meeting.

**b. The parties’ conduct at the meeting highlights their irreconcilable differences over the reductions**

The parties’ conduct at the December 14 meeting strongly supports the Board’s determination that the Union did not consent to the Company’s proposal. Notably, it is undisputed (JA 11) that Newsome and Campbell “never stated that

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<sup>3</sup> The Company’s contention (Br. 30 n.15) that the Union engaged in delay tactics by refusing to provide a bargaining date within 10 days from the date that negotiations were reopened ignores the judge’s explicit finding (JA10) that the Company, having admitted to the “technical flaw” of presenting the Union with a premature reopening notice, “essentially agree[d] that the reopening timelines would commence as of . . . December 6 . . . rather than . . . November 8.” Thus, the Union’s offer to meet with the Company on December 14 was in fact timely and in accord with the reopener’s terms.

they agreed with changes.” It is likewise uncontested (JA 10-11) that the union representatives emphasized the plan’s negative impact on employees, listed the other financial sacrifices that employees had already made to help the Company cut costs, and explained that the employees “just can’t give up any more.” Indeed, rather than embracing the proposed modifications, the Union instead proposed alternatives, which Wille flatly rejected. (*Id.*)

In addition to not agreeing to the modifications, the representatives reminded Wille that the Company would have to invoke the Agreement’s binding arbitration provision if it wanted to implement the reductions. (JA 11.) In this regard, the pair specifically told Wille that, unlike the Teamsters contracts, the Agreement with the Union did not permit the Company to unilaterally alter benefits. (JA 11.) The Board properly deemed “dubious” (JA 11) Wille’s assertion that she and Newsome agreed that the Company had the right to unilaterally make the proposed reductions. Because the Agreement plainly did not give the Company that power, the Board correctly adopted the judge’s conclusion (JA 12) that “[i]t is implausible that Newsome and Campbell would agree to the existence of so significant a management right when that right did not exist.” In fact, Wille was equivocal on this point and admitted that she might have been confused with other contracts. (JA 11-12.)

Given the Union's express and clear disagreement, the Board rightly rejected as "implausible in the extreme" (JA 11) Wille's testimony that Newsome and Campbell were "happy and smiling" during the meeting. As the Board noted, they were faced not only with "substantial reductions . . . without any counterbalancing concessions," but the Company had also rejected the Union's counterproposals. Thus, the tone and temperament of the meeting was likely not as congenial as Wille claimed. On the contrary, the evidence shows that the tenor was one of inflexibility on both sides, which is hardly consistent with there having been a "meeting of the minds." See *Bobbie Brooks*, 835 F.2d at 1169 (finding agreement where there "was a sense of accomplishment and congratulations at the conclusion of that negotiating session").

It is also uncontested (JA 10-11) that the meeting ended with no written agreement or other written confirmation that the Union consented to the proposed changes. As the Board correctly found (JA 12), the absence of any such writing supports a finding that no agreement was reached. The parties' general practice was to "sign off" on such agreements. (JA 11-12 & n.5.) Moreover, leading up to the meeting, the parties, particularly Wille, had engaged in "extensive, rapid fire" written correspondence. (JA 7.) Given this demonstrated penchant for written communication, the Board properly determined (JA 12 n.5) that the lack of written agreement here "weighs against" a finding "that such an agreement was reached."

Overall, the Union’s conduct at the meeting shows its explicit rejection of the Company’s proposal and its insistence on proceeding to arbitration if the Company persisted. Such conduct stood in stark contrast to the Company’s firm position that the reductions were essential. It is therefore not surprising that the meeting ended with the Union reiterating its disagreement (JA 11 & n.4) instead of “mutual expressions of satisfaction on [its] successful outcome.” *Teamsters Local No. 771*, 357 NLRB No. 173, 2011 WL 6958623, at \*10 (2011) (deeming such behavior a “hallmark indication” of agreement).<sup>4</sup>

**c. The parties’ behavior after the meeting is consistent with no agreement having been reached**

The Board also properly found that the parties’ post-meeting behavior supported a finding that no agreement was reached. As it noted (JA 12), Wille did not “even follow up the December 14 meeting with correspondence confirming the supposed agreement that she had been so actively seeking.” This failure is inconsistent with Wille’s prior engagement in a “flurry of correspondence” with the Union over mere preliminary matters, as well as Wille’s “extreme[] impatien[ce] to see the [proposal] implemented.” (JA 10, 12.) Moreover, the

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<sup>4</sup> The Company puts forward (Br. 28-32) what is essentially a conspiracy theory that the Union agreed to the cuts at the December 14 meeting, but then reneged on that agreement in order to delay implementation. There is no evidence to support that theory. By contrast, substantial evidence more than supports the Board’s determination (JA 11) that the Union likely sought to delay implementation by *not* agreeing to the proposal at the December 14 meeting.

Board properly noted (JA 12) that the Company never notified the unit employees that it would be implementing the reductions discussed at the December 12 meeting. As the Board aptly explained (JA 12), because of “the magnitude and importance of the reductions, it is simply not credible that Wille, having secured the Union’s agreement, would neglect to confirm that agreement in writing.” *See Bobbie Brooks*, 835 F.2d at 1169 (noting that employer’s post-meeting conduct showed agreement; the employer, among other things, continued checking off union dues and processing grievances “as usual”).

Further, as the Board noted (JA 12), Campbell behaved “precisely” as one would expect following an unlawful change to the employees’ health care benefits: he immediately contacted Newsome after receiving his first paycheck showing the benefits reduction. It is uncontested that just 1 day after the reductions appeared in the employees’ paychecks, the Union objected, informed the Company of its failure to follow the contractual reopening procedure, and demanded that it return benefits to the previous level. (JA 10-11.) This behavior, the Board rightly found (JA 12), is consistent with the union representatives’ testimony that no agreement had been reached. In fact, as the Board readily explained (JA 12), “[t]here is no obvious explanation for why they would agree to the reductions and then turn around and object as soon as the [Company] distributed paperwork revealing that those reductions had been implemented.”

**C. The Company Fails To Meet the Heavy Burden Necessary To Overturn the Judge’s Credibility Determinations**

In arguing that the Union consented to the health care changes and the parties reached an agreement on December 14, the Company levels a protracted attack (Br. 35-43) on the judge’s credibility resolutions which the Board reviewed and adopted. The Company contends that there are various inconsistencies in the testimony of the union witnesses and maintains, despite overwhelming evidence to the contrary, that Wille’s testimony is worthy of credence. As this Court has noted, a party that wishes to overturn credibility determinations adopted by the Board must show, not only that the credited testimony “carries . . . its own death wound,” but also that the “discredited evidence . . . carries its own irrefutable truth.” *United Auto Workers v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). The Company falls far short of meeting that requirement and has failed to show that the Board’s credibility determinations here “are hopelessly incredible, self-contradictory, or patently unsupportable.” *United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (internal quotation marks omitted).

**1. Any alleged inconsistencies in the testimony of union witnesses are irrelevant to determining whether the parties reached an agreement on December 14**

The Company asserts (Br. 35) that the Board “either ignored or hastily discounted several inconsistencies” between the testimony of union witnesses. The Company first points to an alleged conflict between Campbell’s account of the

December 12 informational meeting and that of witness Christopher Clark, a union member. As an initial matter, the Board did not ignore this inconsistency but instead recognized (JA 10 & n.3) that the witnesses “gave conflicting testimony” over whether Wille stated at the meeting that the Company had already decided to implement the reductions on January 1, 2012, or whether she recognized the Company’s duty to bargain with the Union beforehand. The Board properly found (JA 10) it unnecessary to resolve this conflict because there was no allegation that the Company violated the Act by its conduct at the December 12 meeting. In any event, resolution of the inconsistency would have little probative value on the issue of whether the parties reached agreement on December 14.

The Company also points (Br. 35) to Campbell’s testimony that the Union would not agree with any changes unless they were for the better, claiming that it conflicts with Newsome’s statement that the Union offered alternatives to the Company’s proposed modifications. Both statements, however, support the Board’s finding that the Union started and ended the December 14 meeting opposed to the reductions put forward by the Company.

Thus, the Company presents no compelling evidence to warrant overturning the judge’s determination (JA 12), adopted by the Board, that Campbell and Newsome’s testimony regarding the December 14 meeting was “quite consistent

and mutually corroborative” and that, based on “their demeanor and the record as a whole,” they provided a “credible” account.

**2. Wille’s testimony about the December 14 meeting was properly discredited**

The Company also spins various arguments (Br. 37-43) as to why the Board should have credited Wille’s account of the December 14 meeting over that of Newsome and Campbell. As we show below, no argument successfully refutes the judge’s finding (JA 7), adopted by the Board, that Wille’s version of the December 14 meeting was “implausible in the extreme.”

The Company argues (Br. 37-38) that the Board erroneously “ignored or rejected” Wille’s testimony as uncorroborated. The Company points out that Wille’s notes concerning the December 14 meeting are consistent with her testimony. The Company, however, misstates the Board’s reasoning for rejecting Wille’s testimony. The Board found (JA 13) that Newsome and Campbell’s testimony, corroborated by Newsome’s contemporaneous handwritten notes, was simply more credible than Wille, who was unable to remember when she wrote her notes. Contrary to the Company’s assertion (Br. 37), the Board did not create a rule that corroboration is a prerequisite to accepting testimony. Further, the Company’s claim (Br. 38) that Wille’s notes are admissible pursuant to certain evidentiary rules is beside the point and conflates admissibility, which is not at issue here, with credibility.

The Company contends (Br. 20-21) that the judge’s credibility assessment of Wille warrants little deference because it was not based on demeanor but instead on the judge’s “subjective opinion of what each party was more likely to do in a given situation.” This argument misstates the basis of the judge’s credibility determination. The judge explicitly stated (JA 12 (emphasis supplied)) that he “found that Wille was a less than fully credible witness *based on her demeanor and testimony as a whole.*” The judge found (JA 12) that, among other things, Wille was “overly anxious” to give testimony supportive of the Company and “extremely impatient” to implement the health care changes. The judge therefore properly considered Wille’s demeanor in giving her testimony little weight. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (deference is owed to “judge’s credibility determinations because [judge] ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records’”) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

The Company takes issue with the judge’s finding (JA 12) that Wille was “extremely impatient to see the health care changes implemented.” The Company instead contends (Br. 41) that Wille was “diligently endeavoring in good faith to comply with contractual deadlines.” This contention, however, ignores that Wille sent a premature reopener notice (which further delayed the timeline for implementation and likely exacerbated her impatience) and insisted on moving

matters to mediation despite the Union's unavailability. (JA 12.) Such behavior is consistent with her overall impatience, not due diligence. The Company maintains (Br. 40) that "there is no evidence" that Wille intended to deliberately file the notice of reopening a week prematurely. But the Company provides no evidence to support its theory that Wille "simply made a mistake." Rather, the Company relies solely on its own self-serving conjecture and speculation, which is no basis for dismissing the judge's finding.<sup>5</sup>

While extolling the virtues of Wille's testimony (Br. 41), the Company denigrates the testimony of Newsome and Campbell (Br. 42-43), faulting it as "vague" and "evasive." But the testimony upon which the Company relies (Br. 42 n.21) consists of Campbell's statements to Wille that the Union "could not agree" to the changes and that the employees "can't afford to take that kind of cut." Such testimony is far from ambiguous and instead clearly sets forth the Union's disagreement with the Company's proposal. Moreover, Newsome's December 14 notes, made during the meeting, corroborate Campbell's testimony (JA 177) that the Union ended the meeting by stating it "could not agree to [the change]."

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<sup>5</sup> The Company also argues (Br. 40 n.19) that the Union should have been "faulted for waiting over three weeks to object" to the Company's procedural flaw. However, unlike Wille's rush to implement the changes, which undermines her credibility, the Union's delay in objecting to the premature notice served to draw out the bargaining process, which buttresses the finding that the Union did not suddenly concede to the reductions on December 14.

Overall, the Company presents no basis to overturn the judge's finding (JA 13) that "the union witnesses' account of what was said at the December 14 negotiation session [is] more credible than the contrary account of [Wille]." At most, the Company's arguments show that the record contains "conflicting testimony," which is precisely the situation where "essential credibility determinations [must] be[] made," *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), and where deference to the Board and judge is most appropriate. What the Company seeks is to have the Court "retry the evidence," which it is "not for [a] court" to do. *See Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003).

**D. Contrary to the Company's Assertions, the Parties' Prior Relationship and Bargaining History Support the Board's Finding That They Did Not Reach an Agreement on the Reductions**

The Company argues (Br. 24) that the Board ignored "important aspects of the parties' bargaining history and practices" in finding that the parties failed to reach agreement. Such history and past practices includes the parties' contentious bargaining relationship, the protracted 2008 reopener process, and prior unwritten contract modifications. The Board, however, did consider both the parties' history and practices. Therefore, what the Company really takes issue with is the Board's eminently reasonable conclusion that these factors tend to support the finding that the Union did not consent to the reductions.

The Company notes (Br. 25) Wille’s preparations (lining up a mediator and an arbitration panel) for what she considered to be the likely outcome of the December 14 meeting based on the parties’ past bargaining history—a contentious and drawn-out disagreement over the reductions. The Company claims Wille’s lack of follow-through on those plans evidences that the parties reached agreement. On the contrary, such a contentious history supports the Board’s finding (JA 11) that “it is not credible that the Union would surrender on this important issue only 10-20 minutes into the first negotiation on the subject.” And Wille’s failure to contact the mediator or arbitration panel simply illustrates her rush to implement the modifications following the failure to reach agreement.

In deciding that no agreement was reached, the Board also expressly took note (JA 9) of the parties’ inability to reach agreement on proposed changes to employee health care benefits in 2008, which was ultimately resolved by binding arbitration. The Board reasonably inferred (JA 11) that the Union knew, based on its 2008 reopener experience, that by not agreeing to the reductions at the meeting, it “could potentially have either stopped the reductions from being implemented or extracted concessions from the [Company].” In other words, past experience proved that not agreeing to the reductions was the most beneficial course for the Union to take. And, as the Board noted (JA 11), the Union had done just that in the 2008 reopener process, and “while ultimately unsuccessful in preventing the

unwanted changes, had nevertheless succeeded in postponing those changes by about a year.” Thus, the Board did consider the parties’ 2008 reopener experience, and properly determined that that experience cut against any assertion that the parties came to an agreement on such a significant economic change in a mere 20 minutes. *See Gulf Ref. & Mktg. Co.*, 238 NLRB 129, 129 n.2 (1978) (affirming propriety of using bargaining history to determine whether unions had agreed to grant employer the unilateral right to alter or terminate an employee discount plan).

The Company further argues (Br. 28) that “the parties have a long history of coming to unwritten agreements,” and that the Board’s decision ignores that history. To the contrary, the decision carefully examined (JA 12) that evidence, and properly discounted Wille’s testimony that it was the parties’ usual practice to enter into unwritten agreements. While Wille testified as to other circumstances where the parties might have orally agreed to contract changes, Wille was not working for the Company when those agreements were reached and therefore “had no direct knowledge” of them. (JA 12.) The Company defends (Br. 39-40) Wille’s testimony by claiming that she gained “institutional knowledge” of unwritten agreements as part of her job. Even if true, the Board properly took notice of the indirect nature of this knowledge in assessing the probative value of Wille’s testimony. *See Garcia v. Sec’y of Labor*, 10 F.3d 276, 285 (5th Cir. 1993)

(testimony not based on direct knowledge could be discounted in assessing conflicting evidence).

Moreover, while the Company points to a previously unwritten agreement raising the hourly wage of two employees as evidence that the parties did not always enter into midterm written modifications, the Board reasonably distinguished (JA 12) that agreement from the reductions proposed here. The prior modification affecting the wages of two employees involved “a far less significant change” than the proposed health modification, which promised to cost “every bargaining unit employee . . . thousands of dollars annually” while saving the Company about \$220,000 per year.<sup>6</sup> (JA 12.) Thus, the parties’ prior oral agreement was simply not comparable to the unit-wide benefits reduction at issue here.

The Company further maintains (Br. 26-28) that the Board placed excessive emphasis on the fact that the parties did not reduce to writing the agreement allegedly reached at the December 14 meeting. The decision does not suggest that whether an agreement was reduced to writing was “dispositive” (Br. 26) of anything. Instead, the Board made clear (JA 12) that it relied on the absence of a written agreement along with many other considerations. Indeed, it noted that this

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<sup>6</sup> That amount directly contradicts the Company’s statement (Br. 24 (emphasis in original)) that it “had *nothing to gain* by fabricating an agreement between the parties and suddenly ignoring the reopener process.”

factor made the Company's claim that an agreement had been reached "even *more* implausible." (JA 12 (emphasis supplied).)

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In sum, substantial evidence, much of it undisputed, supports the Board's finding that the Union never consented to the benefits reductions proposed by the Company. Moreover, it is undisputed that the parties' Agreement mandated a process for reopening and renegotiating those benefits, and that the Company did not follow that procedure before reducing unit employees' benefits. Thus, the Board correctly concluded that the Company violated Section 8(a)(5) and (1) of the Act when it implemented changes to the contractual health and welfare benefits provided to employees represented by the Union, without the Union's consent and without following the procedures in the contractual reopening clause.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

January 2015

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL'S POTATO CHIP COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 14-1163, 14-1175
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	9-CA-72637
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,301 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/Linda Dreeben  
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Dated at Washington, DC  
this 28th day of January, 2015

**UNITED STATES COURT OF APPEALS  
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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC  
this 28th day of January, 2015