

**No. 15-1883**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**1199 SEIU, UNITED HEALTHCARE WORKERS EAST,  
NEW JERSEY REGION**

**Intervenor**

**v.**

**REGENCY HERITAGE NURSING AND REHABILITATION CENTER**

**Respondent**

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board for enforcement of its Order issued against Regency Heritage Nursing and Rehabilitation Center. The Board found that Regency unilaterally changed the terms and conditions of employment of unit employees without first notifying and giving the Union (1199 Service Employees International Union, United Healthcare Workers East, New Jersey Region) an opportunity to bargain over the change.

The Board's Decision and Order issued on April 30, 2014, and is reported at 360 NLRB No. 98.<sup>1</sup> The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The Court has jurisdiction over this case under the same section of the Act because the unfair labor practice occurred in New Jersey.

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<sup>1</sup> JA 2-22. "JA" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Regency's opening brief.

The Board filed its application for enforcement on April 10, 2015. The application is timely; the Act places no limit on the time for filing actions to enforce Board orders.

### **STATEMENT OF THE ISSUES**

After a collective-bargaining agreement expires, employers are required to maintain the existing terms and conditions of employment until a new agreement, or an impasse in bargaining, is reached. Regency does not dispute that after its collective-bargaining agreement with the Union expired, it stopped paying the previously established minimum wage rates to employees who completed their probationary period. Does substantial evidence support the Board's finding that Regency's failure to pay these minimum wage rates violated the Act?

### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

This case has not previously been before this Court or any other court.

### **STATEMENT OF THE CASE**

#### **I. THE BOARD'S FINDINGS OF FACT**

##### **A. Regency's Operations and Collective-Bargaining Relationship**

Regency operates a nursing home in Somerset, New Jersey, and the Union represents a unit of nonprofessional employees at that facility. (JA 4.) The parties' most recent collective-bargaining agreement was in effect from March 1, 2008, through February 28, 2011. (JA 4; JA 117-46.) Article 19 of that agreement

specified the minimum-wage rates for employees who had completed their probationary periods in particular job classifications, including certified nursing assistant, licensed practical nurse, recreation, maintenance, and cook. (JA 4; JA 134.) Under Article 4, probationary employees—new hires in the first 90 to 120 days of employment—are not eligible for the minimum wage rates until their probationary period ends. (JA 5 & n.2; JA 60-61, 91, 122.)

**B. After the Collective-Bargaining Agreement Expired, Regency Failed to Pay the Contractually Required Minimum Wages to New Employees Who Completed Their Probationary Periods**

On March 10, 2011, after the collective-bargaining agreement expired, Regency first hired four employees: Clark, Greybush, and Obeng, who were “no-frills” nursing assistants; and Reyes, a nursing assistant. Under the contract, Regency was not obligated to pay Clark, Greybush, and Obeng the contractual minimum post-probationary wage rates because they were no-frills nursing assistants. (JA 12, 16 n.31; JA 134.) Regency was obligated to, but did not, pay Reyes the contractual minimum wage rate of \$11 per hour after June 10, 2011, the date his 90-day probationary period ended. (JA 17; JA 134.) Regency never notified the Union what rates it paid Reyes after his probation ended. (JA 16; JA 341.)

On March 24, 2011, Regency hired three employees: two nursing assistants and one housekeeping employee. (JA 16 & n.30.) Regency paid the nursing

assistants \$10 per hour, and the housekeeping employee \$8.50 per hour. After their 90-120 day probationary period ended, Regency failed to raise their wages to the contractual minimum wage rates: \$11 for the nursing assistants and \$9.50 for the housekeeping employee. (JA 16; JA 134, 223-26, 274-75, 349-52.)

On May 31, the parties had their first of several negotiating sessions for a successor contract. (JA 10; JA 37.) One of the issues at these sessions was the size of the unit. Several times during bargaining, the Union asked Regency for a current list of bargaining-unit employees, but Regency did not provide one. (JA 11-12 & n.25; JA 44, 46-47, 56-59.)

The Board found that the Union did not learn of Regency's failure to pay post-probationary employees the correct wage rates until November 10, 2011, when, during a bargaining session for a new contract, the Union asked whether Regency was paying the contractual minimum rates to new hires. Regency's counsel replied no, Regency was not. (JA 12; JA 52.)

Between March 1, 2011, and December 4, 2012, Regency hired 70 employees, including 32 nursing assistants, 1 licensed practical nurse, three laundry employees, and 12 housekeeping employees. None of these employees ever received the contractual minimum wage rates. (JA 9.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On April 30, 2014, the Board (Members Miscimarra, Hirozawa, and Schiffer) found, in agreement with the administrative law judge, that Regency violated Section 8(a)(5) and (1) of the Act by unilaterally changing the established terms and conditions of employment of its employees and failing to pay the wage rates to all eligible employees hired on and after March 1, 2011, without first notifying and giving the Union an opportunity to bargain. (JA 2.)

The Board's Order requires Regency to cease and desist from unilaterally changing the terms and conditions of employment of its unit employees without first notifying the Union and affording it an opportunity to bargain, 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, 29 U.S.C. § 157. Affirmatively, the Order directs Regency to take the following actions: to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, the Board ordered Regency to rescind the unlawful change, and pay employees hired since March 1, 2011, no less than the minimum wages rates then in effect. Finally, the Board ordered Regency to make all affected employees whole for any losses sustained as a result of the unlawful change and to post a remedial notice. (JA 2-3.)

## **SUMMARY OF ARGUMENT**

It is a well-settled tenet of labor law that an employer violates the Act by unilaterally changing a term or condition of employment that is the subject of the mandatory duty to bargain, including in situations in which the collective-bargaining agreement has expired. Those terms and conditions of employment cannot be changed unless the parties bargain to an agreement or reach an impasse in bargaining, neither of which occurred here.

Regency does not dispute the Board's finding that it violated the Act by unilaterally changing the wages of new employees without first notifying and giving the Union an opportunity to bargain. Instead, Regency presents a host of defenses, none of which immunizes it from liability for its actions. First, Regency claims that it had no obligation to pay new employees the contractual minimum wage rates because they were applicants rather than employees. New employees are entitled to receive the benefit of the bargain negotiated between a union and employer and codified in a collective-bargaining agreement, even if they were hired after the contract was signed. Further, all employees, regardless of date of hire, are entitled to the benefit of the status quo once the contract expired.

Next, Regency claims that the Union should have uncovered its unlawful acts earlier and, therefore, that the Union's unfair-labor-practice charge is time-barred. But the Act's six-month time limit on filing charges does not begin to run

until a party has “clear and unequivocal notice” of the violation. Regency engaged in ambiguous and misleading conduct to ensure that the Union did not know it was hiring new employees or what it was paying them, which the Board found to have “seriously hampered the Union’s effort to diligently represent [Regency’s] employees.”

Regency’s argument that this dispute should have been deferred to arbitration similarly fails. The Board will not defer where the issue to be decided involves statutory construction rather than contract interpretation. The question before the Board was whether Regency violated the Act by failing to pay new employees the contractual minimum wage rates after the contract expired. Moreover, the arbitration provision expired with the contract, and Regency’s violation of the Act occurred after the contract expired. Because the dispute did not involve contractual interpretation and did not involve actions that occurred before the contract expired, the Board did not abuse its discretion by declining to defer to arbitration, which here was neither required nor appropriate.

Finally, Member Hirozawa did not abuse his discretion by deciding not to recuse himself from this case. He followed the Office of Government Ethics regulations and Executive Order 13490 and determined that he did not have a covered relationship that would require him to consider recusal. Member Hirozawa had left private practice and worked for the NLRB for three years before

this case was transferred to the Board for decision—one year longer than required by the Executive Order and two years longer than required by the Office of Government Ethics regulations.

### **STANDARD OF REVIEW**

The Board’s findings of fact are “conclusive” under Section 10(e) of the Act, 29 U.S.C. § 160(e), if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *Spectacor Mgmt. Group v. NLRB*, 320 F.3d 385, 390 (3d Cir. 2003). 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; *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 610 (3d Cir. 1996). The Court reviews the Board’s choice of remedies, as well as its determination whether to defer to arbitration, under an abuse of discretion standard. *See St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 299 (3d Cir. 2005) (remedies); *NLRB v. Yellow Freight*, 930 F.2d 316, 322 (3d Cir. 1991) (deferral to arbitration).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT REGENCY UNLAWFULLY CHANGED THE WAGE RATES OF NEW EMPLOYEES AND FAILED TO BARGAIN WITH THE UNION OVER THE CHANGE**

Regency does not contest the Board’s finding that it failed to pay the contractual minimum wage rates to employees hired after the contract expired. (Br. 6, 14.) Nor does it contest the Board’s finding that the contractual minimum wages became, by operation of law upon contract expiration, terms and conditions of employment that could not be unilaterally changed without first bargaining with the Union. Instead, to defend its actions, Regency nonsensically claims that it had no obligation to maintain the wage rates for post-probationary unit employees hired after the contract expired because they were merely “applicants” for employment—a contention the Board found “frivolous.” (JA 2 n.3.) In addition to this defense, Regency claims that the Board erred because: the Union’s unfair-labor-practice charge is barred by the six-month limitation in Section 10(b) of the Act; the dispute should have been deferred to arbitration; and Member Hirozawa should have recused himself. As shown below, Regency’s arguments fail.

**A. Regency Owed a Statutory Duty to Maintain the Status Quo After the Expiration of the Collective-Bargaining Agreement**

**1. Regency 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.” 29 U.S.C. § 151. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), as amplified by Section 8(d), 29 U.S.C. § 158(d), requires an employer to bargain with its employees’ representative over “wages, hours, and other terms and conditions of employment.”<sup>2</sup>

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. An employer violates Section 8(a)(5) and (1) of the Act if it unilaterally alters the status quo without bargaining to impasse. *See Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120, 1126 (3d Cir. 1983). 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

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<sup>2</sup> 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 therefore produces a “derivative” violation of Section 8(a)(1). *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

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].” 369 U.S. 736, 743 (1962). *Accord Ciba-Geigy Pharm.*, 722 F.2d at 1126.

**2. Regency’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.” *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)). *See also Indus. Union of Marine & Shipbuilding Workers of Am., AFL-CIO v. NLRB*, 320 F.2d 615, 620 (3d Cir. 1963). “Under the NLRA, it is clear that an expired collective bargaining agreement continues to define the 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.’” *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)). 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.” *Laborers Health & Welfare*, 484 U.S. at 544 n.6 (1988) (quoting *NLRB v. Katz*, 369 U.S. at 743).

Importantly, this post-expiration “maintenance-of-status-quo obligation” derives from the Act, not the contract. *Litton*, 501 U.S. at 206; *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001). Even though the terms and conditions of the status quo are “defined by reference to the substantive terms of the expired contract,” *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970), those “terms and conditions continue in effect by operation of the NLRA,” not by operation of the contract. *Litton*, 501 U.S. at 206. 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.

*Litton*, 501 U.S. at 206. Accordingly, an employer’s failure to honor the terms and conditions of an expired collective-bargaining agreement is a statutory violation “in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act.” *Laborers Health & Welfare*, 484 U.S. at 544 n.6 (1988) (quoting *Katz*, 369 U.S. at 743).

**B. The Board Reasonably Found that Regency Violated the Act by Unilaterally Changing the Wage Rates for New Employees and Failing to Notify and Provide the Union an Opportunity to Bargain over the Change**

Regency failed to pay the contractual minimum wages to employees it hired after the contract expired. Instead of bargaining as required by Section 8(a)(5) of the Act, Regency attempted to hide its action from the Union by failing to provide information on all employees despite numerous requests, failing to answer questions about the pay rate for new hires, and finally admitting—eight months after the contract expired—that it unilaterally changed the wage rates for new employees. The Board found that Regency violated the Act by changing the wage rates and failing to notify and bargain with the Union about the change.

The Board's conclusion is reasonable. As explained above, it is well-settled that the terms and conditions of employment in the contract—such as wage rates—survive the contract's expiration, and an employer cannot change the terms and conditions of employment of unit employees, including new employees, without first bargaining with the Union. *See Litton*, 501 U.S. at 198; *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (finding that employer violated the Act by unilaterally changing wage rates for some current employees and new hires after contract expired); *Triple A Fire Prot., Inc.*, 315 NLRB 409, 422 (1994), *enforced*, 136 F.3d 727 (11th Cir. 1998) (finding that employer

violated the Act by unilaterally changing wage rates for new hires after contract expired).

**1. Regency's new hires were employees, not applicants**

Once a majority of employees in a bargaining unit select a union as their exclusive bargaining representative, “the union is empowered to bargain collectively with the employer on behalf of all employees in the bargaining unit over wages, hours, and other terms and conditions of employment.” *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988). *Accord NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 190 (7th Cir. 1983) (“the Act requires an employer to recognize and bargain with the union as the exclusive representative of *all* employees in the unit”). And when the union and employer reach a contract, its provisions apply to all employees in the unit—whether they were employed when the contract was signed or hired afterwards. *See Mack Trucks*, 294 NLRB 864, 865 (1989) (finding that employer violated the Act by “announcing and implementing changes in the contractual wage rates of new hires during the term of collective-bargaining agreements without the consent of the collective-bargaining representative”); *Chase Mfg., Inc.*, 200 NLRB 886, 887 (1972) (finding employer violated the Act by threatening to hire new employees at wages below those specified in the collective-bargaining agreement).

As explained above, an employer's duty to maintain the status quo in the terms and conditions of employment is contractually required when a collective-bargaining agreement is in effect, and is required as a matter of law under the Act after the contract expires. *See Litton*, 501 U.S. at 206, and cases cited at pp. 12-13. And, contrary to the contention raised by Regency, an employer is required to maintain the status quo, even with regard to employees hired after the contract expired. *See Creative Eng'g*, 228 NLRB 582, 582 (1977) (finding that the employer violated the Act by bargaining directly with new hires and failing to pay the wages and benefits set out in the recently expired collective-bargaining agreement). Thus, once its contract with the Union expired, Regency was obligated to pay all post-probationary employees the minimum wage rates set out in the contract unless it first bargained with the Union over any change.

Regency nonetheless argues (Br. 37-44) that the Board erred by ordering it to pay contractual wages and bargain over the terms and conditions of employment of mere applicants for employment. Regency's brief mischaracterizes the Board's decision. The Board did not find that Regency failed "to bargain over post contract changes to the post probationary rates of unknown, unhired, non employees." (Br. 42.) Rather, as the Board explained, new hires who have been employed for 90 to 120 days performing bargaining unit work "cannot be construed as 'applicants' for employment." (JA 13.) Thus, the Board affirmed the administrative law judge's

finding that it was “undisputed” that Regency failed to pay the contractual minimums to employees hired after the contract expired, as well as failed to notify the Union and provide it with an opportunity to bargain over this change.<sup>3</sup> (JA 2 & n.3, 12.) Because Regency failed to maintain the status quo of minimum wages set out in the expired contract, the Board properly found that it violated the Act.

**2. Substantial evidence supports the Board’s finding that the Union’s unfair-labor-practice complaint was timely because the charge was filed within 6 months of when the Union was put on notice of the violation**

Regency next argues that the Union’s unfair-labor-practice complaint is time-barred under Section 10(b) of the Act, which states that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b). Because the 10(b) limitations period constitutes an affirmative defense, Regency “has the burden of proof to establish the untimeliness of the charge.” *NLRB v. Pub. Serv. Elec. & Gas*

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<sup>3</sup> Regency’s suggestion made in passing (Br. 42 n.14) that it has no duty to bargain over the change in wage rates because the parties could have been at “one issue” impasse is waived. Under Federal Rule of Appellate Procedure 28 and Third Circuit Local Appellate Rule 28.1(a), the Court will not consider arguments that have not been set forth in the statement of issues and presented with supporting arguments and citations. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). In any event, as the Board explained (JA 19), one-issue impasse is insufficient to justify unilateral changes, and “an employer may not unilaterally change any terms or conditions of employment without having bargained to impasse as a whole.” See *RBE Elecs.*, 320 NLRB 80, 81 (1995); *Bottom Line Enters.*, 302 NLRB 373, 374 (1991).

*Co.*, 157 F.3d 222, 228 (3d Cir. 1998) (noting that 10(b) functions as an affirmative defense, and party claiming it bears the burden of proof). As discussed below, Regency failed to meet this burden.

Under well-settled Board law, the Section 10(b) period begins to run only when a party has “clear and unequivocal notice” of a violation of the Act. *Pub. Serv. Elec.*, 157 F.3d at 227-28. Clear and unequivocal notice can be established by showing that the party filing the unfair-labor-practice charge had actual or constructive knowledge of the violation more than six months prior to the filing of the charge. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enforced sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). The Board may impute knowledge where the conduct was “sufficiently open and obvious to provide clear notice” or where “the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.” *Id.* (internal quotations omitted). Section 10(b) will not, however, bar a complaint where the employer has sent conflicting signals or engaged in ambiguous conduct. *See Concourse Nursing Home*, 328 NLRB 692, 694 (1999) (citing *A & L Underground*, 302 NLRB 467, 469 (1991)).

Because the charge was filed on February 7, 2012, Regency must show that the Union had clear and unequivocal notice of the violation before August 7, 2011, to prove that the complaint is untimely. (JA 16.) Substantial evidence supports the

Board's finding that the Union did not have clear and unequivocal notice by August 7 of the violation found, i.e., Regency's failure to pay the correct wage rates to employees—hired after the contract's expiration—who had completed their probationary periods.

As the Board explained (JA 16), the first date the Union could have possibly known that Regency was violating its obligation to maintain the status quo in wages paid to employees who had completed their probationary periods was June 24, 2011—90 days after Regency hired three post-contract-expiration bargaining unit employees on March 24.<sup>4</sup> But substantial evidence supports the Board's finding that the Union had no notice prior to August 7 that Regency hired these

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<sup>4</sup> Specifically, the Board found that three of the four post-contact employees hired earlier than March 24 were “no-frills” nursing assistants who were not entitled to the post-probationary wage rate. (JA 12, 16 n.31; JA 134.) And the Board also found (JA 16-17) that the Union was not put on notice, prior to August 7, that the fourth hire, Regie Reyes, was not paid the increased wage between June 11, when it was due for him, and July 14, when he was fired. The documents Regency provided during the arbitration, including a list of employees provided to the Union on June 17, did not show what rate it paid Reyes after his probation ended. (JA 6, 16; JA 374, 422.) Nor did the backpay calculations in the document Regency provided the Union on August 4 show any underpayment for Reyes post-probation. (JA 17; JA 405-06.) In fact, as the Board found, none of the documentation provided by Regency to the Union “establishe[d] that the Union knew what rates that [Regency] was paying Reyes for the brief period that he worked for [Regency] when he might have been eligible for backpay” before his firing on July 14, 2011. (JA 17.) While the Union apparently “acquiesced in [Regency's] decision to disqualify Reyes for any backpay due to his July 14 termination,” the Union did so without being “aware that [Regency] may have violated the Act with respect to Reyes for the 1-month period that he worked after his probationary period ended until his discharge.” (JA 17.)

employees, much less notice of their rates of pay. (JA 17.) During a 2011 arbitration, Regency resisted the Union's efforts to obtain a list of bargaining unit employees and failed to respond to the Union's repeated requests for a list of employees performing bargaining unit work.<sup>5</sup> (JA 18.) None of the documents Regency provided during the arbitration included any of these employees.<sup>6</sup> (JA 17.) Indeed, the administrative law judge found Regency's exclusion of the new hires from documents provided in arbitration to be "unconscionable [sic], misleading, and an affront to the arbitrator." (JA 18.) Throughout the events in this case, Regency's "actions . . . seriously hampered the Union's effort to diligently represent [Regency's] employees and . . . any delay in the Union filing the instant charges was a consequence of conflicting signals and otherwise ambiguous conduct by [Regency] thereby requiring a rejection of its 10(b) defense." (JA 18.) *See Pub. Serv. Elec.*, 157 F.3d at 228 (Section 10(b) "is not

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<sup>5</sup> Under Article 19 of the contract, the minimum wage rate for bargaining unit employees was scheduled to increase on December 1, 2010. (JA 5; JA 134.) Regency failed to make that increase. In response, the Union filed a grievance and demanded arbitration. (JA 5; JA 67-68, 367-68.) In November 2011, the arbitrator issued a written award requiring Regency to pay specified amounts of backpay, calculated through June 11, 2011, to listed individuals. (JA 5; JA 394-97.)

<sup>6</sup> Nor did Regency notify the Union of the more than 50 other bargaining unit employees Regency hired between March 1 and October 29, 2011. (JA 18.)

meant to punish a party who delays in filing due to the ambiguous conduct of another party”).

Not until the unfair-labor-practice hearing in this case, in response to a subpoena, did Regency provide evidence of all the new employees and their rates of pay. (JA 20; JA 181-366.) Because there is no evidence that the Union “was ever made aware of [Regency’s] hiring [the new] employees, much less when their respective probationary periods ended,” the Board reasonably found that the Union did not have actual or constructive notice of Regency’s failure to pay any employees the correct post-probationary wages before August 7. (JA 17.)

In making this finding, the Board rejected Regency’s claim that the arbitration provided “sufficient evidence that the Union knew” Regency was not paying all new employees, even those hired after the contract’s expiration, the contractual minimum wage rates. (JA 15.) Rather, as the Board found, the arbitration dealt exclusively with the wage rates of employees hired before the contract expired. (JA 14.) The Board further found it “reasonable for the Union to assume that [Regency] would abide by the arbitrator’s decision” with regard to new employees. (JA 19.) In any event, “knowledge that another party *might* commit an unfair labor practice when the time is right will not start the 10(b) period.” *Pub. Serv. Elec.*, 157 F.3d at 227 (quoting *Esmark, Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir. 1989).

Indeed, the facts of this case show that, not only did the Union not have notice of Regency's unilateral change to new employees' wages by August 7, the Union did not receive that notice until November 10, 2011. Only then, during negotiations for a successor collective-bargaining agreement, did Regency admit its failure to pay the contractual wage rates to employees who had completed their probationary periods. (JA 20; JA 50.) Accordingly, the Board properly found that the Union did not have actual or constructive notice of Regency's violation before August 7, 2011.

Having found that the unfair labor practice complaint was timely filed because the charge was filed within 6 months of when the Union had notice of the violation, the Board properly remedied the unfair labor practice with a make-whole remedy dating from the unfair labor practice's inception. Without citation to any authority, Regency claims (Br. 46) that the Board can only order relief beginning six months before the time that the unfair labor practice charge was filed. But it is established that a make whole remedy is not restricted to six months before the charge was filed where "the Union did not immediately become aware of unfair labor practices through no fault of its own." *Pullman Bldg. Co.*, 251 NLRB 1048, 1048 (1980), *enforced*, 111 LRRM 2650 (9th Cir. 1982). In such a case, "[o]nce the 10(b) period has been tolled for the purpose of filing the charge, the case is before [the Board] on the same basis as is any other case, and hence the usual

make-whole remedy is the appropriate one.” *Id.*; accord *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 300-01 (3d Cir. 2005); *Vallow Floor Coverings*, 335 NLRB 20, 21 (2001).

### **3. Deferral to arbitration is neither required nor appropriate**

In its brief, Regency claims (Br. 44) that deferral to arbitration is “required” under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), because the parties “have an extant arbitration continuing on the issues of the minimums” and “willful participation in an arbitration waives any claims of arbitrability.” Regency’s claims misstate both the facts and the Board’s deferral standard. Further, deferral is left to the Board’s discretion, and Regency has failed to show that the Board abused that discretion. *See NLRB v. Yellow Freight*, 930 F.2d 316, 322 (3d Cir. 1991).

Neither *Collyer* nor *Dubo* applies to the situation at hand. In *Collyer*, the Board set out its standard for deferring to arbitration before an arbitration award has been issued.<sup>7</sup> In *Dubo*, the Board stated that it would defer to arbitration where

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<sup>7</sup> In *Collyer*, the Board described the following factors as favoring deferral to arbitration: the dispute arose in the context of a long and productive collective-bargaining relationship; there was no claim of employer animosity to employees’ protected activity; the collective-bargaining agreement provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer asserted its willingness to arbitrate the dispute; and the dispute was well suited to resolution by arbitration. *Collyer*, 192 NLRB at 842.

the grievance procedures had already been started. 142 NLRB at 432. Neither deferral standard applies here.

As the Board explained (JA 13-14), it does not defer under *Collyer* where the issue involves statutory construction rather than contract interpretation. *See Avery Dennison*, 330 NLRB 389, 390 (1999) (noting that “[t]he Board’s policy against deferral in matters of statutory interpretation is well established”); *Meilman Food Indus.*, 234 NLRB 698, 705-06 (1978), *aff’d sub nom. Meat Cutters Local 304 v. NLRB*, 593 F.2d 1370 (D.C. Cir. 1979) (mem.) (no deferral where the issue involved “a legal matter arising from the obligation under the Act to refrain unilaterally from changing conditions of employment,” which “is within the special competence of the Board”). Here, the question before the Board was whether Regency violated the Act by failing to pay new unit employees the contractual minimum rates after the contract expired, not whether Regency had a contractual obligation to pay those rates. (JA 14.) Because the question before the Board involved solely statutory interpretation, the Board did not abuse its discretion by declining to defer to arbitration.

Further, contrary to Regency’s suggestion (Br. 44, 46), this case does not involve an ongoing arbitration. As the Board explained, the arbitrator’s 2011 award involved Regency’s failure to implement a December 2010 wage increase required by the contract. (JA 14.) Regency argued that the arbitrator retained

jurisdiction and that post-contract violations should also be deferred to him under *Dubo Manufacturing*. As the Board explained, Regency fell “far short of establishing that the issues of postcontract failures to pay minimums to newly hired employees was before [the arbitrator].” (JA 14.) Both the grievance and the arbitrator’s award were concerned solely with the unilateral reduction of wages for employees hired prior to the contract’s expiration. (JA 14.) Indeed, the arbitration could have not involved unit employees hired post-expiration because when the arbitrator issued his oral award in May 2011, unit employees hired after the contract expired would have been eligible for backpay because they would not yet have completed the 90-120 day probationary period. (JA 14.) The Board further found that the arbitrator’s written decision referred to employees hired before the contract expired. (JA 14.) Regency offered no argument or evidence to refute this finding.<sup>8</sup>

Finally, Regency’s failure to pay contractual minimum wages to employees hired after the contract expired is not subject to the expired contract’s arbitration

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<sup>8</sup> *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40 (3d Cir. 1985), cited by Regency (Br. 44 n.17), is inapposite: in that case, the employer refused to comply with an arbitration board’s decision. In this case, the issue of Regency’s unilateral changes to the wages of new employees has not been submitted to an arbitrator.

provision because arbitration clauses do not survive expiration of the contract.<sup>9</sup> *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 200-01 (1991); *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 135 (D.C. Cir. 2001). The Board will not defer disputes based on post-expiration conduct unless the dispute “arises under that contract.” *Nolde Bros. v. Bakery Workers, Local 358*, 430 U.S. 243, 249 (1977). *Nolde* applies “only where a dispute has its real source in the contract” and “does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable.” *Litton*, 501 U.S. at 205. Rather, “[a] postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.” *Id.* at 205-06.

Regency makes no argument that the issue of wages for new hires arises under the contract. (Br. 44-46.) In any event, the arbitration provision of the contract explicitly contradicts any such argument and defines a grievance as “a dispute regarding the interpretation or application of this Agreement and arising during its term.” (JA 129.) The Board found (JA 14) that “all of the alleged

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<sup>9</sup> Regency was well aware of this fact, telling the Union during negotiations for a successor agreement that it would not agree to a contract extension because it did not want to be subject to the contract’s arbitration clause. (JA 11; JA 46.)

violations of the Act were triggered by events that occurred after the contract expired.” Further, as discussed above, the dispute over wages for new hires does not involve the interpretation of the contract. Once the contract expired, the wages set out in the contract “are no longer agreed-upon terms; they are terms imposed by law.” *Litton*, 501 U.S. at 206. As such, the Union’s right to bargain over changes to employees’ terms and conditions of employment arises not from the contract, but from the statute, which the Board has primary responsibility for enforcing. *See NLRB v. Gen. Warehouse Corp.*, 643 F.2d 965, 969 n.15 (3d Cir. 1981) (“Regardless of its deferral policy, the Board retains the primary responsibility and power to adjudge unfair labor practices”).

Because the dispute over Regency’s unilateral change to wages for new employees concerns Regency’s statutory obligation to maintain the terms and conditions of employment post-contract expiration, the Board did not abuse its discretion by declining to defer to arbitration. *See NLRB v. Regency Heritage Nursing & Rehab. Ctr.*, 437 F. App’x 65, 67 (3d Cir. 2011) (unpublished) (finding that Board did not abuse its discretion by refusing to defer to arbitration where the dispute was “not covered by any arbitration agreement”).

**4. Member Hirozawa properly participated in this case and did not abuse his discretion by declining to recuse himself where his prior employment with the Gladstein law firm ended more than three years before this case was transferred to the Board**

Courts “review an agency member’s decision not to recuse himself from a proceeding under a deferential, abuse of discretion standard.” *Metro. Council of N.A.A.C.P. Branches v. F.C.C.*, 46 F.3d 1154, 1164 (D.C. Cir. 1995) (citing *Air Line Pilots Ass’n v. United States Dep’t of Transp.*, 899 F.2d 1230, 1232 (D.C. Cir. 1990) (collecting cases)). That standard is similar to the one applied to judicial recusal decisions. *See Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977) (in reviewing a denial to disqualify under 28 U.S.C. § 455, inquiry is “whether the district judge abused his discretion”). As shown below, guided by the relevant authorities, Member Hirozawa did not abuse his discretion in denying Regency’s request that he recuse himself.

Member Hirozawa was a partner for 19 years in the law firm Gladstein, Reif & Meginniss LLP, which represented the Union before the Board in this case. In April 2010, he left that firm to join the NLRB as chief counsel to Chairman (then Member) Pearce. After serving in that position for three years, he was nominated for a Board seat, confirmed by the Senate and sworn in as a Board member on August 5, 2013.<sup>10</sup> *See* <https://www.nlr.gov/who-we-are/board/kent-y-hirozawa>

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<sup>10</sup> Regency’s assertion (Br. 18) that on August 23, 2010, then-Member Pearce and chief counsel Hirozawa “had as their client” the Union in this case is

(last visited Nov. 30, 2015). The administrative law judge issued the decision in this case on June 6, 2013, and the case was transferred to the Board that same day. (JA 22.) Thus, Member Hirozawa had not worked for the Gladstein law firm for more than three years prior to his participation in this case.

Relying on the relevant Office of Government Ethics regulations and Executive Order 13490 (JA 2 n.1), Member Hirozawa appropriately declined to recuse himself from participating in this case. The Office of Government Ethics regulations, 5 C.F.R., Part 2635, Subpart E, set forth standards for impartiality in performing official duties and, in 5 C.F.R. §2635.502, require federal employees to consider the appearance of certain personal and business relationships. Specifically, that regulation states that such employees should not participate in matters involving persons with whom the employees have a “covered relationship,” and where “the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.” 5 C.F.R. §2635.502(a). Covered relationships include, among others, “[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant,

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clearly incorrect. While Chairman Pearce’s current chief counsel, Ellen Dichner, represented the Union before the Board in this case, neither she nor Chairman Pearce participated in this case. (JA 2 n.1.)

contractor or employee.”<sup>11</sup> *See* 5 C.F.R. § 2635.502(b)(1)(iv). The President’s Executive Order 13490, “Ethics Commitments by Executive Branch Personnel” (Jan. 21, 2009), which applies to Presidential appointees, extends the ban for an additional year from appointment. *See* Exec. Order 13490, Sec. 1. Because Member Hirozawa had ended his employment with his former law firm more than three years before this case was presented to the Board, he properly determined that he did not have a covered relationship within the meaning of 5 C.F.R. § 2635.502, nor would his participation “cause a reasonable person with knowledge of the relevant facts to question his impartiality.” (JA 2 n.1, quoting 5 C.F.R. § 2635.502(a).)

Further, this case does not concern a former employer or former client of Member Hirozawa as those terms are defined in the Executive Order. Under the Order, every Executive Branch appointee must pledge, among other requirements, that he will not “for a period of 2 years from the date of [his] appointment participate in any particular matter involving specific parties that is directly and substantially related to [his] former employer or former clients, including

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<sup>11</sup> Regency’s claim (Br. 17) that Example 4 in 5 C.F.R. § 2635.502 “directly applies to Member Hirozawa” fails to account for the specific language of that example. In the example, the official in question had “just resigned from her position” at a private company. 5 C.F.R. § 2635.502. In contrast, Member Hirozawa had not worked for the Gladstein law firm for more than three years before this case went before the Board.

regulations and contracts.” Exec. Order 13490, Sec. 1. The Order defines “former employer” as “any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that ‘former employer’ does not include any executive agency or other entity of the Federal Government.” Exec. Order 13490, at Sec. 2(i). Further, the Order defines “former client” as “any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment.” *Id.* at Sec. 2(j). Again, because Member Hirozawa began working for the NLRB in April 2010—more than three years before his appointment to the Board—his decision not to recuse himself fully comports with the Executive Order’s requirements.<sup>12</sup>

Regency’s argument that Member Hirozawa erred by not stating “that he ‘ran this by’ anyone as mentioned in the regulation” (Br. 17) is a misreading of the plain language of the Office of Government Ethics regulation. Under the regulation, the employee is only required to notify the agency designee “[w]here [he] knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household,

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<sup>12</sup> In arguing (Br. 19) that the Executive Order barred Member Hirozawa’s participation, Regency ignores that the definition of former employer and former client covers relationships existing only “within the 2 years *prior to*” the date of the appointment.

or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.” 5 C.F.R. § 2635.502(a). In this case, because he had not worked for the Gladstein law firm for more than three years prior to his involvement in this case, there was no reason for Member Hirozawa to consult the agency’s ethics designee.

Finally, the Board did not abuse its discretion by denying Regency’s motion for reconsideration seeking Member Hirozawa’s recusal. As shown, the applicable regulations create a broad prophylactic restriction relating to prior employment and representation. Member Hirozawa’s decision not to recuse himself complies with those guidelines as well as the related Executive Order. He thoughtfully considered the applicable authorities by which he is bound and properly determined that recusal in this case was unnecessary.

Accordingly, Regency has provided this Court no basis to disturb either Member Hirozawa’s decision or the Board’s denial of Regency’s request for recusal. Indeed, in two prior cases, the Court has rejected similar contentions with regard to a different Board member, and has recognized the authorities upon which Member Hirozawa relied in making his determination. *See NLRB v. Regency Grande Nursing & Rehab. Ctr.*, 453 F. App’x 193, 197 (3d Cir. 2011) (Member

Becker's decision not to recuse was consistent with the requirements of 5 C.F.R. §2635.502 and Executive Order 13490); *NLRB v. Regency Grande Nursing & Rehab. Ctr.*, 441 F. App'x 948, 954 (3d Cir. 2011) (same).<sup>13</sup> The same result is warranted here.

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<sup>13</sup> In another case currently pending in this Circuit, *NLRB v. New Vista Nursing & Rehabilitation, LLC* (3d Cir. Nos. 11-3440, 12-1027, 12-1936), but back before the Board on temporary remand, Member Hirozawa responded to a similar request for recusal in a Board order denying a motion for reconsideration. *See Order Denying Motion for Reconsideration and Motion To Recuse*, 2016 WL 67744, at \*2-3 (NLRB, Jan. 5, 2016).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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January 2016

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

NATIONAL LABOR RELATIONS BOARD	*
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Petitioner	* No. 15-1883
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and	*
	* Board Case No.
1199 SEIU, UNITED HEALTHCARE WORKERS	* 22-CA-074343
EAST, NEW JERSEY REGION	*
	*
Intervenor	*
	*
v.	*
	*
REGENCY HERITAGE NURSING AND	*
REHABILITATION CENTER	*
	*
Respondent	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,737 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has

been scanned for viruses using Symantec Endpoint Protection version  
12.1.2015.2015 and is virus-free according to that program.

s/ Linda Dreeben  
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Dated at Washington, DC  
this 15th day of January, 2016

**UNITED STATES COURT OF APPEALS  
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	*
Respondent	*

**CERTIFICATE OF BAR MEMBERSHIP**

In accordance with Third Circuit LAR 46.1(e) and pursuant to LAR 28.3(d), Kellie Isbell certifies that she is a member in good standing of the bar of the Maryland Court of Appeals and is not required to be a member of the bar of this Court because she represents the federal government in this case.

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Dated at Washington, DC  
this 15th day of January, 2016



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Dated at Washington, DC  
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