

Nos. 15-2285, 15-2592

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

THE FINLEY HOSPITAL

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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SUMMARY OF THE CASE

The National Labor Relations Board seeks enforcement of its Order against the Finley Hospital (“the Hospital”). Certain portions of that Order are uncontested and therefore entitled to be summarily enforced. With regard to the remainder of the Board’s Order, the Board found that the Hospital violated the Act by unilaterally discontinuing nurses’ annual pay raises. It is well settled that, when a collective-bargaining agreement expires, an employer must bargain with a union before altering the status quo; it is also well established that this post-expiration status quo is defined by the substantive terms of the collective bargaining agreement. Here, the text of the parties’ agreement specifically provides for a series of annual raises, to be paid on nurses’ anniversary dates. Although parties may waive an employer’s obligation to maintain the status quo, the Board found no evidence that the parties had “clearly and unmistakably” agreed to such a waiver: the language of the parties’ contract does not mention when the nurses’ annual raises shall cease or grant the employer the authority to terminate them. Thus, by discontinuing those raises without bargaining, the Hospital violated the Act. By extension, the Hospital also violated the Act by announcing those unlawful changes to its employees.

If the Court grants the Hospital’s request for oral argument, the Board requests that it be allowed to participate and be allotted an equal amount of time.

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The Board agrees with the Petitioner regarding the basis for the Court's subject matter jurisdiction over this proceeding.

STATEMENT OF THE ISSUES PRESENTED

- I. Whether the Board is entitled to summary enforcement of its uncontested findings that the Hospital violated Section 8(a)(5) and (1) of the Act when it failed to timely provide requested information to the Union and to offer to bargain a reasonable accommodation of the Union's request.

WCCO Radio, Inc. v. NLRB, 844 F.2d 511 (8th Cir. 1988)

NLRB v. Bolivar-Tees, Inc., 551 F.3d 722 (8th Cir. 2008).

- II. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing nurses' annual pay raises and violated Section 8(a)(1) by announcing this unlawful unilateral change to employees.

Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125 (D.C. Cir. 2001), *enforcing AlliedSignal Aerospace*, 330 NLRB 1216 (2000).

NLRB v. General Tire & Rubber Co., 795 F.2d 585 (6th Cir. 1986).

Marion Mem. Hosp., 335 NLRB 1016 (2001), *enforced*, 321 F.3d 1178 (D.C. Cir. 2003).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by Service Employees International Union, Local 199 (“the Union”),¹ the Board’s General Counsel issued a complaint alleging that The Finley Hospital (“the Hospital”) had violated the Act by committing multiple violations of Section 8(a)(1) and (5) of the Act. An administrative law judge held a hearing and, on April 25, 2007, issued a decision and recommended order, dismissing certain allegations and finding merit in others. (JA 292 303.) On June 3, 2015, the Board issued a final Decision and Order, adopting many of the findings of the administrative law judge, with some modification as to reasoning. (JA275-92.)² In disagreement with the judge, however, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to bargain a reasonable accommodation with respect to certain information requested by the Union. (JA 281-83.)

¹ “JA” refers to the Joint Appendix, “BSA” refers to the Board’s Supplemental Appendix, and “Br.” refers to the Hospital’s Opening Brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

² The Board (Chairman Pearce and Member Block, Member Hayes dissenting) issued a prior decision and order in this case on September 28, 2012. *See* JA249-74 (*The Finley Hospital*, 359 NLRB No. 9 (Sept. 28, 2012)). After the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the D.C. Circuit vacated that decision and remanded the case to the Board. On June 3, 2015, the Board issued a new decision and order, which form the basis for the petitions for review and enforcement presently before this Court.

I. THE BOARD'S FINDINGS OF FACT

A. The Parties and Their Collective-Bargaining Agreement

The Hospital operates three facilities in Iowa. (JA 275, 293; JA 34, 43.) In 2003, the Board certified the Union as the exclusive bargaining representative of full-time and regular part-time nurses at all three hospitals. (JA 275; JA 35, 44.)

After lengthy negotiations, the parties executed a one-year collective-bargaining agreement, effective June 20, 2005. (JA 275; JA 304-26.) Article 20.3 of the Agreement sets forth the Hospital's policy regarding nurses' annual raises/payments:

Base Rate Increases During Term of Agreement. For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement will be three (3) percent. If a Nurse's base rate is at the top of the range for his/her position, and the Nurse is not on probation, such Nurse will receive a lump sum payment of three (3) percent of his/her current base rate

(JA 276; JA 317.) During the negotiation of this agreement, the parties never discussed whether these annual raises/payments³ would continue or cease in the event that the agreement expired without a successor agreement in place. (JA 276; JA 70.)

³ Although Article 20.3 provides both annual raises and lump-sum payments, for ease of reference the Board will refer to "annual raises" for the remainder of its Brief.

B. The Hospital Unilaterally Discontinues Annual 3% Raises

The Hospital and the Union began negotiations for a successor agreement on March 28, 2006. (JA 275-76; BSA 1-3.) On June 20, 2006, in the midst of those negotiations, the then-current collective-bargaining agreement expired. (JA 275-76; JA 321.) The next day, the Hospital announced to its employees that it was discontinuing pay raises for nurses represented by the Union. (JA 276; JA 327.) According to a letter sent to employees by the Chairman of the Hospital's Board of Directors, the Hospital was "unable to provide increases to nurses . . . until the date a new contract is reached" "[b]ecause wage increases must be agreed to by both [the Union] and the Hospital." (JA 276, 294; JA 327.) The Hospital did not give the Union notice of this decision or an opportunity to bargain over it. (JA 276, 294; JA 73-75.) In fact, the Hospital did not directly inform the Union of the cessation of annual raises until July 17, 2006, when the Hospital stated during a bargaining session that it would not grant any raises until a new agreement was signed and that, if such raises were eventually granted, they would not be made retroactive. (JA 276, 294; JA 75.) The Hospital reiterated this position several months later at a forum meeting open to staff. (JA 294; JA 372.)

C. The Union Makes a Request for Information Concerning Unit Operations Councils and Nurses' Absence from Work Owing to Work-Related Illnesses and Exposures, and the Hospital Refuses To Comply

Prior to the negotiation of the 2005 collective-bargaining agreement, the Hospital established Unit Operations Councils (UOCs). (JA 279.) The Hospital intended for these committees to provide staff with the opportunity to discuss day-to-day operations, quality, and safety. (JA 279.)

On April 26, 2006, the Union made an information request of the Hospital, asking that it provide the Union various information, including information about the UOCs as well as about nurses' absences from work owing to work-related illnesses and exposures and the replacement of nurses who called out sick owing to the mumps. (JA 279.) Although the Hospital substantially complied with the Union's other requests, the Hospital specifically refused to provide this information. (JA 279.)

D. The Hospital Terminates Nurse Gina Gross; the Union Makes a Request for Information About the Complainants Against Gross and Files a Grievance; the Hospital Refuses To Comply with the Union's Request

On June 22, 2005, the Hospital terminated Nurse Gina Gross for behavior disruptive of "a fellow employee(s) [sic] performance of their duties" and causing "dissatisfaction of care for a patient and/or their family members and friends."

(JA 281.) The disciplinary notice cited five complainants: three coworkers and two family members of patients who had received care from Gross. (JA 281.)

In aid of filing a grievance, the Union requested information relevant to Gross's termination, including the names and contact information of the complainants against her. (JA 281.) Thereafter, the Union filed a grievance contesting Gross's termination. (JA 281.)

The Hospital provided some of the requested information but refused to provide the names and contact information of the complainants, citing confidentiality concerns. (JA 281.) It made no attempt to bargain over an arrangement that would provide the Union with the information it needed while addressing the Hospital's confidentiality concerns. (JA 281.) Although the Hospital eventually provided the names of the employees who had complained about Gross, the Hospital never provided the names of the complaining family members. (JA 281.) Ultimately, the grievance went to arbitration, where an arbitrator sustained the Hospital's discharge of Gross, citing a "flurry of complaints about Gross' interpersonal relations from coworkers, as well as patients and their families." (JA 281.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member McFerran, Member Johnson dissenting) found, in agreement with the administrative law

judge, that the Hospital had violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing the nurses' annual pay raises. The Board reasoned that "the term and condition of annual pay increases in specified amounts, and the Respondent's duty to continue to pay such increases pending negotiation of an agreement, was established by the parties' collective-bargaining agreement." (JA 276.) The Board distinguished, however, "between the employer's *contractual* obligation (if any) to maintain a particular term and condition post-expiration and the employer's statutory obligation to do so." (JA 277) (emphasis in original.) Quoting the Supreme Court, the Board described the distinction as "elemental." (JA 277).⁴

Examining the durational language contained in Article 20.3 of the parties' collective-bargaining agreement, the Board acknowledged that the language "clearly limit[ed]" the employer's contractual obligation to provide annual raises to the one-year term of the collective-bargaining agreement. (JA277.) But the Board saw nothing in Article 20.3 or any other part of the agreement that clearly and unmistakably waived the employer's *statutory* duty to continue granting the nurses annual raises after the agreement's expiration. In particular, the Board found that Article 20.3 did not suffice as a clear and unmistakable waiver because that article "do[es] not mention post-expiration employer conduct in any way, much less

⁴ JA 277 (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991)).

expressly permit unilateral employer action.” (JA 277.) “Thus,” the Board wrote, “the [Hospital] has failed to prove a waiver of its obligation to maintain the status quo established by the expired collective-bargaining agreement.” (JA278.) The Board accordingly concluded that the Hospital violated Section 8(a)(5) and (1) of the Act when it unilaterally discontinued that benefit without making any effort to bargain with the Union. (JA 279.) By extension, the Board found that the Hospital also violated Section 8(a)(1) when it announced this unlawful unilateral change to its employees. (JA 279.)

The same Board majority found two additional violations relating to information requests made by the Union. First, the Board found that the Hospital had violated Section 8(a)(5) and (1) of the Act by refusing to provide and/or timely provide the Union with information concerning the UOCs, nurses who were out sick due to work-related illnesses and exposures, and the replacement of nurses who called out sick owing to the mumps. (JA 279-81.) Second, the Board found that the Hospital had violated Section 8(a)(5) and (1) by refusing to offer, or failing to timely offer, an accommodation in response to the Union’s request for the names and contact information of the complainants against employee Gross. (JA 281-83.)

To remedy the Hospital’s unfair labor practices, the Board ordered the Hospital to cease and desist from engaging in the violations found and from, in any

like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act. (JA 284.)

Affirmatively, the Board ordered that the Hospital bargain with the Union before implementing any changes in its employees' terms and conditions of employment; resume the 3% annual pay raises and lump-sum payments that the Hospital discontinued in June 2006; make employees whole for any losses caused by the Hospital's unlawful discontinuation of the 3% annual pay raises and lump-sum payments; and furnish the Union with the requested information concerning UOCs and absences caused by nurses' work-related illnesses. Given that the grievance and arbitration of Gross's termination had already concluded, the Board specifically refrained from ordering the Hospital to provide information related to those proceedings, unless the Union could state a present need for the information. (JA 284-85.)

STANDARD OF REVIEW

In review proceedings, this Court "must defer to NLRB decisions provided they are 'not irrational or inconsistent with the Act.'"⁵ This includes deferring to the Board's interpretation of its own precedents.⁶ Accordingly, this Court will

⁵ *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001) (quoting *NLRB v. Fin. Inst. Emps.*, 475 U.S. 192, 202 (1986)).

⁶ *See, e.g., Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006) ("As we have repeatedly held in considering this kind of challenge, an 'agency's

enforce a Board order if the Board has “correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole, even if [the Court] might have reached a different decision had the matter been before [the Court] *de novo*.”⁷ “[T]he Court will conduct a *de novo* review,” however, “of any contract interpretation engaged in by the Board.”⁸

“[I]t is well established that the NLRB has ‘broad authority to construe provisions of the Act.’”⁹ In passing the Taft-Hartley Act, “Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.”¹⁰ Accordingly, deference is warranted to “the Board’s interpretation of the scope of the bargaining obligation under Section 8(d) of the

interpretation of its own precedent is entitled to deference.”); *Global Crossing Telecomm. v. F.C.C.*, 259 F.3d 740, 746 (D.C. Cir. 2001) (same).

⁷ *NLRB v. Young Women’s Christian Ass’n*, 192 F.2d 1111, 1116 (8th Cir. 1999) (quoting *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 590 (8th Cir. 1997) (internal quotations omitted)).

⁸ *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1215 (8th Cir. 1992) (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991)). See also *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (“We review *de novo* the Board’s contract interpretations that are not based on policy under the Act, but . . . defer to the Board’s interpretation of the Act, so long as it is rational and consistent with that law.”).

⁹ *King Soopers*, 254 F.3d at 742 (quoting *Fin. Inst. Emps.*, 475 U.S. at 202).

¹⁰ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

Act if it is ‘reasonably defensible.’”¹¹ In particular, “[w]hether a party has waived its right to bargain is a question within the Board’s specialized expertise and factfinding authority.”¹²

SUMMARY OF ARGUMENT

In this review proceeding, the Hospital does not challenge the Board’s findings that the Hospital unlawfully failed to provide certain information to the Union and failed to offer to bargain an accommodation of the Hospital’s confidentiality concerns. The Board is accordingly entitled to summary enforcement of these violations.

The Hospital focuses its attack upon the Board’s finding that it violated the Act by unilaterally discontinuing nurses’ pay raises upon the expiration of the parties’ collective-bargaining agreement. The Hospital characterizes (Br. 8) the Board’s decision as “turn[ing] established doctrine on its head,” when in actuality the Board’s decision straightforwardly applied established principles and precedents relating to an employer’s post-expiration duties. The Act imposes a statutory duty upon an employer to bargain with its employees’ representative before making changes to the post-expiration status quo, and it is black-letter law

¹¹ *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983) (quoting *Ford Motor Co.*, 441 U.S. at 497).

¹² *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989) (citing *Am. Distrib. Co.*, 715 F.2d 446, 450 (9th Cir. 1983)).

that “the status quo . . . is defined by reference to the substantive terms of the expired contract.”¹³ The Board thus examined the plain text of Article 20.3 of the parties’ collective-bargaining agreement; and, after disregarding language in Article 20.3 that establishes the duration of the Hospital’s *contractual* obligation to provide benefits, the Board determined that the substantive terms of Article 20.3 defined a post-expiration status quo of annual raises. Accordingly, the Board concluded that the Hospital owed a *statutory* duty to maintain that status quo. In the face of this statutory duty, there is no merit to the Hospital’s claim that the Act prohibited it from continuing to grant annual raises.

The Board similarly relied upon established principles and precedents in rejecting the Hospital’s defense of waiver. It is undisputed that a union’s waiver of its right to the post-expiration continuation of benefits must be “clear and unmistakable.” The precedents interpreting that standard further establish that, owing to the “elemental” difference between contractual and statutory rights, this right is not waived by language merely stating that benefits will be provided during the term of the contract. The contractual language proffered by the Hospital does no more than this, however, and so the Board found that language insufficient to constitute a waiver, in line with settled precedent.

¹³ *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970).

The Hospital evokes a parade of horrors in describing the consequences of the Board's decision for labor relations. In doing so, the Hospital ignores the fundamental reality that the Board's Order does not require the Hospital to provide annual raises in perpetuity; it only requires the Hospital to bargain with the Union before discontinuing them. Furthermore, if it were truly their intention to waive the Union's statutory rights, nothing prevented the parties from clearly and unmistakably expressing that intent in their contract. The Board's longstanding and consistently applied "clear and unmistakable" standard has the virtues of stability, predictability, and promoting clarity and precision in drafting. By contrast, the Hospital's proposed rule of decision requires the Court to make a number of questionable interpretive inferences. Because these inferences are arbitrary, they create uncertainty in the collective-bargaining process and add an additional variable to a process that already has enough moving parts.

Finally, if the Court concludes that the Board correctly found that the Hospital unlawfully made unilateral changes to the status quo, it follows that the Hospital violated Section 8(a)(1) of the Act by announcing those changes to its employees, as the Board additionally found.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

The Board's findings in this case include that the Hospital violated Section 8(a)(5) and (1) by failing to timely provide information concerning its UOCs and nurses' absence from work because of work-related illnesses or exposures (JA 279-81); the Board additionally found that the Hospital violated Section 8(a)(5) and (1) by not offering to bargain a reasonable accommodation of the Union's request for the names and contact information of potential witnesses in the grievance and arbitration of the termination of employee Gross (JA 281-83).¹⁴ The Hospital did not petition for review of these findings, and its Opening Brief does not challenge them. The Board is accordingly entitled to summary enforcement of the relevant portions of its Order.¹⁵

¹⁴ *Parsons Elec. Co. v. NLRB*, 976 F.2d 1167, 1169 (8th Cir. 1992) (“An employer has a duty to bargain collectively with the representative of its employees, and failure to do so is an unfair labor practice. The duty to bargain includes the duty to supply information necessary to intelligently carry out the bargaining process, including information needed to process grievances.”) (citing 29 U.S.C. § 158(a)(5); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 514 (8th Cir. 1988)).

¹⁵ *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) (“The Board is entitled to summary enforcement of the uncontested portions of its order.”) (quoting *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006)).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY DISCONTINUING NURSES’ ANNUAL PAY RAISES AND VIOLATED SECTION 8(a)(1) BY ANNOUNCING THIS UNILATERAL CHANGE TO EMPLOYEES

A. The Hospital Owed a Statutory Duty To Maintain the Status Quo After the Expiration of the Collective-Bargaining Agreement

1. The Hospital owed a duty to bargain with the Union prior to making unilateral changes to the status quo

As set forth in the initial section of the statute, one of the primary purposes of the Act is to “encourag[e] the practice and procedure of collective bargaining.”¹⁶ Section 8(a)(5) of the Act implements this aim by requiring an employer to bargain with its employees’ chosen representative over the terms and conditions of their

¹⁶ 29 U.S.C. § 151.

employment,¹⁷ including *inter alia* their right to pay raises.¹⁸ A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1).¹⁹

Given this bargaining obligation, the employer cannot change its employees' current terms and conditions of employment—the “status quo”—without first bargaining with their chosen representative and attempting to come to agreement. Apart from certain narrow exceptions,²⁰ an employer violates Section 8(a)(5) and (1) if the employer unilaterally alters the status quo without bargaining to

¹⁷ 29 U.S.C. § 158(a)(5). *See also id.* § 158(d) (“[T]o 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.”); *id.* § 158(b)(3) (imposing complementary duty to bargain on employees' chosen representative).

¹⁸ *See* 29 U.S.C. § 158(d) (classifying wages as mandatory subject of bargaining); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1088-89 (8th Cir. 1969) (finding that employer's unilateral pay raises violated the Act).

¹⁹ *See* 29 U.S.C. § 158(a)(1) (“It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of” their statutory rights). *See also, e.g., Am. Oil Co. v. NLRB*, 602 F.2d 184, 186 (8th Cir. 1979); *Standard Oil Co. of Cal. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968).

²⁰ *See NLRB v. Talsol Corp.*, 155 F.3d 785, 794 (8th Cir. 1998) (employer may unilaterally implement if the union refuses to bargain or unreasonably delays in bargaining); *General Tire & Rubber Co.*, 274 NLRB 591, 593 (1985) (permitting unilateral change if “at the time the employer made the changes, the representative did not have majority status or the employer had a good-faith doubt, based on objective considerations, of the representative's continuing majority status”); *Am. Oil Co. v. NLRB*, 602 F.2d 184, 188 (8th Cir. 1979) (union may waive its right to bargain over changes to the status quo though “clear and unmistakable” language).

impasse.²¹ The Supreme Court affirmed this “unilateral-change doctrine” in *NLRB v. Katz*, where the Court held “that an employer’s unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to negotiate].”²²

2. The Hospital’s duty to maintain the status quo extended beyond the expiration of the collective-bargaining agreement and was statutory in nature

With the Supreme Court’s approval, the unilateral-change doctrine “has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.”²³ “Under the NLRA, it is clear that an expired collective bargaining agreement continues to define the

²¹ See *NLRB v. Whitesell Corp.*, 638 F.3d 883, 890 (8th Cir. 2011).

²² 369 U.S. 736, 743 (1962). *Accord Whitesell Corp.*, 638 F.3d at 890 (discussing *Katz*); *NLRB v. Hardesty Co.*, 308 F.3d 859, 864 (8th Cir. 2002) (same).

See also *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (“A unilateral change not only violates the plain requirement that the parties bargain over ‘wages, hours, and other terms and conditions,’ but also injures the process of collective bargaining itself. ‘Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.’”) (quoting *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

²³ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)).

status quo as to wages and working conditions, and that ‘[t]he employer is required to maintain that status quo . . . until the parties negotiate to a new agreement or bargain in good faith to impasse.’”²⁴ As the Supreme Court has observed, preserving the status quo post-expiration promotes the process of collective-bargaining: “[f]reezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.”²⁵

Importantly, this post-expiration “maintenance-of-status-quo obligation” derives from the Act, not the contract.²⁶ Even though the terms and conditions of the status quo are “defined by reference to the substantive terms of the expired

²⁴ *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (quoting *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981)). See also *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (“If an employer enters into a contract with a union . . . the employer generally has a duty to continue to bargain with that union after the contract expires and to maintain the status quo during bargaining.”) (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998)).

Cf. Litton, 501 U.S. at 199-200 (notwithstanding the unilateral-change doctrine, no-strike and arbitration clauses do not survive expiration of the collective-bargaining agreement); *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481-82 (6th Cir. 2002) (management rights clause does not survive expiration of collective-bargaining agreement).

²⁵ *Laborers Health & Welfare*, 484 U.S. at 544 n.6 (1988).

²⁶ *AlliedSignal Aerospace*, 330 NLRB 1216, 1216 (2000). See also *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (“[T]he unilateral change doctrine is premised on a statutory right.”).

contract,”²⁷ those “terms and conditions continue in effect by operation of the NLRA,” not by operation of the contract.²⁸ The Supreme Court described this distinction between contractual and statutory rights “as elemental”:

Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory duty to bargain, those terms and conditions no longer have force by virtue of the contract. . . . They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.²⁹

“Thus, an employer’s failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement” does not constitute an actionable breach of contract under Section 301 of the Labor Management Relations Act³⁰; rather, it is a statutory violation “in breach of

²⁷ *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970).

²⁸ *Litton*, 501 U.S. at 206. *See also Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993) (“A collective bargaining agreement terminates on its expiration date like any other contract; however, the employer is required to maintain the status quo unless and until a new agreement is reached or the parties negotiate in good faith to impasse.”); *Rayner v. NLRB*, 665 F.2d 970, 977 (9th Cir. 1982) (“those terms and conditions established by the contract . . . survive the contract,” but “an employer’s contractual obligations cease with the expiration of the contract”) (quoting *Bay Area Sealers*, 251 NLRB 89, 90 (1980)).

²⁹ *Litton*, 501 U.S. at 206.

³⁰ *See* 29 U.S.C. § 185 (“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties.”). *See also Derrico v. Sheehan Emerg. Hosp.*, 844 F.2d 22, 25 (2d Cir.

sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act.”³¹

B. The Board Correctly Determined that the Hospital Violated the Act By Unilaterally Changing the Status Quo of Annual Pay Raises

1. The substantive terms of Article 20.3 established a post-expiration status quo of annual pay raises

The Board accurately determined that Article 20.3 established “a status quo of annual raises.” (JA 276.) In making this determination, the Board relied upon the specific text of Article 20.3. The Board was thereby following the principle, articulated by this Court in *Hinson v. NLRB*, that “the status quo is . . . defined by reference to the substantive terms of the expired contract.”³²

That principle is well illustrated by *Intermountain Rural Electric Association v. NLRB*,³³ in which the Tenth Circuit confirmed that the language of the collective-bargaining agreement defines the specific terms of the status quo. As in the present case, the parties in *Intermountain Rural* agreed to a one-year collective-

1988) (“When a complaint alleges a claim based on events occurring after the expiration of a collective bargaining agreement, courts have held that section 301 cannot provide a basis for jurisdiction.”); *id.* (collecting cases).

³¹ *Laborers Health & Welfare*, 484 U.S. at 544 n.6.

³² 428 F.2d 133, 139 (8th Cir. 1970).

³³ 984 F.2d 1562 (10th Cir. 1993). *Accord Emps. United Labor Ass'n v. Douglas Cty.*, 816 N.W.2d 721, 726-27 (Neb. 2012) (applying *Intermountain Rural Electric Association* to Nebraska collective-bargaining law).

bargaining agreement.³⁴ According to the specific terms of that agreement, the employer would pay “one hundred percent (100%)” of its employees’ medical and dental premiums.³⁵ Upon the agreement’s expiration, the employer “announced that . . . [it] would pay the new premiums only to the extent of the dollar amount it paid under the Agreement.”³⁶ Given the clear terms of the parties’ agreement, the Board found this refusal to pay “one hundred percent (100%)” of its employees’ premiums an unlawful unilateral change to the status quo.³⁷

The Tenth Circuit enforced the Board’s Order. In rejecting the employer’s challenge, the Tenth Circuit emphasized that it is “the contract language itself, which defines the status quo”:

[T]he contract language itself . . . explicitly provided that [the employer] would pay, not a fixed dollar amount, but a maximum of 100% of the health and dental premiums as established by two plans. Although the contract language clearly places a limitation on [the employer’s] financial liability, no particular dollar figure is identified. It follows that when the dollar amount of those rates increases, so too does [the employer’s] maximum dollar obligation.³⁸

³⁴ *Intermountain Rural Elec.*, 984 F.2d at 1564.

³⁵ *Id.*

³⁶ *Id.* at 1565.

³⁷ *Id.* at 1566, 1570.

³⁸ *Id.* at 1567.

The Tenth Circuit concluded that the employer “paid 100% of its employees’ medical and dental insurance premiums during the term of the Agreement, and therefore, to preserve the status quo, was required to pay 100% of the new premiums upon expiration of the Agreement.”³⁹

Consistent with this precedent, the Board determined the status quo in the instant case by referring to the specific, substantive terms of the parties’ collective-bargaining agreement. (JA 276.) In making this determination, the Board disclaimed any reliance upon the Hospital’s past practice of awarding nurses annual pay raises (JA 279 n.12); instead, the Board found that the status quo “was established by the parties’ collective-bargaining agreement” (JA 276), which reads:

Base Rate Increases During Term of Agreement. For the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation, during the term of this Agreement will be three (3) percent.

(JA 317.) In accord with established precedent, the durational language contained in Article 20.3 did not factor into the Board’s determination of the status quo. It is the substantive terms of the expired contract that define the status quo.⁴⁰ The Board thus focused upon the substantive terms of Article 20.3, including the amount and timing of nurses’ annual pay raises, rather than the non-substantive

³⁹ *Id.* (emphasis in original).

⁴⁰ *See Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970).

language, including the duration of the Hospital's contractual obligations: "the Hospital will adjust the pay of Nurses on his/her anniversary date. Such pay increases for Nurses not on probation . . . will be three (3) percent." (JA 317.) The Board naturally and correctly read this language as establishing a "dynamic" status quo of annual 3% wage increases. (JA 274, 277.)

This distinction between substantive and durational terms recognizes the fact, also acknowledged by the D.C. Circuit, that "the *Katz* rule [*viz.*, the unilateral-change doctrine] often presupposes the end of a collective bargaining agreement and guarantees the continuation of existing benefits *as a matter of law*."⁴¹ Thus, if durational language were to "vitiate[] a Union's *statutory* claim to continued status quo benefits," this "would be to drain the unilateral change doctrine of any coherent meaning."⁴² Simply put: language specifying the duration of a party's contractual obligation does not determine the nature of a statutory obligation that only commences after the contract has expired.

In its challenge to this finding, the Hospital unsuccessfully attempts to narrow the scope of the language of Article 20.3. The text of Article 20.3 is not framed narrowly in terms of giving "*one* raise on *one* date" or "a single increase on a single day," as the Hospital claims (Br. 19, 23). Article 20.3 provides that

⁴¹ *Honeywell Int'l*, 253 F.3d at 128 (emphasis in original).

⁴² *Id.*

“[b]ase [r]ate [i]ncreases” and “pay increases” will be made to nurses “on his/her anniversary date.” (JA 317) (emphasis added). Framed as it is in these general terms, the text of Article 20.3 establishes a status quo of periodic pay raises, to be granted annually on each nurse’s anniversary date.

At the same time, it is important to note the limits of the Board’s status quo finding. The Board’s finding does not, as the Hospital claims, grant the Union “non-negotiated, perpetual wage increases after a labor contract expires.”⁴³ The Hospital’s duty to maintain the status quo post-expiration derives from its duty to bargain⁴⁴; thus, the Hospital’s duty only extends until it bargains with the Union and either reaches impasse or some other agreement.⁴⁵ Furthermore, as this Court pointed out in *Hinson*, “[t]he [Board’s] order does not compel [the Hospital] to agree to any new or different contract provision; it simply requires [it] to abide by an obligation once extant by reason of the binding contract but then continuing on

⁴³ Br. 39 (quoting *The Finley Hospital*, 362 NLRB No. 102 (June 3, 2015) (Johnson, Member, dissenting), Slip Op. at p.14).

⁴⁴ See pp. 16-21, *supra*.

⁴⁵ *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986) (“It is well settled that an employer is required to maintain the status quo established by an expired collective bargaining agreement *until the parties reach a new agreement or bargain to an impasse.*”) (emphasis added).

after its expiration, in limited form, not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act.”⁴⁶

The Hospital confuses the issue by citing and discussing (Br. 24-28) numerous cases which did not involve expired collective-bargaining agreements. In the absence of a collective-bargaining agreement, the Board engages in a fact-intensive inquiry to determine whether the past practices of the employer were so well-established as to constitute a status quo that the employer could not alter without first bargaining with its employees’ representative.⁴⁷ And in this regard, the Hospital is correct that, in the absence of a collective-bargaining agreement, “[w]hether a practice is longstanding is a factor to be evaluated in determining whether or not an employer’s practice is an established one.”⁴⁸ But where an employer and a union codify and memorialize workplace policies in a collective-bargaining agreement, the post-expiration status quo is “defined by reference to the substantive terms of the expired contract.”⁴⁹ For this purpose, the duration of the collective-bargaining agreement is irrelevant, as the Tenth Circuit demonstrated by finding a post-expiration status quo based on the terms of a collective-bargaining

⁴⁶ See *Hinson v. NLRB*, 428 F.2d 133, 138 (8th Cir. 1970).

⁴⁷ See, e.g., *Hyatt Corp. v. NLRB*, 939 F.2d 361, 371 (6th Cir. 1991).

⁴⁸ *Id.*

⁴⁹ *Hinson*, 428 F.2d at 139.

agreement that lasted only one year.⁵⁰ Since the substantive terms of Article 20.3 define a post-expiration status quo of annual raises, it was unnecessary to inquire whether those raises were so “longstanding” as to constitute a well-established past practice and part of the status quo. In any event, insofar as the execution of a collective-bargaining agreement “announce[s] . . . a formal policy change” on the part of the employer, a collective-bargaining agreement marks a well-established employer practice.⁵¹

The Hospital’s comparison (Br. 20) of Article 20.3 to the no-strike provision in Article 5A does not alter this analysis. It has long been established that contractual no-strike clauses do not extend beyond a collective-bargaining agreement’s expiration.⁵² This means that the durational language in Article 5A—which provides that the Union will not engage in or encourage a strike “for the duration of this Agreement” (JA 309)—is superfluous: regardless of the presence of that language, the Union’s promise not to strike would terminate as a matter of law upon the expiration of the collective-bargaining agreement. For this reason, the durational language in Article 5A does not support the Hospital’s interpretation

⁵⁰ *Intermountain Rural Elec.*, 984 F.2d at 1564.

⁵¹ *Hyatt Corp.*, 939 F.2d at 371.

⁵² *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (“[I]n recognition of the statutory right to strike, no-strike clauses are excluded from the unilateral change doctrine.”).

of the durational language in Article 20.3, unless the Hospital wishes to argue that the language in both articles is superfluous.

Finally, insofar as the Hospital relies (Br. 16) upon *NLRB v. Frontier Homes Corporation*,⁵³ the legal validity of that case has been vitiated by intervening case law. When this Court decided *Frontier Homes* nearly fifty years ago, it rested its holding upon the premise that “[t]here is nothing in the Act or in the case law interpreting the Act, that authorizes the terms of the contract to extend beyond its expiration date.”⁵⁴ This premise is inconsistent with intervening decisions issued by this Court⁵⁵ as well as the Supreme Court.⁵⁶

⁵³ 371 F.2d 974 (8th Cir. 1967).

⁵⁴ *Id.* at 980.

⁵⁵ See *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (“If an employer enters into a contract with a union . . . the employer generally has a duty to continue to bargain with that union after the contract expires and to maintain the status quo during bargaining.”) (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998)); *Hinson*, 428 F.2d at 139 (“Since the status quo is quite obviously defined by reference to the substantive terms of the expired contract, it follows that, in a limited and special sense, those pertinent contractual terms ‘survive’ the expiration date.”).

⁵⁶ See pp. 18-21 & nn. 23-31, *supra*.

2. The Act required and entitled the Hospital to fulfill its nondiscretionary duty to maintain the status quo and continue providing annual raises

As a defense against its unfair-labor practices, the Hospital claims (Br. 33-37) that the Act prohibited it from continuing to grant nurses annual pay raises after the expiration of the parties' collective-bargaining agreement. This argument is of no force, given the Hospital's nondiscretionary duty to maintain the status quo.

It is true that the granting of benefits "immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect" violates § 8(a)(1) of the Act.⁵⁷ Given the limited ambit of this prohibition, however, this Court has long recognized that an employer can implement wage increases that "are merely aimed at maintaining the status quo."⁵⁸ Here, the

⁵⁷ *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). *See also* 29 U.S.C. § 158(a)(1); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 74 (8th Cir. 1969) (finding violation). *Cf. Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298, 303 (8th Cir. 1972) ("[A]n employer may increase wages or other benefits during an organizational campaign if its action is without any purpose of impinging upon the employees' freedom of choice in selecting or rejecting the Union.").

⁵⁸ *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062 (8th Cir. 1970). *See also id.* ("Where there is a well-established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases.").

substantive terms of Article 20.3 established a post-expiration status quo of annual pay raises. The Hospital was thus both entitled and required to continue providing nurses with those raises after the contract's expiration.

Nor does the record support any suggestion that the Hospital ceased providing annual pay raises out of a good-faith fear of liability under the Act. If the Hospital were worried that granting pay raises to nurses could be viewed as an unlawful failure to bargain, it could have obviated any such concern by requesting that the Union bargain over this particular issue. Instead, the Hospital waited a month before informing the Union at the bargaining table that it was no longer providing annual pay raises and that there would be no more raises until a new agreement was signed. (JA 276; JA 75.) This apparent attempt to use the withholding of raises as leverage in negotiations is exactly the result that the Board's rules concerning post-expiration conduct are designed to eliminate.⁵⁹

Furthermore, this unilateral change in pay practices significantly shifted the ground upon which the parties stood. At trial, the parties stipulated as to the Hospital's past practices, agreeing that from 1996 to 2005 the Hospital granted nurses 3% annual raises. (JA 294; BSA 4.) Article 20.3 thus did not represent a

⁵⁹ See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988) ("Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract."); JA 277 ("Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place.").

significant “depart[ure]” from its past practice, as the Hospital claims (Br. 2). Rather, Article 20.3 codified the Hospital’s established practice of granting annual pay raises while making only limited changes to it—for instance, by providing that annual raises were to be granted on nurses’ respective anniversary dates. (JA 294; BSA 4.)⁶⁰ Given the well-established principle that “the status quo is . . . defined by reference to the substantive terms of the expired contract,”⁶¹ the Board did not rely (JA 279 n.12) on this evidence of past practice when determining the status quo. Nevertheless, this undisputed evidence dispels any notion that the Board’s decision unfairly alters the balance of power in the parties’ bargaining relationship. In fact, it is the Hospital’s unilateral actions that disrupted the bargaining status quo, and the Board’s decision that seeks to restore it.

⁶⁰ During the same period, nurses at the top of the pay scale received annual lump sum payments of 2, 3, or 4%, depending on their longevity. Raises could also be withheld for poor performance. (JA 294; BSA 4.)

⁶¹ *Hinson v. NLRB*, 429 F.2d 133, 139 (8th Cir. 1970).

3. The Hospital's Defense of "Clear and Unmistakable" Waiver Has No Merit

a. Waiver of the statutory right to have the status quo maintained post-expiration must be "clear and unmistakable."

An exception to the unilateral-change doctrine exists where "there has been a clear relinquishment of the [union's] bargaining right"⁶²; in such an event, a union agrees to "waive its statutory protection against unilateral changes in mandatory subjects of bargaining."⁶³ Such a waiver is not to be lightly inferred. Acting pursuant to its authority to construe provisions of the Act, the Board has determined that "[a]n employer relying on a claim of waiver of a duty to bargain bears the burden of demonstrating it clearly and unmistakably"⁶⁴—a standard that this Court has repeatedly affirmed.⁶⁵ This heightened standard derives from the

⁶² *Am. Oil Co. v. NLRB*, 602 F.2d 184, 188 (8th Cir. 1979).

⁶³ *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001).

⁶⁴ *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989) (citing *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 233 (6th Cir.1988)). See also *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008).

⁶⁵ See *Am. Oil Co. v. NLRB*, 602 F.2d 184, 188 (8th Cir. 1979) ("It is settled law that any waiver of the statutory right to bargain over a mandatory subject of bargaining must be in 'clear and unmistakable language.'") (quoting *N.L. Indus., Inc. v. NLRB*, 536 F.2d 786, 788-89 (8th Cir. 1976)). See also *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1263 (8th Cir. 1994); *WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 516 (8th Cir. 1988); *Technicolor Gov't Servs., Inc. v. NLRB*, 739 F.2d 323, 328 (8th Cir. 1984); *Metromedia, Inc. v. NLRB*, 586 F.2d 1182, 1189

fact that the rights being waived are statutory in nature.⁶⁶ And like the unilateral-change doctrine, the Board's strict standard for waiver "reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes."⁶⁷

Where, as here, it is claimed that contractual language constitutes a waiver of a union's statutory right to bargain, close attention must be paid to the distinction between the union's contractual rights and its statutory rights. A provision in a collective-bargaining agreement stipulating that a union's *contractual* rights extend for a particular period of time does not imply clearly and unmistakably that the union's *statutory* rights are coterminous. To the contrary, the unilateral-change doctrine "often presupposes the end of a collective

(8th Cir. 1978). *See also Mt. Sinai Hosp.*, 331 NLRB 895, 895 n.2 (2000) (applying "well-settled 'clear and unmistakable' standard"); *In re Tidal Water Assoc. Oil Co.*, 85 NLRB 1096, 1098 (1949).

⁶⁶ *See In re Tidal Water*, 85 NLRB at 1098 ("We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights."). *Accord Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (where statutorily protected right is at stake, "the waiver must be clear and unmistakable"); *Amcar Div. v. NLRB*, 641 F.2d 561, 566 (8th Cir. 1981) (waiver of right to strike must be "clear and unmistakable"); *Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553, 560 n.10 (8th Cir. 1981) (similar); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (8th Cir. 1979) (waiver of union's right to information concerning its collective-bargaining duties must be "clear and unmistakable").

⁶⁷ *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007).

bargaining agreement, ensuring the continuation of existing benefits beyond the term of the agreement as a *matter of law*.”⁶⁸ Thus, it “would effectively drain the unilateral change doctrine of any coherent meaning were [the Court] to hold that a general contract duration clause . . . vitiates a [u]nion’s *statutory* claim to continued status quo benefits.”⁶⁹

Thus, in considering whether contractual language amounts to a waiver of the union’s right to bargain over post-expiration changes to employee benefits, the Board has required that the contractual language clearly and unmistakably authorize the employer to cease providing benefits after the contract’s expiration. Thus, for instance, the Board found in *Cauthorne Trucking* that by agreeing to the following language, the union had clearly and unmistakably waived its right to the continuation of pension benefits post-expiration: “[A]t the expiration of any particular collective bargaining agreement . . . any Company’s obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.”⁷⁰ As the Board has explained, it

⁶⁸ *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (emphasis in original).

⁶⁹ *Id.* (emphasis in original).

⁷⁰ *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), *remanded on other grounds*, 691 F.2d 1023 (D.C. Cir. 1982).

premised its finding of waiver in *Cauthorne Trucking* on the contract's explicit statement that the employer's obligation to provide benefits "shall terminate."⁷¹

Similarly, in the Board's recent decision in *Oak Harbor Freight Lines*, the Board found that the following language constituted a clear and unmistakable waiver of the employer's obligation to make post-expiration contributions to a pension trust:

Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the [pension] trust in the same manner and amount as required in the most recent expired bargaining agreement *until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement which conforms to the trust policy on acceptance of employer contributions, whichever occurs first.*⁷²

⁷¹ See, e.g., *Schmidt-Tiago Constr. Co.*, 286 NLRB 342, 343 n.7, 366 (1987) (distinguishing *Cauthorne* on the grounds that the contractual language at issue "does not on its face, as in *Cauthorne Trucking*, specifically state that Respondent's obligation to contribute to the pension trust funds ends with the expiration of the current collective-bargaining contract"); *KBMS*, 278 NLRB 826, 849 (1986) (distinguishing *Cauthorne* on the grounds that the contractual language at issue did not "purport to deal with the termination of the employer's obligation to contribute to the funds").

⁷² *Oak Harbor Freight Lines, Inc.*, 358 NLRB No. 41 (2012), Slip Op. at p. 13 (incorporated by reference in *Oak Harbor Freight Lines, Inc.*, 361 NLRB No. 82 (2014), Slip Op. at p. 1) (emphasis added).

The Board found that this language sufficed to waive the union’s right to bargain because it “expresses a clear intent to relieve [the employer] of its obligation to make payments after contract expiration and notice to cancel trust payments.”⁷³

By the same token, the Board and courts have repeatedly found that language stipulating the duration of a union’s *contractual* right to benefits does not amount to a clear and unmistakable waiver of the union’s *statutory* right to the post-expiration continuation of those benefits. In *Honeywell International v. NLRB*, a collectively-bargained agreement providing laid-off employees with severance benefits contained durational language stating that it would remain effective “until midnight on June 6, 1997, but not thereafter unless renewed or extended in writing by the parties.”⁷⁴ On June 7, 1997, the agreement expired without renewal or extension, and Honeywell unilaterally ceased providing severance benefits to any employee who became eligible on June 7 or after. Affirming the Board’s findings, the D.C. Circuit held that Honeywell had thereby violated the Act and rejected the contention that the union had contractually waived its right to bargain over the post-expiration continuance of severance benefits. As the D.C. Circuit explained, the agreement “makes it clear that the Union’s *contractual* right to severance benefits ended on June 6, 1997; but the

⁷³ *Id.* at p.14.

⁷⁴ 253 F.3d at 130.

provision is silent on the Union's *statutory* rights In other words, the duration clause in no way evinces a clear and unmistakable waiver by the Union."⁷⁵

In *NLRB v. General Tire & Rubber Company*, the Sixth Circuit similarly found no indication that the union had waived its statutory right to bargain over post-expiration changes. In support of waiver, the employer in that case relied on a contractual clause obligating it to provide benefits for 90 days after the contract's termination: "Notwithstanding the termination of the Agreement . . . the benefits described herein shall be provided for ninety (90) days following termination."⁷⁶ Notably, the clause directly addressed the employer's post-expiration obligations. The clause was "silent on the treatment of benefits after the ninety-day period," however, and "no language in the agreement purported to divest the union of its statutorily-protected right to bargain over the issue of benefits."⁷⁷ Under these circumstances, the Sixth Circuit concluded that by agreeing to this clause, the union had not "clearly and unmistakably" waived its right to the continuation of benefits post-expiration.⁷⁸

⁷⁵ *Id.* at 134.

⁷⁶ 795 F.2d 585, 587-88 (6th Cir. 1986).

⁷⁷ *Id.* at 588.

⁷⁸ *Id.* See also *KBMS*, 278 NLRB 826, 826, 849 (1986) (finding that union did not waive its right to bargain over post-expiration contributions to pension and welfare funds where agreement provided that "said contributions shall continue to

b. The durational language contained in Article 20.3 does not amount to a “clear and unmistakable” waiver of the Hospital’s statutory duty to maintain the status quo

The Hospital argues (Br. 39-48) that Article 20.3—the same contractual article that provides for nurses’ annual pay raises—privileged it to unilaterally discontinue nurses’ annual pay raises, because it constituted a “clear and unmistakable” waiver of the Hospital’s statutory duty to maintain this aspect of the status quo. The waiver inquiry is broad and encompasses “an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.”⁷⁹ It is undisputed, however, that during contract negotiations the parties did not discuss what would happen to nurses’ pay raises after the contract expired. (JA 276; JA 70.) The Hospital thus bases its claim of waiver solely upon the language of the parties’ collective-bargaining agreement, relying primarily upon Article 20.3. In doing so, the Hospital repeatedly emphasizes (Br. 40, 42, 47-48) that Article 20.3 states “three separate times” that annual pay raises shall be provided “[f]or the duration of this Agreement.”

be paid as long as a[n] [employer] is so obligated pursuant to said collective bargaining agreements.”).

⁷⁹ *Columbus & S. Ohio Elec. Co.*, 270 NLRB 686, 686 (1984), *affirmed*, 795 F.2d 150 (D.C. Cir. 1986).

The Board rightly rejected this defense. (JA 276-79.) Applying well-settled precedent interpreting the “clear and unmistakable” standard, the Board acknowledged that the language of Article 20.3 clearly “limits the effective period of the [Hospital’s] contractual obligation.” (JA 278.) “The contract language . . . does not,” however, “address the [Hospital’s] post-expiration conduct or obligations or authorize unilateral employer action of any kind.” (JA 278.) The Board thus found the instant case similar to *Honeywell International* and *General Tire & Rubber*, in which employers unsuccessfully relied upon durational language as a basis for waiver. (JA 277-78.) By the same token, the Board distinguished its decisions in *Cauthorne Trucking* and *Oak Harbor Freight Lines*, in which the relevant agreements had explicitly authorized the employers to cease providing benefits after expiration of the parties’ collective-bargaining agreements. (JA 278.) Consistent with this case law, the Board found that the Hospital “has failed to prove a waiver of its obligation to maintain the status quo established by the expired collective-bargaining agreement.” (JA 278.)

The Board correctly determined that merely repeating durational language does not suffice to clearly and unmistakably waive the Union’s statutory rights. The Hospital broadly agrees (Br. 45-46) with the D.C. Circuit’s decision in *Honeywell International* and does not dispute the settled principle that contractual language stating that benefits will be provided during the term of a contract does

not clearly and unmistakably waive a union's statutory right to the continuation of those benefits post-expiration. That being the case, merely repeating the same insufficient durational language does not convert that language into a clear and unmistakable waiver. The clear and unmistakable standard is designed to encourage parties to state their rights and duties with a clarity that assures that those rights and duties are understood or should be understood by the parties themselves.⁸⁰ If a phrase is not already clear in and of itself, sheer repetition of that phrase adds nothing.

The Hospital relies upon a similarly dubious interpretive principle when it argues (Br. 45-48) that the durational language in Article 20.3 constitutes a clear and unmistakable waiver because it is contained in Article 20.3 rather than an "omnibus duration clause" that applies to the entire contract, such as in *Honeywell International*.⁸¹ The Hospital's hair-splitting distinction ignores the Sixth Circuit's holding in *General Tire & Rubber*. Unlike in *Honeywell International*, the durational language in *General Tire & Rubber* specifically addressed the provision of benefits that were at the heart of that case: "Notwithstanding the termination of the Agreement . . . the benefits described herein shall be provided for ninety (90)

⁸⁰ See JA 279 ("Board doctrine, as applied here[,] creates incentives for precision and clarity in defining the parties' respective rights and obligations.").

⁸¹ See 253 F.3d at 130, 133-34.

days following termination.”⁸² The Sixth Circuit nevertheless found this language insufficient to constitute a clear and unmistakable waiver of the union’s right to the post-expiration continuation of those benefits.⁸³ In any event, the presence of durational language in Article 20.3 does not mitigate the gravamen of the Board’s reasoning. The Board found that Article 20.3 did not clearly and unmistakably waive the union’s statutory rights because it “does not address the employer’s post-expiration conduct or obligations or authorize unilateral employer action of any kind.” (JA 276.) The strength of this criticism is not lessened because the durational language is to be found in Article 20.3 rather than in an omnibus duration clause.

The remaining authorities cited by the Hospital (Br. 42-44) are off-point. *NLRB v. United Technologies Corporation*, in which the Second Circuit affirmed the Board’s finding of waiver, involved the application of a management-rights clause during the term of the parties’ collective-bargaining agreement. Neither the scope of post-expiration obligations nor the provision of benefits were involved.⁸⁴ In any event, there is no useful comparison to be made between the contractual language at issue in the two cases. In *United Technologies*, the employer

⁸² *General Rubber & Tire Co.*, 795 F.2d at 588.

⁸³ *See id.*

⁸⁴ 884 F.2d 1569, 1574-75 (2d Cir. 1989).

successfully argued that the parties' collective-bargaining agreement authorized it to make and apply new attendance rules, relying upon language in the parties' collective-bargaining agreement that explicitly granted the employer "the right to make and apply rules and regulations for . . . discipline"⁸⁵; by contrast, in support of its purported right to terminate benefits upon the agreement's expiration, the Hospital cannot point to any language in Article 20.3 that even references post-expiration conduct by the Hospital, let alone explicitly authorizes the Hospital to cease providing benefits upon the agreement's expiration.

The Supreme Court's decision in *M & G Polymers USA LLC v. Tackett*⁸⁶ is equally unhelpful. *M & G Polymers* involved the duration of retirees' contractual rights, not their statutory rights.⁸⁷ The Supreme Court therefore did not apply the "clear and unmistakable" standard, and its decision does not meaningfully illuminate the Board's application of that heightened standard in this case.

For the reasons above, the Board rightly rejected the Hospital's contention that Article 20.3 clearly and unmistakably waived the Union's right to the post-expiration continuation of benefits. The Hospital was thus not privileged to discontinue nurses' annual pay raises without first bargaining, and the Board

⁸⁵ *Id.* at 1574.

⁸⁶ 135 S. Ct. 926 (2015).

⁸⁷ *Id.* at 933.

correctly found that this unilateral change violated Section 8(a)(5) and (1) of the Act.

C. The Hospital Violated Section 8(a)(1) by Announcing to Employees Its Discontinuation of Wage Increases

The day after the CBA expired, the Chairman of the Hospital's Board of Directors sent employees a letter in which he announced that annual pay raises would no longer be provided, until the Hospital and the Union came to a new agreement. (JA 276, 294; JA 327.) The Board found that this announcement of unlawful unilateral changes to employees violated Section 8(a)(1) of the Act. (JA 279.)

This finding is not challenged, except insofar as the Hospital argues that it was privileged to discontinue the nurses' annual raises without first bargaining with the Union. As discussed above,⁸⁸ the Board correctly rejected this argument and found that the Hospital's unilateral discontinuation of those raises violated the Act. By extension, the Hospital's announcement of those changes to its workforce was also unlawful,⁸⁹ and the Board's finding of a violation on those grounds should be enforced.

⁸⁸ See pp. 16-43, *supra*.

⁸⁹ See 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of" their statutory rights). See also *Marion Mem. Hosp.*, 335 NLRB 1016, 1019 (2001) (finding that employer violated Section 8(a)(1) by announcing unlawful unilateral changes to its workforce), *enforced*, 321 F.3d 1178 (D.C. Cir. 2003).

CONCLUSION

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

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

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	*	
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	*	15-2592
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	33-CA-14942
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,094 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Board counsel certifies that the foregoing document has been scanned for viruses and is virus-free.

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Dated at Washington, DC
this 3rd day of November 2015

**UNITED STATES COURT OF APPEALS
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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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