

Nos. 15-1034, 15-1045

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

**HEARTLAND-PLYMOUTH COURT MI, LLC
D/B/A HEARTLAND HEALTH CARE CENTER-PLYMOUTH COURT**

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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici: Heartland-Plymouth Court MI, LLC d/b/a Heartland Health Care Center-Plymouth Court was the respondent before the Board and is the petitioner/cross-respondent before the Court. SEIU Healthcare Michigan was the charging party before the Board. The Board's General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on Heartland's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on January 29, 2015 and reported at 362 NLRB No. 3.

C. Related Cases: The ruling under review has previously been before the Court. On July 15, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against Heartland, reported at 359 NLRB No. 155. Heartland filed a petition for review with this Court (No. 13-1227). The Court placed the case in abeyance pending resolution of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013). On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that the January 2012 recess appointments of Members

Griffin and Block were not valid. On June 27, 2014, the Board set aside the Decision and Order against Heartland and retained the case on its docket for further action. The Board subsequently filed a motion to dismiss Heartland's petition for review, which the Court granted. Following that dismissal, the Board issued the decision on review here, which incorporates the earlier decision by reference.

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**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**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Heartland-Plymouth Court MI, LLC d/b/a Heartland Health Care Center-Plymouth Court to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Heartland. In its Order, the Board found that Heartland violated the National Labor Relations Act by failing to give the union representing its

employees notice and an opportunity to bargain over the effects of Heartland's decision to reduce the hours of employees in the dietary department. (JA 528.)¹ The Board's Decision and Order issued on January 29, 2015, and is reported at 362 NLRB No. 3. (JA 533-34.) That decision incorporates by reference an earlier Board Decision and Order issued on July 15, 2013, and reported at 359 NLRB No. 155. (JA 522-30.)

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), 29 U.S.C. § 160(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

Heartland filed its petition for review on February 13, 2015, and the Board filed its cross-application for enforcement on March 2, 2015. Both Heartland's petition and the Board's cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ "JA" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

An employer is obligated to bargain over the effects of any decision that affects bargaining-unit employees' terms and conditions of employment. Heartland did not give the Union notice and an opportunity to bargain over the effects of its decision to reduce the hours of dietary department employees. Does substantial evidence support the Board's finding that Heartland's failure to provide the Union with notice and an opportunity to bargain over its decision violated Section 8(a)(5) and (1) of the Act?

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by SEIU Healthcare Michigan ("the Union"), the Board's General Counsel issued a complaint alleging that Heartland violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to provide the Union with notice and an opportunity to bargain over Heartland's decision to reduce the hours of dietary department employees. After a hearing, an administrative law judge found the violations of the Act as alleged. On review, the Board affirmed the judge's rulings, findings, and conclusions and adopted his recommended order with some modification. (JA 533

& n.2.) Below are summaries of the procedural history, the Board's findings of fact, and the Board's conclusions and order.

I. THE PROCEDURAL HISTORY

On July 15, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against Heartland, reported at 359 NLRB No. 155. Heartland filed a petition for review with this Court (No. 13-1227). The Court placed the case in abeyance pending resolution of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013). On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that the January 2012 recess appointments of Members Griffin and Block were not valid. On June 27, 2014, the Board set aside the Decision and Order against Heartland and retained the case on its docket for further action. (JA 531-32.) The Board subsequently filed a motion to dismiss Heartland's petition for review, which the Court granted.

On January 29, 2015, the Board issued a new Decision and Order in which it "considered de novo the judge's decision and the record in light of the exceptions and briefs." (JA 533.) The Board "also considered the now-vacated Decision and Order, and . . . agree[d] with the rationale set forth therein." (JA 533.) Accordingly, the new Decision and Order affirmed the judge's rulings, findings,

and conclusions; adopted the judge's recommended Order, as modified; and incorporated its July 15, 2013 Decision and Order by reference. (JA 533.)

II. THE BOARD'S FINDINGS OF FACT

A. Heartland Reduces the Hours of Dietary Employees Without Notifying and Bargaining with the Union

Heartland operates a long-term care and skilled nursing rehabilitation facility in Plymouth, Michigan. (JA 525; JA 107, 123.) The Union represents Heartland's full- and part-time dietary aides and cooks, housekeeping employees, laundry employees, maintenance employees, restorative aides, and certified nursing assistants. (JA 525; JA 40.)

The parties' most recent collective-bargaining agreement, in effect from July 8, 2011 to July 8, 2014, contained a broad management-rights clause under which management had the right, among other things, to determine and change starting times, quitting times, and shifts; to determine the size and composition of the work force; and to determine whether and to what extent work would be performed by employees. (JA 525; JA 152.) In addition, the contract contained a "zipper clause,"² which stated that the parties, for the life of the agreement, agreed to waive the right to bargain over any subject referred to in the agreement "even

² A zipper clause is a common provision precluding a party from requiring the other to bargain about any additional topics during the life of the agreement. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. & its Local 547*, 765 F.2d 175, 180 (D.C. Cir. 1985).

though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.” (JA 525; JA 172.)

Heartland prepares its annual departmental staffing and budgets on a census count of 90 patients. (JA 525; JA 121.) When the census falls below 90, managers adjust staffing schedules downward. In the dietary department, if staff hours must be reduced, manager Cari Mitter seeks volunteers to leave early. If there are not enough volunteers, hours are cut beginning with the least senior employee. (JA 525; JA 121.)

In the fall of 2011, after a state inspection, Heartland faced denial of payment for Medicare and decided to limit its admissions. The census subsequently decreased to about 60 patients. (JA 525; JA 93, 121.) In the dietary department, Mitter decided to reduce employee hours rather than lay off employees. (JA 525; JA 127.) Beginning in September 2011, Mitter cut the hours of 10 dietary employees. (JA 525; JA 127.) Of those 10 employees, Clondia Finley’s hours were reduced from 80 every two weeks to between 54 and 60. (JA 526.) At the same time, Heartland hired a new, full-time dietary employee. (JA 110.) Union steward Brandi Malone met with management and was able to reach agreement on restoring the hours of most of the employees, except for Finley. (JA 526; JA 110.)

Union representative Kim Fowlkes did not learn that Heartland cut full-time dietary employees' hours until informed by an employee during a routine site visit in November. (JA 526; JA 42.) Fowlkes contacted Bret Lucka, the facility administrator, and Karen Szkutnik, the human resources manager. Both told Fowlkes they knew nothing about any reduction in hours. (JA 526; JA 43, 45-46.)

On November 9, 2011, the Union filed a class-action grievance alleging that Heartland's reduction in employee hours violated the collective-bargaining agreement. (JA 526; JA 51.) During a grievance meeting in December, Fowlkes argued that it was wrong to cut the hours of full-time, but not part-time, employees and to hire new employees at the same time. She also complained that management failed to notify her of the hours reduction. (JA 526; JA 54.) Management, for the first time, justified its actions by responding that the patient census decreased from 90 to 60, the facility was losing money, and the State could shut it down. (JA 526; JA 55-56, 60.)

During the meeting, Szkutnik offered to allow Finley to make up hours by working a split shift (working some hours in the morning and returning in the afternoon). Fowlkes rejected this proposal. (JA 526; JA 57.) On December 19, Szkutnik repeated the offer in a phone call with Fowlkes. Fowlkes told Szkutnik that Finley did not want to work a split shift. (JA 526; JA 65.) On December 20, Szkutnik emailed Fowlkes a response to the grievance. In her response, she stated

that during their phone conversation Fowlkes notified her that the Union rejected Heartland's proposed solutions to the reduction in hours and would proceed with arbitration. (JA 526; JA 437.) Fowlkes responded that the issue was not resolved, and that the Union would be willing to drop all charges if Heartland restored employee hours. (JA 526; JA 438.) Neither party made any further proposals to settle the issue.

B. The Parties Go to Arbitration, but the Arbitrator Does Not Reach the Unfair Labor Practice Issue

On December 13, the Union filed an unfair labor practice charge, alleging that Heartland's unilateral changes to employee hours violated the Act. (JA 526; JA 8.) On January 17, 2012, the Regional Director deferred further proceedings to the parties' grievance/arbitration process. (JA 526.) On June 6, 2012, the parties participated in a hearing before the arbitrator.

In his award, the arbitrator framed the issue as "Did the Employer violate the parties' agreement by reducing the regular work hours of Clondia Finley below eight per day and eighty per pay period due to a major continuing drop in resident census?" (JA 526; JA 443.) He found that Heartland did not violate the collective-bargaining agreement and denied the Union's class-action grievance. (JA 526; JA 447.) The parties did not raise the issue of Heartland's responsibility to engage in effects bargaining to the arbitrator, and the arbitrator did not address that issue in his award. (JA 522 n.1, 526; JA 443-47.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge, that Heartland violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects of Heartland's decision to reduce the hours of dietary department employees.

The Board's Order requires Heartland 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 the rights guaranteed them by Section 7 of the Act. (JA 529.) Affirmatively, the Order directs Heartland, on request, to meet and bargain with the Union over the effects of its decision to reduce the hours of dietary employees and, if an understanding is reached, embody the understanding in a signed agreement. The Board also ordered a limited make-whole remedy, generally referred to as a *Transmarine* remedy (because it originated in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)). It requires Heartland to provide a make-whole remedy from the period beginning five days after the date of the Board's Order until one of four events occurs: (1) Heartland bargains to agreement with the Union; (2) the parties reach bona fide impasse; (3) the Union fails to request bargaining within five days of receiving the Board's decision; or (4) the Union fails to bargain in good faith. (JA 523.)

SUMMARY OF ARGUMENT

The Board has long interpreted Section 8(a)(5) of the Act to require that employers bargain with their employees' bargaining representative over the effects of decisions concerning terms and conditions of employment. The distinction between bargaining over a decision and its effects has been recognized by the Supreme Court. Even where the parties' collective-bargaining agreement gives the employer the right to make a certain decision, the employer may still be required to bargain over the effects of that decision. Here, the Board found that Heartland violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain over the effects of Heartland's decision to reduce employee hours.

Applying its longstanding clear and unmistakable waiver doctrine, the Board determined that although the collective-bargaining agreement gave Heartland the authority to reduce employee hours, it did not waive the Union's right to bargain over the effects of that decision. Specifically, the Board found that the "zipper" clause relied upon by Heartland made no reference to effects bargaining and could not have waived the Union's rights to bargain over effects. The Court's contract coverage doctrine applies when matters are covered by the parties' collective-bargaining agreement. Because the effects of the change in hours were not covered by the parties' agreement, the Board properly applied its clear and

unmistakable waiver analysis. Further, the Board found that Heartland implemented its decision to reduce employee hours before notifying the Union of its decision. Because Heartland presented the Union with a *fait accompli*, the Union did not waive its right to bargain by failing to request effects bargaining.

The Board did not abuse its discretion by declining to defer to the arbitrator's decision. Under its court-approved deferral policy set out in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), the Board will defer but only where "the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." *Olin*, 268 NLRB at 574. Here, the parties did not present the issue of effects bargaining to the arbitrator, and arbitrator did not address it. Under these circumstances, the Board did not abuse its discretion by refusing to defer to the arbitrator's decision.

The Board has broad discretion to devise remedies that effectuate the policies of the Act. For almost 50 years, the Board's standard remedy in effects bargaining cases, called a *Transmarine* remedy, has required employers to engage in effects bargaining and provide employees with limited backpay. Contrary to Heartland's claims, *Transmarine* remedies have been required not only in situations involving job loss, but also where employers failed to bargain over the effects of changes to company policies. Further, the Board's *Transmarine* remedy has been routinely enforced by appellate courts, including this one, with backpay

accruing from the date of the Board's decision. Heartland has articulated no reason to justify its request that the remedy be modified so that backpay accrues from the date of the Court's decision rather than the date of the Board's decision.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. While the Board has the authority to interpret collective-bargaining agreements in order to resolve unfair labor practice cases, *see NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court accords "no special deference" to the Board's interpretation of agreements, and decides *de novo* what the contract means. *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991). But the Board's factual findings on matters bearing on the intent of the parties to the contract are entitled to the same deference as any other factual findings. *Id.* at 640; *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986).

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT HEARTLAND VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO GIVE THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN OVER THE EFFECTS OF ITS DECISION TO REDUCE DIETARY EMPLOYEES' HOURS

The parties do not dispute that Heartland had the contractual right to change employee hours without bargaining with the Union. But even where an employer has no obligation to bargain about a decision, it violates Section 8(a)(5) and (1) of the Act by failing to give its employees' bargaining representative advance notice and an opportunity to bargain about that decision's impact on employees' terms and conditions of employment. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981). *See also Vico Prods. Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003); *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972). As shown below, the Board's rule is rational and consistent with the Act and is therefore entitled to great deference from the Court.

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

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."³ In

³ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act

turn, Section 8(d) of the Act, 29 U.S.C. § 158(d), defines the “duty to bargain collectively” as “the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” *See Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 209-10 (D.C. Cir. 2004).

The Board has also long interpreted Section 8(a)(5)’s obligation to engage in collective bargaining as encompassing an obligation to engage in both “decisional bargaining” about an employer’s underlying decision and “effects bargaining” about the effects that an employer’s decision will have on the terms and conditions of employment. *See, e.g., McLoughlin Mfg. Corp.*, 182 NLRB 958, 959 (1970), *enforced sub nom. Int’l Ladies’ Garment Workers Union, AFL-CIO v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972); *Challenge-Cook Bros.*, 282 NLRB 21, 26 (1986), *enforced*, 843 F.2d 230, 232-33 (6th Cir. 1988); *Holiday Inn of Benton*, 237 NLRB 1042, 1042-43 (1978), *enforced in relevant part sub nom. Davis v. NLRB*, 617 F.2d 1264, 1267-70 (7th Cir. 1980). In *First National Maintenance*, the Supreme Court ratified that decisional-bargaining and effects-bargaining distinction by holding that an employer’s decision to terminate part of its business was a core entrepreneurial decision falling outside the scope of Section 8(d)’s mandatory

therefore produces a “derivative” violation of Section 8(a)(1). *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

bargaining subjects, even though the employer retained the distinct “duty to bargain about the results or effects of its decision.” 452 U.S. at 676-77 & n.15, 686. The Court explained that “the ‘effects’ bargaining mandated by § 8(a)(5)” — *i.e.*, mandatory “bargaining over the effects of a decision” — “must be conducted in a meaningful manner and at a meaningful time” and, when warranted, the “Board may impose sanctions to insure [the] adequacy” of such bargaining. *Id.* at 681-82; accord *Dodge of Naperville, Inc. v. NLRB*, No. 12-1032, 2015 WL 4619830, at *3 (D.C. Cir. Aug. 4, 2015).

1. Heartland had a duty to bargain over the effects of its decision to reduce dietary employees’ hours

Applying these principles, the Board properly found (JA 522 n.1, 527) that, although the contract permitted Heartland to reduce employees’ hours without first bargaining with the Union, Heartland was under an independent duty to bargain over the effects of that decision. The Board further found (JA 522, 528) that Heartland failed to provide the Union with notice and an opportunity to bargain over those effects. Instead, Heartland implemented its decision to reduce employee hours in September 2011, without notifying the Union. Union representative Fowlkes did not discover the change until November, when an employee told her about it during a routine site visit. When Fowlkes contacted facility administrator Lucka and human resources manager Szkutnik, both denied knowing anything about a reduction in hours. By failing to “bargain[] over the

effects of a decision . . . in a meaningful manner and at a meaningful time,” *First Nat’l Maint.*, 452 U.S. at 81-82, Heartland violated Section 8(a)(5) and (1) of the Act.

Heartland cites no support for its claims that effects bargaining “is a false issue that simply does not exist. . . where the dispute is over the employer’s contractual rights” (Br. 25) and “makes no sense” in situations where a collective-bargaining agreement is in place (Br. 27). In fact, Heartland’s responsibility to bargain over effects of its decision is a statutory one. *See First Nat’l Maint.*, 452 U.S. at 681 (“‘effects’ bargaining [is] mandated by § 8(a)(5)”); *accord NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 233 (6th Cir. 1988) (duty to bargain over effects “is a statutory duty that derives from §8(a)(5)”). And that statutory responsibility exists whether or not the parties have a collective-bargaining agreement. *See, e.g., Local Union 36, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 83-84 (2d Cir. 2013); *Challenge-Cook Bros.*, 843 F.2d at 233; *Natomi Hosps. of California, Inc. (Good Samaritan Hosp.)*, 335 NLRB 901, 902 (2001).

Moreover, contractual language waiving the Union’s right to bargain over the change in hours “does not constitute a waiver of the right to bargain over that decision’s effects.” *Natomi Hosps.*, 335 NLRB at 903. In other words, “[e]ven when a particular managerial decision is not itself a mandatory subject of

bargaining, the decision's forecasted impact on salaries, employment levels, or other terms and conditions of employment . . . constitute[s] a mandatory subject of collective bargaining." *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996). As the Court has recognized, Heartland's failure to give the Union an opportunity to bargain about the effects of a decision affecting the employees' working conditions effectively "denigrate[s] the Union and the viability of the process of collective bargaining itself, in the eyes of unit employees." *Vico Prods.*, 333 F.3d at 208.

2. The Board reasonably applied its longstanding clear and unmistakable waiver standard

In determining whether Heartland was required to bargain with the Union over the effects of its decision to reduce employee hours, the Board applied its longstanding clear and unmistakable waiver analysis. (JA 522 n.1.) Heartland, relying on *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), claims that it did not violate the Act because the language of the collective-bargaining agreement relieved it of its obligation to engage in effects bargaining. Specifically, Heartland argues (Br. 19) that there is no contractual language or bargaining history showing that the parties intended to treat effects bargaining differently than decisional bargaining. Heartland further argues (Br. 19) that the agreement's "zipper" clause demonstrated "that the parties intended the agreement to be the complete resolution of all 'subjects' addressed in the agreement. The Board, however, properly

rejected Heartland’s argument. As explained below, the Board instead applied its clear and unmistakable waiver analysis and found that nowhere in the collective-bargaining agreement did the Union waive its right to bargain.

Under the Board’s clear and unmistakable waiver analysis, an employer asserting that a union has waived its bargaining rights has the burden of proving a clear and unmistakable waiver. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) (citations omitted), *enforced sub nom. Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001). A finding of waiver may be based on contractual language, bargaining history, or a combination of the two. However, contractual language must be “clear and unmistakable” to be treated as a waiver of statutory bargaining rights. *Local Union 36, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 81-82 (2d Cir. 2013); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). A finding of waiver “requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term” *Provena Hosps.*, 350 NLRB 808, 811 (2007).⁴

⁴ The “clear and unmistakable waiver” standard first appeared in a Board decision shortly after the enactment of the Taft-Hartley Act. *See Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949) (rejecting the contention that a contractual “management functions” clause privileged the employer’s unilateral changes in a pension plan). In the more than 60 years since *Tide Water*, the Board has consistently adhered to the position that contractual waivers of statutory bargaining rights must be clear and unmistakable. *See Provena*, 350 NLRB at 812, and cases

The Board applies the same clear and unmistakable waiver analysis to determine whether a union has waived its right to bargain over the effects of a decision and “has repeatedly held that generally worded management-rights clauses or ‘zipper’ clauses will not be construed as waivers of statutory bargaining rights.” *Id.* at 822. *See also Suffolk Child Dev. Ctr.*, 277 NLRB 1345, 1350 (1985) (zipper clause “does not mean that a union has clearly and unmistakably relinquished its right to bargain over all mandatory subjects of bargaining”).

The Supreme Court approved the clear and unmistakable waiver standard in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12, 709 (1983) in a case involving discrimination under Section 8(a)(3) and (1) of the Act. The Board applied the same standard in a case arising under Section 8(a)(5) which ultimately reached the Supreme Court. *See C&C Plywood Corp.*, 148 NLRB 414, 416 (1964), *enforced*, 385 U.S. 421, 430-31 (1967). The propriety of the “clear and unmistakable waiver” standard was not squarely in issue in the Supreme Court. Nevertheless, the Court stated that “[w]e cannot disapprove of the Board’s approach.” 385 U.S. at 430.

Applying these principles, the Board reasonably found that the Union did not clearly and unmistakably waive its right to bargain over the effects of

cited at n.19 therein. The consistency of the Board’s interpretation of the Act renders it especially worthy of judicial deference. *See Pattern Makers v. NLRB*, 473 U.S. 95, 115 (1985).

Heartland's decision to reduce employee hours. (JA 522 n.1, 527.) Contrary to Heartland's argument (Br. 21-22), the zipper clause (JA 172) makes no reference whatsoever to effects bargaining and falls far short of demonstrating that the Union exercised its right to bargain over the effects of employees' loss of hours. *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003) (noting that employer's actions were "not embraced by the literal language" of the contract).

The zipper clause involved in this case is very different from the clause at issue in the cases cited by Heartland (Br. 22). In *GTE Automatic Electric, Inc.*, 261 NLRB 1491, 1491 (1982), and *CBS Corp.*, 326 NLRB 861, 861 n.4 (1998), the parties agreed to zipper clauses that waived bargaining on all subjects and matters whether specifically referred to or covered in the contract or not. In *Radioear Corp.*, 214 NLRB 362, 362 (1974), the zipper clause waived bargaining over "any subject or matter not specifically referred to or covered" in the contract. In contrast, the zipper clause agreed to by Heartland and the Union provides only that each party "shall not be obligated to[] bargain collectively with respect to any subjects or matters referred to in this Agreement." (JA 172.) Effects bargaining is not "referred to in [the parties'] Agreement" and, therefore, Heartland's argument that the zipper clause waived the Union's right to engage in effects bargaining must be rejected. *See Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 233 (6th Cir. 1988) (finding that although contract allowed employer to make certain

decisions it was “completely silent with respect to the duty to bargain over the *effects* of these decisions”) (emphasis in original).

The Court’s contract coverage doctrine, which Heartland argues the Board should have applied, explicitly presupposes that the parties have exercised, rather than waived, their statutory right to bargain and provides that “[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement, with respect to a matter covered by the contract.” *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836, 838 (D.C. Cir. 1993). In *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), the Court applied its contract coverage analysis and found that the employer had no duty to bargain over either the decision to adopt a new policy or the effects of that decision. The Court agreed with Enloe that the management-rights clause “justifie[d] its refusal to bargain over effects because the agreement authorized Enloe to ‘implement’ its mandatory on-call policy.” 433 F.3d at 838.

Unlike the management rights clause at issue in *Enloe*, the clause in this case does not give Heartland the right to “implement” reductions in employees’ hours. (JA 152.) Nor does Heartland contend that the management rights clause justified its refusal to bargain over effects. As discussed above, the parties’ agreement fails to address effects bargaining at all. Because the effects of the change in hours are not matters that were covered by the parties’ agreement, the contract coverage

doctrine does not play a role, and the Board reasonably applied its clear and unmistakable waiver doctrine.

3. The Board reasonably found that the Union did not waive its right to bargain over the reduction in hours because Heartland presented the Union with a *fait accompli*

Heartland contends (Br. 30-33) that even if it had an obligation to bargain over the effects of its decision to reduce the hours of dietary employees, the Union failed to demand bargaining and thereby waived its right to bargain. The record evidence, however, supports the Board's finding that Heartland presented the Union with a *fait accompli*. Therefore, Heartland's defense fails, and the Board is entitled to enforcement of its order. *See Regal Cinemas*, 317 F.3d at 314.

Under Section 8(a)(5) of the Act, "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 682 (1981). As the Court has noted, "pre-implementation notice is required to satisfy the obligation to bargain over the effects' of a decision that impacts conditions of employment." *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003) (quoting *Los Angeles Soap Co.*, 300 NLRB 289, 289 n.1 (1990)). Further, an employer may not avail itself of a waiver defense where it presents the union with a *fait accompli*. "Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919

(D.C. Cir. 1972). *See also Dodge of Naperville, Inc. v. NLRB*, No. 12-1032, 2015 WL 4619830, at *3 (D.C. Cir. Aug. 4, 2015); *Regal Cinemas*, 317 F.3d at 314; *NLRB v. Roll & Hold Warehouse & Distribution Co.*, 162 F.3d 513, 519-20 (7th Cir. 1998); *Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1259-60 (6th Cir. 1995); *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

The Board reasonably concluded that Heartland presented the Union with a *fait accompli*. Heartland did not provide the Union with “pre-implementation notice” of the reduction in hours, as required. *See Vico Prods.*, 333 F.3d at 208. Instead, Heartland provided no notice at all. The undisputed testimony shows that union representative Fowlkes first learned of the reduction in hours from an employee, two months after the change was implemented. (JA 522 n.1, 526.) Fowlkes contacted administrator Lucka and human resources manager Szkutnik, and both told her they knew nothing of any reduction in hours. (JA 526; JA 45-46.) Another month went by before management confirmed the change in hours during a grievance meeting. (JA 527.)⁵ Thus, the record shows that Heartland failed to provide any notice, much less “notice that allow[s] reasonable scope for bargaining.” *Int’l Ladies’ Garment Workers*, 463 F.2d at 919. On the basis of these uncontested facts, the Board reasonably concluded that Heartland presented

⁵ Contrary to Heartland’s claim (Br. 20), this case is distinguishable from *Enloe*, where the employer announced the policy in advance of implementation, and the union failed to request effects bargaining. *See Enloe*, 433 F.3d at 839.

the Union with a *fait accompli*, which precluded pre-implementation bargaining. Accordingly, Heartland cannot assert that the Union waived its right to bargain over effects by failing to demand bargaining.

Moreover, contrary to its claim (Br. 30-31), Heartland failed to show that the parties engaged in effects bargaining. Rather, the Board found that testimony at the arbitration hearing “was not sufficiently developed to show . . . that [Heartland] engaged in effects bargaining.” (JA 522 n.1.) Specifically, the Board found that while union steward Brandi Malone testified that she met with management after Heartland reduced employee hours and reached agreements regarding some employees, she could not recall the details of the agreements. Nor did she offer any specifics regarding the meetings with management. (JA 526; JA 110, 112.) Heartland did not call any members of management to testify about their discussions with Malone or any agreements reached. (JA 528.) Thus, the Board reasonably found that the testimony was “not sufficiently developed” to show that the parties engaged in effects bargaining. (JA 522 n.1.)

B. The Board Did Not Abuse Its Discretion by Declining to Defer to Arbitration

Section 10(a) of the Act, 29 U.S.C. § 160(a), provides that the Board’s authority to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise” When presented with a complaint implicating

events that have been reviewed by an arbitrator, the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964).

The Board will defer to arbitration awards, but only if certain conditions are met. Under the Board's seminal decision in *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955), deferral to an arbitration award is appropriate if the arbitration proceedings were fair and regular, the parties agreed to be bound, and the arbitrator's decision is "not clearly repugnant" to the policies of the Act. In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board affirmed its *Spielberg* standards and added that it would require that "an arbitrator has adequately considered the unfair labor practice." This standard is met if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." *Olin*, 268 NLRB at 574.⁶

Before the Board, the party opposing deferral has the burden of demonstrating that the arbitration at issue did not satisfy at least one of the above requirements. *Olin*, 268 NLRB at 574. The Court reviews the Board's decisions

⁶ The Board revised its post-arbitral deferral standard in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014). The Board adopted the new standard prospectively and, therefore, did not apply it in this case. (JA 533 n.1.)

regarding deferral to arbitration for abuse of discretion. *Util. Workers Union of Am., Local 246, AFL-CIO v. NLRB*, 39 F.3d 1210, 1213 (D.C. Cir. 1994).

The Board did not abuse its discretion by finding that the General Counsel met his burden to show that the arbitrator was not presented with the facts relevant to resolving the unfair labor practice. Indeed, Heartland does not dispute (Br. 24-25) that neither party raised the issue of effects bargaining to the arbitrator.⁷ (JA 522 n.1; JA 107-08, 448-96.) Indeed, the Board found (JA 522 n.1) that “the issue of [Heartland’s] obligation to engage in effects bargaining was not raised in the arbitral hearing or in the parties’ posthearing briefs to the arbitrator,” and the arbitrator’s decision did not address the issue. The Board further found that testimony at the hearing “was not sufficiently developed to show either that evidence relevant to the statutory issue before the Board was presented to the arbitrator, or that [Heartland] engaged in effects bargaining.”⁸ (JA 522 n.1.)

⁷ Heartland’s suggestion (Br. 18) that the Regional Director erred by including an effects bargaining allegation in the complaint was not raised to the Board in its exceptions to the administrative law judge’s decision and cannot be considered by the Court. *See* 29 U.S.C. § 160(e)). *See also* *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009). Further, issues on which no discernible argument is raised in the opening brief are deemed waived by this Court. *See* *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (holding that contentions merely mentioned in a party’s opening brief are deemed waived).

⁸ Thus, this case is unlike *Dennison National Co.*, 296 NLRB 169 (1989) and *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005), cited by Heartland (Br. 29). In *Dennison*, the Board found that the arbitrator received “ample evidence”

There is no requirement that parties submit the unfair labor practice issue to the arbitrator. Rather, the question for the Board is whether the question was submitted and whether arbitrator addressed it. Because the parties did not provide the arbitrator with the facts necessary to resolve the unfair labor practice issue, the Board did not abuse its discretion by declining to defer to the arbitrator's decision. *See J.R. Simplot Co.*, 311 NLRB 572, 573 (1993), *enforced mem.*, 33 F.3d 58 (9th Cir. 1994) (refusing to defer to arbitration award where arbitrator declined to address unfair labor practice allegations in a pending charge); *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), *enforced mem.*, 762 F.2d 990 (2d Cir. 1985), *overruled on other grounds*, *Don Chavas, LLC*, 361 NLRB No. 10, 2014 WL 3897178, *6 n.31 (refusing to defer to arbitral award where "parties presented no evidence concerning what the judge found to be the actual reasons for [employee's] discharge"); *Dick Gidron Cadillac*, 287 NLRB 1107, 1111 (1988), *enforced mem.*, 862 F.2d 304 (2d Cir. 1988) (deferral not warranted where arbitrator not presented with facts necessary to resolve unfair labor practice issue).

Rather than address the Board's finding that the arbitrator was not presented with the relevant facts, Heartland instead makes unsupported legal arguments that the arbitrator "has no occasion to distinguish between a decision and its effects"

relevant to the statutory issue. 296 NLRB at 170. And in *Smurfit-Stone*, the Board found that "the parties presented the arbitrator generally with the facts relevant to resolving the unfair labor practice issue." 344 NLRB at 659.

(Br. 27-28) and “his ability to remedy the problem is plenary.” (Br. 28.) These claims fail to acknowledge the Board’s court-approved deferral policy. As discussed above, under *Olin*, the Board will find that an arbitrator has adequately considered the unfair labor practice and defer to his decision if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin*, 268 NLRB at 574. The Court “has affirmed the Board’s application of *Spielberg/Olin* deference to arbitration awards on several occasions.” *Util. Workers Union of Am., Local 246, AFL-CIO v. NLRB*, 39 F.3d 1210, 1213 (D.C. Cir. 1994). The Board applied its court-approved deferral policy in this case, and Heartland’s arguments to the contrary should be rejected.

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

The Board bears primary responsibility for devising remedies that effectuate the policies of the Act and its remedial authority is a broad discretionary one, subject to limited judicial review. See *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969). As the Supreme Court has noted, “the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by the reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); accord *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738

(D.C. Cir. 2015) (stating that “the court has no business second-guessing the Board’s judgments regarding remedies for unfair labor practices”).

Accordingly, the Board’s choice of remedies is not to be disturbed unless its order represents “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006). In its brief, Heartland does not come close to making the requisite showing.

Having determined that Heartland violated the Act by failing to provide notice and an opportunity to bargain over the effects of its reduction in dietary employees’ hours, the Board was entitled to order a remedy that would effectuate the purposes of the Act. The remedy selected by the Board is one that it first adopted in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968), and subsequently clarified in *Melody Toyota*, 325 NLRB 846, 846 (1998), as the standard remedy for effects bargaining violations. The Board found that “although [Heartland’s] decision did not result in the loss of jobs, it did cause unit employees to incur economic losses.” (JA 523.) And it “deprived the Union of ‘an opportunity to bargain . . . at a time. . . when such bargaining would have been meaningful in easing the hardship on employees’ whose hours were being curtailed.” (JA 523, quoting *Transmarine*, 170 NLRB at 389.)

The traditional *Transmarine* remedy requires an employer to engage in effects bargaining and to provide employees with limited backpay from five days after the date of the Board's decision until the occurrence of one of four specified conditions. *Transmarine*, 170 NLRB at 390. The Board's modified remedy in this case requires Heartland to bargain over the effects of its decision and to pay the employees who suffered economic losses as a result of its unilateral reduction in hours the difference between their normal weekly wages and their weekly wages after the hours reduction from five days after the date of the Board's decision until the occurrence of one of four specified conditions. Bargaining must take place and backpay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the Union fails to request bargaining within five days after receipt of the Board's decision or to commence negotiations within five days of the employer's notice of its desire to bargain; or (4) the Union ceases to bargain in good faith. (JA 523.)

By modifying the *Transmarine* remedy to conform to the specific loss here—loss of wages due to Heartland's reduction of employee hours—the Board chose a remedy designed to “recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences” for Heartland. (JA 523.) The modified remedy “is more appropriately tailored to the violation here and will better effectuate the policies of

the Act.” (JA 523.) *See also Rochester Gas & Elec. Corp.*, 355 NLRB 507, 507 (2010), *enforced sub nom. Local Union 36, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 90-91 (2d Cir. 2013) (awarding modified *Transmarine* remedy for change to employees’ use of company vehicles).

Contrary to Heartland’s claim, *Transmarine* remedies are not solely used in situations involving job loss. While the traditional *Transmarine* remedy is typically used to award limited backpay in cases in which an employer failed to bargain over the effects of a decision to close a facility, the Board has also applied a modified *Transmarine* remedy in cases in which employees suffer economic losses other than loss of employment. *See Local Union 36*, 706 F.3d at 90-91 (enforcing *Transmarine* remedy where employer failed to bargain over effects of decision regarding employees’ use of company vehicles); *Columbia College Chicago*, 360 NLRB No. 122, 2014 WL 2612995, at *4 (ordering modified *Transmarine* remedy where employer failed to bargain over effects of unilateral change resulting in part-time employees’ loss of course-cancellation fee); *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1040, 1045 (1990) (ordering *Transmarine* remedy where employer failed to engage in effects bargaining over sale of facility where successor retained all unit employees).

Finally, even though for almost 50 years the Board has applied its *Transmarine* remedy from the date of the Board’s decision, Heartland asks the

Court to modify the Board's remedy so that backpay accrues from the date of the Court's decision. Heartland has articulated no reason for the remedy to be modified. *See NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1291 (7th Cir. 1989) (rejecting employer's argument that *Transmarine* remedy should begin to accrue from date of court decision because case did not "present any novel question of law"). Moreover, courts routinely enforce Board decisions in which the remedy includes a limited *Transmarine* backpay order, with backpay accruing from the date of the Board's decision. *See, e.g., Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 90 (2d Cir. 2013), *cert. denied sub nom. Rochester Gas & Elec. Corp. v. NLRB*, 134 S. Ct. 2898 (2014); *Sea-Jet Trucking Corp. v. NLRB*, 221 F.3d 196 (D.C. Cir. 2000) (unpublished per curiam), *enforcing* 327 NLRB 540 (1999).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny Heartland's petition for review.

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August 2015

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

HEARTLAND-PLYMOUTH COURT MI, LLC)	
d/b/a HEARTLAND HEALTH CARE)	
CENTER-PLYMOUTH COURT)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1034 & 15-1045
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CA-070626
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,729 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 14th day of August, 2015

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

HEARTLAND-PLYMOUTH COURT MI, LLC)	
d/b/a HEARTLAND HEALTH CARE)	
CENTER-PLYMOUTH COURT)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1034 & 15-1045
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CA-070626
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 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 that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben
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Dated at Washington, DC
this 14th day of August, 2015

STATUTORY ADDENDUM

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1. NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for

believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section 8(d) of the Act (29 U.S.C. § 158(d)) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and

conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and

conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. 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. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the

court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.