

Nos. 14-1095, 14-1100, 14-1111

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

RAMIRO LOPEZ, et al.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Latino Express, Inc. is petitioner before the Court and was respondent before the Board. Ramiro Lopez and thirty-one other employees of Latino Express (collectively, “Lopez”) are petitioners before the Court, but were not parties before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. There are no amici.

B. Rulings Under Review

This case is before the Court on Latino Express and Lopez's petitions to review a Board Order issued on May 21, 2014, and reported at 360 NLRB No. 112. The Board seeks enforcement of that Order against Latino Express.

C. Related Cases

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court. A case involving a different Board Order against Latino Express is pending in this Court, *Latino Express, Inc. v. NLRB*, No 15-1019, but does not involve the same or similar issues.

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Dated at Washington, DC
this 23rd day of February, 2015

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GLOSSARY

Act National Labor Relations Act

Board National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Latino Express, Inc. for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued May 21, 2014, and reported at 360 NLRB No. 112. Ramiro Lopez, an employee at Latino Express, filed a petition for review of the same Order on behalf of himself and thirty-one other employees (collectively, “Lopez”). The Board had jurisdiction over the

proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a).

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, *id.* § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allow the Board, in that circumstance, to cross-apply for enforcement. Lopez filed his petition on June 2, 2014, Latino Express filed its petition on June 4, 2014, and the Board filed its cross-application on June 18, 2014. All filings were timely.

STATEMENT OF ISSUES

I. An employer’s compliance with its duty under Section 8(a)(5) of the Act to bargain in good faith is judged by the totality of its conduct at and away from the bargaining table. Evidence of bad faith includes insisting upon regressive or unlawful terms, reneging on tentative agreements without good cause, refusing to discuss mandatory subjects of bargaining, and committing other unfair labor practices. Does substantial evidence support the Board’s finding that Latino Express failed to bargain in good faith?

II. Unilaterally imposing new terms and conditions of employment without bargaining to impasse is an unfair labor practice. Does substantial evidence support the Board’s finding that Latino Express violated Section 8(a)(5) by

unilaterally implementing the Driver’s Accountable Act—setting forth employees’ financial liability for accidents—in April 2012?

III. A union enjoys an irrebuttable presumption of majority support for the first year after its certification. It is an unfair labor practice under Section 8(a)(5) for an employer to withdraw recognition from a union based on evidence of loss of support arising during that year or without authenticated evidence of such loss.

Does substantial evidence support the Board’s finding that Latino Express unlawfully withdrew recognition based on a decertification petition generated during the certification year and without authenticating the petition’s signatures?

IV. Intervention in an unfair-labor-practice case is in the discretion of the administrative law judge or the Board and may be denied to a party that does not proffer any additional facts which might affect the outcome of the case. Did the Board abuse its discretion by denying Lopez’s motion to intervene?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the attached addendum.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on unfair-labor-practice charges filed by Teamsters Local Union No. 777 (“Local 777”), the Board’s Acting General Counsel issued a complaint alleging that Latino Express violated Section 8(a)(5) and (1) of the Act by failing

to bargain in good faith, unilaterally imposing new terms and conditions of employment, and unlawfully withdrawing recognition from Local 777. The case was heard before an administrative law judge, who issued a decision and recommended order finding violations as alleged.¹ The judge denied Lopez's motion to intervene in the proceedings. On review, the Board affirmed the judge's rulings and conclusions and adopted the judge's recommended order, as modified.

II. THE BOARD'S FINDINGS OF FACT

A. **Latino Express Employees Select Local 777 as Their Bargaining Representative; After Months of Negotiations, Latino Express Proposes a Final Offer Containing Multiple Significant Changes**

Latino Express provides bus-transportation services for Chicago Public Schools and charter-bus services for the general public. (JA 338.)² In 2010 and 2011, drivers at Latino Express sought to organize with Local 777. (JA 337.) The Board found that Latino Express committed numerous unfair labor practices during the course of the organizing campaign; those violations are the subject of separate proceedings. *Latino Express, Inc.*, 358 NLRB No. 94, 2012 WL 3111707 (2012), *adopted by* 361 NLRB No. 137, 2014 WL 7149505 (2014), *petition for review*

¹ The judge dismissed additional complaint allegations, which are not at issue in this appeal.

² "JA" cites are to the Joint Appendix. "Br." cites are to Lopez's opening brief to the Court, and "LE Br." cites are to Latino Express's opening brief. References preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence.

filed, No. 15-1019 (D.C. Cir.). After winning a representation election, Local 777 was certified by the Board on April 18, 2011, as the drivers' collective-bargaining representative. (JA 338.) The unit contained eighty-four employees. (JA 349; JA 210-11.)

Negotiations for a collective-bargaining agreement began on June 10, 2011. At the bargaining sessions, Latino Express was represented by Zane Smith and Sheila Genson, with President Michael Rosas, Sr., and Vice President Henry Gardunio attending some sessions. James Glimco and Elizabeth Gonzalez represented Local 777. (JA 338; JA 235.) Prior to the first session, Local 777 presented Latino Express with a non-economic proposal. Latino Express responded with a counterproposal in November 2011. (JA 338; JA 239, 247.) The parties tentatively agreed to many provisions of the contract, but a few issues remained open. (JA 338-39; JA 241.) On April 2, 2012, Latino Express presented a "final offer," which contained numerous changes from the earlier proposals and tentative agreements. (JA 338-39; JA 240.)

Local 777's initial proposal contained a scope-of-agreement article providing that the collective-bargaining agreement would cover:

All bus routes or runs, including any movement of buses, vans or any other vehicle that will be used for the purpose of transportation by the Employer, except for emergency or maintenance-related movements.

(JA 338; JA 200.) The parties tentatively agreed to that provision. (JA 338; JA 262-63.) Latino Express's final offer added the following language to the scope-of-agreement provision to exclude charter routes:

This Agreement will not cover charter routes, charter routes on weekends, charter routes in excess of 100 miles, emergency, maintenance-related, and non-revenue related movements, as more specifically addressed in this Agreement.

(JA 339; JA 203, 261-63.) During negotiations, the parties had agreed that mechanics, who were not in the bargaining unit, could drive charter routes over one-hundred miles, but Local 777 had never agreed that such charters, or any other charters, were not covered by the collective-bargaining agreement. (JA 338; JA 260-63.)

Local 777 initially proposed that discipline should be only for "just cause" and should be subject to review through a grievance procedure. (JA 339; JA 193-94.) In its November 2011 counterproposal, Latino Express defined "just cause" for termination to include twenty enumerated offenses, and proposed that employees who were disciplined for just cause or were laid off could not utilize the grievance procedure. (JA 339; JA 195, 248-49.) Latino Express's final offer added several new examples of "just cause," including "disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication." (JA 339; JA 198, 252.) The proposal also stated for the first time that employees could be written up for various conduct, including

“distributing union literature on Company time,” “attending a union meeting on Company’s property,” and “attending a union meeting on Company time.”

(JA 339; JA 199, 253-54.) Local 777 objected to those additions, contending that they were illegal. (JA 339; JA 252-54.)

Prior to Latino Express’s final offer, the parties had tentatively agreed to an access-to-premises provision governing the circumstances under which representatives from Local 777 could access Latino Express property. (JA 339; JA 204, 256.) The final offer included additional restrictions, prohibiting union representatives from “solicit[ing] union members or distribut[ing] union literature to Employees who are on Company time” and “hold[ing] meetings on company property,” that had not appeared in the tentatively agreed-to version of the provision. (JA 339; JA 205.)

The final offer did not provide for health insurance. Latino Express did not refuse to offer any such benefit, but wanted to wait until implementation of the Affordable Care Act before adopting a position on the subject. (JA 339, 346; JA 327-28.)

B. Latino Express Unilaterally Implements the Driver’s Accountable Act

Around April 6, 2012, Latino Express attached a form to the drivers’ paychecks notifying them that “a new Driver’s Accountable Act has been implemented at Latino Express.” (JA 342; JA 69-70, 190.) The policy provided

that drivers would be financially responsible for all accidents that occurred outside route times and that Latino Express would cover all accidents that occurred during the route and other authorized times. Employees were asked to sign the agreement. (JA 342; JA 69-70, 190.) The new policy was not discussed with Local 777 during negotiations or at any time before its implementation. (JA 342-43; JA 55, 271). Rather, the parties had tentatively agreed that drivers would not bear any accident costs, regardless of when the accident occurred. (JA 342; JA 272-73.)

Prior to implementation of the Driver's Accountable Act, drivers were responsible for twenty-five percent of the cost of a preventable accident (up to \$500) and Latino Express was responsible for the remaining seventy-five percent. Latino Express was responsible for the full cost of an unpreventable accident if proper procedures were taken. The policy made no distinction between route times and non-route times. (JA 342; JA 70-71, 191-92, 212, 220); *see also Latino Express*, 2012 WL 3111707, at *9-10 & n.15.

C. Employees Ramiro Lopez, Paul Penro, and Tina Patitucci Gather Signatures for a Decertification Petition During the Certification Year; Supervisor Vincent Gabino Rewards Raymond DelToro for Signing the Petition

In March 2012, employee Ramiro Lopez contacted Matthew Muggeridge, an attorney at the National Right to Work Legal Defense Foundation, regarding decertifying Local 777 as the bargaining representative of Latino Express drivers. (JA 339-40; JA 99.) On March 21-23 and 26, Lopez and employees Paul Penro

and Tina Patitucci gathered signatures for a decertification petition. (JA 340; JA 96-100, 107.) In April, Lopez filed the petition with the Board, seeking an election to decertify Local 777. (JA 340; JA 108.)

In late March or early April, Raymond DelToro, Sr., resigned as a Latino Express driver. When Vincent Gabino, a supervisor, asked DelToro why he was leaving, DelToro responded that he was not assigned enough work. Gabino inquired into DelToro's views about Local 777. After DelToro replied that he was not for either Local 777 or Latino Express, and noted again that Latino Express did not give him work, Gabino suggested that DelToro decide which side he supported and said "[l]et's see what we can do." (JA 340; JA 156, 158-62.) DelToro returned to work at Latino Express a few days later. Lopez approached him in the parking lot and asked for his signature to decertify Local 777. After DelToro signed, he saw Lopez speaking with Gabino. Once Lopez left, Gabino approached DelToro and suggested that he would find DelToro some charter work. DelToro was assigned charter routes the following Saturday, and continued to drive Saturday charter routes thereafter. DelToro had never driven Saturday charters before signing the decertification petition. (JA 340-41; JA 156, 161-62.)

D. Latino Express Withdraws Recognition from Local 777 Based on Lopez's Decertification Petition

On April 24, 2012, Zane Smith, the attorney for Latino Express, received a letter from Muggeridge stating that Lopez had filed a decertification petition with

the Board and that further contract negotiations would be illegal because Local 777 lacked the majority support of the employees. (JA 341; JA 207.) That same day, Smith wrote to Local 777 representative Glimco and informed him that Latino Express was withdrawing recognition of Local 777 because it no longer enjoyed majority support among the drivers, as evidenced by the decertification petition. Smith enclosed a copy of the petition, which contained fifty-four signatures. (JA 341; JA 186-89, 206.) Latino Express had not attempted to authenticate the signatures. (JA 349; JA 208-09.) Despite continued requests from Local 777, Latino Express refused to continue negotiations. (JA 341; JA 306-07.)

E. Lopez Files Procedural Motions and Seeks to Intervene in the Unfair-Labor-Practice Case

On September 14, 2012, in preparation for the hearing on the unfair-labor-practice complaint before an administrative law judge, counsel for the Board's General Counsel issued a subpoena ad testificandum to Muggeridge. The General Counsel sought Muggeridge's testimony about his involvement with the decertification petition and his communications with Latino Express that precipitated the withdrawal of recognition. Muggeridge moved to quash the subpoena, which the judge denied on October 4. (JA 28-29.)

On October 8—the day before the hearing began—a group of Latino Express employees represented by Muggeridge filed a motion to intervene in the unfair-labor-practice case. Muggeridge purported to represent thirty-two

employees, including Lopez, Penro, and Patitucci. The judge denied the motion in an oral ruling on October 9. (JA 43-48.)

Because Muggeridge was a subpoenaed witness and did not represent a party in the proceedings, the judge placed him under a sequestration order along with the other witnesses. The judge modified the order to allow Muggeridge to remain in the hearing room while his clients testified and to object during that testimony. (JA 222-23.) He was also allowed to read the portions of the transcript that contained his clients' testimony or that related to his procedural motions. (JA 226.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On May 21, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) found that Latino Express violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith, unilaterally changing terms and conditions of employment by implementing the Driver's Accountable Act, and withdrawing recognition from Local 777. (JA 335, 350.) The Board affirmed the administrative law judge's denial of Lopez's motion to intervene. (JA 335 n.2.)

The Board's Order directs Latino Express to cease and desist from the unfair labor practices found and from "[i]n any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them" by the Act. Affirmatively, the Order requires Latino Express to recognize and bargain with

Local 777, upon request, for a reasonable period—defined as at least six months—and to submit written status reports every thirty days to the compliance officer in the Board’s Region 13 office. The Order also directs Latino Express to rescind the Driver’s Accountable Act and restore the status quo ante, make employees whole for any losses suffered as a result of the Driver’s Accountable Act, physically and electronically post a remedial notice, and read the notice aloud to employees at a meeting for that purpose during work time. (JA 335-36, 351 n.21.)

STANDARD OF REVIEW

The Board’s findings of fact “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). This Court has held that “[w]hether a party has bargained in good faith . . . is largely a matter for the Board’s expertise.” *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982); *see also Dallas Gen. Drivers v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966) (“[I]n the whole complex of industrial relations[,] few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems.”). The Court likewise “will not reverse the Board’s adoption of the ALJ’s credibility determination unless it is ‘hopelessly incredible, self-contradictory, or patently unsupportable.’” *SFO Good-Nite Inn, LLC v. NLRB*, 700

F.3d 1, 10 (D.C. Cir. 2012) (quoting *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1121 (D.C. Cir. 2012)). And it will “defer to the Board’s interpretation of the Act if it is reasonable.” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002). The Board’s rulings on intervention are reviewed for abuse of discretion. *UAW v. NLRB*, 392 F.2d 801, 809-10 (D.C. Cir. 1967).

SUMMARY OF THE ARGUMENT

Employers have a duty under the Act to bargain in good faith with the representative of their employees. Substantial evidence supports the Board’s finding that Latino Express violated that duty. Latino Express upended months of negotiations by presenting a final offer that contained numerous unlawful and regressive proposals, reneged on tentative agreements without explanation, and failed to address a mandatory subject of bargaining. Contemporaneously, Latino Express unilaterally implemented changes to its policy on employees’ financial responsibility for accidents and provided support for a petition to decertify Local 777. Viewed in its totality, Latino Express’s conduct revealed a desire to undermine negotiations and destroy the possibility of agreement—the essence of bad-faith bargaining.

Latino Express’s unilateral change to terms and conditions of employment also constituted an independent unfair labor practice in violation of the duty to

bargain. The new Driver's Accountable Act was imposed without notice to or negotiation with Local 777, and constituted a departure from existing policy.

The Board's finding that Latino Express unlawfully withdrew recognition from Local 777 is likewise supported by substantial evidence in the record and longstanding policy. Under the Board's certification-year doctrine, majority support for an incumbent union is conclusively presumed and insulated from challenge during the first year after the union has been certified; any test of support must occur outside of that period. Because the petition on which Latino Express relied to withdraw recognition contained signatures gathered less than a year after Local 777's certification, the Board reasonably concluded that the withdrawal ran afoul of the certification-year doctrine. As independent grounds for the Board's finding, Latino Express failed to authenticate enough of the petition's signatures to show evidence of a loss of majority support for Local 777.

Finally, the Board did not abuse its discretion in denying Lopez's motion to intervene in the unfair-labor-practice case against Latino Express. Lopez had no evidence that would have changed the result in that case. Moreover, the relevant forum for vindicating an employee's interests regarding a union is a representation proceeding, not an unfair-labor-practice proceeding.

ARGUMENT

Latino Express consistently and in multiple ways breached its statutory duty to bargain with the representative of its employees. Substantial evidence supports the Board's findings that Latino Express violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to bargain in good faith, unilaterally changing terms and conditions of employment, and withdrawing recognition from Local 777 based on an untimely and unauthenticated decertification petition.

Likewise, the Board reasonably found that the administrative law judge did not abuse his discretion in denying Lopez's motion to intervene.

I. Latino Express Violated Its Duty To Bargain in Good Faith By Insisting on Unlawful and Regressive Terms, Reneging on Tentative Agreements, Refusing To Discuss a Mandatory Subject of Bargaining, and Committing Unfair Labor Practices Away From the Bargaining Table

A. The Duty To Bargain in Good Faith

Employers have a duty under the Act to “confer in good faith with respect to wages, hours, and other terms and conditions of employment” with the representative of their employees. 29 U.S.C. § 158(d). Accordingly, an employer commits an unfair labor practice in violation of Section 8(a)(5) by failing to bargain in good faith. *Id.* § 158(a)(5).³ Because the duty to bargain in good faith

³ Section 8(a)(5) prohibits an employer from “refus[ing] to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

“presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract,” *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 485 (1960), an employer breaches its duty by approaching bargaining with a closed mind or otherwise seeking to frustrate the possibility of agreement. *Liquor Indus. Bargaining Group*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 F. App’x 444 (D.C. Cir. 2002).

To determine whether an employer has bargained in bad faith, the Board and courts examine “the totality of [its] conduct,” both “at the bargaining table [and] away from the table.” *Overnite Transp. Co.*, 296 NLRB 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991). Although the Board does not evaluate the merits of proposed contract terms, the content of a proposal may be objective evidence of bad faith. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1034 (D.C. Cir. 1997); *Cent. Mgmt. Co.*, 314 NLRB 763, 770 (1994). For example, a regressive offer may support a finding of bad-faith bargaining, *Chicago Local No. 458-3M, Graphic Commc’ns Int’l Union v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000); *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), *enforced sub nom. NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002), as would insistence on an unlawful proposal, *Thill, Inc.*, 298 NLRB 669, 671-72 (1990), *enforced in relevant part*, 980 F.2d 1137 (7th Cir. 1992). An employer likewise bargains in bad faith by withdrawing from tentative agreements without good cause, *Suffield Acad.*, 336

NLRB 659, 669 (2001), *enforced*, 322 F.3d 196 (2d Cir. 2003), or by suddenly proposing significant new terms at a late stage in the bargaining process, *Cent. Mgmt.*, 314 NLRB at 770-71.

A party's conduct away from the bargaining table also can support a finding of bad-faith bargaining. Committing unfair labor practices during the course of negotiations may qualify as evidence of bad faith. *Hotel Roanoke*, 293 NLRB 182, 184-85 (1989). For example, unlawful unilateral changes to mandatory subjects of bargaining undermine negotiations by removing those subjects from the process entirely. *Id.* at 185; *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). An employer also acts in bad faith when it seeks to remove the union as its employees' bargaining representative by providing unlawful support or assistance to a decertification effort. *Fed. Pac. Elec. Co.*, 203 NLRB 571, 571 (1973), *enforced in relevant part sub nom. Local 2338, IBEW v. NLRB*, 499 F.2d 542 (D.C. Cir. 1974); *Wahoo Packing Co.*, 161 NLRB 174, 174 n.2 (1966).

B. The Totality of Latino Express's Conduct Frustrated Bargaining and Undermined the Possibility of Agreement

Substantial evidence supports the Board's finding that Latino Express bargained in bad faith in violation of Section 8(a)(5). Latino Express's final offer of April 2 contained unlawful and regressive terms, reneged on tentative agreements, and failed to address a mandatory subject of bargaining. Away from the bargaining table, Latino Express unilaterally changed terms and conditions of

employment and provided illicit support to a decertification effort. Based on the totality of Latino Express’s conduct, the Board reasonably concluded that Latino Express engaged in a “purposeful and conscious effort . . . to undermine the possibility of progress at the negotiating table.” (JA 347.)

1. Conduct at the bargaining table

First, the discipline provision in Latino Express’s final offer (JA 198-99) contained numerous unlawful and regressive terms. Under longstanding Board precedent, Latino Express’s proposal that employees could face discipline for “disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication” was unlawful. Such rules reasonably tend to chill employees’ exercise of their rights under the Act by preventing them from speaking critically about their employer’s working conditions. *See, e.g., Claremont Resort & Spa*, 344 NLRB 832, 832 & n.4 (2005) (rule prohibiting “[n]egative conversations about associates and/or managers” unlawful); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (rule prohibiting “false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel” unlawful), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *S. Maryland Hosp. Ctr.*, 293 NLRB 1209, 1221-22 (1989) (rule prohibiting “derogatory attacks on . . . hospital representative[s]” unlawful), *enforced in relevant part*, 916 F.2d 932 (4th Cir. 1990). Likewise, Latino Express’s proposed ban on “distributing

union literature on Company time” was presumptively unlawful. *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994). Employees thus would have fewer rights and protections under Latino Express’s final offer than they would without any collective-bargaining agreement. By insisting upon terms that would violate the Act, Latino Express ensured that bargaining would go nowhere.

Because none of those unlawful provisions appeared in Latino Express’s earlier proposal (JA 195-97), they also constitute regressive bargaining. Latino Express contends (LE Br. 18) that it made the changes after Vice President Gardunio reviewed the previous proposals and Local 777 representatives disrupted a safety meeting, but those proffered justifications have no support in the record. The passage in the transcript that Latino Express cites (LE Br. 18) refers to changes in the access-to-premises provision, not the discipline provision. Moreover, the Board discredited that testimony as without evidentiary basis. (JA 345 n.14.) Nor does Latino Express explain why Gardunio’s review or the alleged disruption of a safety meeting would have supported the changed proposal. Latino Express also asserts that the subject of discipline was still being negotiated (LE Br. 16-17), but the April 2 offer containing the unlawful and regressive proposals was final in both name and fact—Latino Express made no further offer before withdrawing recognition from Local 777.

As further evidence of bad-faith bargaining, the April 2 offer dramatically changed, without explanation, provisions on which the parties had tentatively agreed. Despite approving the language regarding the scope of the agreement in Local 777's initial June 2011 offer (JA 262-63), Latino Express proposed, for the first time, excluding all charter work from the agreement. (JA 203.) Because charter routes had been a central issue in both contract negotiations and the organizing campaign (JA 242), the change was significant. Local 777 was steadfastly concerned with the outsourcing of charters, which traditionally were bargaining-unit work, to non-unionized employees; it had agreed only that non-unit mechanics could drive charters over one-hundred miles in case of an emergency. (JA 260-61.) Accordingly, the Board rightfully concluded that Latino Express's proposal to remove that work from the collective-bargaining agreement entirely was "behavior completely at odds with that of an employer . . . that is pursuing its statutory obligation to make some reasonable effort . . . to compose its differences with the union." (JA 346 (internal quotations omitted).)⁴ In addition, the final offer included a number of changes to the provision regarding access to Latino Express's premises for Local 777 representatives. The initial proposal that both

⁴ Latino Express contends (LE Br. 18) that its final offer referenced charter routes elsewhere, but references to the existence of such work are immaterial. Its final scope-of-agreement provision expressly excluded all charter work from the contract. (JA 203.)

sides approved (JA 256) said nothing about solicitation, distribution, or union meetings, but the April 2 offer added restrictions on all three. Without any explanation, Latino Express's significant late-stage changes to the scope-of-agreement and access-to-premises provisions constitute evidence of bad-faith bargaining. *Suffield Acad.*, 336 NLRB at 669. Those changes erased apparent progress towards an agreement, suggesting that any future progress could likewise fall apart and indicating to employees that the bargaining process itself was ineffective.

In addition, Latino Express's refusal to offer a proposal on health insurance, which is a mandatory subject of bargaining, *Wire Prods. Mfg. Corp.*, 329 NLRB 155, 164 (1999), further supports the Board's finding of bad faith. As its bargaining representative explained, Latino Express's failure to put forward a proposal was not a refusal to provide insurance, but a decision to "hold off" on any agreement until implementation of the Affordable Care Act. (JA 327.) That insistence on postponing discussion of the subject until "some future time of its choosing" was, as the Board recognized, in contravention of Latino Express's "statutory duty to bargain . . . *in the negotiations.*" (JA 346.) The possibility of future events impacting the provision of health insurance did not alter that duty. *Cf. Henry M. Hald High School Ass'n*, 213 NLRB 463, 474-75 (1974) (finding a Section 8(a)(5) violation when employer delayed bargaining until issuance of a

pending court decision that might impact its funding), *enforced mem.*, 559 F.2d 1204 (2d Cir. 1977). Latino Express contends that health insurance was discussed (LE Br. 18-19), but provides no evidence that it made a substantive proposal on the issue; it cites only to a proposed provision from Local 777 to re-open the issue following a change in federal policy or the formulation of a cheaper program and a subsequent deletion of that provision.

2. Conduct away from the bargaining table

Latino Express's conduct away from the bargaining table likewise evinced bad faith. As detailed below, *infra* pp. 26-27, Latino Express unilaterally imposed new terms and conditions of employment when it implemented the Driver's Accountable Act. In addition to constituting an independent unfair labor practice, that action supported the Board's finding of bad-faith bargaining by completely removing a mandatory subject—financial responsibility for accidents—from negotiations. *Hotel Roanoke*, 293 NLRB at 185. As the Board found (JA 342), Latino Express's actions were "particularly surprising" to both Local 777 and the employees given that the parties had been bargaining over that very issue, and had tentatively reached an agreement that employees would bear no accident costs (JA 272-73); Latino Express's abrupt abandonment of those seemingly productive negotiations revealed an aversion to any progress towards agreement. Similarly, Gabino's instructing DelToro to pick a side regarding Local 777 and then

rewarding him with more charter work when he signed the decertification petition undermined the bargaining relationship by assisting the effort to oust Local 777. *Wahoo Packing*, 161 NLRB at 174 n.2. As the Board held, “a decertification petition has a ‘foreseeable effect of obstructing the bargaining process’ by threatening to remove one party to the process entirely. (JA 346 (quoting *Wahoo Packing*, 161 NLRB at 179).) Gabino’s actions also encouraged decertification by suggesting to employees that they would get what they want directly from Latino Express, and thus did not need Local 777.⁵

Through the combined effect of these actions, Latino Express thoroughly undermined the collective-bargaining process and frustrated the possibility of entering into a contract with Local 777. Its conduct revealed that Latino Express approached negotiations with an intent to obstruct progress—the essence of bad-faith bargaining. The series of sudden, dramatic changes in its final offer and its unlawful away-from-the-table conduct supports the Board’s finding that Latino Express was “purposeful[ly] and conscious[ly]” pursuing “a goal of . . . foreclos[ing] any possibility of reaching an agreement.” (JA 347.)

⁵ Contrary to Latino Express’s assertion (LE Br. 19), the General Counsel never “stipulated” that DelToro’s testimony “was not supported”; he simply agreed (JA 177) that DelToro’s signature was not on the copy of the petition that ultimately was provided to Latino Express. DelToro signed a page with “very few signatures” on it, but Lopez showed him five or six other pages with more names. (JA 161.) The petition submitted to Latino Express consisted of four pages. (JA 186-89.)

C. The Absence of Exhibit 9 from the Record Was Inconsequential

Finally, even assuming that, as Latino Express contends (LE Br. 23-24), the Board did not consider Respondent's Exhibit 9, Latino Express's failure to ensure that its own exhibit was included in the case file was inconsequential. It cites to nothing in that document that undermines the Board's decision. Instead, the information on the cited pages is either irrelevant, duplicative, or supportive of the Board's findings. For example, many of those pages are Latino Express's final offer, which was already in the record as General Counsel's Exhibit 18. The copy of the offer in Exhibit 9 contains some handwritten notes from Latino Express counsel Genson, but her testimony as to her recollection of the negotiations was likewise in the record.

Many of the cited pages do not even support the propositions for which Latino Express invokes them: nothing on page SG 223 (LE Br. 17) indicates that Local 777 had "approved the changes" to the discipline provision; pages SG 137-39 and SG 224-50 (LE Br. 18) make no mention of a disrupted safety meeting or concerns from Gardunio or otherwise contain an explanation for why changes to that provision were made; and pages SG 39-44 (LE Br. 19) say nothing about the Driver's Accountable Act or the issue of accident liability generally. Further, none of the pages that Latino Express cites for its assertion that the discipline provision "was discussed many times" (LE Br. 17) contain the unlawful terms that the Board

found to be evidence of bad faith—an absence that supports the Board’s finding that they “were introduced suddenly after months of negotiations” (JA 345). Nor does anything therein indicate that Latino Express intended to back down from its “final” offer. Because Latino Express thus did not cite to anything that would affect the outcome of the case, it suffered no prejudice from the absence of Exhibit 9 from the record.⁶

II. Latino Express Unilaterally Imposed New Terms and Conditions of Employment

Because the Act requires collective bargaining over “wages, hours, and other terms and conditions of employment,” 29 U.S.C. § 158(d), an employer that unilaterally makes changes to those subjects without first bargaining to impasse violates Section 8(a)(5). *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)); *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996) (finding unilateral changes to “existing conditions of employment” to be an unfair labor practice (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970))). Such changes

⁶ As Latino Express admits (LE Br. 23), what happened with Exhibit 9 is unclear. The official case file lists it as “[i]dentified, received, but withdrawn from evidence,” though the transcript contains no record of withdrawal. *See* Response to Latino Express’s Motion to Correct Record, Doc. #1528336 (Dec. 19, 2014). Latino Express did not file a motion with the Board to correct or supplement the record. Accordingly, the record on review in this Court remains the same as it was before the Board. The Notes of the Advisory Committee on Appellate Rules state with respect to Rule 16(a): “There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same.”

“injure[] the process of collective bargaining itself . . . by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (internal quotations omitted).

Latino Express implemented its “new Driver’s Accountable Act” (JA 190) on April 6 without notice to or discussion with Local 777. The policy established that employees would be financially responsible for any accident during non-route times. Yet the “existing conditions of employment,” *Daily News of Los Angeles*, 73 F.3d at 411, prior to April 6 were that employees would pay twenty-five percent of the cost of a preventable accident (up to \$500) and nothing for an unpreventable accident, without distinction for route or non-route times. That policy was set forth in Latino Express’s employee handbook from 2010 (JA 191-92), a memo to drivers from September 2011 (JA 218-21), credited testimony from a longtime employee (JA 70-71, 80-81), and the Board’s findings in a 2011 case against Latino Express, *Latino Express*, 2012 WL 3111707, at *9-10 & n.15. Indeed, Latino Express affirmed in a position statement from the earlier litigation that, “[p]ursuant to Latino Express policy, any employee at Latino Express who is involved in an accident is required to reimburse the company 25% of the costs of the damages caused to the bus by the accident. The company picks up the other 75%.” (JA 212.)

Latino Express does not claim that bargaining was at impasse when it implemented the new policy. It contends (LE Br. 4, 14) that some employees had signed a similar Driver's Accountable Act in 2006, but provides no evidence that such a policy was ever actually in effect or enforced. Moreover, any suggestion that similar conditions may have existed in 2006 is overwhelmed by the substantial evidence that the 25/75-percent policy was in place for at least several years prior to the unilateral implementation on April 6, 2012. In light of that bulk of contrary evidence, the Board discredited (JA 342 n.8) Latino Express's claim that the April 6 terms were already in place when it announced to employees that "a new Driver's Accountable Act has been implemented" (JA 190). Latino Express's unilateral alteration of its accident-liability policy thus constituted an unlawful refusal to bargain with Local 777, in violation of Section 8(a)(5).

III. Latino Express Withdrew Recognition From Local 777 Based on an Untimely and Unauthenticated Decertification Petition

Substantial evidence and long settled legal principles support the Board's finding that Latino Express violated Section 8(a)(5) by unilaterally withdrawing recognition from Local 777. The decertification petition upon which Latino Express relied did not provide a lawful basis for the withdrawal because the signatures were gathered during the certification year and were not authenticated. Either defect provides independently sufficient grounds for the Board's holding that Latino Express's withdrawal was unlawful.

A. The Signatures on the Petition Were Gathered During the Certification Year, When Local 777's Majority Status Was Insulated From Challenge

An employer violates Section 8(a)(5) of the Act by withdrawing recognition from a union that represents a majority of its employees. 29 U.S.C. § 158(a)(5); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006). An incumbent union is presumed to enjoy majority support within the unit. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-38 (1987). For the first year after the union is certified by the Board as the employees' bargaining representative, that presumption is conclusive. *Id.*; *Brooks v. NLRB*, 348 U.S. 96, 98-100 (1954). During the "certification year," the union's majority status is insulated from challenge; an employer cannot withdraw recognition, and employees cannot petition the Board for a decertification election. *Virginia Mason Med. Ctr.*, 350 NLRB 923, 933 (2007); *Centr-O-Cast & Eng'g Co.*, 100 NLRB 1507, 1508-09 (1952).

The Board's certification-year doctrine reflects the need "to foster industrial peace and stability in collective-bargaining relationships," as well as to give effect to the employees' choice to be represented. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 720 (2001); *see also Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) ("[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a

fair chance to succeed.”). In support of that goal, the policy provides a newly certified union with an opportunity to represent the employees in the unit and negotiate with the employer without facing “exigent pressure to produce hothouse results or be turned out.” *Brooks*, 348 U.S. at 100. In addition, it deters an employer from bargaining in bad faith in order to undermine support for the new union with the understanding that it could be “relieve[d] . . . of [its] statutory duties at any time.” *Id.*

Just as an employer cannot withdraw recognition during the first year, it cannot do so outside of the year based on a decertification petition generated during the certification year. *Chelsea Indus., Inc.*, 331 NLRB 1648, 1648-50 (2000), *enforced*, 285 F.3d 1073 (D.C. Cir. 2002); *United Supermarkets, Inc.*, 287 NLRB 119, 120 (1987), *enforced*, 862 F.2d 549 (5th Cir. 1989); *see also Levitz Furniture*, 333 NLRB at 718 n.5 (“[A]n employer may not withdraw recognition after the year following the union’s certification on the basis of evidence of employee dissatisfaction with the union arising during the certification year.”). The same policies articulated by the Supreme Court in *Brooks* support the prohibition on an employer’s use of evidence gathered during the certification year as grounds for later withdrawal. *Chelsea Indus.*, 285 F.3d at 1076. If employee dissatisfaction during the first year can lead to withdrawal of recognition, the union will face pressure during that year to produce hothouse results and the employer

will have an incentive to undermine support and sow discontent while running out the clock. *Id.*

Substantial evidence supports the Board's finding that Latino Express's withdrawal of recognition from Local 777 ran afoul of the certification-year doctrine. It is uncontested that the signatures on the petition were gathered during the certification year. The petition was signed on March 21-23 and March 26, 2012, and the certification year did not end until April 18, 2012. Under this Court's decision in *Chelsea Industries*, Latino Express thus could not lawfully withdraw recognition based on the petition. 285 F.3d at 1076; *see also United Supermarkets*, 287 NLRB at 120. The decertification effort placed undue pressure on Local 777 and provided an incentive to Latino Express to engage in surface bargaining and run out the clock on the certification year. Moreover, giving effect to expressions of employee dissatisfaction from the certification year would be inconsistent with the Board's policy of an irrebuttable presumption of majority support during that period.

The Board reasonably concluded (JA 348-49) that the holding in *Chelsea Industries* and *United Supermarkets* applies regardless of whether an employer knew of the decertification petition during the certification year. Indeed, the policy reasons underlying those decisions apply equally in either situation. Here, the pressure on Local 777 from the decertification effort existed whether or not Latino

Express was aware of it. In addition, an employer like Latino Express seeking to escape its new duty to bargain need not be aware of a specific decertification petition to have an incentive to bargain in bad faith; it retains such an incentive so long as it knows that employees can gather signatures at any point and have a petition ready and waiting as soon as the certification year expires.

Lopez and Latino Express resist that straightforward application of settled law, but their arguments evince a misunderstanding of the certification-year doctrine and overlook key parts of the Board’s analysis. Their insistence that *Chelsea Industries* applies only if the employer receives the petition during the certification year (Br. 15-16; LE Br. 20) focuses exclusively on the impact of evidence of employee dissatisfaction on the employer, completely ignoring the “hothouse results” rationale for the policy that the Supreme Court recognized in *Brooks*. Nor do Lopez and Latino Express offer any support in caselaw for their position that *Chelsea Industries* is so limited. In *LTD Ceramics, Inc.*, 341 NLRB 86, 88, 94 (2004), *enforced*, 185 F. App’x 581 (9th Cir. 2006)—the only case that either of them cites—the Board found that the employer’s withdrawal of recognition based on a petition with some signatures from the certification year was lawful because those signatures were gathered “during the last hours of the last day of the certification year,” not, as Lopez suggests (Br. 17), because the petition was delivered to the employer after the year. Moreover, this case does not fit

within the limited de minimus exception recognized in *LTD Ceramics*, as all of the signatures were gathered nearly a month before the end of the certification year. *See LTD Ceramics*, 341 NLRB at 94 (emphasizing that the signatures were gathered “not . . . months or days before the certification year ha[d] expired, but . . . hours”).

Lopez’s reference to lack of employer taint (Br. 16) reflects a similar misunderstanding. During the certification year, the bargaining relationship is insulated from anything that might undermine it—including employee efforts to oust the union—not just an employer’s unfair labor practices. *See Chelsea Indus.*, 331 NLRB at 1649 (withdrawal of recognition unlawful even without evidence of employer taint); *United Supermarkets*, 287 NLRB at 120 (premature petition and employer taint were independent grounds for finding withdrawal of recognition unlawful). For the same reason, Lopez’s contention that employees “collect[ing] decertification signatures cannot possibly taint bargaining” (Br. 16) is beside the point. The Board did not find that the employees tainted bargaining, only that Latino Express was not privileged to withdraw recognition based on employee dissatisfaction registered during the certification year; taint is not an element of the unfair labor practice. Moreover, Lopez’s position is belied by the Supreme Court’s recognition that giving effect to expressions of employee dissatisfaction from the

first year can undermine a bargaining relationship by pressuring a newly certified union to act rashly. *Brooks*, 348 U.S. at 100.

Lopez's claim (Br. 17-18) that the Board's holding in this case is inconsistent with its practice that a showing of interest during the certification year can support an election petition filed with the Board ignores the Board's explanation in *Chelsea Industries* of why the two situations are different. 331 NLRB at 1650 n.9. When an employer unilaterally withdraws recognition based on signatures gathered in the certification year, the test of employee support that ends bargaining improperly has occurred during the year. By contrast, a decertification petition filed with the Board leads only to an election, which is the true test of majority support; that test properly comes after the certification year. *Id.* Because giving effect to evidence of dissatisfaction arising during the first year is the precise target of the certification-year doctrine, only the former is prohibited. In both circumstances, the Board requires that any test of majority support occur outside of the certification year.⁷

⁷ The Board also noted in *Chelsea Industries* that the law frequently treats decertification elections and unilateral withdrawals of recognition differently, with the latter viewed more suspiciously. 331 NLRB at 1650 n.9; *see also Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (“The Board is accordingly entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a decertification petition from the workers if they want to file one.”).

Nor, as Lopez speculates (Br. 19-20), is the Board's decision likely to confuse or restrict employees. The Board applied its longstanding policy that a union's majority support is insulated from challenge for one year; it is Lopez's position that chips away at that clarity by proposing an exception for the gathering of decertification signatures at some undefined point prior to the end of the year.⁸ In addition, the Board's decision limits an *employer's* ability to withdraw recognition, not *employee* organizing activity; nor does it say anything about activity during the certification year other than gathering signatures.⁹

Finally, Lopez's general invocation of Section 7 rights (Br. 14-15, 20-22) ignores longstanding precedent and the Board's institutional role. As this Court recognized, the rule enunciated in *Chelsea Industries* and *United Supermarkets* represents "the Board's striking a balance between stability and employee free choice in labor relations, as it frequently must do." *Chelsea Indus.*, 285 F.3d at 1077. Moreover, it places no greater burden on employees' ability to oust an incumbent union than does the certification year itself, *id.*—a policy that the

⁸ Lopez's fear of employee confusion is particularly unfounded in this case, because Lopez contacted attorney Muggerridge's organization prior to gathering signatures (JA 99), and thus was in contact throughout the process with a group that could have explained the timing and procedures to him.

⁹ Because similar limits exist for unions, Lopez's suggestion of a double standard (Br. 20) is incorrect. Just as a union's majority status cannot be challenged for a year after certification, a union cannot be elected as bargaining representative for a year after it loses an election. 29 U.S.C. § 159(c)(3).

Supreme Court approved more than sixty years ago, *Brooks*, 348 U.S. at 98-100.

The Board's balancing of interests under the Act based on its expertise in industrial relations is worthy of significant deference. *Allied Mech. Servs, Inc. v. NLRB*, 668 F.3d 758, 764-65 (D.C. Cir. 2012). Because Latino Express's withdrawal of recognition from Local 777 was indisputably based on evidence from the certification year and thus was inconsistent with longstanding policy, the Board's finding of a violation should be enforced.

B. Latino Express Failed To Authenticate the Signatures on the Decertification Petition

The Board's alternative finding that Latino Express's withdrawal of recognition was unlawful because Latino Express failed to authenticate the signatures on the decertification petition is likewise supported by substantial evidence in the record. Outside of the certification year, an employer may rebut a union's presumption of majority support and unilaterally withdraw recognition, but only if it has objective evidence that the union has, in fact, lost such support. *Levitz Furniture*, 333 NLRB at 725. The employer must prove loss of majority support by a preponderance of the evidence. *Id.*

Accordingly, when an employer withdraws recognition based on a decertification petition, it has the burden of authenticating the signatures on the petition. *Ambassador Servs., Inc.*, 358 NLRB No. 130, 2012 WL 4062409, at *1 n.1, 19-20 (2012), *adopted by* 361 NLRB No. 106, 2014 WL 6482780 (2014),

petition for review filed, No. 14-15341 (11th Cir.); *Flying Foods Group, Inc.*, 345 NLRB 101, 103 & n.9, 155 (2005), *enforced*, 471 F.3d 178 (D.C. Cir. 2006). The employer can satisfy its burden by offering “the testimony of the signer, a witness to the signature, . . . or by handwriting exemplars that sometimes involve the testimony of an expert witness.” *Ambassador Servs.*, 2012 WL 4062409, at *20; *see also* NLRB General Counsel Memo. 02-01, at 4 n.13 (Oct. 22, 2001) (“[T]he employer must demonstrate that those signatures are facially authentic, usually by comparing them with employee signatures contained in the employer’s business records or by witness authentication.”), *available at* <http://www.nlr.gov/reports-guidance/general-counsel-memos>. Because an employer’s withdrawal of recognition based on a decertification petition terminates the bargaining process without a formal election, the Board sensibly requires clear, verified evidence of loss of majority support.

Latino Express did not authenticate enough signatures on the petition to show a loss of majority support for Local 777. Instead of attempting to authenticate the signatures when it obtained the petition, Latino Express simply withdrew recognition the same day it was told that Local 777 lacked majority support. (JA 208-09.) At the hearing, Latino Express questioned Lopez, Penro, and Patitucci—the employees who gathered the signatures—but authenticated at most only twenty-three signatures. Penro testified that he obtained signatures on

one page of the petition from individuals whom he recognized as Latino Express employees, but that page contained only seventeen names. (JA 131-32, 138-39, 188.) Patitucci gathered three signatures. (JA 150-51.) Lopez provided no details about any of the individual signatures or how many of them he witnessed. Because Latino Express authenticated at most only twenty-three signatures, it failed to satisfy its burden of proving that Local 777 had lost majority support within the unit of eighty-four employees, and its withdrawal of recognition was thus unlawful. *Levitz Furniture*, 333 NLRB at 725.¹⁰

IV. The Board Did Not Abuse Its Discretion By Denying Lopez’s Motion to Intervene

Intervention in an unfair-labor-practice case is “[i]n the discretion of the [administrative law judge] conducting the hearing or the Board,” 29 U.S.C. § 160(b), and may be allowed “to such extent and upon such terms as he may deem proper, 29 C.F.R. § 102.29. *See also UAW*, 392 F.2d at 809 (explaining that “intervention is a matter of discretion for the [administrative law judge] or the

¹⁰ Neither Lopez nor Latino Express raises an independent challenge to the Board’s remedy. Although Lopez opposes the Board’s bargaining order, he does so only in the context of challenging the unfair-labor-practice findings or the denial of intervention. In any event, the Board explained (JA 350-51) the necessity of an affirmative bargaining order in this case using the analysis required by this Court. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). As the Board held (JA 351), because Latino Express failed to bargain in good faith, the employees did not receive the benefit of their choice to be represented by Local 777 and did not have a fair chance to evaluate Local 777’s performance free from their employer’s unlawful conduct.

Board”). Because Lopez’s participation would not have affected the outcome of the case and because the proper venue for evaluating employee sentiment regarding a union is a representation proceeding rather than an unfair-labor-practice proceeding, the Board did not abuse its discretion in affirming the administrative law judge’s denial of Lopez’s motion to intervene.¹¹

The Board properly denies a motion to intervene when “none of the parties seeking intervention proffers any additional facts which might affect the outcome of the unfair labor practices alleged in th[e] case.” *United Dairy Farmers Co-Op Ass’n*, 242 NLRB 1026, 1045 n.3 (1979), *enforced*, 633 F.2d 1054 (3d Cir. 1980). In addition, the Board and courts have found no abuse of discretion in denying motions to intervene by employees in unfair-labor-practice cases against their employer. *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir. 1947); *cf. Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940) (holding that employees “are not indispensable parties” in such cases). Because the relevant forum for evaluating employee support for a union is a representation proceeding, this holds true even when employees opposed to the union seek to intervene in unfair-labor-practice cases addressing their employer’s duty to bargain. *See, e.g., NLRB v. Todd Co.*, 173 F.2d 705, 707 (2d Cir. 1949); *Semi-Steel Casting*, 160 F.2d at 393;

¹¹ The Board addresses questions concerning representation in proceedings under Section 9 of the Act, 29 U.S.C. § 159(c)(1), and adjudicates unfair-labor-practice complaints in proceedings under Section 10, 29 U.S.C. § 160.

Oughton v. NLRB, 118 F.2d 486, 495-96 (3d Cir. 1941) (en banc); *Tishomingo Cnty. Elec. Power Ass’n*, 74 NLRB 864, 866 n.5 (1947); see also *Int’l Ass’n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 83 (1940) (“Sec. 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees’ full freedom of choice.”).

For example, the court in *Oughton* affirmed the denial of intervention in a refusal-to-bargain case by a group of employees purporting to represent a majority of the unit and seeking to demonstrate lack of support for the union, holding that “th[e] matter was immaterial to a complaint proceeding (under Sec. 10) for the abatement and dissipation of unfair labor practices.” 118 F.2d at 496. Similarly, the judge in *Tenneco Automotive, Inc.*, a case involving the employer’s withdrawal of recognition based on a tainted decertification petition, denied a motion to intervene by employees who had signed the petition. 357 NLRB No. 84, 2011 WL 4590190, at *21 n.1, 64 & n.98 (2011), *enforcement denied on other grounds*, 716 F.3d 640 (D.C. Cir. 2013); see also *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, 1107 (1950) (denying motion to intervene by employees who had filed a decertification petition), *enforced*, 195 F.2d 350 (5th Cir. 1952).

Here, as the Board concluded (JA 335 n.2), the administrative law judge did not abuse his discretion in denying Lopez’s motion to intervene. Lopez could not

have contributed any additional information that would have changed the outcome of the case. *United Dairy Farmers Co-Op*, 242 NLRB at 1045 n.3. The only evidence that Lopez asserts he could have provided was testimony authenticating the signatures on the decertification petition. (Br. 22, 29-33.) But even if the signatures were authenticated, Latino Express's withdrawal of recognition still would have been unlawful because those signatures were gathered during the certification year. *Chelsea Indus.*, 285 F.3d at 1075-76. Lopez's argument simply ignores that independent rationale for the Board's finding that the withdrawal was an unfair labor practice. Further, even as non-parties, Lopez, Penro, and Patitucci testified at the hearing, and had an opportunity to describe the signature-gathering process. Because intervention thus would have had no impact on the resolution of the case, Lopez also faced no prejudice from the denial of his motion.¹²

Further, contrary to Lopez's assertion (Br. 22-24), intervention in the unfair-labor-practice case was not necessary to vindicate his interest in opposing Local 777 or defending the decertification effort. As the administrative law judge explained (JA 44-48), the forum for Lopez to vindicate that interest is a representation case, not an unfair-labor-practice case. *See Tenneco Auto.*, 2011

¹² Lopez also suggests (Br. 30-31) that he could have testified as to whether the signatures were gathered on Latino Express's property, but that is not a legally material point. Withdrawal of recognition was unlawful because of *when* the signatures were collected regardless of *where* they were collected.

WL 4590190, at *21 n.1, 64 & n.98; *Semi-Steel Casting*, 160 F.2d at 393; *Oughton*, 118 F.2d at 495-96. Employee sentiment has no bearing on whether Latino Express unlawfully withdrew recognition or engaged in bad-faith bargaining. Although the Board’s Order requires that bargaining continue for a “reasonable period of time” (JA 350) in order to remedy Latino Express’s unlawful conduct and give effect to the drivers’ selection of Local 777 as their representative, the employees can participate in representation proceedings at the end of that period if they wish to oust Local 777. *See Int’l Ass’n of Machinists*, 311 U.S. at 83.¹³

Moreover, Lopez provides no evidence to undermine the judge’s observation (JA 45) that Latino Express shared his interest in defending the withdrawal of recognition. It certainly wished to avoid liability for an unfair labor practice, and its conduct at the bargaining table and in withdrawing recognition makes clear that it had no desire for a continued relationship with Local 777. An employer cannot

¹³ For similar reasons, Lopez’s passing reference (Br. 19-20) to the Board’s well-established blocking-charge policy does not support his argument. Under that policy, an election may be postponed if there are unremedied unfair labor practices that could interfere with employee free choice. Here, the Board temporarily postponed action on Lopez’s decertification petition based on the pending unfair-labor-practice charges at issue in this case and the unremedied violations found by the administrative law judge in prior proceedings, *Latino Express*, 2012 WL 3111707. *See generally Bishop v. NLRB*, 502 F.2d 1024, 1028-29 (5th Cir. 1974); NLRB Casehandling Manual: Unfair Labor Practice Proceedings § 11730, available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-1.pdf>.

always be relied upon to vindicate its employees' interests, but nothing in the record supports Lopez's contention that their interests were not aligned in this case or that Latino Express may have harbored "nefarious" motives (Br. 33). Although Latino Express ultimately failed to meet its burden of authenticating the signatures, that failure had not yet occurred when the judge ruled on the motion to intervene, which is the relevant time for evaluating whether he properly exercised his discretion.

Lopez cites (Br. 24-27) several cases in which employees were allowed to intervene in unfair-labor-practice cases against their employer, but none of those cases held that intervention *must* be permitted. Indeed, as detailed above, employees' motions to intervene in such cases are often denied. *See Todd Co.*, 173 F.2d at 707; *Semi-Steel Casting*, 160 F.2d at 393; *Oughton*, 118 F.2d at 495-96; *Tenneco Auto.*, 2011 WL 4590190, at *21 n.1, 64 & n.98; *Hotel Del Coronado*, 345 NLRB 306, 308 n.1 (2005); *Sanson Hosiery Mills*, 92 NLRB at 1107; *Tishomingo Cnty. Elec. Power Ass'n*, 74 NLRB at 866 n.5. Nor does Lopez cite any case in which a court found the denial of intervention in such circumstances to be an abuse of discretion.

The cases that Lopez cites are also distinguishable. In *New England Confectionary Co.*, 356 NLRB No. 68, 2010 WL 5462285, at *2 (2010), and *Renaissance Hotel Operating Co.*, No. 28-CA-113793 (2014), the issue was

whether a decertification petition was tainted by unlawful assistance from the employer; evidence of the employees' true sentiment was thus potentially relevant. Here, by contrast, such evidence was unnecessary because the Board found that Lopez's petition did not support withdrawal of recognition even assuming that Latino Express had no involvement with it; the premature timing and lack of authentication were sufficient to prove a Section 8(a)(5) violation.¹⁴ Intervention in *Boeing Co.*, No. 19-CA-32431 (2011), was granted for the sole purpose of filing a post-hearing brief, and, unlike here, that qualified intervention was unopposed. *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), was not a case about intervention. The court observed that the Board's order would affect the Section 7 rights of a group of employees, *id.* at 301, but made no finding that those employees should have been a party to the litigation or, as Lopez claims, that "no other litigant could realistically speak for them" (Br. 26).¹⁵

¹⁴ Moreover, *New England Confectionary* contained no analysis of the intervention issue, and the order from *Renaissance Hotel* is a non-precedential ruling from an administrative law judge. *See Freeman Decorating Co.*, 335 NLRB 103, 107 n.3 (2001) ("[P]ortions of administrative law judges' decisions . . . for which no Board-review has been conducted, are of no precedent[i]al value." (internal quotations omitted)).

¹⁵ The other cases that Lopez cites are similarly distinguishable. The employer's refusal to bargain after receiving union-authorization cards in *Gary Steel Products Corp.*, 144 NLRB 1160, 1160 n.1 (1963), *Sagamore Shirt Co.*, 153 NLRB 309, 311, 322 (1965), and *J.P. Stevens & Co.*, 179 NLRB 254, 254 n.1 (1969), could have been lawful if it harbored good-faith doubt that the cards truly indicated majority support for the union. The intervening employees' testimony as

Finally, although Lopez contends that the effect of the denial of his motion to intervene was “compounded by the General Counsel’s attempt to subpoena, and the ALJ’s sequestration of” Muggeridge (Br. 32), he does not argue that the subpoena or the sequestration order was improper. Nor could he. Because Muggeridge was personally involved in the chain of events that led to Latino Express’s withdrawal of recognition, his testimony regarding those events would have “relate[d] to any matter under investigation or in question”—the standard for a Board subpoena. 29 U.S.C. § 161(1); *see also* *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (“Information sought in an administrative subpoena need only be ‘reasonably relevant.’” (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))).¹⁶ Similarly, the administrative law judge appropriately followed longstanding Board procedure in

to whether they were coerced into signing thus was, unlike here, relevant to whether an unfair labor practice had been committed. Trustees of a pension fund were allowed to intervene in *Camay Drilling Co.* “[i]n light of the rigorous fiduciary obligations imposed upon the[m] by ERISA,” and because they had evidence that could affect the remedy for the employer’s failure to make payments into the fund. 239 NLRB 997, 998 (1978). *Washington Gas Light Co.* involved an employer’s allegedly unlawful refusal to withhold union dues; unlike here, the employee who intervened had no other forum to vindicate his interest in not having dues withheld. 302 NLRB 425, 425-26 & n.1 (1991).

¹⁶ Prior to the withdrawal of recognition, Muggeridge told Smith that a decertification petition had been filed with the Board and instructed Latino Express to stop bargaining with Local 777. (JA 207.) In a letter to counsel for the General Counsel, Smith stated that Muggeridge had sent a copy of the petition to Latino Express. (JA 208.)

placing Muggeridge under a sequestration order. Upon request of any party, the judge will exclude witnesses from the hearing except when they are testifying and will direct them not to discuss their testimony with other witnesses. *Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995); *Unga Painting Corp.*, 237 NLRB 1306, 1306-07 (1978); *cf.* Fed. R. Evid. 615 (“At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony”).¹⁷ And ultimately, as explained above, *supra* pp. 39-40, Muggeridge could not have elicited any testimony that would have affected the result in this case even if he had been able to examine his clients.

¹⁷ The judge modified the order to accommodate Muggeridge’s role as counsel to non-party witnesses, allowing him to remain in the hearing room when his clients testified, object during the examination, and review the portions of the transcript related to that testimony and the motion to intervene. (JA 223, 226.)

CONCLUSION

The Board respectfully requests that the Court deny Lopez's and Latino Express's petitions for review and enforce the Board's order in full.

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NATIONAL LABOR RELATIONS BOARD

February 2015

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

RAMIRO LOPEZ, et al.)	
)	
Petitioners)	Nos. 14-1095
)	14-1100
v.)	14-1111
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	13-CA-77678
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,738 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 23rd day of February, 2015

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v.)	14-1111
)	
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Respondent)	13-CA-77678
)	

CERTIFICATE OF SERVICE

I certify that on February 23, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Washington, DC 20570

Dated at Washington, D.C.
this 23rd day February, 2015

STATUTORY ADDENDUM

29 U.S.C. § 158(a)

29 U.S.C. § 158(d)

29 U.S.C. § 160(b)

29 U.S.C. § 161(1)

29 C.F.R. § 102.29

STATUTORY ADDENDUM

29 U.S.C. § 158(a)

Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(d)

Obligation to bargain collectively

For the purposes of this section, to bargain collectively is 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . .

..

29 U.S.C. § 160(b)

Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board

in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 161(1)

Documentary evidence; summoning witnesses and taking testimony

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

29 C.F.R. § 102.29

Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the regional director issuing the complaint; during the hearing such motion shall be made to the administrative law judge. An original and four copies of written motions shall be filed. Immediately upon filing such motion, the moving

party shall serve a copy thereof upon each of the other parties. The regional director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served upon each of the other parties, or may refer the motion to the administrative law judge for ruling. The administrative law judge shall rule upon all such motions made at the hearing or referred to him by the regional director, in the manner set forth in § 102.25. The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.