

**Nos. 15-3675 & 15-3859**

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

**POLYCON INDUSTRIES, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

The jurisdictional statement of Polycon Industries, Inc. (“the Company”) is not complete and correct. This case is before the Court on the petition for review of the Company, and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order issued by the Board on

October 29, 2015, and reported at 363 NLRB No. 31. (SA 1-9.)<sup>1</sup> The Board found that the Company unlawfully refused to execute to execute a collective-bargaining agreement it reached with the Teamsters Local Union No. 142, affiliated with International Brotherhood of Teamsters (“the Union”). The Board’s Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act (“the Act”), as amended. 29 U.S.C. §§ 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Company’s petition for review, filed on December 2, 2015, and the Board’s cross-application for enforcement, filed on December 28, 2015, are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act because the unfair labor practice occurred within this Circuit in Indiana. 29 U.S.C. § 160(e) and (f).

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<sup>1</sup> “SA” refers to the short appendix filed by the Company containing the Board’s decision and order and the attached decision of the administrative law judge. “Tr” refers to the transcript, which is included in the appendix filed by the Company, using numbers at the top-right of the page. “A” refers to the remainder of the appendix filed by the Company, using numbers marked “App.” at the bottom of the page. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF ISSUE**

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute its collective-bargaining agreement with the Union.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

This unfair labor practice proceeding came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by Teamsters Local Union No. 142, affiliated with the International Brotherhood of Teamsters ("the Union"). (SA 2-3.) The complaint, which issued on July 19, 2013, alleged that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 158(a)(5) and (1)) by refusing to execute a collective-bargaining agreement it had reached with the Union. (SA 2-3.) After a hearing, an administrative law judge issued a decision finding that the Company violated the Act as alleged. The Company filed exceptions, and the Board's General Counsel filed an answering brief. (SA 1.) On October 29, 2015, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended order. (SA 1-2.) Thereafter, the Company initiated these proceedings with a petition to review the Board's Order, and the Board filed a cross-application for enforcement of its

Order. The Board's findings in the unfair labor practice proceedings are summarized below.

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

### **A. For Over Two and One-Half Years, the Company and the Union Engaged in Negotiations for an Initial Collective-Bargaining Agreement**

The Company manufactures bottles at its facility in Merrillville, Indiana, from which it sells and ships directly to purchasers. (SA 3.) On July 27, 2010, the Board certified the Union as the exclusive collective-bargaining representative of those employees. (SA 3.)

The Company and the Union commenced negotiations for an initial collective-bargaining agreement in October 2010, and the negotiations took over two years. (SA 3; Tr 18.) On January 5, 2013, the Union's members voted to ratify the draft of the collective-bargaining agreement to which the parties had agreed. (SA 3; Tr 20.) Upon ratification, the Union delivered a copy of the collective-bargaining agreement to the Company. (SA 3; Tr 20-21.) However, the ratified draft contained a typographical error that stated that employees would begin receiving three weeks of paid vacation leave on the anniversary of their third year of employment, instead of their tenth year. (SA 3; Tr 21, A 82.) The parties later corrected that error. (SA 3; Tr 21, A 82.)

The parties' collective-bargaining agreement included a union-security clause, which required all employees to be members of the Union. (SA 3-4; A 81.) However, on March 12, 2013, the Company's counsel emailed the Union requesting that the parties revise the clause in light of Indiana's "right-to-work" statute, which prohibited such requirements as of March 12, 2010. (SA 3-4; Tr 23, A 78.) The Union responded with a proposed memorandum of understanding, which stated that the union-security clause would have no force while the Indiana statute was in effect, but that the clause would become fully effective if the statute became nullified, invalidated, or repealed. (SA 4; A 110-11.) The Company rejected the proposed memorandum via email on March 19. (SA 4; A 112.) The Union responded by proposing that the parties simply add language to the security clause stating that it "will be enforced to the extent allowed by law." (SA 4; Tr 36, A 113.) The Union also encouraged the Company to send alternative language. (SA 4; A 113.)

By March 23, not having received any alternative language from the Company on the union-security clause, the Union again submitted the contract for membership ratification. (SA 4; Tr 36.) This draft included the corrected language regarding employee vacation time, and it also included the union-security clause that the Company had deemed objectionable on March 12. (SA 4; Tr 36.) Before the vote, however, the Union notified its members that, after the vote, the union-

security clause would be changed to reflect Indiana's right-to-work law. The Union's members voted to ratify the contract. (SA 4; Tr 36, A 95-109.)

On March 25, the Union then emailed a "final" draft of the collective-bargaining agreement to the Company with its proposed language that the union-security clause would only be enforced to the extent allowed by law. (SA 4; Tr 37-38, A 113.) The Company did not respond, and the Union emailed again one month later. (SA 4; Tr 37, A 113.) On April 30, the Union warned the Company that it planned to file an unfair labor practice charge with the Board unless the Company signed the collective-bargaining agreement as ratified by the Union membership on March 23, 2013, but with the Union's concession on the language of the union-security clause. (SA 4-5; A 114-16.)

The Company then proposed its own union-security language that would have invalidated any union membership requirements regardless of whether the Indiana statute remained in effect. (SA 5; A 119-20.) The Union rejected this proposal and instead suggested adding to the original union-security language a statement that the clause "will not be implemented so long as the Indiana Right-To-Work statute remains in effect." (SA 5; A 123.) The Union also notified the Company that it would file an unfair labor practice charge with the Board due to the Company's refusal to sign the agreement. (SA 5; A 123.) This charge was filed on May 2, 2013. (SA 5; A 117.)

**B. The Company and the Union Reached a Collective-Bargaining Agreement, but the Company Refuses to Sign It**

The Company's counsel emailed the Union on May 3 to state that the Union's proposed union-security clause language was "fine." (SA 6; A 122.) This email also proposed that the contract's start date be May 1, 2013, and that the parties initial and date each page, so as to avoid confusion with earlier drafts. (SA 6; A 122.) The email then asked the Union to send a draft incorporating the agreed language. (SA 6; A 122.) The Company's counsel added, "I will review and, assuming that it is consistent with our agreement, forward to the client for signing." (SA 6; A 122.)

On May 7, the Union's counsel emailed a copy of the collective-bargaining agreement, with the new union-security language inserted, to the Company's counsel. (SA 6; A 121-22.) In the same email, the Union's counsel suggested moving one sentence that had already been in the agreement—which read, "Said authorization shall be in compliance with all applicable Federal and State Language"—from Article 1, Section 2 to Section 3. (SA 6; A 121-22.) Because Section 3 addressed dues checkoff authorizations, the Union's counsel contended that moving the sentence "makes more sense," but also stated that the Union would accept the Company's position if it disagreed with the move. (SA 6; A 96, 122.) The Union's counsel also wrote that he "obviously [had] no objection" to the Company's request that each page be initialed and dated. (SA 6; A 122.)

The Company's counsel emailed the Union on May 9, this time to state that it would not sign the final agreement because of a decertification petition that employees were circulating. (SA 6; A 121.)

### **III. THE BOARD'S DECISION AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to execute its collective-bargaining agreement with the Union. (SA 1.) Specifically, the Board observed that Section 8(d) of the Act requires either party, upon the request of the other, to execute a written contract incorporating an agreement reached during negotiations. (SA 7.) The parties reached an agreement when the Company agreed to the Union's proposed union-security language, which was the last substantive issue to be resolved in bargaining, and the Company was thus obligated to execute the collective-bargaining agreement. (SA 6-7.) Accordingly, the Board ordered that the Company cease and desist from failing and refusing to execute the collective-bargaining agreement, and from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (SA 9.) The Board also ordered the Company to execute the collective-bargaining agreement and give retroactive effect to its terms, make employees whole for any

losses attributable to its failure to execute the agreement, and post a remedial notice. (SA 9.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that, on May 3, 2013, the Company and the Union reached a meeting of the minds on the final substantive issue that had prevented them from agreeing to a collective-bargaining agreement. On that date, the Company informed the Union that it was "fine" with the Union's proposal for how the contract's union-security clause should read. With that meeting of the minds, a collective-bargaining agreement was arrived at and none of the subsequent communications—whether requesting to review a written agreement or to change the placement of a phrase—altered that result. Accordingly, when, on May 9, 2013, the Company refused to execute the collective-bargaining agreement, it violated Section 8(a)(5) and (1) of the Act.

The Company cannot be heard to use events occurring after May 3 to relieve it from executing the collective-bargaining agreement it had agreed to on May 3. Specifically, the Company claims that it learned that a decertification petition had garnered support from a majority of employees by May 9. But since the contract is deemed executed on May 3, the date it was agreed to, the Board's contract-bar rule operates as an irrebuttable presumption of the Union's continuing majority status for three years, or for the duration of the contract, whichever is shorter.

## STANDARD OF REVIEW

As this Court has recognized, its review of the Board's order "is circumscribed." *SCA Tissue N. Am., LLC v. NLRB*, 371 F.3d 983, 987 (7th Cir. 2004); accord *Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993). Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the applicable standard of review is whether the Board's factual findings are supported by "substantial evidence." *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 502 (7th Cir. 2003); accord *NLRB v. Midwestern Pers. Servs., Inc.*, 508 F.3d 418, 423 (7th Cir. 2007). This standard "requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that *could* satisfy the reasonable fact finder." *Midwestern Pers. Servs., Inc.*, 508 F.3d at 423 (internal citations omitted). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support the conclusion of the Board.'" *SCA Tissue N. Am.*, 371 F.3d at 988 (quoting *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 533 (7th Cir. 2003)).

Under the substantial evidence standard of review, the Court owes considerable deference to the Board's factual findings, inferences, and conclusions. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (the Board is "presumably equipped or informed by experience to deal with a specialized field of knowledge"). Thus, the Court will not displace the Board's resolution of

conflicting evidence even if “the court would justifiably have made a different choice had the matter been before it de novo.” *Id.*; see also *SCA Tissue N. Am.*, 371 F.3d at 987-88; *Cent. Transp., Inc. v. NLRB*, 997 F.2d 1180, 1189 (7th Cir. 1993).

The existence of a collective-bargaining agreement is essentially a factual question, and the Board’s function is to determine “whether negotiations have produced a bargain which the employer has refused to sign and honor[.]” *NLRB v. Strong*, 393 U.S. 357, 361 (1969). The Board’s finding that an agreement was reached must be upheld if it is supported by substantial evidence. *Capitol-Hustling Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982).

To the extent that legal issues are involved, the Court applies a similarly deferential standard and will uphold the Board’s determination if its legal conclusion has “a reasonable basis in the law.” *FedEx Freight E.*, 431 F.3d 1019, 1025-26 (7th Cir. 2005). If it has, “it should not be rejected merely because the courts might prefer another view of the statute.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); accord *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983); see also *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (“On an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference.”).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO EXECUTE THE COLLECTIVE-BARGAINING AGREEMENT IT HAD REACHED WITH THE UNION**

#### **A. Applicable Principles**

Under Section 8(a)(5) of the Act, an employer commits an unfair labor practice when it “refuses to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). The statutory duty to bargain imposed on employers and unions encompasses the duty to execute “a written contract incorporating any agreement reached if requested by either party.” 29 U.S.C. § 158(d). For over 70 years, the black letter law has been that an employer’s “refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.” *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941); *see also YWCA of W. Mass.*, 349 NLRB 762, 771 (2007). Such “refusal to sign [is] a refusal to bargain collectively and an unfair labor practice” under Section 8(a)(5).

*Id.*<sup>2</sup>

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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 the rights guaranteed” to them by the Act. A violation of Section

**B. Substantial Evidence Supports the Board’s Finding that the Parties Reached a Meeting of the Minds on a Collective-Bargaining Agreement on May 3**

Under Board law, the “crucial inquiry” when determining whether a party is obligated to sign a contract is whether the two sides have reached an ‘agreement,’ even though that ‘agreement’ might fall short of the technical requirements of an accepted contract.” *Capitol-Hustling Co.*, 671 F.2d at 242 (internal citations omitted). A collective-bargaining agreement is formed after a “meeting of the minds” on all substantive issues and material terms of the contract. *Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998). To determine whether the parties reached a meeting of the minds, the Board looks to the parties’ “intent as objectively manifested in what they said to each other.” *MK-Ferguson Co.*, 296 NLRB 776, 776 n.2 (1989); *see also Windward Teachers Ass’n*, 346 NLRB 1148, 1150-51 (2006).

Substantial evidence supports the Board’s finding that, on May 3, 2013, “the parties reached a meeting of the minds on all substantive issues and material terms of a collective-bargaining agreement.” (SA 7.) On that date, the parties had resolved the final substantive issue that had been preventing a meeting of the minds: the desire to make sure any union-security clause was not inconsistent with

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8(a)(5) of the Act produces a derivative violation of Section 8(a)(1). 29 U.S.C. § 158(a)(1); *see G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989).

the Indiana statute. (SA 3-4, 7; Tr 24, A 78.) After each party had rejected proposals from the other, the Union offered language that the Company accepted. (SA 4-5; A 110-16, 118-24.) Specifically, the Company's counsel emailed the Union's counsel on May 3, stating, "[y]our language is fine . . . . Let's have the contract start date be May 1, 2013." (SA 6; A 122.) The Company's request to examine a copy of the collective-bargaining agreement, with the final clause included, did not create a new condition precedent to a final and binding agreement. (SA 7.) Because the request occurred at the same time as the final issue had been resolved, it was not a condition to the Company's acceptance. (SA 7-8.) See discussion of *NLRB v. General Teamsters Union Local 662*, 368 F.3d 741 (7th Cir. 2004), at pp. 16-18 below. The Company thus violated the Act when it refused to execute the agreement reached on May 3.<sup>3</sup>

Thus, by May 3, the parties had no outstanding substantive subjects to bargain, and the Company was obligated to execute the collective-bargaining agreement. 29 U.S.C. § 158(d). Indeed, with the exception of the dispute over the language of the union-security clause, the Union and the Company actually had resolved all substantive issues four months earlier, in January. (SA 3, 7.) In the

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<sup>3</sup> One Board member would have even gone further and dated the Company's violation as of March 19, 2013. Chairman Pearce concluded (SA 1 n.2) that, on that date, the Company should have executed a contract embodying the parties' agreement with the Union's proposed modification to the union-security clause or should have responded with its own proposal for resolving that issue. (SA 1 n.2.)

ensuing four months, the Company had raised no objection to any of those substantive terms, only pointing out one typographical error in the provision providing for the accrual of vacation times. (SA 3; Tr 21, A 82.) The Company would have had a high burden if it had tried to renegotiate any of those terms prior to May 3. “[W]ithdrawal of a proposal by the employer without good cause is evidence of a lack of good faith bargaining . . . in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon or acceptance by the Union appears to be imminent.” *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983); *accord Transit Serv. Corp.*, 312 NLRB 477, 483 (1993), *enforced by consent judgment NLRB v. Transit Serv. Corp.*, No. 94-1420 (7th Cir. June 23, 1994). And the Company never even attempted this kind of withdrawal. Once the Company stated that the Union’s proposed union-security language was “fine” on May 3, the parties had agreed to all substantive issues in the collective-bargaining agreement, and the Company cannot be heard to contend otherwise. (SA 7.)

The Company argues that the parties had not yet reached a meeting of the minds by May 3, but it does not dispute that the parties agreed to all substantive issues. (Br 14-22.) Its request that each page be initialed and dated is not enough to invalidate the meeting of the minds, because it did not affect a substantive term of the agreement and the Union stated it “obviously [h]ad no objection” to it. (SA 6-7; A 122.) *See Fashion Furniture Mfg., Inc.*, 279 NLRB 705, 705-06 (1986)

("[T]he need for minor alterations in the agreement does not relieve the parties of the obligation to execute the contract agreed to, particularly where, as here, the other party indicates a willingness to make such alterations."). Similarly, the Union's May 7 suggestion that a sentence be moved into a different section did not invalidate the previous meeting of the minds because the substantive terms of the agreement were already established and the suggestion did not affect those terms. (SA 6-7; A 122.) *Fashion Furniture Mfg., Inc.*, 279 NLRB at 705-06. Attempting to modify terms once the meeting of the minds has been reached does not mean that the collective-bargaining agreement has not already been reached. *Teamsters Local 771*, 357 NLRB No. 173, slip op. at 5-6 (2011) (citing *Mack Trucks, Inc. v. Auto Workers*, 856 F.2d 579 (3d Cir. 1988)).

This Court's decision in *NLRB v. General Teamsters Union Local 662*, 368 F.3d 741 (7th Cir. 2004), embraces the Board's commonsense principles regarding when parties have reached a meeting of the minds. In *General Teamsters*, after a union and employer returned to bargaining after a strike, the parties neared completion of a new collective-bargaining agreement. To resolve the last two issues, the employer proposed a quid pro quo whereby the employer would find work for four strikers, in exchange for the union no longer using four employee-representatives whom the employer believed impaired its relations with the union. *Id.* at 743. The union informed the employer that it had accepted the employer's

proposed quid pro quo. *Id.* at 743-44. However, when the union accepted the quid pro quo, it also informed the employer that it would present the quid pro quo for ratification by its members. *Id.* Later, when the employer was upset that the four employee-representatives continued to represent the union, the union argued that the quid pro quo had not been submitted for membership ratification. *Id.* at 744. The Court upheld the Board's finding that the parties had reached a meeting of the minds when the union agreed to the quid pro quo. *Id.* at 745-46. And the Court rejected the argument that the union's accompanying statement that it would submit the quid pro quo to its members for ratification could invalidate the meeting of the minds that had occurred. *Id.* at 745-46.

Here, the Company and Union reached an enforceable meeting of the minds just as the parties had in *General Teamsters*. In both cases, one party—the Company here and the General Teamsters there—accepted the other side's proposal on the final issue. *Gen. Teamsters*, 368 F.3d at 743-44. In both cases, that party suggested an additional condition at the same time as it had arrived at a meeting of the minds. Here, the Company requested a new written document embodying the agreed-upon terms. There, the General Teamsters notified the employer that it would present, for membership ratification, the quid pro quo to which it had already agreed. *Gen. Teamsters*, 368 F.3d at 745-46. As in *General*

*Teamsters*, the request that the Company made upon arriving at a meeting of the minds should not invalidate that contract. 368 F.3d at 745-46.

The Company, in a strained effort to find any help in *General Teamsters* for its position in this case, notes that the union there was allowed to request a review of the written terms. (Br 20-22.) But the Company ignores the fact that the union there made the request to review the written terms before it agreed to the contract's substantive terms. *Gen. Teamsters*, 368 F.3d at 743-44. Here, the Company stated that the Union's proposal on the final issue was "fine" without ever establishing review of the entire written agreement as a condition precedent to the agreement. (SA 6; A 122.) A request to review written terms made at the same time as there has been a meeting of the minds does not create a condition precedent to the agreement. Indeed, a meeting of the minds can be found at a time when an agreement is only oral, further underscoring the fact that any discrepancies and drafting errors that are produced when the agreement is reduced to writing do not affect the finding that a contract has been agreed to and must be enforced. *Fashion Furniture Mfg., Inc.*, 279 NLRB at 705-06; *Ga. Kraft Co., Woodkraft Div. v. NLRB*, 696 F.2d 931, 938 (11th Cir. 1983), *unrelated part vacated*, 104 S. Ct. 1673 (1984).

The Company argues (Br 13-19) that Indiana contract law governs this dispute and that it does not support the Board's finding that the parties had arrived

at a meeting of the minds on May 3, obligating the Company to execute the collective-bargaining agreement. First, the Company never raised Indiana contract law to the Board. As a result, Section 10(e) of the Act jurisdictionally bars this Court from considering that argument. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (“[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.”); *accord Cast N. Am. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 1000 (7th Cir. 2000).

In any event, the Company does not advance its argument when it cites Indiana contract law. “The duty to bargain arises under Section 8(d) of the Act, and the Federal statute, not State law, controls the validity of contractual relations entered into in fulfillment of such statutory bargaining duty.” *Painters, Local 823*, 161 NLRB 620, 623 (1966); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (courts must look to federal labor relations law, not state contract law, in determining whether a collective-bargaining agreement exists). And, in administering national labor law and “in determining whether the parties have in fact reached agreement under a particular set of circumstances, the Board is not strictly bound by the technical rules of contract law.” *NLRB v. Truckdrivers*,

*Chauffers & Helpers Local Union No. 100*, 532 F.2d 569, 571 (6th Cir. 1976) (citing *Lozano Enters. v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964)); accord *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981). The case the Company cites, *Dillard v. Starcon International, Inc.*, 483 F.3d 502 (7th Cir. 2007), is not inconsistent with this tenet. It applies state law only to an agreement settling an employment discrimination claim. *Dillard*, 483 F.3d at 507.

Finally, the Board was correct in determining that the decertification petition that was filed with the Board on May 22 cannot, as a matter of law, alter the Company's obligation to execute the collective-bargaining agreement that it had agreed to on May 3. (SA 8.) As the Board stated, citing *YWCA of Western Massachusetts*, 349 NLRB at 762-64, "[e]ven if the Union lost majority support after May 3, 2013, the date the parties reached a meeting of the minds on the terms of a collective-bargaining agreement, the [Company] could not, on that basis, lawfully refuse to execute that agreement." (SA 1 n.1.) Once the contract is deemed executed on May 3, as the Board noted (SA 8 n.11), under the Board's longstanding contract-bar rule, the Union becomes entitled to an irrebuttable presumption of majority status for up to three years or the length of the contract, whichever is shorter, preventing any decertification petition from being considered during that time. *Auciello Iron Works, Inc.*, 517 U.S. 781, 785-86 (1996); *NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994).

In *Flying Dutchman Park, Inc.*, 329 NLRB 414 (1999), the Board addressed facts almost identical to those here. In *Flying Dutchman*, the parties resolved their remaining substantive issues in a meeting on August 18, 1994. *Id.* at 414. On August 23, the union faxed a copy of the agreement to the employer, and the employer responded by notifying the union that the faxed copy had not included an agreed-upon clause. *Id.* at 415. The union faxed the correct copy on August 25, but that day both parties also received a decertification petition that had been filed with the Board on August 23. *Id.* Because the Board found that the parties entered into a contract on August 18, it rejected the employer's claim that the decertification petition relieved it of its obligation to execute the contract. *Id.* at 415, 417-18. Here, as in *Flying Dutchman*, the collective-bargaining agreement became effective when the parties reached a meeting of the minds by agreeing on the final substantive issue, and the contract-bar rule prevents a subsequent

decertification petition from affecting the Union's irrebuttable presumption of majority status.<sup>4</sup>

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<sup>4</sup> If the Court were to overturn the Board's finding that the Company was obligated to execute the collective-bargaining agreement as of May 3, then the case should be remanded to the Board to determine if the May 22 decertification petition is a valid expression of majority-employee sentiment. Because the Board held that the contract-bar rule prevents this subsequent decertification from even being considered, the Board did not have to pass on the validity of the petition. But its validity would depend upon at least three factors. First, when the employer relies on a decertification petition, the employer carries the burden, not necessarily at the time of withdrawal but at the unfair labor practice hearing, *Flying Foods Group, Inc.*, 345 NLRB 101, 103 n.9 (2005), of authenticating the petition signatures of a majority of the bargaining unit employees, either through testimonial evidence or handwriting exemplars. See *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 184 (D.C. Cir. 2006). Second, as the Board noted, there is a question whether the petition contains the signatures of a majority of the employees in the unit. (SA 1 n.1.) And third, there would need to be an examination of whether any of the signatures were obtained after the Company's May 9 announcement of its refusal to bargain. Any signatures obtained after that announcement would be tainted by the Company's announced refusal to honor its bargaining obligation.

**CONCLUSION**

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

Respectfully submitted,

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March 22, 2016

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

POLYCON INDUSTRIES, INC.	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-3675
	*	15-3859
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	13-CA-104249
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,247 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 22<sup>nd</sup> day of March, 2016

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

POLYCON INDUSTRIES, INC.	*
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	*
Respondent/Cross-Petitioner	*
	*

**CERTIFICATE OF SERVICE**

I certify that on March 22, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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this 22<sup>nd</sup> day of March, 2016