

No. 15-60011

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

HALLMARK-PHOENIX 3, L.L.C.,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to largely undisputed facts and, therefore, that oral argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Hallmark-Phoenix 3, L.L.C. (“the Company”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), as

amended (“the Act,” 29 U.S.C. §§ 151, et seq.). The Decision and Order, issued on December 22, 2015, and reported at 361 NLRB No. 146 (D&O 1–12),¹ is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Company petitioned for review on January 7, 2015; the Board cross-applied for enforcement on February 6. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because the Company resides in Texas because it is headquartered there.² The filings were timely; the Act imposes no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF ISSUES PRESENTED

The ultimate issue is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) when it made unlawful unilateral midterm contract modifications within the meaning of Section 8(d) to its collective-bargaining agreements with International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts, Local 780 (“IATSE”) and Transport Workers Union of America, Local 525 (“TWU”). The subsidiary issues are:

¹ “D&O” refers to Board’s Decision and Order, contained in Volume III (“Pleadings”) of the Record (ROA 333–47); it is the sole content of the Company’s Record Excerpts filed with this Court; “Tr.” to the transcript of the hearing before the administrative law judge in Volume 1 of the Record; “GCX” (General Counsel’s) and “RX” (Company’s) to exhibits introduced at that hearing contained in Volume II of the Record. References preceding a semicolon are to Board findings; those following, to supporting evidence.

² The Board’s cross-application for enforcement inadvertently stated that venue was proper because the unfair labor practices occurred in Florida.

(1) whether the Board has jurisdiction to interpret the provisions of the union contracts;

(2) whether the Board rationally concluded that deferral to the grievance and arbitration procedures was inappropriate;

(3) whether the Company unlawfully refused to pay severance as specified under the applicable collective-bargaining agreements to its employees; whether the Board's order of severance pay for employee Kevin Ratliff is entitled to summary enforcement;

(4) whether the Company unlawfully refused to fully and timely pay IATSE and TWU unit employees' vacation pay, including the lead pay differential;

(5) whether the Company unlawfully failed to remit union dues to IATSE;

(6) whether the Company unlawfully added language to IATSE-represented employees' vacation paychecks stating that, by signing the checks, the employees were waiving any future claims against the Company; and

(7) whether any part of this case is moot.

STATEMENT OF THE CASE

This case came before the Board on a consolidated complaint issued by the Board's Acting General Counsel, after investigation of an amended charge (Case 12-CA-90718) filed by TWU and a separate amended charge (Case 12-CA-94037) filed by IATSE. (D&O 5; GCX 1.) After a hearing, an administrative law judge issued a decision finding that the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by making several unilateral changes to its collective-bargaining agreements with TWU and IATSE by refusing to timely pay employees' their full accrued vacation pay with lead employee pay differential and severance pay and failing to remit union dues to IATSE. (D&O 11.) The judge also found that IATSE-represented employee Kevin Ratliff was owed severance pay pursuant to the collective-bargaining agreement as he had not been employed by a "Successor Contractor" under that agreement. (D&O 9-10.) Additionally, the judge found that the Company violated Section 8(a)(5) and (1) when it inserted language on the back of IATSE-represented employees' September 14, 2012 vacation paychecks waiving future claims for unpaid wages or benefits, without providing notice to and bargaining with IATSE. (D&O 7, 11.)

The Company and the General Counsel filed exceptions to the judge's decision before the Board. No exceptions were filed to the judge's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to timely pay the

IATSE unit employees all of their accrued vacation time, including lead pay for lead employees. (D&O 1 nn.1, 3.) The Board accordingly adopted that finding *pro forma*. The Board adopted the remainder of the judge's findings with certain modifications. In adopting the judge's finding that deferral to arbitration was inappropriate, the Board noted that it found no merit to the Company's contention that the Board lacked jurisdiction in contract-modification cases. (D&O 1, n.2.) The Board emphasized that the Company's refusal to timely pay TWU unit employees all accrued vacation pay with lead pay differential for lead employees, to deduct and transmit union dues to IATSE, and to pay its employees severance pay constituted midterm contract modifications within the meaning of Section 8(d) of the Act and, for that reason, violated Section 8(a)(5) and (1). (D&O 1 n.3.) The Board also rejected the Company's contention that it had relied upon a sound arguable contract interpretation in failing to make severance payments under the IATSE and TWU contracts. (*Id.*)

The Board affirmed the judge's determination that Ratliff's subsequent employment with the Air Force did not excuse the Company's severance liability to him under the IATSE collective-bargaining agreement for the reasons stated by the judge and for the additional reason that, pursuant to the IATSE contract, Ratliff had been laid off for more than thirty days before his employment with the Air Force. (*Id.*) Finally, the Board affirmed the judge's finding that the Company

violated Section 8(a)(5) and (1) by inserting the waiver language on the back of employees' vacation paychecks. (*Id.*)

I. THE BOARD'S FINDINGS OF FACTS

A. The Company's Operations

From 2008 until August 31, 2012, the Company was a contractor providing vehicle operations maintenance services (VOMS) for the United States Air Force at Patrick Air Force Base and Cape Canaveral Air Force Station. (D&O 5, 7; Tr. 34–37, 129.) The Company's Patrick Air Force Base employees were represented by IATSE and its Cape Canaveral employees were represented by TWU. (D&O 5; Tr. 52–53, 125–29, GCX 5, 6, 34, 35.) The Company was party to separate collective-bargaining agreements with IATSE and TWU. (D&O 5; Tr. 54–55, 124–29, GCX 5, 6.)

B. TWU and IATSE Collective-Bargaining Agreements Set Forth Employees' Terms and Conditions of Employment, Including Vacation and Severance Pay

1. TWU collective-bargaining agreement

Since the late 1950s, TWU has represented a unit of employees with several successive VOMS contractors performing vehicle maintenance services at Cape Canaveral Air Force Station. (D&O 5; Tr. 52–53, 56.) The Company and TWU entered into a successor collective-bargaining agreement that was effective from October 2010 through September 30, 2014 (“TWU CBA”). (D&O 5; Tr. 54–55;

GCX 6.) The TWU CBA sets various terms and conditions of employment including provisions for the payment of carryover vacation pay, severance pay, and an increased lead pay differential for lead employees. (D&O 6, 8–9; GCX 6).

a. Vacations

Article 27 of the TWU CBA provides for annual vacations ranging from ten days to twenty-two days based upon the length of the employee's tenure. (D&O 8; GCX 6.) Article 27 provides, in relevant part:

27.3

An employee who has completed his probationary period shall be paid for his accrued vacation upon termination of employment with the Company, except that he shall not be paid for such vacation if he has been discharged for a cause involving monetary or material loss to the Company

27.7

Vacation carryover will be permitted, per the following schedule. Any excess hours not used will be forfeited. Days over and above this requirement are in a use or lose situation, maximum carry over allowed as of 9/30 is 180 hours. Carry over does not apply if HP3 is not the successful contractor for the rebid of VOM.

(Id.)

b. Lead pay

Additionally, Article 31 of the TWU CBA addresses the pay differential afforded to lead employees:

31.3

Any employee selected by Management to perform a lead function shall receive \$1.50 per hour in addition to his regular straight-time base rate of pay for all hours worked as lead. If an employee performs as a lead for 30 days or more and is off on holiday, vacation or sick leave, he shall continue to receive lead³ pay.

(*Id.*) It is undisputed that the Company had paid the lead pay differential for lead employees' vacation allowance. (D&O 8, 10; Tr. 46–50, 70, 142–43, 169–70, GCX 7, 8, 9, 10, 36.)

c. Severance pay

Article 30 of the TWU CBA provides employees with a minimum of one year of service between three and twelve weeks of severance allowance, depending on employees' tenure. (D&O 8–9; GCX 6.) Specifically, Article 30 provides that:

30.1

An employee with one year or more of service under this Agreement who is laid off for any reason other than those set forth in paragraph 30.2 and 30.5^[4] shall receive severance pay as set forth in paragraph 30.4.

³ The administrative law judge's recitation of this contractual provision mistakenly replaces the word "lead" with the word "sick." (D&O 8.)

⁴ Article 30.5 excuses the payment of severance pay to employees re-employed by the Company in a different position or employed by a successor contractor. (GCX 6.)

30.2

Severance allowance will not be paid if the layoff is the result of an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work

30.8

Such severance pay shall be paid at the end of a waiting period of 30 days from the date of such layoff.

(Id.)

2. IATSE collective-bargaining agreement

Beginning in 1987, IATSE began representing employees working for the VOMS contractors at Patrick Air Force Base. (Tr. 125.) The most recent collective-bargaining agreement between IATSE and the Company was effective from September 1, 2011 to August 31, 2014 (“IATSE CBA”). (D&O 5; GCX 5, 34, 35.) The IATSE CBA governs terms and conditions of employment including the payment of unused vacation pay, pay differentials for lead employees, severance pay to laid-off unit employees, and union dues check-off provisions. (D&O 6, 8–9; GCX 5.)

a. Vacation and lead pay

Article 19.2.2 of the IATSE CBA provides that “[v]acation pay shall be paid at the employee’s regular base pay rate.” (GCX 5.) Schedule B provides that lead employees “shall receive \$1.50 per hour in addition to his/her straight-line base

rate of pay for all hours worked as a lead.” (D&O 8; GCX 5.) It is undisputed that lead employees received the lead pay differential for their vacation allowance while the Company was VOMS contractor. (D&O 8, 10; Tr. 46–50, 70, 142–43, 169–70, GCX 7, 8, 9, 10, 36.)

b. Severance pay

Article 20 of the IATSE CBA provides employees with a minimum of one year of service with one week of severance pay per year, up to a maximum of eighteen weeks. (D&O 9; GCX 5.) Specifically, Article 20.6 provides:

20.6.1

Any employee with more than 6 months of continuous service credit, who has established seniority, shall be entitled to severance pay when involuntarily laid off because of lack of work for a period in excess of 30 days; however, no employee shall be entitled to severance pay in cases where such layoff is due to fire, flood, explosion, bombing, earthquake or Act of God, causing damage at locations where work is performed under this agreement, or from strikes or work stoppages resulting in the inability to maintain normal operations

20.6.3

Such severance pay shall be paid at the end of a waiting period of 30 days from the day of such layoff. [. . .] An employee who has received severance allowance and is subsequently reinstated during the period the allowance covers will repay the difference to the Company in a manner agreeable to both. [. . .] Severance pay will not be granted when the employee accepts employment of the same, similar, or greater responsibility or skill by a Successor Contractor to the PAFB & CCAF VOM.

(Id.)

c. Dues check-off

Article 3 of the IATSE CBA requires the Company to deduct union dues from employees' paychecks, as authorized, and remit them to IATSE:

3.3

[T]he Company shall deduct from such employee's wages, in accordance with this agreement, if he so authorizes, the employee's Union dues and remit same to the duly authorized representative of the Union[.]

(Id.)

3. Grievance provisions are common to the TWU and IATSE collective-bargaining agreements

The TWU CBA and the IATSE CBA contain identical grievance/arbitration provisions. (D&O 9; GCX 5, 6.) They provide:

TWU 8.2, IATSE 6.2

All grievances shall be presented as soon as practicable after the occurrence of the event on which it is based, but in no event later than 10 working days if it is a dismissal grievance, or if the grievance arises from any other cause, no later than 20 working days from the date the union knew or reasonably should have known of the events giving rise to the grievance. The Arbitrator may consider the timeliness of the non-termination grievances filed after the 20th day and before the 45th day and may continue the matter where there is a justifiable excuse for the untimeliness. The failure to submit a grievance within a period of 45 days shall constitute an absolute bar to further action

TWU 8.3, IATSE 6.3

Time limits for grievances at any step, or for any response, may be extended by mutual agreement between the union and HP3[.]

(D&O 9; GCX 5, 6.)

C. In 2011, the Air Force Informs the Company that It Intends to In-Source the VOMS Work and Terminate Its Contract with the Company; the Company Ultimately Receives a One-Year Extension

In 2011, the Air Force informed the Company that it intended to terminate the Company's contract and in-source the VOMS work effective September 1, 2011. (D&O 6; Tr. 37.) The Company informed TWU and IATSE of the Air Force's intention to terminate its VOMS contract. (D&O 5; Tr. 57, 126.) On March 17, 2011, TWU sent the Company an email (with a copy to IATSE) seeking confirmation of the Company's intention to pay severance pay pursuant to the TWU CBA in the event of in-sourcing. (D&O 7; GCX 13.) The Company responded to the Unions that it intended to comply with the CBA. (*Id.*) Throughout the summer of 2011, the Company sought to obtain a one-year extension of the VOMS contract from the Air Force and kept the Unions apprised of its efforts. (D&O 7; Tr. 59; GCX 14, 15.) In September 2011, the Company informed the Unions that the Air Force had agreed to a one-year extension of the VOMS contract with the Company. (D&O 7; Tr. 63–64.)

D. In 2012, the Air Force In-Sources the VOMS Contract Effective September 1; the Unions Raise the Company's Severance Pay Liability Under the Collective-Bargaining Agreements

On June 19, 2012, the Company informed the Unions by email that the Air Force intended to in-source the VOMS contract work at both Cape Canaveral and Patrick Air Force Base effective September 1, 2012. (D&O 7; GCX 16.) On July

3, IATSE sent a letter to the Company specifically stating that it intended to enforce the severance pay provisions outlined in Article 20.6 of the IATSE CBA in the event of in-sourcing. (D&O 7.) On July 7, TWU emailed the Company, stating its position that the Company must pay severance, citing Article 30.1 of the TWU CBA regarding severance for employees “laid off for any reason.” (D&O 7; GCX 17.) On July 9, the Company’s attorney responded to IATSE stating that its severance pay demand was premature and that the Air Force was disputing that employees would be entitled to severance pay under the IATSE CBA because the employees were being terminated pursuant to Article 23.3 of the IATSE CBA rather than laid off under Article 20.6.1.⁵ (D&O 7; GCX 24.) On July 13, the Company’s attorney similarly responded to TWU, asserting the same claims. (D&O 7; GCX 18.) On August 3, in response to IATSE’s inquiries concerning whether employees would receive severance pay, the Company stated that “[i]f employees are paid it will be a lump sum payment” and the Air Force was claiming that it was not liable. (D&O 7–8; GCX 25.)

On August 17, the Company sent employees letters stating:

Due to the government’s decision to in-source your positions and terminate the existing Vehicle Operation and Maintenance

⁵ Article 23.3 provides that the Company “will provide notice to the union if the HP3 VOM contract is cancelled or HP3 is relieved of duty under the Patrick VOM contract and will be prepared to negotiate with the union with respect to any transitional arrangements that may be appropriate to the circumstances.” (GCX 5.)

contract, this letter will serve as formal notification that as a result of the termination of our contract, your employment with Hallmark Phoenix 3, LLC has been terminated. The termination becomes effective 1 September, 2012.

You will be compensated for all hours worked and remaining vacation through the end of your normal workday.

(D&O 7; GCX 19.) On August 28, TWU sent the Company another email reminding it of the severance-pay obligations under the TWU CBA. (GCX 19.) The Company replied by stating that the Air Force was disputing the severance-pay obligation and the Company intended to pursue a claim against the Air Force for the severance pay. (*Id.*) TWU replied that severance pay was owed under the TWU CBA and the Air Force's willingness to pay these claims was not relevant to the Company's obligation to pay them in the first instance. (*Id.*) The Company responded that employees would receive their severance pay "when it c[ame] to fruition." (*Id.*) On August 31, the Company's VOMS contract with the Air Force expired and all of its TWU and IATSE-represented employees were laid off at that time. (D&O 6; Tr. 37, 129.)

E. The Company Partially Pays Employees' Accrued Vacation Pay on September 14, 2012, but Fails to Deduct and Remit IATSE Dues; The Company Requires its IATSE-Represented Employees To Waive Future Claims for Pay or Benefits

On September 14, 2012, the Company sent its TWU and IATSE unit employees checks for a portion of their accrued vacation pay. (D&O 7; Tr. 88,

130–31, GCX 1(h)(h), 21, 26, 50, RX 6, 7, 9.) The Company failed to deduct and remit IATSE union dues. (D&O 7; GCX 27.)

Further, printed on the back of each IATSE-represented employee's check was the following language: "By signing this check employee agrees that it has been paid all that it is owed for accrued pay and waives any and all claims for that purpose." (*Id.*) The Company never informed IATSE of its intent to include the waiver language on the checks. (D&O 7; Tr. 131–32.)

On September 24, 2012, TWU corresponded with the Company over TWU's disagreement with the amount of vacation pay that had been paid to the TWU-represented employees as it was deficient in carryover pay. The Company responded that carryover pay was not owed because the Company had not been the successful bidder on the VOMS contract. TWU asserted that the Company's claims were irrelevant because the Air Force had in-sourced the work so there was no bidding at all. (D&O 8; GCX 20.) In a subsequent email exchange that same day, the Company's attorney stated that it was the Company's position that carryover vacation hours were not due under the TWU CBA because the Company was not awarded a successor VOMS contract, but nevertheless, the Company was seeking reimbursement for the deficient vacation pay from the Air Force. (*Id.*)

On September 28, 2012, IATSE sent a letter to the Company stating that the Union objected to the waiver language on the paychecks as it represented "an

attempt to bamboozle” the employees and that the amounts disbursed in the September 14, 2012 checks were deficient.⁶ (D&O 8; GCX 27.) On December 13, pursuant to IATSE’s request, the Company informed IATSE that it would not enforce the waiver. (D&O 7; RX 8.)

F. The Unions File Grievances Over the Company’s Deficient Vacation Payouts and Refusal to Pay Severance; The Company Refuses to Process the Grievances on Timeliness Grounds

On October 9, 2012, IATSE submitted a grievance to the Company contesting the amounts paid up to that date and demanding that the Company make employees whole for all severance and vacation pay owed under the IATSE CBA. (D&O 9; GCX 28.) On October 16, IATSE submitted an amended grievance adding the Company’s failure to remit union dues from the September 14, 2012 checks. (D&O 9; GCX 29, 30.) On October 18, the Company rejected the IATSE grievance as untimely. (D&O 9; GCX 32.) On October 23, IATSE responded that the grievance was timely and the matter should be sent to arbitration. (GCX 31.) The grievance never went to arbitration. (D&O 9; GCX 32.)

On November 15, 2012, TWU filed a grievance alleging that the Company had failed to pay the unit employees their full, accrued vacation pay balance on September 14, 2012, and failed to pay severance. (D&O 8; GCX 53, 54.) On November 27, the Company sent an email to TWU asserting that the Company was

⁶ At the time, IATSE was under the mistaken belief that the September 14, 2012 checks were for severance pay and not vacation pay. (GCX 27.)

refusing to waive timeliness defenses regarding grievances with respect to severance and vacation pay and denied the grievance. (D&O 8; RX 3.)

On April 5, 2013, the Company issued additional checks to both the IATSE and TWU unit employees for their accrued vacation. (D&O 6; GCX 1(hh), RX 6, 7.) The combined vacation checks (on September 14, 2012 and April 6, 2013) did not fully compensate employees in the TWU unit for the full number of vacation hours owed because it lacked the lead employee pay differential and failed to credit employees for carryover vacation hours earned from August 16 to August 31, 2012. IATSE lead employees were also not fully compensated for their pay differential. The Company did fully compensate IATSE non-lead employees. (D&O 4–5, 11–13; GCX 57, RX 7.)

G. Kevin Ratliff, an IATSE-Represented Employee, Obtains Employment as a Dispatcher with the Air Force on November 5, 2012

Kevin Ratliff worked at Cape Canaveral as a heavy driver. (D&O 10; Tr. 103–04.) Ratliff spent almost all of his working time driving tractor-trailers, buses, and forklifts when he worked for the Company. (D&O 10; Tr. 103–06.) Ratliff was laid-off from the Company when it lost the VOMS contract on August 31, 2012. (D&O 6.) On November 5, 2012, Ratliff began employment with the Air Force as a dispatcher. (D&O 10.) As a dispatcher, Ratliff spent a majority of his

time working at a computer, scheduling and performing data entry—tasks which he did not perform while employed by the Company. (D&O 10; Tr. 103–07, 121.)

H. The Company Asserts to the Air Force that It is Obligated to Pay its Employees Severance Pay Under the IATSE and TWU Collective-Bargaining Agreements; the Air Force Transfers Funds to the Company to Pay Employees' Severance Pay

On December 11, 2012, the Company sent a letter to the Air Force claiming that it required \$413,803.75 for the purpose of paying employees' severance pay under the TWU and IATSE CBAs. (D&O 1 n. 3, 10 n.4; RX 11.) Specifically, the letter stated that:

Once the USAF made official that it would not exercise the fourth option year of the [VOMS] Contract in July 2012, HP3 became obligated to pay severance at Contract end to non-exempt employees as fringe benefits consistent with the provisions and conditions of each CBA.

(RX 11.) The Company's letter included claims for amounts owed to Ratliff. (D&O 10 n.4; RX 11.)

On April 18, 2013, the Company emailed TWU and stated that the Air Force agreed to pay severance, which the Company would pass along to employees when payment was received, probably in three to four months. (D&O 9; GCX 55.) In September 2013, in response to the Company's claims, the Air Force remitted \$400,382.00 for the express purpose of satisfying severance pay claims under the

TWU and IATSE CBAs. (D&O 1 n.3, 8, 9; Br. 18, GCX 1(ii).) To date, no severance pay has been remitted to the Company's employees. (D&O 8; Tr. 29)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and Johnson) found (D&O 1–2) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by making midterm contract modifications to its collective-bargaining agreements with TWU and IATSE within the meaning of the Section 8(d) of the Act (29 U.S.C. § 158(d)) by: (1) failing to pay all of the vacation pay in a timely manner that it was obligated to pay to its IATSE-represented and TWU-represented employees under the CBAs—including lead employees' pay differential;⁷ (2) failing to deduct union dues from the final vacation paychecks received by IATSE-represented employees and then failing to transmit those dues to IATSE in a timely manner; (3) failing to pay its employees severance pay, including lead-pay differentials, under the applicable provisions of the TWU and IATSE CBAs. (D&O 1–2 & n.3.) The Board also found, in agreement with the judge, deferral to the parties' arbitration process was inappropriate in this case because the Company refused to waive procedural (timeliness) defenses to the Unions' grievances. (D&O 1 n.2, 11.)

⁷ The Board noted that no exceptions were filed to the judge's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to pay all vacation pay in a timely manner that was due under the IATSE CBA including lead employees' pay differential. (D&O 1 n.3.)

In affirming the judge's determinations, the Board clarified that the Company's conduct constituted unlawful midterm contract modification within the meaning of Section 8(d) of the Act and, for that reason, violated Section 8(a)(5) and (1). (*Id.*) The Board also found that the Company failed to prove that it had relied upon a sound arguable contract interpretation in refusing to make severance payments under the IATSE and TWU contracts. (*Id.*)

The Board affirmed the judge's determination that Ratliff's subsequent employment with the Air Force did not excuse the Company's severance liability to him under the IATSE collective-bargaining agreement for the reasons stated by the judge. (*Id.*) Pursuant to exceptions filed by the General Counsel, the Board further found that Ratliff was owed severance pay for the additional reason that, under Articles 20.6.1 and 20.6.3 of the IATSE CBA, he had been laid off for more than thirty days before his employment with the Air Force. (*Id.*) The Board also affirmed the judge's finding that the Company violated Section 8(a)(5) and (1) by inserting the waiver language on the back of IATSE-represented employees' paychecks, declining to pass on whether that constituted a contract modification. (*Id.*)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O

1–2.) Affirmatively, the Board’s Order requires the Company to remit all outstanding accrued vacation and severance pay (including the lead employee pay differential) as set forth in the appendices to the Board’s Order; rescind the waiver language placed on the back of its IATSE-represented employees’ paychecks; compensate employees for any adverse tax consequences of receiving lump-sum back pay awards; and to mail copies of the Board’s Notice and attached appendices to employees’ last known addresses as well as distribute them electronically, as set forth in the Board’s Order. (D&O 2–4.)

STANDARD OF REVIEW

This Court applies a deferential standard in reviewing Board decisions. Specifically, the Court has stated that it “will uphold the Board’s decision if it is reasonable and supported by substantial evidence on the record considered as a whole.” *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007) (internal quotation marks and citation omitted); *see also* 29 U.S.C. 160(e) (factual findings of the Board are “conclusive” if supported by substantial evidence). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). Thus, “the Board’s findings of fact, along with its application of law to those facts, ‘must be upheld if a reasonable person could have

found what [the Board] found, even if the appellate court might have reached a different conclusion had the matter been presented to it in the first instance.”

Oaktree Capital Mgmt., L.P. v. NLRB, 452 F. App'x 433, 437 (5th Cir. 2011)

(citation omitted).

Generally, the Board's interpretation of a collective-bargaining agreement is not entitled to judicial deference. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202 (1991). Rather, to ensure uniformity between judicial and Board interpretations of the same contractual provisions, courts of appeals appropriately subject the interpretation of contractual provisions to a *de novo* analysis. *Id.* Nevertheless, this Court is “mindful of the Board's considerable expertise in interpreting collective bargaining agreements.” *J. Vallery Elec., Inc.*, 337 F.3d at 450 (citation omitted). The Board's findings with respect to the underlying facts pertinent to such an analysis—for example, what was said during the course of bargaining regarding a particular provision—are, however, entitled to acceptance on review if supported by substantial evidence. *See Local Union 1395, IUE v. NLRB*, 797 F.2d 1027, 1030–31 (D.C. Cir. 1986).

A Board determination about whether to defer to grievance and arbitration proceedings must be upheld “so long as it is ‘rational and consistent with the Act,’ and so long as the Board's reasoning is not ‘inadequate, irrational, or arbitrary.’” *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 445–47 (D.C. Cir.

2002) (attribution omitted.) If the Board’s decision in a particular case “is perfectly consistent with, not a change from, well established precedent,” then no explanation for any “change” is required. *Id.*

SUMMARY OF THE ARGUMENT

This case comes before the Court on the principal issue of whether the Company’s refusal to pay its employees the contractually mandated amount of severance and vacation pay after laying off its entire workforce violates Section 8(a)(5) and (1) of the Act.

The Company contends that arbitration—not the Board—was the proper venue for its contract modifications. It is well-settled that the Board has jurisdiction to resolve the meaning of contractual provisions that are at the center of unfair-labor-practice cases. It is equally well-settled that the Board is not required to yield its own jurisdiction despite the availability of alternate means of resolution. The Board reasonably concluded that, because the Company refused to provide any assurances that it would waive procedural defenses to allow an arbitrator to even hear the merits of the parties’ dispute, deferring this matter to arbitration would be inappropriate.

In regard to severance pay, the Board reasonably determined that the Company did not provide any basis—much less a sound, arguable basis—for its interpretations of its collective-bargaining agreements to excuse its obligation to

timely make these payments. The Company has been talking out of both sides of its mouth since it laid off its employees almost three years ago. On the one hand, the Company has consistently maintained to the Unions and the Board that it owed no severance under unambiguous contract provisions and that employees had been fully compensated for their vacation pay. On the other hand, the Company has consistently maintained to the Air Force that severance pay *was* owed to its employees under the its collective-bargaining agreements and, in fact, received over \$400,000 from the Air Force to compensate employees for their claims.

Furthermore, the Board is entitled to summary enforcement of its finding that employee Kevin Ratliff is entitled to severance pay under the IATSE CBA as the Company did not except to the judge's finding before the Board or move for reconsideration before the Board. In any event, the Board reasonably concluded that employee Ratliff was entitled to severance pay under the IATSE CBA because the Air Force was not a Successor Contractor and Ratliff had been unemployed for over thirty days before beginning employment with the Air Force.

The Board is also entitled to summary enforcement of its finding that the Company unlawfully refused to timely pay IATSE employees' vacation pay, including the lead employee pay differential, because the Company failed to file exceptions to the judge's findings with the Board. The Board reasonably found that the Company had no contractual basis for failing to timely pay employees for

their vacation pay, refusing to include lead employees' pay differential in that pay, and failing to timely remit union dues to IATSE. Finally, the Board reasonably concluded that the Company violated Section 8(a)(5) and (1) of the Act by inserting claim waivers on the vacation paychecks of IATSE unit employees, without bargaining with IATSE.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) AND 8(d) OF THE ACT BY UNLAWFULLY MODIFYING TERMS OF ITS COLLECTIVE-BARGAINING AGREEMENTS AND OTHER EMPLOYMENT TERMS

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to “bargain collectively” with the representatives of his employees. In turn, Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment” Section 8(d) also mandates that no party to a collective-bargaining agreement covered by the Act “shall terminate or modify such contract” without obtaining the other party’s consent and fulfilling certain procedural requirements specified in Section 8(d). An employer that makes such a unilateral midterm modification that is unlawful under Section 8(d) also violates Section 8(a)(5) and (1).⁸ *Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14, 21–22 (1st Cir. 2007).

⁸ An employer’s violation of Section 8(a)(5) of the Act derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7]” of the Act (29 U.S.C. § 157), including the right to bargain collectively. *See, e.g., Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

It is clear that severance and other wage benefits are “terms and conditions of employment” within the meaning of Section 8(d) of the Act (29 U.S.C. § 158(d)). *See, e.g., NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *Armour & Co.*, 280 NLRB 824, 826–27 (1986); *see also Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004) (unlawful modification of wage and benefit provisions, including vacation and severance pay provisions).

B. The Board Had Jurisdiction to Interpret the Contract Provisions Related to the Company’s Unlawful Midterm Modifications

In cases involving allegations of unlawful contract modification, contract interpretation is often a central issue. Although the Board is generally not charged with interpreting collective-bargaining agreements, it may do so if necessary for the adjudication of an unfair labor practice. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427–28 (1967); *accord Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1315 (5th Cir. 1988) (with midterm, unilateral contract alteration regarding a mandatory subject of bargaining, Board can “enforce the agreement through its power to remedy violations of the duty to bargain under Section 8(a)(5)”).

Generally, parties with conflicting constructions of their agreement have recourse to arbitrators (often empowered to interpret contracts by the contracts themselves) and the federal courts (under Section 301 of the Act, 29 U.S.C. § 185), to obtain an adjudication of their differences and a definitive interpretation of their contract.

However, the fact that a collective-bargaining agreement contains an arbitration

provision “does not foreclose the Board’s jurisdiction and consideration of an unfair labor practice which also constitutes a breach of the agreement.” *NLRB v. Brotherhood of Ry., Airline & S.S. Clerks*, 498 F.2d 1105, 1109 (5th Cir. 1974); *see also Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1308 (9th Cir. 1979) (“Board can exercise its jurisdiction without regard to potential or pending arbitration proceedings”).

If an employer charged with unlawfully modifying its contract cannot demonstrate that it possesses “a sound arguable basis for ascribing a particular meaning to his contract,” that “his action[s were] in accordance with the terms of the contract as he construes it,” and that he acted in good faith or without anti-union animus, the Board will find that the alleged contract modification violates Section 8(a)(5), 8(d), and 8(a)(1).⁹ *NCR Corp.*, 271 NLRB 1212, 1213 (1984); *cf. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14, 23 (1st Cir. 2007). As shown below, the Company’s contractual arguments lack a sound arguable basis.

C. The Board Rationally Concluded that Deferral to Arbitration was Inappropriate in this Case

Section 10(a) of the Act (29 U.S.C. § 160(a)) provides, in pertinent part, that the Board’s power to prevent unfair labor practices “shall not be affected by any

⁹ *See, e.g., Westinghouse Elec. Corp.*, 313 NLRB 452, 452, 456–57 (1993) (employer did not violate Section 8(a)(5) and (1) where demonstrated that it possessed sound arguable basis because of a longstanding disagreement over rights under contractual seniority clause with the union), *enf’d mem.*, 46 F.3d 1126 (4th Cir. 1995).

other means of adjustment or prevention that has been established or may be established by agreement, law, or otherwise.” Thus, parties may not oust the Board of jurisdiction to adjudicate unfair labor practices by engaging in arbitration over the same factual situation. *NLRB v. Strong*, 393 U.S. 357, 360–61 (1969); *NLRB v. Columbus Printing Pressmen’s Union, Local 252*, 543 F.2d 1161, 1167 (5th Cir. 1967). “The superior authority of the Board may be invoked at any time” and “[s]hould the Board disagree with the arbiter, . . . the Board’s ruling would, of course, take precedence. . . .” *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1974).

Under the Board’s seminal decision in *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), the Board will nevertheless decline to exercise its Section 10(a) authority and will defer to arbitration when: (1) a stable collective-bargaining relationship exists, (2) the employer remains willing to arbitrate the arbitrable issue, and (3) determination of whether the contract and its meaning are central to the dispute. Deferral under *Collyer* is not available to parties who are unwilling to waive the procedural defense that the grievance was not timely filed. *See Capitol City Lumber Co. v. NLRB*, 721 F.2d 546, 549 (6th Cir. 1983) (recognizing that deferral is not available if the grievance is untimely and the employer will not waive timeliness defenses; noting that the employer “has little cause to complain when its own actions are responsible for the failure of the arbitration procedure”);

Hallmor Inc., 327 NLRB 292 (1998) (party that successfully obtained deferral based on representation it would not raise timeliness issue may not secure “fruit” of that misrepresentation by insisting on deferral after reneging on its agreement). The Board’s choice not to defer here was rational and consistent with the Act and its reasoning was not inadequate, irrational, or arbitrary. *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 445–47 (D.C. Cir. 2002)

In the instant case, the Board found deferral inappropriate because the Company refused to waive timeliness defenses to the TWU or the IATSE grievances. The uncontested evidence shows that both TWU and IATSE filed grievances and that the Company refused to process both of those grievances on account that they were untimely. (Br. 7–8.)¹⁰ Furthermore, the Company has never given assurances to the Board it would waive this timeliness defense if the Unions were to resubmit the grievances. The Company’s claims (Br. 8) that it was willing to “waive certain timeliness issues” are belied by its actions when it denied the Unions grievances for being untimely. Moreover, the vagueness of the statement—that the Company would waive “certain” (unspecified) timeliness issues—suggests that it would not waive other timeliness defenses. (D&O 9 n.3.) Accordingly, the Company still has not indicated that it would allow the grievances to go forward for a determination on the merits. Under the Board’s precedent

¹⁰ References to the Company’s April 13, 2015 brief filed with this Court are indicated with “Br.”

under *Collyer*, the Company is foreclosed from invoking the parties arbitration machinery over the primary jurisdiction granted to the Board under Section 10(a).

D. The Refusal To Pay Severance Pay Under the Applicable Provisions of the TWU and IATSE CBAs Constituted Unlawful Contract Modifications

It is undisputed that the Company lost its VOMS contract with the Air Force effective September 1, 2012. (D&O 6.) It is also undisputed that the Company has not remitted any severance pay to either its IATSE or TWU unit employees to date. Moreover, contrary to its position in this case, the Company previously maintained that the employees were owed severance pay under the CBAs. It is uncontested that the Company petitioned the Air Force for severance pay for its employees under the TWU and IATSE CBAs and received money to satisfy those claims. (Br. 18–19.) In finding no merit to the Company’s “interpretation” of the CBAs—that no severance pay was owed its employees—the Board relied (D&O 1 n.3) on the Company’s contemporaneous, inconsistent assertions to the Air Force that severance pay was, in fact, owed employees under the TWU and IATSE CBAs. *NCR Corp.*, 271 NLRB at 1213. Quite simply, the Company is attempting to have its cake and eat it, too. As shown below, substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to pay employees’ severance pay under the applicable collective-bargaining agreements. (D&O 1–2.)

1. Severance pay under the TWU collective-bargaining agreement

The provisions governing severance pay in the TWU CBA have a clear meaning. Article 30 provides that employees with at least one year of service “who [are] *laid off for any reason*” other than those enumerated in Article 30 are entitled to severance pay. (D&O 7; GCX 6 (emphasis added).) Article 30 goes on to specify that severance pay will not be granted “if the layoff is the result of an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work.” (*Id.*) The Board reasonably concluded that the plain language of the TWU CBA specifically provided for severance pay to be paid to employees in the scenario where, as here, the Company laid off its work force due to losing its VOMS Contract with the Air Force. (D&O 8–9, 11.)

The Company’s contention that employees were terminated on August 31, 2012, and the TWU CBA does not address severance pay in the context of terminations (Br. 14–15), is meritless. Article 30 makes clear that severance is due when employees are laid-off for “any reason.” (D&O 8–9; GCX 6.) Of the limited exceptions enumerated in Article 30, “termination” is not one of them. (*Id.*) The Company’s suggestion (Br. 14) that there is any meaningful distinction between a permanent layoff and termination is unsupported; any attempt to preclude contractual severance benefits on that basis flies in the face of its (successful)

assertion to the Air Force that severance was owed under both CBAs.

Furthermore, the duration clause which states that the TWU CBA “shall become null and void for any period(s) for which the Company is not the prime service contractor” does not relieve (Br. 14) the Company of its severance-pay liability.

(*Id.*) As the Board found, the “null and void” clause refers to the Company’s future obligations under the contract, not to past obligations such as severance and vacation pay. (D&O 11.)

2. Severance pay under the IATSE collective-bargaining agreement

The provisions of the IATSE CBA governing severance pay are equally clear. Article 20.6 of the IATSE CBA provides that employees with at least six months of service “shall be entitled to severance pay when involuntarily laid off because of lack of work.” (D&O 9; GCX 5.) Under this provision, the Company is excused from its severance pay obligation only in cases where normal operations cease due to natural disasters or “from strikes or work stoppages resulting in the inability to maintain normal operations.” (*Id.*)

The Company attempts to make the strained contract interpretation that the August 31, 2012 layoff was a “work stoppage” within the meaning of Article 20.6, as it involved a “total work stoppage.” (Br. 11–12.) However, this ignores the context of the term “work stoppage” in conjunction with the term “strikes.” As the Board correctly observed, its context with the term “strikes” makes clear that the

“work stoppages” under the IATSE agreement means those cessations of work caused by employees, not by the Company or the Air Force. (D&O 11.) Indeed, as the Board explained, the contract “refers to strikes or work stoppages by the unit employees *that result in* an inability to maintain normal operations.” (D&O 11(emphasis in original).) It does not mean the converse—as the Company apparently believes—an inability to maintain normal operations (from the loss of the VOMS contract) resulting in the cessation of work and employee layoffs

3. The Court lacks jurisdiction to consider the Company’s defenses to its failure to pay severance to Kevin Ratliff because they were not raised to the Board; the Board reasonably concluded that Ratliff was entitled to severance pay under the IATSE CBA

Because it failed to challenge the administrative law judge’s determination that employee Kevin Ratliff was owed severance pay under the IATSE CBA before the Board, the Company is now foreclosed from attacking those findings (Br. 12–14) before this Court under Section 10(e) of the Act (29 U.S.C. § 160(e)). The administrative law judge found that employee Kevin Ratliff was not employed by a “Successor Contractor” within the meaning of the IATSE CBA and therefore did not fall into an exception for severance pay.¹¹ (D&O 11.) The Board agreed with the judge, additionally finding that Ratliff was entitled to severance pay

¹¹ As noted above (p. 20), only the General Counsel filed exceptions to the judge’s conclusions concerning Ratliff, seeking an additional rationale for the violation, which the Board found. The Company did not respond to that exception.

because, under Article 20.6, Ratliff had been laid off for more than thirty days. (D&O 1 n.3). The Company failed to file exceptions to the judge's finding regarding Ratliff (Company Exceptions dated June 16, 2014, Vol. III, Pleadings pp. 294–97) or a motion for reconsideration to the Board's additional finding. This Court recognized that when no exceptions are filed with the Board to an adverse decision and recommended order of an administrative law judge, the Board, pursuant to Section 10(e), may obtain from the circuit court summary enforcement of its order.¹² See *NLRB v. Mooney Aircraft*, 310 F.2d 565, 565 (5th Cir. 1965); see also *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5 (D.C. Cir. 2012) (Board entitled to summary enforcement of findings to which respondent did not except). Similarly, where the respondent does not raise an issue to the Board, including seeking reconsideration of additional findings by the Board, the Court lacks jurisdiction to hear subsequently raised challenges. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665–66 (1982) (Section 10(e) bar on judicial consideration of issues not raised before Board is jurisdictional); accord *NLRB v. U.S. Postal Serv.*, 477 F.3d 263, 270 n.1 (5th Cir. 2007) (failure to file motion for reconsideration with Board barred Court's consideration of issue). As the

¹² Section 10(e) provides in part:

No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Company did not challenge the judge's and Board's conclusions that Ratliff is entitled to severance, this Court lacks jurisdiction to consider any challenges now.

In any event, the Board reasonably concluded that Ratliff was entitled to severance pay under the IATSE CBA. It is uncontested that Ratliff had been employed as a heavy driver by respondent and its predecessors for eighteen years and, along with the rest of the Company's employees, was laid off effective September 1, 2012. It is also uncontested that on November 5, 2012, Ratliff began working for the Air Force as a dispatcher. The Board found that under Article 20.6.1, Ratliff was unemployed for greater than thirty days. (D&O 1 n.3.) Thus, Ratliff was entitled to severance under the IATSE CBA. By refusing to pay it, the Company violated Section 8(a)(5) and (1).

The Company's contention (Br. 12–13) that the Air Force was a "Successor Contractor" is unavailing. Article 20.6.1 states that severance shall be paid when employee have been "involuntarily laid off because of lack of work for a period in excess of 30 days." (D&O 9; GCX 5.) Article 20.6.3 additionally provides that severance pay will not be owed to those employees who are employed by a "Successor Contractor" at Cape Canaveral. (*Id.*) The Board concluded that under Article 20.6.3, the Air Force was not "Successor Contractor" because, by insourcing the work, the Air Force could not be a Successor Contractor. (D&O 11.) Furthermore, the Company's claims that the Board did not consider "the process

and procedure” involved with in-sourcing the VOMS work is irrelevant. (Br. 12–13.) The operative fact is that, logically, the Air Force is not a contractor for itself and therefore is not a “Successor Contractor” under the CBA; how the in-sourcing occurred is irrelevant. Finally, the Company’s contention (Br. 13–14) that Ratliff’s subsequent employment with the Air Force reduces his severance entitlement from eighteen weeks to nine weeks finds no support in Article 20.6.3. The only situations under Article 20.6.3 where an employee’s severance is calculated pro rata are instances where the employee is “reinstated.” (GCX 5.) As the Air Force could not reinstate Ratliff (as he had previously worked for the Company), this argument is meritless.

4. The Company’s other defenses to paying severance are meritless

In addition to its errant claims that the CBAs do not require severance pay, the Company asserts several equally unavailing claims to excuse its failure to pay severance: the Unions failed to request bargaining; the Air Force should pay the severance; it could not pay due to financial difficulties; the parties were at impasse; and that the Company’s decision—as a “plan administrator”—to refuse to pay employees’ severance and vacation pay is somehow privileged as an exercise of business judgment. None have merit.

First, in claiming that the Unions should have requested bargaining, the Company misunderstands the basic principles on which its unilateral midterm

contract modifications are premised. (Br. 26–27.) During the term of a contract, the scope of the duty to bargain is limited. The Company’s unlawful actions under Section 8(a)(5) and (1) arise under Section 8(d)’s restriction that during the term of a collective-bargaining agreement, the Act does not “requir[e] either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period.” 29 U.S.C. § 158(d). Accordingly, an employer's statutory duty is to follow the terms of its collective-bargaining agreement with a union, unless the union consents to change those terms. *Oak Cliff-Golman Baking*, 207 NLRB 1063, 1064 (1973), *enf’d mem.* 505 F.2d 1302 (5th Cir. 1974). As this Court observed, with a contract in effect, a union has “no obligation even to discuss, much less to agree to, any modification.” *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1316 (5th Cir. 1988)

Next, the Company’s claims that the Unions were owed severance and vacation pay from the Air Force find no support in the parties’ collective-bargaining agreement. (Br. 18.) The Air Force is not a party to either the TWU CBA or the IATSE CBA and neither contract contains provisions which predicate the payment of vacation or severance pay on the Air Force’s willingness to pay for or reimburse those amounts to the Company. (GCX 5, 6.) Moreover, the Company sought and received from the Air Force the severance pay owed to

employees; it is unclear why the Company believes the Air Force must again pay severance.¹³

The Company also claims (Br. 25) that it bargained to impasse over severance and therefore was privileged to eliminate severance pay. Because no bargaining took place and the applicable unfair labor practice was a contract modification rather than a refusal to bargain, the Company cannot assert an impasse defense. *See Standard Fittings Co.*, 845 F.2d at 1316 (wage increase was mandatory term of contract; because the union had no duty to bargain over it, the employer could not claim impasse). Indeed, the Company's impasse claim is at odds with its repeated assertions that there is no contract violation because the Unions never requested bargaining (Br. 8, 11, 18, 25, 26, 27); if there was no bargaining, it is unclear how the parties could have bargained to impasse.

Moreover, the Division of Advice memorandum in *WABCO*, 113 L.R.R.M. 1103, 1983 WL 29362 (June 30, 1983), provides no support for the Company's claim.

¹³ The Company's related claim (Br. 19) that "[s]hould an arbitrator or court determine no money is owed, the [Air Force] will require [the Company] to repay the entire amount" is equally unfounded. There is no arbitration because the Company has precluded it on procedural grounds. It is also unclear what "court" the Company is referencing; obviously if *this* Court denies enforcement with respect to severance, then the Company is correct that it need not pay it and the Air Force would be entitled to reimbursement. If the Company, however, is referencing hypothetical court litigation after enforcement here, it is unclear why the Company believes the Union or employees would seek the severance pay already obtained through this proceeding.

Memoranda issued by the General Counsel's Division of Advice are not Board precedent; they merely explain decisions to issue complaints or not. *Midwest Television, Inc.*, 343 NLRB 748, 762 n.21 (2004) ("Advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the Board"); *Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986) ("the General Counsel's legal position is not the equivalent of Board precedent"). Moreover, *WABCO* provides no support for the Company's position because that employer's implemented last offer came in the context of bargaining for a successor contract, not during the term of an effective collective-bargaining agreement. 1983 WL 29362, at *1–2. In contrast, here, the Company and the Unions were fully within the terms of their collective-bargaining agreements.

The Company's claims (Br. 23–24) that its financial difficulties brought on by its costs in combating the Air Force's decision to in-source the VOMS contract and its loss of revenue from the eventual in-sourcing somehow privileged it to refuse to abide by the its collective-bargaining agreements are equally specious. This Court recognizes that a party to a collective-bargaining agreement may not escape its obligations under that agreement because of financial difficulties. *Standard Fittings Co.*, 845 F.2d at 1315.

Finally, the Company's attempts (Br. 24) to paint itself as a "plan administrator" and that it is entitled to deference in that capacity for failing to

comply with the parties' collective-bargaining agreements or for refusing to remit the funds it has now acquired from the Air Force are meritless. As this plan administrator defense was not advanced before the Board, the Company is now foreclosed from raising it under Section 10(e) (29 U.S.C. § 160(e)). In any event, even assuming the Company is a plan administrator, this Court reviews decisions of plan administrators under an abuse of discretion standard "only when an ERISA plan gives to the plan administrator discretionary authority to construe the plan terms or to determine benefit eligibility." *Weir v. Federal Asset Disposition Ass'n*, 123 F.3d 281, 285 (5th Cir. 1997). Where no such authority exists, the administrator's conclusions are reviewed *de novo* under traditional principles of contract and trust law. *Id.* at 285–86. The Company has not demonstrated that either the collective-bargaining agreements or some other document grants it the discretion to refuse to disburse the severance pay already received from the Air Force. Accordingly, the Company is owed no deference for its "business judgment" in doing so.

E. The Board is Entitled to Summary Enforcement of Its Finding that the Company Unlawfully Failed to Timely Pay Vacation and Lead Pay to IATSE Unit Employees; Those Findings Were Unchallenged Before the Board and the Court Lacks Jurisdiction to Review Them

The Board is entitled to summary enforcement of the portions of its order concerning the Company's failure to pay IATSE lead and vacation pay because the Company failed to file exceptions to the judge's Section 8(a)(5) and (1) findings. (D&O 1 n.3.)¹⁴ The undisputed facts show that the Company's September 14, 2012 payments to the employees in the IATSE unit did not account for the full amount of accrued vacation pay those employees were owed or for lead pay differential for lead employees. The Company's additional payments to employees on April 5, 2013 also failed to fully compensate the IATSE unit lead employees for the lead pay differential owed on their vacation pay. The administrative law judge specifically found that the Company violated Section 8(a)(5) and (1) of the Act by failing to timely pay vacation pay as specified in the IATSE CBA and the Company's own past practice of including lead pay differentials in vacation pay. *See Standard Fittings Co.*, 845 F.2d at 1315–16 (employer's unilateral imposition of wage increase constituted midterm contract modification in violation of Section 8(a)(5) and (1) because its collective-bargaining agreement with the union

¹⁴ The Company's opening brief does not challenge the Board's observation (D&O 1 n.3) that it failed to except to these findings.

explicitly covered “wage increases” and the union was obligated to bargain over set terms and conditions of employment under Section 8(d)).

When no exceptions are filed with the Board to an adverse decision and recommended order of an administrative law judge, the Board may adopt *pro forma* the decision and order and seek summary enforcement of its order under Section 10(c) and (e) (29 U.S.C. § 160(c) and (e)).¹⁵ See *NLRB v. Mooney Aircraft*, 310 F.2d 565, 565 (5th Cir. 1965); *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5 (D.C. Cir. 2012). Section 10(e) of the Act (29 U.S.C. § 160(e)) forecloses a reviewing court from considering any argument not advanced before the Board. That prohibition is jurisdictional. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665–66 (1982). Accordingly, the Board’s finding that the Company acted in violation of Section 8(a)(5) and (1) of the Act by failing to

¹⁵ Section 10(c) provides in part:

In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

timely pay the IATSE-represented employees all of their vacation pay, including lead employee pay differentials, is entitled to summary enforcement by this Court.

In any event, as explained next with respect to the TWU-represented employees, the Company offers no persuasive defense (Br. 15–16) that lead pay was not owed because the VOMS contract terminated. Its claim of mootness regarding vacation pay is addressed in the final section of the brief.

F. The Board Reasonably Concluded that the Company Unlawfully Failed to Timely Pay Vacation and Lead Pay to TWU Unit Employees

Vacation pay, like severance pay, is a mandatory subject of bargaining under Section 8(d) of the Act. *See, e.g., Rapid Fur Dressing*, 278 NLRB 905, 905–06 (1986) (unlawful unilateral change for failing to make vacation fund contributions). It is uncontested that the September 14, 2012 checks issued to employees in the TWU unit by the Company did not fully satisfy the employees’ accrued vacation pay claims under the TWU CBA. It is further uncontested that those claims were not satisfied by the Company until April 5, 2013. Finally, it is uncontested that the Company has never included in either vacation paycheck the pay differential for lead employees.

Under Article 27.3 of the TWU CBA, an employee is owed vacation pay unless he has “been discharged for a cause involving monetary or material loss to the Company.” (D&O 8; GCX 6.) Article 27.7 provides that employees will only

forfeit hours in excess of 180 hours as of September 30 of each year and that the carry over hours do not apply if the Company is “not the successful contractor for the rebid of VOM.” (*Id.*) Finally, Article 31.3 provides that lead employees who perform in that capacity for thirty days or more “shall continue to receive lead pay” “while on holiday, vacation or sick leave.” (*Id.*) The uncontested evidence demonstrated that the Company routinely paid lead employees their pay differential in their vacation pay. (D&O 10.)

The Company has not expressed how its position—that employees did not work so they are not entitled to the lead differential for the vacation hours (Br. 16–17)—comports with this uncontested past interpretation nor the plain language of Article 31.3 stating that lead employees receive lead pay while on vacation. Furthermore, on August 8, 2012, in response to inquiries from the Union, the Company stated that the maximum for accrued vacation would not “kick in” under the TWU CBA until September 30—one month after the August 31, 2012 layoffs. (RX 5.) The Company has not explained, in light of the clear language in Article 27.7 and its prior statements that it would not enforce the 180-hour cap on vacation carryover for TWU employees (RX 5), why it still has not paid all non-lead employees for their unpaid, accrued vacation hours in excess of 180 hours. Finally, Company’s claim (Br. 14), that the TWU CBA was null and void with the end of the VOMS contract is incorrect, because as explained above (p. 30–31), that

language is prospective and does not eliminate the Company's past contractual obligations, including vacation and lead pay previously accrued. Likewise, in claiming that it had no need for lead work after the VOMS contract terminated (Br. 16), the Company ignores that lead pay was owed for vacation hours already accrued by lead employees. Based on this evidence, the Board reasonably concluded that the Company's refusal to include lead pay in its TWU-represented employees' vacation pay constituted an unlawful unilateral midterm contract modification in violation of Section 8(a)(5) and (1).

G. The Board Reasonably Concluded that the Company Unlawfully Failed to Timely Remit Union Dues to IATSE from Employees' September 14, 2012 Vacation Pay Checks

The collection of union dues, much like severance and vacation pay, are mandatory subjects of bargaining within the meaning of Section 8(d) of the Act. *See, e.g., Stevens & Assoc. Construction Co.*, 307 NLRB 1403, 1403 (1992) (failure to remit union dues as specified under parties' collective-bargaining agreement constituted unilateral midterm contract modification within the meaning of Section 8(a)(5) and (d)). The Company acknowledges that it did not remit union dues to IATSE from either the September 14, 2012 or April 5, 2013 payments of accrued employee vacation until April 23, 2013. (Br. 27.) *Atlasburg Machine Co.*, 307 NLRB No. 44, slip op. at 1–2 (1992) (unlawful 7-month delay in remitting union dues). The Company has put forth no explanation or defense as to why such

a delay was justified under the IATSE CBA. Its only defense—mootness—is meritless, as discussed below (p. 48–49). Accordingly, the Board’s finding that this conduct violated Section 8(a)(5) and (1) because it constituted a unilateral midterm contract modification is entitled to enforcement.

H. The Board Reasonably Concluded that the Company Unlawfully Added the Claim Waiver Language to Employees’ September 14, 2012 Vacation Pay Checks Without Bargaining With IATSE

It is uncontested that the Company added the claim waiver language to the September 14, 2012 checks it issued to IATSE unit employees without notice or even an attempt to bargain with IATSE nor has the Company ever challenged that such action was unlawful in the first instance. *See Kaiser-Permanente Med. Care*, 248 NLRB 147, 147 (1980) (employer violated Section 8(a)(5) and (1) by requiring employees to waive overtime pay without first notifying and bargaining with the union). The Company has not made any arguments to this Court concerning the Board’s finding that including the waiver language on the back of employees’ September 14, 2012 vacation pay checks violated Section 8(a)(5) and (1) of the Act because it failed to provide notice and an opportunity to bargain prior to taking such action. (D&O 1 n.3).¹⁶

The Board rejected the Company’s claim that, because it did not enforce the waiver, it did not violate the Act. (D&O 10.) That notification to the Union came

¹⁶ The Board noted that it was unnecessary to pass on whether the waiver language constituted an unlawful contract modification. (D&O 1 n.3.)

three months after employees had received the paychecks and needed to endorse them. Accordingly, the Company's claim that the issue is resolved is contrary to the Board's established requirements to relieve liability. *See Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138–39 (1978) (to relieve liability, respondent's repudiation must be timely, unambiguous, specific to the conduct, and free from other proscribed conduct). Here, the Company may not have enforced the waiver, but it never repudiated its unlawful conduct to the employees. Its related mootness argument, discussed below, should also be rejected.

I. The Board is Entitled to Enforcement of the Portions of Its Order Which the Company Asserts Are Moot and Resolved

The Company claims (Br. 9–10) that certain of its violations of Section 8(a)(5) and 8(a)(1)—its refusal to timely pay non-lead IATSE and TWU employees' vacation pay,¹⁷ refusal to timely remit IATSE union dues, and its unilateral insertion of the claim waiver language on employees' paychecks for IATSE employees—are “moot” and “resolved.” However, numerous decisions of both the Supreme Court and this Court establish that even full compliance with a Board order is no barrier to enforcement. As the Supreme Court long ago stated in *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567–68 (1950):

¹⁷ In its opening brief filed with this Court, the Company does not address the Board's finding that it has not fully compensated several non-lead TWU employees for vacation pay in excess of 180 hours earned prior to the Air Force's termination of the VOMS contract. (D&O 4.)

We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree.

The Supreme Court went on to observe that “[t]he Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices” because enforced Board orders provide the means by which the Board may seek sanctions in contempt for repeated unlawful actions. *Id.*; see *Raven Servs. Corp. v. NLRB*, 315 F.3d 499 (5th Cir. 2002) (employer's compliance with Board order did not prevent Court from granting the Board's enforcement order); *NLRB. v. Mich. Conf. of Teamsters Welfare Fund*, 13 F.3d 911, 919–20 (6th Cir. 1993) (“[T]his rule derives from the Board's interest in having an existing court decree to serve as a basis for contempt proceedings, in the event a renewal of the unfair labor practice occurs after the enforcement order.” (internal quotation marks omitted)). In short, “compliance does not moot an enforcement proceeding, because the Board's orders impose a continuing obligation, and compliance today may evaporate tomorrow.” *NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1163 (7th Cir. 1996).

In this case, the fact that the Company (belatedly) paid its non-lead IATSE employees and most of its non-lead TWU employees for their accrued vacation pay, remitted IATSE union dues almost eight months late, and never enforced the

claim waiver language that it unilaterally placed on the September 14, 2012 vacation paychecks does not alleviate the Company of its burden to establish the absence of such unfair-labor-practices going forward. Enforcement of the Board's Order in this case would practically serve as an assurance that the remittance of lead employees' vacation pay differential and severance pay to employees from both bargaining units will occur without the Company reviving any of its prior unlawful conduct. As numerous courts have recognized, compliance may be temporary, and noncompliance may resume if enforcement is not ordered by a court of appeals. *See NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990) (if a "cease and desist order became moot by virtue of the respondent's discontinuing the specific illegalities that gave rise to the order, such orders would have no force at all").

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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MAY 2015

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

HALLMARK-PHOENIX 3, L.L.C.,)	
)	
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)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Board Case Nos.
Respondent/Cross-Petitioner)	12-CA-90718 &
)	12-CA-94037

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 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 are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 26th day of May, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,802 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 26th day of May, 2015