

Nos. 14-3838-ag, 14-4305-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DOVER HOSPITALITY SERVICES, INC.
A/K/A DOVER CATERERS, INC., A/K/A DOVER
COLLEGE SERVICES, INC.

Respondent

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DOVER HOSPITALITY SERVICES, INC.
A/K/A DOVER CATERERS, INC., A/K/A DOVER COLLEGE SERVICES, INC., A/K/A DOVER GROUP
OF NEW YORK, A/K/A DOVER GROUP, A/K/A QUICK SNACK FOODS, INC.

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This consolidated case is before the Court on the applications of the National Labor Relations Board (“the Board”) for enforcement of two Orders. The first Decision and Order, against Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc. (collectively, “Dover”), issued on September 30, 2014, and is reported at 361 NLRB No. 60 (“*Dover I*”). (A. 80-81.)¹ The second Decision and Order, against Dover Hospitality Services, Inc., a/k/a Dover Caterers, Inc., a/k/a Dover College Services, Inc., a/k/a Dover Group of New York, a/k/a Dover Group, a/k/a Quick Snack Foods, Inc. (collectively, “Dover”), issued on November 5, 2014, and is reported at 361 NLRB No. 90 (“*Dover II*”). (A. 212-13.)

The Board had subject matter jurisdiction over the proceedings in both cases below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Board’s Orders are final and the unfair labor practices occurred in New York. The Act places no time limit on the initiation of enforcement proceedings.

¹ “A.” references are to the deferred appendix. “Br.” references are to Dover’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's findings that Dover violated Section 8(a)(5) and (1) of the Act by twice failing to provide requested information to the Union, and by failing to timely respond to one of the Union's requests for information.

STATEMENT OF THE CASE

The Board has found, in two separate proceedings, that Dover violated the Act by failing to bargain in good faith with Local 1102 of the Retail, Wholesale & Department Store Union, United Food & Commercial Workers Union ("the Union"), the certified bargaining representative of a unit of its employees.

I. PROCEDURAL HISTORY

After an investigation of a charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that Dover had violated Section 8(a)(5) and (1) of the Act by failing to provide relevant information to the Union in response to a January 2011 information request. (A. 72; A. 55-59.) Following a hearing, an administrative law judge found that Dover had violated the Act as alleged. (A. 78.) On review, the Board (Chairman Pearce; Members Griffin and Block) issued a decision on July 12, 2012, affirming the judge's findings ("2012 Decision and Order"). (A. 72.)

After an investigation of another charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that Dover had once again violated Section 8(a)(5) and (1) of the Act by failing to respond to the Union's August 2011 request for relevant information. (A. 206; A. 124-29, 131.)

Following a hearing, an administrative law judge found that Dover had violated the Act as alleged. (A. 210.) On review, the Board (Chairman Pearce; Members Griffin and Block) issued a decision on May 31, 2013, affirming the judge's findings and conclusions, and amending the conclusions to include Dover's failure to respond in a timely manner to the Union's request as a basis for the violation of Section 8(a)(5) and (1) ("2013 Decision and Order"). (A. 205.)

The Board subsequently sought enforcement of both orders in this Court. *See NLRB v. Dover Hospitality Servs., Inc.*, No. 12-4144 (2d Cir. filed Oct. 17, 2012); *NLRB v. Dover Hospitality Servs., Inc.*, No. 13-2307 (2d Cir. filed June 12, 2013). While those cases were pending, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 143 S. Ct. 2550 (2014), which invalidated the recess appointments of Members Griffin and Block. The Court then vacated both orders and remanded the matters to the Board for further proceedings. *See Dover Hospitality Servs.*, No. 12-4144 (2d Cir. July 2, 2014), ECF No. 88; *Dover Hospitality Servs.*, No. 13-2307 (2d Cir. July 2, 2014), ECF No. 90.

Thereafter, on September 20, 2014, a properly constituted panel of the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, concurring) issued the *Dover I* Decision and Order now before the Court, which incorporated the 2012 Decision and Order by reference. Similarly, on November 5, 2014, a properly constituted panel of the Board (Chairman Pearce and Member Schiffer; Member Miscimarra, concurring) issued the *Dover II* Decision and Order now before the Court, which incorporated the 2013 Decision and Order by reference and updated supporting precedent. The Board's findings of fact and conclusions of law in *Dover I* and *Dover II* are set forth below.

II. THE BOARD'S FINDINGS OF FACT

A. Background

The Union represents food service employees working for Dover at the Selden and Brentwood campuses of Suffolk County Community College. As the Board found in both cases (A. 73, 207-08), Dover and the Union were parties to a series of collective-bargaining agreements covering those employees, the most recent of which expired in 2010. Prior to the expiration of the agreement, the Union requested negotiations for a successor contract. (A. 73; A. 14.) The parties first met on January 7, 2010. (A. 73; A. 15.) Director of collective bargaining Dennis Romano represented the Union with David Brijlall, a union representative, Phyllis Steffek, a shop steward and unit employee, and Marianne Hurley, another

unit employee. (A. 73; A. 13, 15, 33, 37-39.) Owner Isaac “Butch” Yamali represented Dover. (A. 73; A. 14-15.)

B. During Bargaining, Yamali Claims Dover Cannot Afford the Current Contract, Let Alone Any Increases

Romano opened negotiations by presenting Yamali with the Union’s written proposals, which included increases in wages and benefits. (A. 73-74; A. 15-16, 34, 39, 64-65.) Yamali responded that Dover “could not afford the current contract, let alone any increases into [the new] contract” proposed by the Union. (A. 74, 207 & n.6; A. 17.) He explained that Dover was not “turning” a profit, its contract to provide food services was expiring, and he was about to renegotiate Dover’s contract with the college. (A. 74; A. 17, 34, 39.) Yamali reiterated that Dover could not afford the current collective-bargaining agreement, asked for a reduction in health-care contributions, and proposed switching employees to another health-care plan arranged by his various business entities. (A. 74; A. 17, 35, 39.) Romano rejected Yamali’s proposal. (A. 74; A. 18.) Yamali responded by reiterating that the current union contract was not affordable and that Dover was not able to make money at the college. (A. 74; A. 18, 35.) He ended the meeting by stating that he would decide whether to continue operating at the college after he met with the college to renegotiate Dover’s contract. (A. 74; A. 18, 35, 39.)

Romano, Brijlall, and Yamali met a second time on April 12, 2010. (A. 74; A. 15, 18-19, 35.) Yamali repeated that Dover was not able to afford the contract

or the Union's proposed increases. (A. 74, 207 & n.6; A. 19, 36.) He stated that Dover was not able to make money and there was nothing to give and nothing to negotiate. (A. 74; A. 19.) Romano stated that Yamali's position was unacceptable and the meeting ended.

The parties met for a third and final time on November 22, 2010. (A. 74; A. 15, 19.) In addition to Romano, the Union's controller and its attorney were also present. (A. 74; A. 19.) Yamali was accompanied by Dover's counsel, Jeffrey Meyer. Yamali proposed that the new contract include a "limited union shop" provision, restricting the collective-bargaining agreement's coverage to four or five employees. (A. 74-75; A. 20.) Romano rejected that proposal and reiterated the Union's demands for increases in wages and benefits. (A. 75; A. 20-21.) Yamali swore and walked out, ending the meeting. (A. 74-75; A. 21.)

C. The Union's January 2011 Request for Information

To evaluate Dover's repeated assertions of an inability to pay, the Union sent a letter on January 5, 2011, requesting the following information about Dover for the years 2005 through 2009: annual state and federal tax returns, audited income statements and balance sheets, and all W-2 and W-3 forms. (A. 75; A. 66, 21-23, 26-28.) In its letter, the Union specified that the requested financial documents were "needed to verify [Dover's] continued position at the bargaining table that the current labor agreement is an impediment to your continued

existence” at the college campuses. (A. 75; A. 66.) Dover never responded to the Union’s letter or provided any of the requested information. (A. 75; A. 22.) The Union filed an unfair-labor-practice charge on January 18, 2011.

D. The Union’s August 2011 Request for Information

Not having received a response to its January information request, the Union mailed a second request for information to Dover on August 3, 2011. (A. 208; A. 100-01, 142-43.) In its letter, the Union requested the same categories of financial documents that it had requested in its January letter for the subsequent year (2010). (A. 208; A. 103-04, 142-43.) In addition, the Union asked Dover to provide those documents for several “also known as” entities that the Union had reason to believe were related to Dover. In its August letter, the Union clarified, as it had in its January request, that it “needed [the information] to verify [Dover’s] continued position at the bargaining table that the current labor agreement is an impediment to [Dover’s] continued existence” at the Brentwood and Selden campuses.

Having received no response to its August 3 request, on August 23, 2011, the Union filed a second unfair-labor-practice charge. (A. 208; A. 104-05.) Then, on September 19, 2012, the day before the scheduled unfair-labor-practice hearing on that charge, counsel for Dover contacted Romano and promised to provide W-2 forms and state and federal tax returns for 2010. (A. 208; A. 105.) Romano explained that those documents would not be fully responsive to the Union’s

request, and asked whether Dover would provide audited income statements, which the Union had also requested. Dover's counsel asserted that he did not have income statements. Romano replied that this was not acceptable.

Later that same day, Dover emailed W-2 forms and one tax return to the Board's regional office, but not to the Union. (A. 208; A. 144-201.) A Board agent at the regional office told Dover that it must send the information directly to the Union, and that its statutory obligation would not be satisfied by the courtesy copy the regional office sent to the Union. (A. 208; A. 133-40.) That same evening, Dover sent a letter to the regional office stating that it would not appear at the hearing scheduled for the following day. (A. 208; A. 141.) In its letter, Dover added that it had "now complied with the Union's request and respectfully submits that the instant matter should be closed."

The hearing took place as scheduled. Dover did not participate. (A. 208; A. 84-85.) Dover never gave any of the requested information directly to the Union. (A. 208; A. 105.) Nor did Dover provide to any party its audited income statements and W-3 forms, or any of the information regarding the "also known as" entities identified in the Union's August 2011 letter. (A. 208; A. 106-10, 144-201.) The one income-tax return that Dover furnished to the Board's regional office pertained to "Dover Gourmet Corp. & Subsidiary Dover Hospitality Services, Inc.," an entity not mentioned in the Union's request. (A. 208; A. 147.)

III. THE BOARD'S CONCLUSIONS AND ORDERS

A. *Dover I*

On September 30, 2014, the Board issued the *Dover I* Decision and Order, finding that Dover had violated Section 8(a)(5) and (1) of the Act by failing to provide the information requested in the Union's January 2011 letter. (A. 80-81.) The Board's Order requires Dover to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 79.) Affirmatively, the Order requires Dover to provide the Union with the information requested in the January letter, and to post a remedial notice.

B. *Dover II*

On November 5, 2014, the Board issued the *Dover II* Decision and Order, finding that Dover had violated Section 8(a)(5) and (1) of the Act by failing to provide the information requested in the Union's August 2011 letter and failing to respond to the letter in a timely manner. (A. 212-13.) The Board's Order requires Dover to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A.

205, 211.) Affirmatively, the Order requires Dover to provide the Union with the information requested in the August letter, and to post a remedial notice.

SUMMARY OF ARGUMENT

Substantial, uncontroverted testimony supports the Board's finding that, in the course of bargaining for a successor collective-bargaining agreement, Yamali repeatedly claimed that Dover could not afford the current agreement's wage rates and benefits, let alone the Union's proposed increases. Having made those assertions, Dover was obligated, under well-established Board and court precedent, to provide, upon request, financial information to the Union so that the Union could evaluate its inability-to-pay claim. Accordingly, in *Dover I*, the Board found that Dover's failure to provide such information in response to the Union's January 2011 letter violated Section 8(a)(5) and (1) of the Act. And, in *Dover II*, the Board found that Dover again violated the Act by failing to timely respond to the Union's second, August 2011 request for updated information, and by failing to provide all of the requested information.

Dover's challenges to the Board's factual findings are untethered from the record evidence, and its legal arguments are baseless to the extent they are not jurisdictionally barred. There is, in particular, no merit to Dover's assertion that the Orders are moot due to compliance, both because it is factually inaccurate and because, legally, compliance does not moot a Board order. For those same

reasons, Dover's request that the Court sanction the Board for seeking enforcement of its Orders is frivolous.

STANDARD OF REVIEW

When a party does not contest an issue on appeal, the Court will summarily enforce that portion of the Board's decision and order. *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1307 n.1 (2d Cir. 1990). With respect to contested issues, the Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; *see also G & T Terminal Packaging*, 246 F.3d at 114. Finally, "[t]his [C]ourt reviews the Board's legal conclusions to ensure that they have a reasonable basis in law." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001).

ARGUMENT**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT DOVER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY TWICE FAILING TO PROVIDE RELEVANT REQUESTED INFORMATION TO THE UNION AND BY FAILING TO TIMELY RESPOND TO THE UNION’S INFORMATION REQUEST****A. An Employer Violates Section 8(a)(5) and (1) when It Fails To Provide Relevant Requested Information to the Union, or To Timely Respond to an Information Request**

Section 8(a)(5) of the Act, read in conjunction with Section 8(d), makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees.² 29 U.S.C. § 158(a)(5) and (d). As part of its duty to bargain in good faith, “[a]n employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative.” *Disneyland Park & Disney’s Cal. Adventure, Divs. of Walt Disney World Co.*, 350 NLRB 1256, 1257 (2007) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)). That includes relevant financial information when, during the course of bargaining, the employer has claimed that it is unable to pay increased wages or other employment terms. *Truitt*

² A violation of Section 8(a)(5) of the Act results in a “derivative” violation of Section 8(a)(1) Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Mfg., 351 U.S. at 151-53; *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 188 (2d Cir. 1991); *Nielsen Lithographing Co.*, 305 NLRB 697, 699 (1991), *enforced sub nom. Graphic Commc'ns Int'l Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). As the Supreme Court has explained: "If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Truitt Mfg.*, 351 U.S. at 152-53; *see also Olivetti Office U.S.A.*, 926 F.2d at 188 ("When dealing with such an integral aspect of labor-management relations, a union should not be required to accept a bald claim of economic hardship at face value."). Therefore, a "refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." *Truitt Mfg.*, 351 U.S. at 153; *accord Olivetti Office U.S.A.*, 926 F.2d at 188.

In determining whether an employer has claimed an inability to pay, the Board evaluates the employer's statements in the context of the particular circumstances of the case; there is no requirement that the employer recite any "magic words." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984). As this Court has explained, "[s]o long as the [employer's] refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the [employer] in

conveying this message is immaterial.” *N.Y. Printing Pressmen & Offset Workers Union No. 51 v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976).

Moreover, an employer’s duty to furnish relevant requested information to the union is not satisfied by providing it to the Board. *See Geiger Ready-Mix Co. of Kan. City, Inc.*, 315 NLRB 1021, 1033 (1994), *enforced in relevant part*, 87 F.3d 1363 (D.C. Cir. 1996). And, finally, an employer separately violates the Act by failing to respond to a request for information in a timely manner. *See Endo Painting Serv., Inc.*, 360 NLRB No. 61, 2014 WL 808073, at *2 (2014), *petition and cross-application filed*, Nos. 14-71316 & 14-71541 (9th Cir.) (briefed but not argued); *Geiger Ready-Mix*, 315 NLRB at 1033; *Columbia Univ.*, 298 NLRB 941, 945 (1990).

B. Dover Had a Duty To Provide the Financial Information the Union Requested To Assess Yamali’s Repeated Claims of an Inability to Pay the Union Proposals

Substantial, uncontroverted evidence supports the Board’s finding (A. 74-75) that, in response to the Union’s bargaining proposals, Yamali repeatedly stated that Dover, which was not “turning a profit,” could not pay the sought-after increases. (A. 17.) In *Dover I*, three union witnesses, including Romano, each testified that Yamali specifically asserted during bargaining that Dover was unable to afford the current union contract, let alone the Union’s proposals. (A. 17-19, 34-36, 39.) In finding that Yamali

made those statements, the Board specifically credited (A. 75) the witnesses' "mutually corroborative" and uncontroverted testimony.³

The Board squarely rejected Dover's assertion, recycled on appeal (Br. 11), that Yamali never "claimed that he was unable to pay the wage and benefit increases sought by the Union," but only expressed that Dover "was simply unwilling to pay the requested increases in light of the economic circumstances in existence at the time." As the Board found (A. 75), there was "simply no record testimony" to support that version of events which, as described, conflicts with three participants' accounts of the bargaining sessions. Yamali never testified at all, much less to contradict those credited accounts. Accordingly, there is no merit to—or evidentiary support for—Dover's chief assertion (Br. 11) that Yamali did not make the statements.⁴

³ Perhaps recognizing the heavy burden it would bear, Dover makes no serious effort to challenge the Board's credibility determination beyond a passing assertion (Br. 13) that the "Board has offered contradictory testimony" as to Yamali's statements. See *G & T Terminal Packaging*, 246 F.3d at 114 (court may not disturb administrative law judge's credibility determinations, affirmed by Board, "unless incredible or flatly contradicted by undisputed documentary testimony").

⁴ In *Dover II*, the Board relied in part on its prior findings in *Dover I* that Yamali had claimed Dover could not afford to pay the Union's proposals, as well as on Romano's uncontroverted testimony to that effect at the *Dover II* hearing. (A. 207-08; A. 100-04.) As in *Dover I*, Yamali did not testify in *Dover II*; indeed, Dover elected not even to attend the hearing. (A. 84.)

Equally well-supported is the Board’s finding (A. 76-77) that Yamali’s statements constituted an inability-to-pay claim sufficient to trigger Dover’s obligation to provide financial information requested by the Union. As the Board explained (A. 77), the case law makes “crystal clear” that statements like Yamali’s—asserting that a company “cannot afford” union proposals—are “functionally equivalent” to statements asserting an “inability to pay.” That analysis is consistent with decisions finding that statements similar to Yamali’s amounted to inability-to-pay claims obligating employers to provide requested substantiating information. *See, e.g., Cent. Mgmt., Inc.*, 314 NLRB 763, 768-69 (1994) (employer claimed it could not afford to pay what it currently paid, or union’s proposals); *Gaucha Food Prods.*, 311 NLRB 1270, 1271-72 & n.2 (1993) (same); *R.E.C. Corp.*, 307 NLRB 330, 331 (1992) (same); *see also Olivetti Office U.S.A.*, 926 F.2d at 183-84, 188 (employer claimed millions of dollars of losses and high labor costs).

Dover’s attempt (Br. 12-14) to counter the Board’s case law by relying on factually distinguishable cases is as ineffective as its counterfactual characterizations of Yamali’s statements. Unlike Yamali’s straightforward assertions of an inability to pay, the Court in *SDBC* found that the contested statements did not concern what the employer could afford

but rather what its investment-company owner would do absent concessions, the owner's unwillingness to operate forever at a loss, and its desire to achieve profitability, all of which amounted to an unwillingness to pay the union's proposals. *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 288-91 (2d Cir. 2013). Likewise, the Court in *Stroehmann* found that, when viewed in context, the employer's statement expressed its position that, due to losses, it "w[ould] not" continue to operate as it had, not that it "c[ould] not" afford to do so. *Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 222 (2d Cir. 1996). Significantly, the Court noted that the employer expressly had disclaimed an inability to pay, referencing its controlling entity's "deep pockets" and desire for the employer to continue to compete in the marketplace. *Id.*

In sum, substantial evidence supports the Board's reasonable finding that Dover had a duty to provide the financial information that the Union requested to assess Yamali's repeated claims of an inability to pay.

C. Dover Failed To Provide the Information Requested in the Union's January 2011 Letter in Violation of Section 8(a)(5) and (1) of the Act

Ample evidence supports the Board's finding (A. 72, 78) that Dover's failure to provide the information requested in the Union's January letter violated Section 8(a)(5) and (1) of the Act. As the Board found (A. 75), and as the January letter explained, the Union sought the requested financial information in order to

assess Yamali's assertions during bargaining that the current contract's rates and the proposed increases were unaffordable. (A. 21-23, 26-28, 66.) As demonstrated above, there is no factual or legal basis for Dover to challenge the Board's finding that it had a duty to substantiate its inability-to-pay claims. Nor does Dover suggest that the particular requested documents were not relevant for that purpose. And, as the record evidence unequivocally establishes, Dover never provided any of the requested information. (A. 22.)

Dover's argument (Br. 15-17) that the Board's *Dover I* Order and application for enforcement are moot, because Dover has complied with the Union's January information request to the extent possible, is baseless. Dover does not—and factually cannot—dispute the Board's finding that it never provided a single document in response to the Union's January 2011 request, which sought three types of financial documents for the years 2005-2009. (A. 78; A. 66.) Nor has it so much as attempted to explain why compliance would be impossible. Moreover, as explained below, even if Dover had provided the information compliance does not moot a Board order, *see* pp. 24-25.

D. Dover Failed To Bargain in Good Faith by Failing To Provide the Information Requested in the Union’s August 2011 Letter, and by Failing To Respond in a Timely Manner

Substantial evidence also supports the Board’s findings (A. 205) that Dover again violated Section 8(a)(5) and (1) of the Act by failing to provide the information requested in Union’s August 2011 letter, and by failing to respond to that request in a timely manner. As shown, in August 2011, the Union again sought to verify Yamali’s asserted inability-to-pay claim by requesting updated financial information as well as information regarding several “also known as” entities.⁵ (A. 101-04, 142-43.) As the Board found, and Dover does not dispute, Dover did not respond to the Union’s August 2011 request for 13 months. When it did, it provided only a portion of the requested information to the Board’s regional office the day before the unfair-labor-practice hearing. (A. 205 & n.2, 208-10; A. 105, 108-09, 133-40.)

⁵ In considering the violations related to the August 2011 request, the Court does not have jurisdiction to consider Dover’s argument (Br. 11) that Yamali never claimed an inability to pay. Dover did not raise that objection before the Board in *Dover II*, as required by Section 10(e) of the Act. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); Dover’s Exceptions to the Decision of the Administrative Law Judge in *Dover II* (A. 202-04); *see also* *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982) (a “Court of Appeals lacks jurisdiction to review objections that were not urged before the Board”); *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 (2d Cir. 2009) (same). In any event, as demonstrated, *see* pp. 16-19, there is no merit to Dover’s claim.

To begin, Dover has never attempted—either before the Board or before this Court—to justify its lengthy delay in responding to the August letter. That delay alone constitutes a separate violation of the Act. *See Endo Painting*, 2014 WL 808073, at *2; *Geiger Ready-Mix*, 315 NLRB at 1033. Accordingly, the Board is entitled to summary enforcement of its finding that Dover’s failure to timely respond to the Union’s August 2011 request for information was an unfair labor practice in violation of Section 8(a)(5) and (1). *See NLRB v. Enjo Contracting Co., Inc.*, 131 F. App’x 769, 770 (2d Cir. 2005); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 68 (2d Cir. 1992); *Springfield Hosp.*, 899 F.2d at 1307 n.1.

With respect to the violation based on failure to provide the requested information, the credited evidence establishes that Dover’s belated response was incomplete and inadequate: it failed to provide audited income statements, any W-3 forms, or any documents regarding the “also known as” entities, all requested in the August letter.⁶ (A. 205 & n.2, 209-10; A. 107-10, 144-201.) Furthermore,

⁶ Relying on the distinguishable *East Dayton Tool & Die Co.*, 239 NLRB 141, 142-43 (1978), Dover erroneously claims (Br. 16-17) that its failure to provide information about the “also known as” entities did not violate the Act. Specifically, Dover claims that the Union’s request was “in the nature of a ‘bargaining’ communication, seeking [Dover’s] position with respect to the Union’s proposals,” rather than a request for information. Dover failed to raise that specific objection before the Board in *Dover I* or *II*, and the Court therefore lacks jurisdiction to consider it. 29 U.S.C. § 160(e); Dover’s Exceptions to the Decision of the Administrative Law Judge in *Dover I* and *Dover II* (A. 68-71, 202-04). In any event, unlike the request in *East Dayton*, which asked *why* the employer had no female employees and very few black employees, the Union’s

Dover does not dispute that it sent the information it did provide only to the Board's regional office. (A. 105, 133-40.) As the regional office advised Dover at the time, Dover had a statutory duty to provide responsive information directly to the Union, and sending the information to the regional office did not satisfy that duty. *See Geiger Ready-Mix*, 315 NLRB at 1033.

Finally, in light of its belated, incomplete response to the August 2011 letter, there is no merit to Dover's assertion that the Board's *Dover II* Order, and corresponding application for enforcement, are moot because it purportedly has complied with the information request to the extent possible. First, there is no dispute that Dover did not respond to the letter in a timely manner. Second, Dover's belated production of information was incomplete. And, having elected not to attend the hearing in *Dover II*, Dover failed to cross-examine Romano or to introduce any evidence supporting its claim that additional responsive information does not exist. Instead, Dover asks the Court to blindly trust its bare assertion that it cannot fulfill its outstanding obligations because the information does not exist. A reviewing court, however, considers only evidence that was before the Board when the agency decided the case. *See* 29 U.S.C. § 160(e) (court determines whether order is supported by substantial evidence in the agency record);

August 2011 request (A. 142-43) unambiguously sought objective financial information about those entities to assess Dover's inability-to-pay claim; it did not call for a subjective response from Dover, let alone a counter proposal.

29 C.F.R. § 102.45 (defining record); Fed. R. App. P. 16(a) (same); *see also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001) (refusing to consider extra-record evidence not before the Board).⁷

In any event, this enforcement proceeding would not, as a matter of law, be moot even if Dover were in full compliance.⁸ *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 569 (1950) (compliance “clearly irrelevant” to enforcement); *accord William J. Burns Int’l Detective Agency, Inc. v. NLRB*, 441 F.2d 911, 914 (2d Cir. 1971) (“The fact, however, that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts.”). The Board’s orders against violators of the Act impose continuing obligations, and therefore it “is entitled to have [any] resumption of the unfair practice barred by an enforcement decree.” *Mexia*, 339 U.S. at 567; *accord NLRB v. Bagel Bakers Council of Greater N.Y.*, 434 F.2d 884, 889 (2d Cir. 1970); *see*

⁷ It is, moreover, well-established that the Board tailors its remedies, if necessary, in compliance proceedings subsequent to enforcement. Therefore, Dover will have the opportunity in a compliance proceeding to prove that no additional responsive documents exist. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901-02 (1984) (approving Board’s policy); *NLRB v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 828 F.2d 936, 939 (2d Cir. 1987) (declining to consider whether corporate merger excused compliance and mooted enforcement; deferring to compliance proceeding); *accord NLRB v. Castaways Mgmt., Inc.*, 870 F.2d 1539, 1544 (11th Cir. 1989) (declining to consider impossibility defense in enforcement proceedings); *NLRB v. Ohmite Mfg. Co.*, 557 F.2d 577, 579 n.5 (7th Cir. 1977) (compliance issues properly considered only after Board order has been enforced).

⁸ As Dover recognizes (Br. 19 n.3), it also has not complied with the mandate in *Dover I* and *II* that it post a remedial notice, as both Orders require.

also *NLRB v. Raytheon Co.*, 398 U.S. 25, 27-28 (1970) (evidence that an employer complied with a Board order does not “give[] any assurance that [the unlawful acts] will not be repeated in the future”). And, given that Dover has twice violated the Act by the same type of unlawful conduct, enforcement of the cease-and-desist portions of the Board’s Orders is particularly appropriate.

E. Dover’s Sanctions Request Is Both Frivolous and Procedurally Flawed

The Court should reject Dover’s frivolous request (Br. 18-19) that the Court impose sanctions on the Board for applying for enforcement of *Dover I* and *Dover II* pursuant to Federal Rule of Appellate Procedure 38. Initially, Dover’s request is procedurally improper because such a request must be made in a separate motion. *See Great Am. Ins. Co. v. M/V HANDY LAKER*, 348 F.3d 352, 354 (2d Cir. 2003) (denying request for Rule 38 sanctions in brief because no separate motion was filed). Substantively, the Court “generally impose[s] such sanctions only in cases of blatant frivolity, bad faith, or repetitive frivolous filings.” *DePasquale v. DePasquale*, 568 F. App’x 55, 56-57 (2d Cir. 2014). As previously set forth, Dover has utterly failed to comply with the request for information at issue in *Dover I*, and has only provided some of the information requested in *Dover II*—to the wrong party and in an untimely fashion. Moreover, even if Dover had complied, the Board would still be privileged to seek enforcement of its Orders. Accordingly, Dover’s sanctions request is entirely lacking in merit.

CONCLUSION

Ample, uncontroverted evidence supports the Board's findings that Yamali repeatedly claimed Dover could not afford the Union's contract proposals, and that Dover violated the Act by failing to respond to, or provide information requested in, union letters seeking to substantiate those claims. The few challenges to the Board's unfair-labor-practice findings that Dover has preserved are factually unfounded and legally unsupported. Accordingly, the Board asks that the Court enter a judgment enforcing the Board's Orders in *Dover I* and *Dover II* in full.

Respectfully submitted,

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