

In The
**United States Court Of Appeals
For The Seventh Circuit**

**CONTEMPORARY CARS, INC. and AUTONATION, INC.,
SINGLE AND JOINT EMPLOYERS,**
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,**
Intervening-Respondent.

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

**PETITIONERS/CROSS-RESPONDENTS' PETITION FOR
REHEARING WITH SUGGESTION FOR REHEARING *EN BANC***

Joel W. Rice
FISHER & PHILLIPS, LLP
10 South Wacker Drive, Suite 3450
Chicago, IL 60606
(312) 346-8061 – Telephone
(312) 346-3179 – Facsimile
jrice@laborlawyers.com

Steven M. Bernstein
FISHER & PHILLIPS, LLP
101 East Kennedy Blvd., Suite 2350
Tampa, FL 33602
(813) 769-7500 – Telephone
(813) 769-7501 – Facsimile
sbernstein@laborlawyers.com

Counsel for Petitioners/Cross-Respondents

Counsel for Petitioners/Cross-Respondents

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-3723

Short Caption: Contemporary Cars, Inc. v. National Labor Relations Board

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used**

[] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item 3):

AutoNation, Inc.
Contemporary Cars, Inc.
Mercedes-Benz of Orlando

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fisher & Phillips LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AutoNation, Inc. is the parent corporation of Contemporary Cars, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AutoNation, Inc. owns 100% of the stock of Contemporary Cars, Inc.

Attorney's Signature: s/ Steven M. Bernstein Date: January 6 2015

Attorney's Printed Name: Steven M. Bernstein

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Fisher & Phillips LLP
101 East Kennedy Blvd. Suite 2350 Tampa FL 33602

Phone Number: 813) 769-7500 Fax Number: 813) 769-7501

E-Mail Address: sbernstein@laborlawyers.com

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

CONTEMPORARY CARS, INC., d/b/a)	
Mercedes-Benz of Orlando, and)	
AUTONATION, INC., SINGLE AND)	
JOINT EMPLOYERS,)	
)	
Petitioners,)	
)	
v.)	
)	No. 14-3723
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent,)	
)	

CERTIFICATE OF SERVICE

I certify that on January 6, 2015, I filed the attached pleading with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit, and served the same via U.S. mail, postage pre-paid, on the following parties:

Rafael Aybar
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
201 E. Kennedy Boulevard, Ste. 530
Tampa, FL 33602-0000

Linda Dreeben
Jill A. Griffin
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
1099 14th Street N.W., Room 8101
Washington, DC 20570

Dated: January 6, 2015

s/ Steven M. Bernstein
Fisher & Phillips LLP
401 E. Jackson St., Ste. 2300
Tampa, FL 33602
(813) 769-7500
sbernstein@laborlawyers.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14 3723

Short Caption: Contemporary Cars, Inc. v. National Labor Relations Board

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used**

[] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item 3):

AutoNation, Inc.
Contemporary Cars, Inc.
Mercedes-Benz of Orlando

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fisher & Phillips LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AutoNation, Inc. is the parent corporation of Contemporary Cars, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AutoNation, Inc. owns 100% of the stock of Contemporary Cars, Inc.

Attorney's Signature: s/ Joel W. Rice Date: January 6 2015

Attorney's Printed Name: Joel W. Rice

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Fisher & Phillips LLP
10 S. Wacker Dr., Suite 3450, Chicago, IL 60606

Phone Number: (312) 346-8061 Fax Number: (312) 346-3179

E-Mail Address: jrice@laborlawyers.com

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

CONTEMPORARY CARS, INC., d/b/a)	
Mercedes-Benz of Orlando, and)	
AUTONATION, INC., SINGLE AND)	
JOINT EMPLOYERS,)	
)	
Petitioners,)	
)	
v.)	
)	No. 14-3723
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent,)	
)	

CERTIFICATE OF SERVICE

I certify that on January 6, 2015, I filed the attached pleading with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit, and served the same via U.S. mail, postage pre-paid, on the following parties:

Rafael Aybar
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
201 E. Kennedy Boulevard, Ste. 530
Tampa, FL 33602-0000

Linda Dreeben
Jill A. Griffin
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
1099 14th Street N.W., Room 8101
Washington, DC 20570

Dated: January 6, 2015

s/ Steven M. Bernstein
Fisher & Phillips LLP
401 E. Jackson St., Ste. 2300
Tampa, FL 33602
(813) 769-7500
sbernstein@laborlawyers.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. RULE 35 (b) STATEMENT	1
II. STATEMENT OF THE CASE	2
A. Summary of Pertinent Facts	2
1. Background As To The Dealership’s Service Department.....	2
2. Economic Downturn and Build-Up to Spring 2009 Layoffs	2
3. The April 2009 Layoffs and Their Aftermath	3
B. Procedural History Bearing Upon Remedy Issue	4
1. ALJ Proceedings As To Unfair Labor Practice Charges	4
2. The Board-Engendered Delays Associated With The Dealership’s Challenge To Union Certification	5
3. Board-Related Delays Associated With Review Of ALJ Decision As To Alleged Unfair Labor Practices	6
4. The Panel’s Decision	7
III. ARGUMENT.....	9
A. The Panel’s Decision Conflicts With This Court’s <i>Sundstrand</i> Decision With Respect To The Appropriate Remedy	9
B. The Panel’s Decision Raises A Question Of Exceptional Importance Regarding The Board’s Remedial Powers.....	12
IV. CONCLUSION.....	15

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Capital Cleaning Contractors, Inc. v. NLRB</i> , 147 F.3d 999 (D.C. Cir. 1998).....	13
<i>Contemporary Cars, Inc.</i> , 354 NLRB No. 72 (2009)	5
<i>Contemporary Cars, Inc.</i> , 355 NLRB 592 (2010).....	5-6
<i>Gulf States Mfg., Inc. v. NLRB</i> , 704 F.2d 1390 (5 th Cir. 1983)	14
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	13
<i>New Process Steel, L.P. v. NLRB</i> , 560 U.S. 674 (2010).....	5
<i>NLRB v. Contemporary Cars, Inc.</i> , 667 F.3d 1364 (11 th Cir. 2012)	6
<i>NLRB v. Noel Canning</i> , 573 U.S. ___, 134 S. Ct. 2550 (2014)	6
<i>Noel Canning v. NLRB</i> , No. 12-1281, cert. granted, 81 U.S.L.W. 3629 (June 24, 2013).....	6
<i>Republic Steel Corp. v. NLRB</i> , 311 U.S. 7 (1940).....	13
<i>Sundstrand Heat Transfer, Inc. v. NLRB</i> , 538 F.2d 1257 (7 th Cir. 1976)	<i>passim</i>

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984).....7, 13

Trico Products Corp. v. NLRB,
489 F.2d 347 (2nd Cir. 1973).....14

Statutes:

29 U.S.C. § 158(a)(3).....4

29 U.S.C. § 158(a)(5).....4

29 U.S.C. § 160(c)1, 13, 15

I. RULE 35 (b) STATEMENT

This petition for rehearing and suggestion of rehearing *en banc* concerns an abuse of the Board's discretion in granting full backpay and reinstatement with seniority rights to four technicians who were non-discriminatorily laid off in the spring of 2009. Petitioners/Cross Respondents Contemporary Cars, Inc. and AutoNation, Inc. (collectively, "the Dealership") request a rehearing *en banc* to address the patent conflict between the panel's decision to affirm that holding and a prior decision of this Circuit in *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976). As dissenter Judge Manion made clear, *Sundstrand* holds that "a full backpay remedy" for failure to bargain over a layoff is only appropriate if bargaining "*would have kept the employees on the job.*" (Op., p. 36, citing *Sundstrand*, 538 F.2d at 1260) (emphasis added).¹ The panel's opinion failed to properly apply that holding to the undisputed facts in this case.

This petition also raises a question of exceptional importance concerning the proper interpretation of Section 10(c) of the National Labor Relations Act ("the Act")(29 U.S.C. § 160(c)). Numerous courts have held that Section 10(c) authorizes the Board to award backpay only where it serves a remedial, rather than a punitive purpose. This petition affords the Court an opportunity to clarify

¹ The Dealership cites to the transcript and Appendix attached to its Opening Brief consistent with the nomenclature used in its Opening Brief, and cites to the Court's February 26, 2016 decision in this matter as "Op."

application of this important principle in the context of a technical refusal to engage in bargaining that would not have restored the jobs in question. Such clarification will provide guidance as to the limits on the Board's remedial powers, and the factors bearing upon such determination.

II. STATEMENT OF THE CASE

A. Summary of Pertinent Facts

1. Background As To The Dealership's Service Department

Doing business as Mercedes-Benz of Orlando, Petitioner Contemporary Cars, Inc. sells and services cars in Maitland, Florida. (Op., p. 3; Tr. 26, 130). The Dealership's General Manager is Bob Berryhill. (Op., p. 3; Tr. 137-38).

The Dealership has three teams of service technicians—each of which has its own team leader. (Op., p. 3; A9; Tr. 336). The technicians are not paid by the hour. Rather, they are paid by the “book time” assigned to each service job. (Op., p. 3; A9; Tr. 333). The upshot of this piece-rate system is that if work volume slows, then idled technicians bring home less pay. (Op., p. 3; A9).

2. Economic Downturn and Build-Up to Spring 2009 Layoffs

The Dealership was significantly impacted by the Great Recession of 2008. (Op., p. 5; Tr. 1196, 1221; Resp. Exs. 31-37). By October 2008, daily repair orders had fallen by 50%. (Tr. 1109-10, 1200-03). In this deteriorating economic environment, booked service hours declined by over 40%. (Tr. 1242).

By the fall of 2008, work had declined to such an extent that the technicians were already leaving for other opportunities. (Tr. 419-20; Op., p. 36). Remaining technicians were either leaving early or sitting idle. (Tr. 928, 1329-30). The need for layoffs was openly discussed among the technicians, as there “was not enough work to support everybody.” (Tr. 1331-32).

3. The April 2009 Layoffs and Their Aftermath

Mr. Berryhill determined that technician head count would have to be reduced in order to preserve opportunities for more qualified technicians. (Tr. 1205-07, 1236-37, 1360, 1437; A22). As one witness testified, “starving out” technicians to see who would give up and leave was not acceptable. Rather, the Dealership was focused on retaining its best technicians to provide customers with the best service. (Tr. 1257). By the spring of 2009, Berryhill, in consultation with senior management, had determined that four additional positions would have to be eliminated for the sake of those who would remain. (A22).

Consequently, Berryhill directed the team leaders to put together an objective evaluation form for purposes of rating the skills of the technicians. (A22). All three team leaders provided their input in the form of numerical ratings. (A23). The team leaders were explicitly instructed not to take union sympathies into consideration. (*Id.*). The four lowest rated technicians were subsequently selected for layoff as a result of this ranking system. (*Id.*).

Although the Dealership did not reach out to it in conjunction with the layoffs, the Union must have recognized that bargaining would have been a hollow exercise, as its subsequent letters to the Dealership seeking information pertinent to bargaining failed to even refer to the layoffs. (A27; Tr. 324; GC Ex. 87-90).

Following the layoffs, and continuing into 2010, flat rate hours remained depressed. (Tr. 1236-38, 1242). While there was no excess of work for the technicians who remained, the Dealership's difficult decision achieved its intended purpose—to avoid a mass defection of the most capable technicians in the shop.

B. Procedural History Bearing Upon Remedy Issue

1. ALJ Proceedings As To Unfair Labor Practice Charges

The Board's General Counsel filed a complaint, subsequently amended, alleging, *inter alia*, that the April 2009 layoffs: (a) were motivated by anti-Union animus in violation of Section 8(a)(3) of the Act; and (b) violated Section 8(a)(5) of the Act in light of the Dealership's failure to bargain over them. (Op., p. 7). The Dealership denied these allegations. (See Answers to Amended Consolidated Complaint).

On March 18, 2011, the Administrative Law Judge ("ALJ") issued a finding in favor of the Dealership as to approximately 75% of the Complaint allegations. (A4-29). Of particular import, the ALJ found that the Dealership did not act with discriminatory animus in its selection of the four technicians. (A23). Rather, he

found that the reduction-in-force was “dictated by economic circumstances,” and that the four technicians at issue “would have been discharged *even in the absence* of their union activities.” (A22-23) (emphasis added).

Notwithstanding this finding, the ALJ concluded that the Dealership was obligated to bargain over the layoffs. (A25). As a remedy, he ordered the Dealership to reinstate the technicians with full backpay and benefits. (A27).

2. The Board-Engendered Delays Associated With The Dealership’s Challenge To Union Certification

On December 16, 2008, a narrow majority of service technicians voted in favor of Union representation. (Op., p. 6). The Dealership subsequently challenged the Union’s certification as exclusive bargaining representative. (*Id.*).

On September 3, 2009, an unauthorized two-member Board panel affirmed the certification. (*Id.*); *Contemporary Cars, Inc.*, 354 NLRB No. 72 (2009). During the pendency of the Dealership’s legal challenge, the Supreme Court held on June 17, 2010 that all such two-member Board decisions were invalid on the ground that the Board lacked statutory authority to act without a proper quorum. (*Id.*); *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010).

In the wake of *New Process Steel*, a three-member Board panel set aside the two-member 2009 ruling, and, on August 23, 2010, issued a new order affirming the results of the election. (Op., p. 6-7); *Contemporary Cars, Inc.*, 355 NLRB 592,

593 (2010). Ultimately, in 2012, the Eleventh Circuit enforced the 2010 Board order. *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1373 (11th Cir. 2012).

3. Board-Related Delays Associated With Review Of ALJ Decision As To Alleged Unfair Labor Practices

On September 28, 2012, yet another unauthorized Board panel issued a decision upholding the ALJ's ruling as to the alleged unfair labor practices. *Contemporary Cars, Inc.*, 358 NLRB 1729 (2012). Pertinent to this petition, the Board upheld the ALJ's refusal to bargain findings. (A4-8). Likewise, the Board upheld the ALJ's remedy of full backpay and reinstatement. (A4, 6). The Dealership then petitioned this Court for review of the Board's decision. (Op., p. 7).

The Court subsequently stayed the proceedings, pending the Supreme Court's decision in *Noel Canning v. NLRB*, No. 12-1281, *cert. granted*, 81 U.S.L.W. 3629 (June 24, 2013), which concerned the issue of whether two Board members who had taken part in the underlying decision were serving by way of invalid recess appointments. (See Order Granting Petitioner's Motion to Hold Briefing Schedule in Abeyance, Appeal No. 12-3764, Document #19). In 2014, the Supreme Court issued its decision in *Noel Canning* holding that Board members Griffin and Block were appointed unconstitutionally. *NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2557 (2014). This Court then vacated the Board's 2012 decision and remanded for further proceedings. (Op., p. 7). On

December 16, 2014—over two years after its constitutionally infirm decision—the Board issued a renewed decision adopting the 2012 Board decision. (Op., p. 7; A30-34). This appeal followed.

4. The Panel's Decision

There was a sharp division of opinion between the panel majority and dissent over the appropriate remedy for the Dealership's failure to bargain over the April 2009 layoffs, Judge Hamilton's majority opinion conceded that "the function of a backpay remedy must be to restore the affected employees to the position they *would have* been in if their unlawful layoff had not happened." (Op., p. 32, citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984)) (emphasis added). Nonetheless, he concluded that the Board's remedy was supported by substantial evidence because he surmised that bargaining "might" have saved their jobs. (Op., p. 32).

As support for such conjecture, Hamilton suggested that the Union *could have* accepted reduced work for every technician in lieu of layoffs, or bargained for other, unspecified cost-cutting measures. (*Id.*). As to this Circuit's precedent in *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976), Hamilton merely noted that it involved layoffs "compelled by business necessity," whereas, in his view, this case did not involve an economic necessity. (Op., p. 33). Judge Hamilton went on to suggest that, "options other than layoffs were

available,” and on that basis alone, he concluded, “*Sundstrand* does not apply.” (*Id.*).

In dissent, Judge Manion accurately cited *Sundstrand* for the broader proposition that “a full backpay remedy must have been predicated on the assumption that bargaining over the effects of the layoff would have kept the employees on the job.” (Op., p. 36, citing *Sundstrand*, 538 F.2d at 1260). Judge Manion pointedly addressed Judge Hamilton’s “speculat[ion] that the union could have bargained for less work per technician or some other unspecified deal.” Specifically, he emphasized that it was essential for the Dealership “to keep its more skilled technicians as fully employed as possible” and “to make sure they had enough work” within a deteriorating economic environment. (*Id.*). Judge Manion noted that this latter point was not “conjecture,” but rather based on the undisputed fact that “technicians were leaving the dealership for other opportunities, as they saw that the dealership could not supply enough work per person.” (*Id.*).

Given such circumstances, the dissent reasoned, it would be punitive and a violation of *Sundstrand* to require the Dealership to pay multiple years of backpay and restore seniority rights to the least skilled technicians. (Op., p. 37). As Judge Manion noted: “Under *Sundstrand*, the dealership should not be penalized for attempting to keep as many of the highly skilled technicians as fully employed as possible.” (*Id.*). The dissent further observed that it is highly “dubious” that the

four technicians with the lowest objective rankings would have received full pay had they been retained, when “there was not enough work to go around when technicians were laid off.” (*Id.*). Finally, Manion found seven years of backpay “too harsh” in light of the “significant delays” where the Board’s own missteps invalidated two separate Board decisions in this matter. (*Id.*, p. 37-38).

III. ARGUMENT

A. The Panel’s Decision Conflicts With This Court’s *Sundstrand* Decision With Respect To The Appropriate Remedy.

This Circuit’s decision in *Sundstrand* had two separate components. The first concerned the substantive question as to whether an employer must bargain over the effects of layoffs that are the product of “compelling economic circumstances.” 538 F.2d at 1259. The Court held that, under such circumstances, an employer may be obligated to notify the Union and provide requested information, but not to bargain over the effects of the layoffs. *Id.*

Section II of *Sundstrand*, however, contained a separate remedial component that narrowly addressed the propriety of a backpay award. In it, this Circuit made clear that even if there was a duty to bargain, the Board’s remedy must be limited to “restor[ing] the situation to that which *would have* been obtained but for the illegal action.” *Id.* at 1260 (emphasis added). Where it was “wholly improbable” that bargaining would have restored the affected employees, a backpay remedy was inappropriate. *Id.* Given the conjectural basis for the Board’s remedial

determination, the Court held that it had abused its discretion in ordering full backpay. *Id.*

The panel here improperly conflated the two *Sundstrand* components in an attempt to distinguish it from the instant case. Specifically, the panel concluded that unlike in *Sundstrand*, the layoffs here were not “compelled by economic necessity.” (Op., p. 33). Although the Dealership strenuously disputes that conclusion, the existence of a narrowly defined economic exigency only bears on *Sundstrand*’s first component: whether there was a duty to bargain.

Consequently, the panel wholly failed to confront Section II of *Sundstrand*, concerning the appropriateness of a backpay remedy *after* a technical refusal to bargain. That section has nothing to do with whether economic circumstances are sufficiently compelling to relieve the employer of its duty to bargain. Rather, it speaks to the more fundamental issue of the principled limits on the Board’s remedial power—which is confined to restoring the *status quo ante*, and not to penalizing the employer or conferring a windfall upon employees.

The panel’s decision cannot be squared with Section II of this Circuit’s opinion in *Sundstrand*. The panel weakly speculated that bargaining “might have” saved the four technicians’ jobs—without citing to any record evidence to support that conclusion. (Op., p. 32). The panel further posited a conjectural scenario in

which the union could have reduced work for every technician in order to avert layoffs, without attempting to specify how this could have been done. (*Id.*).

As the dissent recognized, this unwarranted speculation flies in the face of undisputed record evidence establishing that technicians were already leaving or threatening departure due to a pronounced lack of work. (Op., p. 36; Tr. 419-20, 1331-32). The panel also ignored the threat of adverse selection inherent in such an approach, where the technicians were paid by the job rather than by the hour.

As the record reflects, the rationale behind the layoffs was not to cut costs, but to keep the most highly skilled technicians from leaving. (Op., p. 37; A22; Tr. 1257). Spreading around a diminishing amount of work inevitably would have driven the best technicians to follow through on their threats to leave, thereby preserving jobs for lesser skilled counterparts, at cross-purposes with the Dealership's business objectives. This is not conjecture, but an economic fact.

In affirming the Board's full backpay award, the panel endorsed a punitive remedy, rather than one designed to make whole the affected employees. This, too, was recognized by the dissent, which correctly observed that full backpay and restoration of seniority for the four lowest rated technicians would represent an unfair and unwarranted windfall. (Op., p. 37). Compounding the unfair and punitive nature of this remedy is the fact that a significant portion of the protracted seven-year backpay period can be directly attributed to delays of the Board's own

making – in the form of its decision to act without a proper quorum, not once, but twice over the course of the procedural history. (*Id.*, p. 37-38). As Judge Manion pointed out, the Dealership should not be penalized for such delays, given the utter improbability that bargaining would have led to a preservation of jobs for the four weakest technicians.

In sum, there is no way to square the panel's decision with this Court's holding in Section II of *Sundstrand*. The undisputed evidence of record leads to but one conclusion: no amount of bargaining would have saved the four technicians' jobs. The teaching of *Sundstrand* is that under such circumstances, full backpay would not restore the *status quo ante*, but rather impose an unfairly punitive remedy. The panel ignored that teaching, and the full Circuit should take up this issue.

B. The Panel's Decision Raises A Question Of Exceptional Importance Regarding The Board's Remedial Powers.

The panel's decision to affirm the Board's unfairly punitive remedy also raises a question of exceptional importance regarding appropriate limits on the Board's remedial powers. Since deciding *Sundstrand* four decades ago, this Circuit has had little occasion to address this issue. This case presents a unique opportunity for this Circuit to apply fundamental principles of jurisprudence to the question of an appropriate remedy where there has been a technical failure to bargain over layoffs that could not have been averted.

The Board's remedial authority under Section 10(c) of the Act includes "such affirmative action including reinstatement of employees with or without backpay as will effectuate the policies of the Act . . ." 29 U.S.C. § 160(c). In *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940), the Supreme Court made clear that the Act is remedial, not penal, in nature, and thus does not vest the Board with discretion "to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."

The Supreme Court has reaffirmed this proposition on several occasions. In *Sure-Tan, Inc. v. NLRB*, 467 U. S. 883 (1984), for example, the Court reversed an award of backpay that was not "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." 467 U.S. at 901. A backpay remedy, the Court stressed, must address "only the actual, and not merely speculative, consequences of the unfair labor practices." *Id.* at 900. *See also*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43, 148-52 (2002) (reversing Board's award of backpay to illegal aliens, Court reaffirms that Board's "discretion to select and fashion remedies for violation of the NLRA" has limits).

Numerous Circuit Courts have affirmed the cardinal principle that the Board does not have authority to impose a punitive remedy. *See, e.g., Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009-10 (D.C. Cir. 1998) (court holds that remedy unlawfully exceeded the Board's statutorily limited powers, while

stressing that Circuit Courts are required to carefully examine the Board's findings and reasoning to ensure that the Board has "selected a course which is remedial rather than punitive") (internal citations omitted); *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399-1402 (5th Cir. 1983) (citing Circuit rule that backpay order will not be enforced where result "would be to put worker in a better position than he would be without the violation," court denies enforcement of Board's backpay order and remands for further consideration of "whether the company's economic situation would have required the layoffs in any event"); *Trico Products Corp. v. NLRB*, 489 F.2d 347, 353-54 (2nd Cir. 1973) (court reverses backpay award and restores ALJ's findings that layoffs would have occurred, in any event, due to company's economic condition).

The foregoing cases illustrate that the Circuit Courts are not to serve as a rubber stamp for the Board's choice of remedy, where it is punitive in nature and finds no reasonable support in the record. They also illustrate that the employer's business conditions must be taken into account in fashioning a remedy. This proposition holds true even if the employer's condition does not rise to the level of "compelling economic circumstances" required to avoid a bargaining obligation.

Regardless of whether the economic circumstances confronting the Dealership were unforeseen, they were undeniably dire in this case. Nor can it be

disputed that technicians were leaving (and threatening to leave) because they were sitting idle—a critical problem when technicians are paid by the job.

For all these reasons, this Circuit should affirm the important principle that the Board is not free to impose a punitive remedy, but instead must fashion one that is appropriately tailored to the facts before it. This case presents an appropriate vehicle for this Circuit to address this important issue.

IV. CONCLUSION

Rehearing is necessary to correct the panel's error in affirming full backpay and reinstatement to four technicians whose jobs would not have been saved by any amount of bargaining, given the dire economic circumstances confronting the Dealership. In so erring, the panel's decision directly conflicts with this Circuit's holding in Section II of *Sundstrand*. Moreover, the remedial issue raised by this petition is one of exceptional importance, as it concerns the proper limits on the Board's powers under Section 10(c) of the Act. For all these reasons, the Dealership respectfully requests that the Court grant this petition for rehearing and suggestion of rehearing *en banc* in its entirety.

Respectfully submitted,

By: /s/ Steven M. Bernstein
Steven M. Bernstein
FISHER & PHILLIPS, LLP
101 East Kennedy Blvd., Suite 2350
Tampa, FL 33602
Telephone: (813) 769-7500
Facsimile: (813) 769-7501
Email: sbernstein@laborlawyers.com

Joel W. Rice, Esq.
FISHER & PHILLIPS LLP
10 South Wacker Drive, Suite 3450
Chicago, Illinois 60606
Telephone: (312) 346-8061
Facsimile: (312) 346-3179
Email: jrice@laborlawyers.com

*Attorneys for Petitioners/Cross-
Respondents*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements**

1. This Petition for Rehearing with Suggestion for *Rehearing En Banc* complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared using Microsoft Word in 14 Point Times New Roman.

Respectfully submitted this 11th day of April, 2016.

/s/ Joel W. Rice

Joel W. Rice

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this the 11th day of April, 2016, I filed the foregoing via the Court's CM/ECF System, which will send notice of such filing to all registered users.

The necessary filing and service were performed in accordance with instructions given to me by counsel in this case.

/s/ Melissa A. Dockery

Melissa A. Dockery

GIBSON MOORE APPELLATE SERVICES

206 East Cary Street

Richmond, Virginia 23219

(804) 249-7770