

Nos. 15-1029, 15-1046

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

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH A. HEANEY
Supervisory Attorney

HEATHER S. BEARD
Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-1743
(202) 273-1788

RICHARD F. GRIFFIN, JR
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

B. Rulings Under Review

This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board (Chairman Pearce and Members Johnson and Schiffer) in *Noel Canning, a division of the Noel Corporation and Teamsters Local 760*, Case No. 19-CA-032872, issued on December 16, 2014, and reported at 361 NLRB No. 29 (2014).

C. Related Cases

On February 8, 2012, the Board (Members Hayes, Flynn, and Block) issued an earlier Board Order in this case, reported at 358 NLRB No. 4. On January 25, 2013, this Court granted the Company's petition for review (No. 12-1115), denied the Board's cross-application for enforcement (No. 12-1153), and vacated the Board's February 2012 Order because at the time of that 2012 Order, the Board included three persons whose January 2012 appointments to the Board the Court found invalid. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The Board subsequently filed a petition for certiorari. Thereafter, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which held the January 2012 appointments invalid, affirming this Court's decision on modified grounds. The case before the Court at this time, as described in "B." above, incorporates the Board's February 2012 Order by reference.

The Company has challenged the Board's jurisdiction to decide this case anew following this Court's denial of enforcement of the Board's February 2012 Order. There are three other cases pending in the courts of appeals in which the Board issued new decisions after the courts had similarly denied enforcement. These cases have been fully briefed. *See Enterprise Leasing Co.-Southeast, LLC*, 361 NLRB No. 63, 2014 WL 4954773 (application for enforcement pending, *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, Fourth Circuit Case No. 14-2072) (oral argument scheduled September 16, 2015); *Huntington Ingalls Inc.*, 361 NLRB No. 64, 2014 WL 4966737 (petition for review and cross-application for enforcement pending, *Huntington Ingalls Inc. v. NLRB*, Fourth Circuit Case Nos. 14-2051, 14-2148) (oral argument scheduled September 16, 2015); and *Big Ridge Inc.*, 361 NLRB No. 149, 2014 WL 7223112 (petition for review and cross-application for enforcement pending, *Big Ridge, Inc. v. NLRB*, Seventh Circuit Case Nos. 15-1046 and 15-1103).

/Linda Dreeben/
Linda Dreeben
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th St., NW
Washington, DC. 20570
(202) 273-2960 (phone)

Dated at Washington, DC
this 20th day of July, 2015

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GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to this Court
“The Company”	Noel Canning
“JA”	Joint Appendix
“SA”	The Board’s Supplemental Appendix
“The Union”	International Brotherhood of Teamsters, Local 270

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Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Noel Canning (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order finding that the Company violated the National Labor Relations Act (“the Act”) by refusing to reduce to writing and execute a collective-bargaining agreement reached with the International Brotherhood of Teamsters, Local 760 (“the Union”).

The Board had subject matter jurisdiction under Section 10(a) of the Act, as amended (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order issued on December 16, 2014, and is reported at 361 NLRB No. 129.¹ The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on February 5, 2015. The Board filed its cross-application for enforcement on March 2, 2015. Both were timely; the Act places no time limitations on such filings.

STATEMENT OF ISSUES

1. Whether the Board properly considered this case anew and resolved the merits of the unfair-labor-practice allegations.

2. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute and enter into a collective-bargaining agreement to which it orally agreed.

¹ "JA" references are to the Joint Appendix filed by the Company. "SA" references are to the Supplemental Appendix being filed with this Brief.

RELEVANT STATUTORY PROVISIONS

The attached Addendum includes pertinent statutory provisions not already provided in the Company's Addendum.

STATEMENT OF THE CASE

The case before the Court is the Board's December 16, 2014 Decision and Order, which incorporates by reference, and as modified, the Board's 2012 Decision and Order.² The Board found that the Company violated the Act by refusing to execute and enter into a collective-bargaining agreement to which it orally agreed.

Before the Court, the Company contends only that the Board lacked jurisdiction to issue its Decision and Order in this case. If the Court rejects the Company's challenge to the validity of the Board's Order, then the Order is entitled to summary enforcement in full.

I. THE BOARD'S FINDINGS OF FACT

A. Negotiations Between the Company and the Union

The Company bottles and distributes Pepsi-Cola products. (JA 3.) The Company and the Union have enjoyed a long standing collective-bargaining relationship with successive agreements dating back to the 1940s. (JA 3.) On

² Because of this express incorporation by reference, the citations in this brief are to both the Board's 2014 Decision and Order and the Board's earlier 2012 Decision and Order.

April 30, 2010, their most recent agreement expired, and after agreeing to an extension, the parties commenced bargaining for a new contract. (JA 3.)

The parties met for five bargaining sessions, starting June 26, 2010 and ending on December 8, 2010. (JA 3.) Although the parties resolved most issues, two points of contention emerged – wages and pension plans. (JA 3.) During the five sessions, the parties did not exchange any written proposals but discussed the pros and cons of the Union’s versus the Company’s pension plans. The parties eventually agreed to let the employees decide between the two plans and, by November, the employees decided to remain with the Union’s plan. (JA 4 n.2.) Negotiations continued, with the parties meeting on November 15, 2010, without reaching agreement. (JA 7.)

On December 8, 2010, the parties met for the last time. Representing the Union were its business representative, Bob Koerner, and unit employees Matthew Urlacher and Mark Weber, who was attending for the first time as a last minute substitution. (JA 3.) Company President Rodger Noel, Plant Manager Sam Brackney, Chief Financial Officer Larry Estes, and Treasurer Cindi Zimmerman represented the Company. (JA 3.)

After other proposals were discussed, the Union presented a proposal of a 2-year agreement with a \$.45 per-hour increase in each year, and to allow the employees to determine how much of the raise to divert to the Union’s pension

plan. (JA 4.) Under the proposal, the Company would continue to pay the employees' medical insurance, and the employees would receive a retroactive pay bonus. (JA 4.)

The Company responded with a \$.40 per-hour increase for each year, and included the retroactive pay bonus and full medical insurance coverage. (JA 4.)

The Union was agreeable to this offer, which became known as the "40-40" proposal. (JA 4-5.)

However, the Company believed that the employees would be better off financially with a different Company proposal. (JA 4.) Alternatively, it put forth a 2-year contract, with employees receiving a \$.78 per-hour wage increase and an additional \$.12 per hour for pensions in the first year, and a \$.33 per-hour wage increase with no additional amount for pensions in the second year. The employees would also pay a portion of their monthly health premium. (JA 4.)

Koerner suggested that the employees vote on the two proposals, the "40-40" plan and the Company's alternative. (JA 4.) Both were for a 2-year contract and included a retroactive pay bonus. Koerner stated that the Union would be neutral and not claim a preference for either proposal, and the parties would be bound by whatever proposal the employees chose. (JA 4.)

After the Union reviewed the respective proposals' terms, the Company agreed to this approach. (JA 4.) President Noel, after confirming the starting date

for the new contract, said “then let’s do it.” (JA 4.) Plant Manager Brackney nodded his agreement. (D&O 6.) Estes, the Company’s chief financial officer, instructed the parties to “write it up and get it sent over.” (JA 4.) Treasurer Zimmerman agreed to email Koerner the two proposals. The Company gave the Union permission to use the Company’s meeting room for the vote on the two proposals. (JA 5.) The meeting ended after all the parties shook hands. (JA 4.)

B. Post-Negotiation Events

The following day, December 9, 2010, Weber discussed the two proposals with his co-workers, who expressed a strong preference for the “40-40” proposal. (JA 5.) Weber also spoke to Brackney, expressing his relief that the negotiations were “all over.” (JA 5.) Brackney agreed and told Weber that both parties got a “good deal.” (*Id.*)

At 4:00 p.m. that same day, Zimmerman emailed Koerner a document titled “Proposal,” which outlined two alternative proposals. (JA 5.) While the Company’s proposal remained relatively unchanged, the Company significantly altered the “40-40” proposal, denying employees the right to determine their wage-pension allocation and setting the pension contribution “not to exceed \$.10 of the \$.40.” (*Id.*)

The next morning, December 10, 2010, Koerner sent Zimmerman an email detailing the terms that the parties had agreed to on December 8, which included

the Union's understanding that "the wage pension diversion for each year was proposed as \$.40 per hour with the employees diverting whatever portion to pension which would be voted by the group." (JA 5.) That same morning, Koerner posted a notice at the Company's premises announcing a vote for the contract on Wednesday, December 15, 2010, in the Company's meeting room. (JA 5.)

Koerner then informed Weber that the Company changed its mind on the agreement. (JA 5.) Afterwards, Weber asked Brackney why the Company reneged; Brackney responded that he did not know. (JA 5.)

Later that evening, during a telephone conversation, Koerner informed President Noel that Zimmerman's December 9 email did not reflect the parties' December 8 agreement. (JA 5.) Noel responded that the agreement had not been in writing, and that he had the right to make decisions for the Company. (JA 5.) Koerner informed Noel that the Union was going to vote on what the parties had agreed to at the bargaining table. (JA 5.)

On December 15, the Union held the vote, and the employees overwhelmingly chose the "40-40" proposal by a vote of 37 to 2. (JA 5.) The employees also voted to divert all \$.40 of the wage increase into the pension trust. (JA 5.)

Koerner immediately presented the vote results to Noel, who made a rude comment. The next day, Noel sent Koerner two letters. (JA 5-6.) The first letter stated that “[it was] not appropriate to vote an offer that was not made by the employer,” and that the parties were at an impasse. (JA 6.) The second letter demanded Koerner refer all further communications to the Company’s attorney. (JA 6.)

On January 13, 2011, the Union sent copies of the new collective-bargaining agreement to the Company. (JA 7.) This agreement reflected the terms employees ratified on December 15. The Company has since refused to execute it. (JA 7.)

II. THE PRIOR PROCEEDINGS

A. The Initial Board Proceeding

Acting on unfair-labor-practice charges filed by the Union, the Board’s General Counsel issued a complaint alleging, *inter alia*, that the Company violated the Act by refusing to execute a written contract embodying the terms to which the parties had orally agreed during collective-bargaining negotiations. (JA 3.)

Following a hearing, the administrative law judge found that the parties had reached a verbal agreement on all substantive issues of a collective-bargaining agreement, and that the Company’s failure to execute that agreement and abide by those terms violated Section 8(a)(5) and (1) of the Act (29 U.S.C. Sec. 158(a)(5) and (1)). (JA 8.) Upon exceptions filed by the Company, the Board (Members

Hayes, Flynn, and Block) issued a Decision and Order on February 8, 2012, affirming the judge's decision and adopting his recommended order. (JA 1-3.)

B. The D.C. Circuit's and Supreme Court's *Noel Canning* Decisions

At the time of the Board's 2012 Order, the Board included three persons whose January 2012 appointments to the Board had been challenged as constitutionally infirm. Following the Board's 2012 Decision and Order, the Company petitioned for review and the Board cross-applied to this Court for enforcement (Case Nos. 12-1115 and 12-1153). After briefing and oral argument, the Court, on January 25, 2013, issued an opinion concluding that substantial evidence supported the Board's finding that the Company engaged in unfair labor practices but nevertheless denied enforcement and vacated the Board's Order. *Noel Canning v. NLRB*, 705 F.3d 490, 494-96, 499, 506-07, 513-14 (D.C. Cir 2013), *affirmed as modified*, 134 S. Ct. 2550 (2014) ("the D.C. Circuit's" or "the Court's" *Noel Canning* decision)).

The Court's sole basis for denying enforcement was that because the "President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that session continued," those appointments were invalid, and "the Board lacked a quorum of three members when it issued its decision in this case." *Id.* at 506-07 (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010) (holding that two-

member quorum of a three-member panel delegated all of the Board's powers could not continue to exercise that delegated authority after the third Board member's appointment expired). In accordance with its opinion, the Court issued a judgment granting the Company's petition for review, vacating the Board's order, and denying the Board's cross-application for enforcement. (JA 28.) The Court issued mandate on March 20, 2013, which consisted of a copy of the Court's judgment. (JA 30.)

Thereafter, the Board filed with the Supreme Court a petition for writ of certiorari on the recess appointment issue, which the Court granted. On June 26, 2014, the Supreme Court issued *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) ("the Supreme Court's *Noel Canning* decision"), holding that the three recess appointments to the Board in January 2012 were invalid under the Recess Appointments Clause, including the appointments of Members Flynn and Block.³ The Supreme Court therefore issued a judgment affirming the D.C. Circuit's judgment. (JA 32.)

³ The Supreme Court modified the D.C. Circuit's reasoning regarding the recess appointment issue but reached the same result invalidating the appointments. *See* 134 S. Ct. at 2556-57.

III. THE BOARD'S DECISION AND ORDER AFTER THE SUPREME COURT'S *NOEL CANNING* DECISION

In an August 15, 2014 letter, the Board's Executive Secretary notified all the parties in this matter that, in light of the Supreme Court holding that the panel which first decided this case was invalid, the Board would "consider anew the Company's exceptions . . . and will issue a decision and order resolving the complaint allegations." (JA 33, SA 2.)⁴ On September 5, 2014, the Company filed a motion to submit additional written argument. (JA 33 n.2, SA 3.) On September 10, 2014, the Executive Secretary denied the Company's motion, but stated that the Board would allow the Company to submit a letter calling attention to pertinent and significant authorities that had come to the Company's attention after filing its brief with the Board.⁵ (JA 33, SA 5). The Company did not do so.⁶ (JA 33 n.2.)

⁴ At that time, the Board was composed of five Presidentially-appointed, Senate-confirmed members, having regained a quorum in August 2013. *See The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members>.

⁵ The Board permits the submission of such letters in appropriate cases pursuant to its decision in *Reliant Energy*, 339 NLRB 66 (2003), in which the Board modeled its procedure after Federal Rule of Appellate Procedure 28(j) (citation of supplemental authorities). *See* JA 33 n.2.

⁶ The Company's failure to avail itself of this opportunity stands in contrast to the three other cases pending in the courts of appeals in which the Board issued new decisions after the courts had similarly denied enforcement. *See Enterprise Leasing Co.-Southeast, LLC*, 361 NLRB No. 63, 2014 WL 4954773 (application for enforcement pending, *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, Fourth

On December 16, 2014, the Board (Chairman Pearce, Members Johnson and Schiffer) issued the Decision and Order before the Court in the instant case.

Although the Company did not challenge the Board's power to decide the case anew, the Board noted (JA 33, 33 n.1) that the 2013 D.C. Circuit's *Noel Canning* decision to deny enforcement, affirmed by the Supreme Court on modified grounds, "was not based on the merits of the unfair labor practice case," but rather on the absence of a quorum at the time the original order was issued. Accordingly, "[i]n view of the [Supreme Court's decision in *Noel Canning*]," the Board "considered de novo the judge's decision and the record in light of the exceptions and briefs," as well as the "now-vacated [2012] Decision and Order," and stated that it agreed with the rationale of the 2012 Decision and Order. (JA 33.) The Board then affirmed the findings and adopted the order of the administrative law judge, to the extent and for the reasons stated in the Board's 2012 Decision and Order, which it incorporated by reference. (JA 33.)

Circuit Case No. 14-2072); *Huntington Ingalls Inc.*, 361 NLRB No. 64, 2014 WL 4966737 (petition for review and cross-application for enforcement pending, *Huntington Ingalls Inc. v. NLRB*, Fourth Circuit Case Nos. 14-2051, 14-2148); and *Big Ridge Inc.*, 361 NLRB No. 149, 2014 WL 7223112 (petition for review and cross-application for enforcement pending, *Big Ridge, Inc. v. NLRB*, Seventh Circuit Case Nos. 15-1046 and 15-1103). In those cases, unlike the Company here, the employers submitted supplemental letters to the Board challenging the Board's jurisdiction to issue new decisions after receiving notice that the Board planned to do so. See *Enterprise*, 2014 WL 4954773 at *1; *Huntington*, 2014 WL 4966737 at *1; and *Big Ridge*, 2014 WL 7223112 at *1.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). (JA 33-34.) Affirmatively, the Order requires the Company to execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010; apply the terms retroactively to October 1, 2010 and for the agreed upon 2-year duration; and to make the employees whole for any loss incurred as a result of the Company's unfair labor practice.⁷ (JA 33-34.) Finally, the Order requires the Company to post a remedial notice and to distribute such a notice electronically.⁸ (JA 34-35.)

SUMMARY OF ARGUMENT

1. The Board properly found that the Court's denial of enforcement of the February 2012 Decision and Order did not prevent the Board from deciding this case anew. In denying enforcement, the Court relied solely on its holding,

⁷ The Board additionally required the Company to compensate employees for any adverse tax consequences of receiving a lump sum backpay award, and to file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters, in accordance with its recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). (JA 33 n.3, JA 34.)

⁸ The Board also modified the required notice to provide employees with information about where to find the Board's Decision and Order, in accordance with its recent decision in *Durham School Services*, 360 NLRB No. 85 (2014). (JA 33 n.3, JA 35.)

affirmed as modified by the Supreme Court, that the Board's recess appointments were invalid and therefore the Board was improperly constituted when it issued the Decision and Order. Interpreting the Court's mandate as permitting further proceedings in these circumstances fully comports with the treatment by the courts of appeals in other cases in which enforcement was denied for lack of a Board quorum, and with principles governing the reasonable and equitable interpretation of mandates. The Board's view is also supported by the decisions of every court, including this one, that have permitted a properly constituted Board to address the merits of the unfair-labor-practice allegations in proceedings after *New Process* and *Noel Canning*. The Company's assertion that the now properly constituted Board should be precluded from resolving the underlying unfair-labor-practice dispute relies on a litany of distinguishable cases and conflicts with both reasonable and equitable principles governing the interpretation of mandates. Accordingly, the Board properly interpreted the Court's mandate and decided this case anew.

2. Before the Court, the Company has not challenged the Board's findings that the Company violated the Act by refusing to execute and enter into a collective-bargaining agreement to which it orally agreed. Thus, the Board is entitled to summary enforcement of these uncontested violations.

ARGUMENT

I. THE BOARD PROPERLY CONSIDERED THIS CASE ANEW AND RESOLVED THE MERITS OF THE UNFAIR-LABOR-PRACTICE ALLEGATIONS

Taking account of the D.C. Circuit's and Supreme Court's decisions in *Noel Canning*, see pp. 12 above, the Board in the decision now under review (JA 33) considered the case anew. Under settled principles, the Board's task was to construe the Court's decision, affirmed as modified by the Supreme Court, "in light of the principle that a mandate is to be interpreted reasonably and not in a manner to do injustice." *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (per curiam) (quoting *Wilkinson v. Mass Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)); accord *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947); *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202, 204 (5th Cir. 1995); *Phillips Petroleum Corp. v. FERC*, 902 F.2d 795, 798 (10th Cir. 1990); *Little v. United States*, 794 F.2d 484, 489 n.3 (9th Cir. 1986). In performing this task, the Board was mindful of the instruction that "[i]nterpretation of an appellate mandate entails more than examining the language of the court's judgment in a vacuum." *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998).

There is no merit to the Company's argument (Br.1-29) that the Court's order denying enforcement deprived the Board of jurisdiction to decide this case

with a properly constituted Board panel. As shown below, the Board properly construed the mandate as permitting it to resolve the unfair-labor-practice allegations. Specifically, the Board concluded (JA 33) that the Court's decision was not a final resolution of the unfair labor practice issue and should not be interpreted as terminating further proceedings before the Board.

It is well established that an appellate mandate is reasonably construed to govern only what "was actually decided." *Exxon Chem. Patents*, 137 F.3d at 1478. As the Board recognized (D&O 1, 1 n.1), the sole basis of the Court's *Noel Canning* decision denying enforcement, affirmed by the Supreme Court, was the conclusion that the January 2012 recess appointments were invalid. *See* 705 F.3d at 494-96, 499, 506-07, 513-14. Significantly, although the Court found that the Board's decision was "supported by substantial evidence," (*Id.* at 496), the Court denied enforcement solely because "the [recess] appointments were constitutionally invalid and the Board therefore lacked a quorum." *Id.* (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010)). The Court's Judgment and Mandate (JA 28, 30) stated that in "accordance with" the Court's opinion, "the petition for review is granted, the Board's order is vacated, and the cross-application is denied." In turn, the Supreme Court's Judgment (JA 32) affirmed the judgment of the Court.

As the now-properly constituted Board concluded (JA 33), "in view of the decision of the Supreme Court," it was free to consider the case anew.

Specifically, as the Board found (JA 33), the D.C. Circuit’s decision denying enforcement, affirmed by the Supreme Court, was not based upon the Court’s adversely resolving the unfair-labor-practice issues raised in the General Counsel’s complaint and litigated in the unfair-labor-practice proceedings. To the contrary, in an effort to resolve the case on non-constitutional grounds, the Court first reviewed the merits of the unfair labor practice findings, and concluded that substantial evidence supported the Board’s findings. *See* 705 F.3d at 493, 496. Because the Court denied enforcement solely on the ground that the order before it had been issued by improperly appointed Board members, the Board reasonably concluded (JA 33) that the Court’s mandate was not intended to preclude further proceedings before a Board composed of validly appointed members. As the Board has explained, “[t]he clear import” of both the Supreme Court’s decision and this Court’s decision in *Noel Canning* is that “no validly constituted Board has ruled on the exceptions to the administrative law judge’s decision” and, therefore, that the exceptions are “still pending before the Board, and the Board is free to address them.” *Big Ridge Inc.*, 361 NLRB No. 149, 2014 WL 7223112 at *1 (petition for review and cross-application for enforcement pending, *Big Ridge, Inc. v. NLRB*, Seventh Circuit Case Nos. 15-1046 and 15-1103); *see also Enterprise Leasing Co.-Southeast, LLC*, 361 NLRB No. 63, 2014 WL 4954773 at *2 (application for enforcement pending, *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, Fourth Circuit Case No. 14-2072);

Huntington Ingalls Inc., 361 NLRB No. 64, 2014 WL 4966737 at *2 (petition for review and cross-application for enforcement pending, *Huntington Ingalls Inc. v. NLRB*, Fourth Circuit Case Nos. 14-2051, 14-2148).

The Board's conclusion is in accord with how other circuits construed similar mandates denying enforcement after *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010), which set aside orders issued by a two-member Board on the ground that the two members lacked authority to issue decisions after the term of the third member expired and the Board's membership fell below its quorum requirement. The decision of the Eighth Circuit in *NLRB v. Whitesell Corp.*, 638 F.3d 883 (2011), which issued during the post-*New Process* period, is the most instructive in calling attention to the difference between a court denying enforcement on the merits and denying enforcement because the panel that issued a decision lacked authority.

In *Whitesell*, the Eighth Circuit relied on the Supreme Court's decision in *New Process* to deny enforcement of an order issued by the improperly constituted two-member Board. 638 F.3d at 888. Subsequently, in reviewing the new final order issued by a validly constituted Board, the Eighth Circuit squarely held that its prior order denying enforcement did not prevent the properly constituted Board from considering the case. *Id.* Responding to virtually the same arguments as the Company makes here, the court explained that its prior denial was based only on

the composition of the two-member Board, not the merits of the unfair-labor-practice issues, and that its order denying enforcement “without reference to remand” did “*not* preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision.” *Id.* at 889 (emphasis added).

Likewise, the Second Circuit in *NLRB v. Domsey Trading Corp.*, 383 F. App’x 46, 47 (2d Cir. 2010), when it denied enforcement of a two-member Board order pursuant to *New Process*, “anticipated further proceedings before the Board and that a new petition for enforcement would be filed.” *Whitesell*, 638 F.3d at 889 (noting that after a validly constituted Board panel reconsidered the case, the Second Circuit reviewed the merits of the Board’s decision in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011)). In sum, as the Eighth Circuit has explained, where, as here, a court determines that no proper Board quorum has decided the merits, a remand need not be explicitly ordered for the Board to consider the case anew because the court’s mandate is reasonably construed to permit a properly constituted Board to decide the case. *Whitesell*, 638 F.3d at 889.

In contending that the Board’s conclusion was incorrect, the Company utterly ignores *Whitesell* and instead relies (Br. 13-26) on distinguishable cases. Specifically, it relies on cases in which the court, after considering and ruling on the merits, enforced or set aside a final order issued by a properly constituted Board. *See, e.g., Int’l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-*

Picher Mining & Smelting Co., 325 U.S. 335, 339-44 (1945) (absent proof of fraud or mistake, the Board is not entitled to have a court-enforced order vacated almost 2 years later so that it can enter a new remedial order that in retrospect it decides is more appropriate); *W.L. Miller v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (once court enforces Board order on the merits, Board lacks authority to reopen proceeding to award additional relief);⁹ *NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996) (Board not entitled to continue processing representation case after court explicitly denied enforcement on the merits); *Service Employees Int’l. Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate claim, the merits of which were implicitly rejected by earlier court decision).¹⁰

Here, by contrast, the Court denied enforcement because the order before the Court was issued by officials that the Court found were improperly appointed.

⁹ This Court’s recent decision in *Dupuy v. NLRB*, No. 14-1001 (D.C. Cir. July 17, 2015), 2015 WL 4385603, is distinguishable for the same reasons as are *Eagle-Picher* and *W.L. Miller*. In *Dupuy*, 2015 WL 4385603 at *5-6, this Court held that the Board may not alter a court-enforced remedial order, which is not the case here.

¹⁰ *Eagle-Picher* and the similar cases that the Company cites (Br. 13-26) were fully presented and briefed to the *Whitesell* court (see *NLRB v. Whitesell*, Eighth Cir. Case No. 10-2934, ECF Entry ID 3712382 at *36-38 (employer brief filed 10/12/2010); ECF Entry ID 3723703 at *43-45 (Board brief filed 11/12/2010)) and thus “are to be taken as covered by the court’s decision though not mentioned in the opinion.” *Com. of Pa. v. Brown*, 373 F.2d 771, 777 (3d Cir. 1967) (citing *Bingham v. United States*, 296 U.S. 211, 218-19 (1935)).

That distinction makes all the difference.¹¹ A judicial determination that an order had not been issued by a properly constituted tribunal means that the merits of the case have yet to be authoritatively decided. That is exactly how the Board construed the mandate here. And, as noted above, the Eighth Circuit in *Whitesell* agreed with the Board's construction of its similar mandate.¹²

The Company's primary remaining argument against the Board's authority to decide the case anew (Br. 10-15) is that the so-called "plain text" of Section 10(e) undermines the Board's interpretation of the Court's mandate. The Company's assertion, however, rests on a distinction between denying enforcement

¹¹ The Company's reliance (Br. 23-24) on *Mobil Oil Corporation v. Federal Power Commission*, 417 U.S. 283 (1974), is similarly misplaced. Although in *Mobil*, the Supreme Court stated in *dicta* that the Commission would not have been able to reopen an order "on its own," 417 U.S. at 310-11, its observation came in the wholly different context of the lower court having ruled on the merits of a previous order issued by a properly-constituted Commission.

¹² This view is supported by the common-law proposition that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello v. United States*, 365 U.S. 265, 285 (1961); accord *Hughes v. United States*, 71 U.S. (4 Wall) 232, 237 (1866) ("In order that a judgment may constitute a bar to another suit, it must be . . . determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."), *quoted in Costello*, 365 U.S. at 286; *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1959) ("At common law a dismissal on a ground other than the merits would not constitute res judicata in a later case."); *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) ("An order has no res judicata significance unless it is a final adjudication of the merits of an issue.").

and remanding that lacks any basis in the text of Section 10(e). After a court has completed its review of the merits, the plain language of Section 10(e) allows the court to “enter a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part the order of the Board.” 29 U.S.C. § 160(e). In other words, the plain language of the statute makes no provision for a final decree remanding the case to the Board. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (explaining that an order to remand is an exercise of a court’s equity powers). Thus, a court that strictly adhered to the limited options given by the statute’s literal language would never use the word “remand” but instead, would explain that its setting aside of the Board’s order was without prejudice to the Board’s resuming consideration of the case with a properly constituted panel. That, in essence, is what the Eighth Circuit held to be the meaning of its *Whitesell* decree. The same is true here.¹³

¹³ The Company also contends (Br. 13) that the Board’s interpretation of the Court’s mandate is “eviscerate[d]” by Section 10(e)’s language providing additional evidence to be taken before the Board “if either party applies to the court for leave to adduce additional evidence” (*see* 29 U.S.C. Section 10(e)). But the Company’s formalistic argument, which maintains that Congress provided for remand in that one instance and that one instance only, flies in the face of *Ford Motor*. As discussed above, the Supreme Court in that case recognized that a court possesses equitable remand authority apart from any explicit statutory authorization. Thus, the statute’s provision for parties to request the taking of additional evidence does not indicate that Congress intended to limit the court’s inherent remand authority in other circumstances. Indeed, courts routinely remand to administrative agencies absent a party’s request, and for reasons other than the need for adducing additional evidence.

Nor is there merit to the Company’s argument (Br. 12, 14) that the Board’s actions are inconsistent with the language of Section 10(e) that “[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final” 29 U.S.C. § 160(e). Here, there is no question that the Court’s prior judgment was final with respect to the issue that it decided—that the Board was improperly constituted when it issued the order before the Court. *See Whitesell*, 638 F.3d at 889 (explaining that in its earlier decision, it had denied the application for enforcement because the Board was improperly constituted, and “[o]n that issue, our decision is final.”) The Company mistakenly construes (Br. 12-14) the Board’s interpretation of the Court’s mandate as improperly creating an “implied” remand (Br. 9, 13, 26) absent direction from the Court. But here, the Board reasonably construed the Court’s “judgment and decree” itself as contemplating further Board action under the circumstances. In this context, the Court’s “judgment and decree” enabled the Board to continue processing the case after the Supreme Court’s judgment relinquished its exclusive jurisdiction.¹⁴

¹⁴ In contrast, in *Ford Motor*, 305 U.S. at 371, the Court held that the Board could not resume processing of a case while exclusive jurisdiction remained in the court. The Company’s reliance (Br. 23) on *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 361 (6th Cir. 1976) for the same proposition—that the Board cannot act while jurisdiction remains with the court—is therefore misplaced because here, the Supreme Court’s Judgment relinquished jurisdiction.

Nothing about the Board's interpretation is inconsistent with the plain language of Section 10(e) cited above.¹⁵

The Court should also reject the Company's construction of the mandate as precluding further Board proceedings because it would result in injustice. *See Bailey v. Henslee*, 309 F.2d at 844 (mandate is to be interpreted reasonably and not to do injustice). Under the Company's view, the parties—through no fault of their own and unlike every party to have previously come before the Board—would not be entitled to a decision by a properly constituted Board. The Board's interpretation of the Court's mandate avoids injustice to the parties and to the employees whose rights are at issue. *See Laclede Gas Co. v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970) (“[t]he interest of the . . . employees in having the issue resolved on an appropriate theory of law is an important one”); *Cf. NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969) (consequences of Board's internal delay should not fall on victims of unfair labor practices). As the Seventh Circuit recognized under comparable circumstances, “[t]he parties are entitled to a decision on the merits of their case by a properly constituted panel of the NLRB prior to appellate review.” *New Process Steel, L.P. v. NLRB*, 08-3517, 2010 WL

¹⁵ Nor is the Board's interpretation inconsistent with Board Rule and Regulation 101.14 (29 C.F.R. Sec. 101.14), as the Company further urges (Br. 15-16). Rule 101.14, which merely recognizes that a court may direct a remand to the Board, does not proscribe the Board from interpreting a court's mandate as contemplating further action even in the absence of a remand.

4137308, at *1 (7th Cir. Aug. 3, 2010) (remanding *New Process* following the Supreme Court's decision).

This Court's citation to *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), in its decision denying enforcement (705 F.3d at 506-07) strongly suggests that the Court contemplated for this case to be treated similarly to the cases that were denied enforcement following *New Process*. All the *New Process*-related decisions of this Court, as well as numerous decisions of other circuit courts, disposed of those cases in a manner that permitted a properly constituted Board to decide anew the unfair-labor-practice cases that were pending in court when *New Process* issued, including cases that had been argued and even decided.¹⁶ That

¹⁶ See, e.g., *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Case Nos. 08-1162, 08-1214, 564 F.3d 469 (D.C. Cir. 2009), on remand 356 NLRB 599 (2010); *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir. Sept. 20, 2010), on remand 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Northeastern Land Servs., Ltd. v. NLRB*, Case No. 08-1878 (1st Cir. July 30, 2010), on remand 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st Cir. 2011); *County Waste of Ulster, LLC v. NLRB*, Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010), on remand 355 NLRB 413 (2010), *enforced*, 665 F.3d 48 (2d Cir. 2012); *J.S. Carambola v. NLRB*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010), on remand 356 NLRB No. 23 (2010), *enforced*, 457 F. App'x 145 (3d Cir. 2012); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir. July 23, 2010), ECF No. 66, on remand 355 NLRB 492 (2010), *enforced*, 438 F. App'x 244 (4th Cir. 2011); *Bentonite Performance Mineral, LLC v. NLRB*, Case No. 09-60034 (5th Cir. June 22, 2010), on remand 355 NLRB 582 (2010), *enforced*, 456 F. App'x 2 (D.C. Cir. 2012); *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 80, on remand 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426, 09-2468 (7th Cir. July 8, 2010), ECF No. 28, on remand 355 NLRB 409, *enforced*, 645 F.3d 870 (7th Cir. 2011); *Leiferman Enters., LLC v.*

result—unlike the result the Company seeks here—is consistent with the general rule that an appellate court’s finding of legal error does not “foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.” *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940); accord *S. Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800, 803-06 (1976); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901).

Similarly, after the Supreme Court’s decision in *Noel Canning*, all of the circuit courts have found it appropriate for a properly constituted Board to resolve cases that were pending in court when *Noel Canning* issued.¹⁷ For example, in

NLRB, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010), on remand 355 NLRB 364 (2010), *enforced*, 649 F.3d 873 (8th Cir. 2011); *NLRB v. Legacy Health Sys.*, Case No. 09-73383 (9th Cir., July 9, 2010), ECF No. 19, on remand 355 NLRB 408 (2010), *enforced*, 662 F.3d 1124 (9th Cir. 2011); *Teamsters Local Union No. 523 v. NLRB*, 624 F.3d 1321 (10th Cir. 2010), on remand 357 NLRB No. 4 (2011), *enforced*, 488 F. App’x 280 (10th Cir. 2012); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010), on remand 355 NLRB 472 (2010), *enforced*, 419 F. App’x 963 (11th Cir. 2011).

¹⁷ See, e.g., *Oak Harbor Freight Lines Inc. v. NLRB*, Case Nos. 12-1226, 12-1358, 12-1360 (D.C. Cir. August 1, 2014); *NLRB v. Instituto Socio Economico Comunitario, Inc.*, Case No. 13-1688 (1st Cir. October 3, 2014); *NLRB v. Dover Hospitality Servs., Inc.*, Case No. 13-2307 (2d Cir. July 2, 2014); *NLRB v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 3, 2014); *NLRB v. Nestle Dreyer’s Ice Cream Co.*, Case No. 12-1783 (4th Cir. July 29, 2014); *Dresser-Rand Co. v. NLRB*, Case No. 12-60638 (5th Cir. July 23, 2014); *Little River Band of Ottawa v. NLRB*, Case Nos. 13-1464, 13-1583 (6th Cir. Aug. 13, 2014); *Contemporary Cars, Inc. v. NLRB*, Case Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014); *Relco Locomotives, Inc. v. NLRB*, Case No. 13-2722 (8th Cir. July 1, 2014); *DirectTV*

approximately 19 cases in which the Board had filed the record, the D.C. Circuit vacated underlying Board decisions in light of *Noel Canning* and remanded to the Board for further proceedings. See e.g., *Marquez Bros. Enterprises, Inc. v. NLRB*, Case Nos. 12-1278, 12-1357 (D.C. Cir. November 18, 2014); *Lancaster Symphony Orchestra v. NLRB*, Case Nos. 12-1371, 12-1384 (D.C. Cir. October 21, 2014); *Oak Harbor Freight Lines Inc. v. NLRB*, Case Nos. 12-1226, 12-1358, 12-1360 (D.C. Cir. August 1, 2014). The Company’s construction of the Court’s mandate would unjustly deny to the parties in this case a ruling on the merits comparable to that afforded to similarly-situated parties in other cases impacted by *Noel Canning*. The Company’s construction also unjustifiably attributes to the Court an intent to depart from the normal and usual course of judicial proceedings in circumstances where the decision below was rendered by an improperly constituted panel.¹⁸

Contrary to the Company’s suggestion (Br. 15), a different result is not warranted because courts of appeal have sometimes chosen to explicitly remand

Holdings, LLC v. NLRB, Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014); *Int’l Union of Operating Eng’rs, Local 627 v. NLRB*, Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014); *NLRB v. Gaylord Chem. Co.*, Case Nos. 12-15404, 12-15690 (11th Cir. Aug. 13, 2014).

¹⁸ See *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; “it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel”); *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 364 (6th Cir. 1976) (remanding case for “complete consideration by a duly constituted panel of the Board”); *KFC Nat’l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 307 (2d Cir. 1974).

after *Noel Canning*, but the Court did not do so here. Such was also the case post-*New Process*, but as discussed above, the *Whitesell* court nonetheless interpreted its earlier mandate, which did not explicitly remand, as also contemplating further Board action under the circumstances. Merely because some, but not all, courts included explicit remand language after *New Process* and *Noel Canning* does not preclude the Board from reasonably interpreting mandates such as those in *Whitesell* and here as also allowing it to issue its first valid decision.

In light of the above legal and equitable principles, the Company's remaining claim (Br. 26-28)—that allowing the Board to revisit the case would “punish” the Company “for relying on this Court’s judgments”—rings hollow. The Company could reasonably have foreseen further proceedings in light of the Court’s denial of enforcement solely because of the Board’s improper constitution, which distinguishes this case from the litany on which it relies. This is particularly true given the circuit courts’ treatment of Board decisions post-*New Process* (pp. 26-27 n.15). The Company’s complaint (Br. 27) that the Board did not seek remand before the Court or Supreme Court also misses the mark, given the Courts’ equitable power to remand and the prior *Whitesell* decision confirming that a remand is not necessary where a court’s mandate is reasonably construed to permit a properly constituted Board to decide the case. *Whitesell*, 638 F.3d at 889.

The Company's citation (Br. 26-28) to concerns that the *Eagle-Picher* Court had about allowing a decree to be reopened are inapplicable here, because, there, a properly constituted Board had already secured a decision on the merits and then later sought to revise it. In short, the valid finality concerns precluding the Board from re-litigating decisions on the merits by a properly constituted panel simply do not apply when a properly constituted Board has yet to issue a decision on the merits.

In sum, interpreting the Court's mandate as permitting further proceedings before the Board fully comports with principles governing the reasonable and equitable interpretation of mandates. In contrast, the Company's cribbed reading relies on readily distinguishable cases and conflicts with both legal and equitable principles. Therefore, the Board properly considered this case anew.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDINGS THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO EXECUTE AND ENTER INTO A COLLECTIVE-BARGAINING AGREEMENT TO WHICH IT ORALLY AGREED

An employer violates the Act by refusing to bargain collectively with the statutory representative 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). It has been black letter law, for over 60 years, that "an employer's failure to reduce to writing an agreement reached with a union

constitutes an unlawful refusal to bargain.” *Young Women’s Christian Ass’n*, 349 NLRB 762, 771 (2007) (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941)). Accordingly, an employer fails to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to sign a document embodying terms it has agreed to in collective bargaining.¹⁹ *See H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941).

In its opening brief, the Company does not contest the Board’s unfair-labor-practice findings that it violated Section 8(a)(5) and (1) of the Act by its refusal to execute a written agreement embodying the terms of the consensus arrived at through collective bargaining with the Union—findings that the Court previously found to be supported by substantial evidence. *Noel Canning*, 705 F.3d at 496. Nor does the Company contest any portion of the Board’s remedial order. The Company’s waiver of these issues entitles the Board to summary enforcement of all of its findings. *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015) (Board entitled to summary enforcement of uncontested findings); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012) (same). *See also* Fed R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain

¹⁹ 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 results in a “derivative” violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

party's contentions with citation to authorities and the record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

CONCLUSION

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.

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s/ Heather S. Beard
HEATHER S. BEARD
Attorney

National Labor Relations Board
1099 14th Street NW
Washington DC 20570
(202) 273-2949
(202) 273-1788

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2015

ADDENDUM

STATUTORY ADDENDUM

Except for the following, all of the applicable statutes, etc. are contained in the Company's Addendum to its brief.

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq.:

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

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

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

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

Regulations:

Federal Rule of Appellate Procedure 28(a)(8)(A):

Rule 28. Briefs:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

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)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	19-CA-032872
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,817 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of July, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of July, 2015