

Nos. 15-2305 & 15-2478

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

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; INTERNATIONAL
UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 1700**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board agrees with the Petitioners that oral argument would be of assistance to the Court, and submits that 10 minutes per side would be sufficient.

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“the UAW”) and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1700 (“Local 1700,” collectively “the

Union”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against Local 1700 on August 27, 2015, and reported at 362 NLRB No. 196. (A. 1174, 1178-81.)¹ The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board’s Order is final and the unfair labor practice occurred in Michigan. The Union’s petition and the Board’s cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that Local 1700 violated Section 8(b)(1)(A) of the Act by breaching its statutory duty of fair representation owed to Aretha Powell?

¹ “A.” references are to the joint appendix. “Br.” references are to the Union’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following the investigation of charges filed by Aretha Powell against her former employer Caravan Knight Facilities Management, Inc. (“the Company”) and Local 1700, the Board’s Acting General Counsel filed a consolidated complaint alleging that the Company had violated Section 8(a)(3) and (1) of the Act by imposing onerous working conditions on Powell and then discharging her, and violated Section 8(a)(1) by coercively interrogating an employee. (A. 1182; A. 34-37.) The complaint further alleged that the Union had violated Section 8(b)(1)(A) of the Act by restraining and coercing Powell in the exercise of the rights guaranteed in Section 7 of the Act, and violated Section 8(b)(2) of the Act by attempting to cause, and causing, the Company to discharge Powell in violation of Section 8(a)(3). (A. 1182; A. 34-37.) Following a hearing, an administrative law judge found no merit to the allegations and dismissed the complaint in its entirety. (A. 1189.)

On review, the Board (Members Miscimarra, Johnson, and McFerran) issued a decision on August 15, 2015, affirming the judge’s finding that the Company did not violate Section 8(a)(3). (A. 1174-76.) Contrary to the judge, however, the

Board found that the Company had violated Section 8(a)(1).² (A. 1174, 1179.)

With respect to Local 1700, the Board affirmed the judge's finding that it had not violated Section 8(b)(2), but reversed the judge and found that Local 1700 had violated Section 8(b)(1)(A) by breaching its statutory duty of fair representation owed to Powell.³ (A. 1178-79.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Parties; Overtime

The Company performs maintenance, cleaning, and janitorial services for automaker Chrysler at its Sterling Heights Assembly Plant. (A. 1183; A. 33 ¶2, A. 45 ¶2.) It is a signatory to a collective-bargaining agreement that includes Local 1700, which represents the Company's janitorial employees. (A. 1183; A. 63-64, 68.) The Company hired Powell as a janitor in September 2008, and she became a member of the bargaining unit. (A. 1183; A, 324-25.)

The parties' bargaining agreement provides for mandatory and voluntary overtime. (A. 1183; A. 73-76.) Employees may volunteer for weekend overtime by using a signup sheet posted on a bulletin board in the "cage," an area containing

² Because the Company has complied with the Board's order, that finding is not before the Court.

³ The judge specifically dismissed all allegations against the UAW (A. 1189), the Board did not reverse that decision (A. 1174 n.1, 1178-79), and the Board's Order and remedy name only Local 1700 (A. 1179-81).

supplies, employee lockers, tables, and chairs. If there are not enough volunteers, employees are supposed to be assigned mandatory overtime based on whoever worked the fewest overtime hours. (A. 1183; A. 122, 146-48, 228, 232, 237, 329-30, 584, 612, 639.) The Company records the number of overtime hours that an employee works on an “equalization list.” (A. 1183; A. 73, 121, 130-33.)

Although the bargaining agreement requires the equalization list to be posted on the bulletin board, the Company, with Local 1700’s agreement, began keeping it in the site manager’s office in 2009 because the posted list frequently was removed or defaced. (A. 1183; A. 75, 182, 191, 233, 235-36, 330-31, 731, 827-28, 867-68.)

B. Powell Questions Why the Overtime List Is Not Posted

On April 11, 2012, Powell asked Margaret Faircloth, a steward for Local 1700, why the overtime equalization list was not posted on the bulletin board and why employees were not being credited for the overtime hours they had worked. (A. 1184; A. 331-32.) After some discussion, Faircloth explained that it was not posted because second and third shift employees were filing grievances alleging that a disproportionate amount of overtime opportunities were going to first shift employees. (A. 1184; A. 332-34.)

Later that morning, Powell learned that Faircloth had told LeVaughn Davis, Local 1700’s chairperson, that she had requested the posting of the overtime equalization list. (A. 1184; A. 337, 896.) Powell then confronted Faircloth, asking

if she had told Davis about her request. (A. 1184; A. 338.) Faircloth, Powell, a shift supervisor, and another Local 1700 representative further discussed the posting of the list. Faircloth told Powell that, because it was in Powell's best interests, she had passed along to Davis and others Powell's request for the list to be posted. (A. 1184; A. 339, 341.) Powell replied that she wanted to leave Local 1700. (A. 1184; A. 341.)

The following day, April 12, Powell and another employee spoke with Shoun Walle, the Company's site manager, about the overtime list. (A. 1184; A. 341-42.) After some discussion of Powell's complaints about overtime procedures, Walle explained that the overtime list was not posted because employees on second and third shift were complaining about not getting enough overtime. (A. 1184; A. 502.) Around that time, Davis informed Walle about complaints by Powell and others that the overtime list was not posted. (A. 1184; A. 236.)

Not satisfied with Walle's response, Powell requested a meeting with Shawn Dean, the vice president of Local 1700. (A. 1185; A. 176, 346.) On April 16, Powell met with Dean and Davis in the union office. (A. 1185; A. 177, 347-48, 810.) Powell recounted her April 11 conversation with Faircloth, expressed her dissatisfaction with the union's representation, and said she wanted to leave the union. (A. 1185; A. 177, 180, 182, 195-96, 348.) Dean said he would provide the

applicable information. Powell then chided Davis for reporting her comment to management, instead of speaking with her. (A. 1185; A. 196.) After a heated exchange between Powell and Davis, Dean attempted to calm the situation and sent Davis out of the room to retrieve Powell's personnel file. (A. 1185; A. 194, 349-50, 813-14.) In response to Powell's concern, Dean directed Davis to post the overtime list. (A. 1184; A. 176-77, 179-80, 187, 331-36, 338-39, 342, 473, 501, 536, 604-07, 622, 812.)

C. Powell's Disputes with Faircloth and Tanner; the Company Suspends Powell for Threatening Tanner

In early May, while speaking with coworkers Balinda Tanner, Patrice Williams, and Jacqueline Keys in the parking lot, Powell said she wanted to fight Faircloth and offered \$100 to anyone who would fight her. Tanner later told Faircloth about Powell's statement. When Powell learned that Faircloth knew what she had said, Powell apologized to Faircloth. (A. 1185; A. 758-59, 889, 930-32.) On May 10, Powell got into a fight at work with her former boyfriend Dishan Longmire after she saw him embrace Tanner. (A. 1185; A. 619-21, 692-93.)

On May 11, as employees waited in the cage for the pre-shift meeting to start, Powell was conversing with a coworker when Tanner made a comment. Powell then told Tanner "I see I'mma have to tear off into your motherfucking ass." (A. 1185; A. 938.) Tanner responded "[y]eah, yeah whatever, whatever; that ain't going to happen." (A. 1185; A. 136, 371, 528-30, 644-45.)

Immediately following the incident, Tanner reported Powell's statement to Faircloth, who was not present during the exchange (A. 1186; A. 669-70), and to Davis. The three of them went to Walle to lodge a complaint against Powell. (A. 1186; A. 939-40.) Faircloth and Tanner submitted witness statements that they had heard Powell threaten Tanner. (A. 1186; A. 137-38.) With Davis observing, Walle subsequently interviewed several employees who were present during the incident. (A. 1186; A. 773.) No one reported seeing or hearing anything unusual or stated that Powell had threatened Tanner. (A. 1186; A. 207-13, 262-63, 273-75, 306-07, 586, 588-89, 592, 603, 666-69, 672, 684-85, 762, 774-75.) Davis asked no questions and took no notes during the interviews. (A. 1186; A. 291-92, 837-49.)

Later that morning, Powell spoke with Davis and Faircloth. Davis said that Dean had asked him to speak with Powell about her ongoing concerns. Powell said she did not understand how everything had been blown out of proportion about posting the overtime list. Powell then suggested that they have union meetings, and Davis said he was working on that. The meeting then concluded. (A. 1186; A. 372-74.)

On the morning of May 12, Faircloth told Powell to report to Walle's office. When she arrived, Davis took her outside and asked if she recently had an altercation with another employee. Powell asked if he was referring to Tanner, and Davis confirmed that he was. Powell said she had not spoken with Tanner "in a

month” and Davis said he would try to help her. Davis then took Powell to the union office where she started to write a statement. Davis told Powell that she had to watch what she said because everything she said got back to him and that nothing gets past him. (A. 1186; A. 375-79.)

Davis and Powell then returned to Walle’s office, where Walle and Faircloth were waiting. (A. 1186; A. 379-80.) Powell submitted her statement about the May 11 incident with Tanner and Walle informed her she was suspended, pending an investigation into her alleged threat. (A. 1186; A. 116, 380.) Powell refused to sign her suspension paperwork. (A. 1186; A. 381.) Neither Faircloth nor Davis spoke on Powell’s behalf during the May 12 meeting. (A. 1186; A. 244-45, 277, 280-81, 380-83, 448, 453, 786-88.)

D. The Company Discharges Powell and Local 1700 Files a Grievance on Her Behalf

On May 16, the Company discharged Powell for threatening Tanner on May 11. (A. 1186; A. 117.) On May 18, Faircloth filed a grievance on Powell’s behalf and represented her at the step 1 meeting, during which she made no arguments on Powell’s behalf. (A. 1186; A. 208, 283, 794, 906-07, 927.) The Company denied the grievance at step 1. (A. 1186; A. 792, 908.)

Local 1700 proceeded to step 2 of the grievance process. (A. 1186; A. 792-93.) Davis met with Walle and the Company agreed to settle the grievance by reinstating Powell, without backpay, provided that she complete, at her own

expense, an anger management class, and agree to a 90-day “last chance” agreement. (A. 1186; A. 119, 255-56, 793-94, 798, 859.) The proposed settlement was consistent with a recent reinstatement settlement that the Company and Local 1700 had negotiated for another employee. (A. 1186; A. 139, 796.)

On May 23, Davis contacted Powell and informed her of the proposed settlement, including that she would have to take an anger management class. (A. 1186; A. 383-85, 798-99.) Powell said she was unemployed and could not afford to pay for such a course; Davis replied that the Company had not commented on that fact. (A. 1186; A. 385.) Powell rejected the proposed settlement and Davis then settled the grievance at the second step, without making a counteroffer. (A. 1187; A. 385, 799-800.)

On May 25, Powell called Faircloth and asked if a grievance had been filed because she had not seen one. Faircloth said one had been filed. Powell then told Faircloth that she wanted to advance her grievance to arbitration; Faircloth said that was not how the process worked and that the grievance had to take its course. (A. 1187; A. 386.) Davis later telephoned Powell, who asked what type of investigation Davis had done and how it had been determined that she was guilty and then terminated. (A. 1187; A. 387.) Davis responded that “none of your coworkers had your back. None of them came to your rescue.” (A. 1187; A. 388.)

Davis told Powell that because she had turned down the proposed settlement, there was nothing else that he could do. (A. 1187; A. 386-88.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Miscimarra, Johnson, and McFerran) found that Local 1700 had violated Section 8(b)(1)(A) of the Act by breaching its statutory duty of fair representation by representing Powell arbitrarily or in bad faith in connection with her grievance. (A. 1178-79.) The Board's Order requires Local 1700 to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 1180-81.)

Affirmatively, the Order requires Local 1700 to: 1) promptly request that the Company consider Powell's grievance and, if it agrees to do so, process the grievance with due diligence in accordance with the collective-bargaining agreement; 2) permit Powell to be represented by her own counsel at any grievance proceeding, including arbitration or other resolution proceedings, and pay the reasonable legal fees of such counsel; and 3) post a remedial notice. (A. 1181.) In the event it is not possible for Local 1700 to pursue the grievance, and if the General Counsel shows in compliance proceedings that a timely pursued grievance would have been successful, the Order requires Local 1700 to make Powell whole

for any increases in damages suffered as a consequence of its failure to process her grievance in good faith, in the manner set forth in the remedy portion of the Decision and Order. (A. 1181.)

STANDARD OF REVIEW

“It is well established that [the Court] review[s] the Board’s factual determinations as well as the Board’s application of law to a particular set of facts under a substantial evidence standard.” *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002); *see also* 29 U.S.C. § 160(e) (Board’s factual findings shall be conclusive “if supported by substantial evidence on the record considered as a whole”). “[U]nder this standard, [the Court] defer[s] to the Board’s reasonable inferences and credibility determinations, even if [it] would conclude differently under de novo review.” *Painting Co.*, 298 F.3d at 499. Specifically, “[t]he Board’s choice between two equally plausible and reasonable inferences from the facts cannot be overturned on appellate review, even though a contrary decision may have been reached through de novo review of the case.” *Exum v. NLRB*, 546 F.3d 719, 724 (6th Cir. 2008) (internal quotation marks omitted). Similarly, “[b]ecause the Administrative Law Judge and the Board are the triers of fact in the first instance, their credibility resolutions are to be accorded considerable weight on review.” *Local Union No. 948, IBEW v. NLRB*, 697 F.2d 113, 117 (6th Cir. 1982) (internal quotation marks omitted.) Consequently, “[t]he Board’s choice

between conflicting testimony will not be set aside simply because this court would justifiably have made a different choice had the matter before it been *de novo*.” *Id.*

SUMMARY OF ARGUMENT

The Board reasonably found that Local Union 1700 breached its duty of fair representation owed to member Aretha Powell. In making that determination, the Board found, based on substantial evidence, that several of Local 1700’s actions in the processing of Powell’s grievance, considered cumulatively, constituted bad faith, or at the very least impermissible arbitrary conduct. Specifically, Margaret Faircloth, a union steward, submitted a statement against Powell that was, in part, false because it represented that she had witnessed Powell threatening a coworker. Despite having submitted a statement adverse to Powell, Faircloth then represented her at step 1 of the grievance process without disclosing the statement’s existence to Powell. Lastly, Powell remained unaware of Faircloth’s adverse statement throughout Local 1700’s processing of her grievance, including when presented with a potential settlement.

Local 1700’s several factual challenges, including regarding Faircloth’s presence when Powell made the threat and her involvement in the processing of the grievance, have no merit and cannot overcome the Court’s deference to the Board’s factual findings and, particularly, to the Board’s credibility

determinations. It is similarly unsuccessful in seeking, on the one hand, to unduly emphasize one aspect of the Board's threefold finding (Faircloth's representation of Powell at step 1), while on the other hand striving to downplay, if not eliminate, Faircloth's involvement in Powell's grievance. Furthermore, although Local 1700 claims that the Board failed to apply precedent that it had no duty to act as an advocate at early investigative stages, that assertion stems from its mistaken belief that the Board confused two separate meetings several days apart. The balance of Local 1700's challenges were not raised before the Board, either before or after the issuance of its decision, and therefore they are not properly before the Court.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LOCAL 1700 VIOLATED SECTION 8(b)(1)(A) BY BREACHING ITS STATUTORY DUTY OF FAIR REPRESENTATION

A. A Union Owes Its Members a Statutory Duty of Fair Representation

As the employees' exclusive collective-bargaining representative, a union "is under a statutory duty 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Local 594, UAW v. NLRB*, 776 F.2d 1310, 1315 (6th Cir. 1985) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967)). A union breaches this duty when its conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190; accord *Roadway Express*, 355 NLRB 197, 202 (2010), *enforced mem.*, 427 F. App'x 838 (11th Cir. 2011). As the Supreme Court has clarified, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (internal citation omitted); accord *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 526 (6th Cir. 1993). A union's actions are made in bad faith "if made with improper intent or motive." *Bowerman v. UAW, Local No. 12*, 646 F.3d 360, 368 (6th Cir. 2011). Unlike in the other two prongs of *Vaca*, motive or intent is not required in determining whether a

union's conduct is arbitrary. *Id.*; accord *Mine Workers Dist. 5 (Pa. Mines)*, 317 NLRB 663, 663 (1995).

The tripartite standard announced in *Vaca* applies to all union conduct, *O'Neill*, 499 U.S. at 67, 77, including the processing of grievances, *Ruzicka v. General Motors*, 649 F.2d 1207, 1211 (6th Cir. 1981). More specifically, although unions have a broad range of discretion in determining which grievances to pursue, where a union undertakes to process a grievance, its perfunctory disposition or abandonment of the grievance because of ill will or other invidious considerations constitutes a breach of its duty of fair representation. *Glass Bottle Blowers Ass'n, Local No. 106*, 240 NLRB 324, 324-25 (1979). A union's breach of its statutory duty of fair representation unjustifiably restrains employees in the exercise of their Section 7 rights, thereby violating Section 8(b)(1)(A) of the Act.⁴

B. Local 1700 Breached Its Statutory Duty of Fair Representation

Substantial evidence supports the Board's finding that Local 1700 violated Section 8(b)(1)(A) because its processing of Powell's grievance constituted bad faith or impermissible arbitrary conduct. Specifically, the Board reasonably found

⁴ Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7" of the Act. Section 7, 29 U.S.C. § 157, in turn protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

(A. 1178), based on three facts “consider[ed] cumulatively,” that Local 1700 breached its statutory duty of fair representation owed to Powell. First, Faircloth, a steward, submitted a statement against Powell that was, in part, false because it represented that she had witnessed Powell’s threat to Tanner.⁵ (A. 138.) Second, Faircloth represented Powell at step 1 of the grievance process without disclosing to Powell that she had submitted a statement against her. (A. 1178; A. 381-82, 390, 909-10.) Third, throughout Local 1700’s processing of her grievance, Powell remained unaware that Faircloth had submitted an adverse statement regarding the underlying incident. (A. 1178; A. 390.)

In reviewing the foregoing facts, the Board found (A. 1178) it “particularly significant” that Faircloth had represented Powell at step 1 “without disclosing either the existence of or the nature of her statement against Powell.” Doing so, the Board reasoned (A. 1178), deprived Powell of a potentially “crucial” piece of information—that the Company appeared to possess an eyewitness statement, from a union steward no less, corroborating Tanner’s complaint and version of events.⁶

⁵ The Board found that Faircloth was not present, based on the credited testimony of employee Nathaniel Hudson. (A. 1186 & n.35; A. 123, 669-70.) Powell likewise testified that Faircloth was not present. (A. 564.)

⁶ The significance of Faircloth’s statement—coming from a union steward and serving as the only evidence corroborating Tanner’s account—undermines Local 1700’s assertion (Br. 44) that it was “not ‘wholly irrational’” to not disclose it to Powell.

The omitted information, the Board explained (A. 1178), reasonably could have altered Powell's approach to the processing of her grievance. For instance, armed with such knowledge, Powell might have asked Local 1700 for a different representative. As shown, Faircloth offered no arguments on Powell's behalf at the May 18 step 1 grievance meeting, during which she simply met with Walle and handed him a cursorily completed grievance form. (A. 120, 208, 254-55, 907-08, 926-27.) In addition, Powell might have accepted the Company's reinstatement offer at step 2 because knowledge of Faircloth's statement reasonably could have affected both Powell's evaluation of the settlement and her assessment of whether Local 1700 would pursue her grievance to arbitration in the absence of settlement.

In reaching its decision, the Board cautioned (A. 1179) that "unique circumstances . . . narrowly circumscribe" its unfair-labor-practice finding. Thus, as the Board explained, it would not find a violation of Section 8(b)(1)(A) merely because Faircloth provided a statement to the Company about the incident that was adverse to a unit employee. Likewise, it would not be a per se violation that Faircloth misrepresented that she witnessed the incident. Nor was it suggesting that Local 1700 was required to furnish a copy of, or disclose the substance of, Faircloth's statement to Powell, as opposed to the neutral fact that she had

provided a statement.⁷ Rather, as the Board explained, it “regard[ed] as material the absence of any disclosure to Powell—before, during, or after Faircloth’s representation of Powell at step 1—that Faircloth had submitted a statement to [the Company] relevant to Powell’s grievance.” (A. 1179.) If Local 1700 had disclosed that fact to Powell, the Board observed (A. 1179) that Faircloth’s representation of Powell might not have violated Section 8(b)(1)(A). But there was no such disclosure. Accordingly, the Board found (A. 1178) that the foregoing facts, “considered together, constitute bad faith or impermissible arbitrary conduct” and “anything but ‘fair representation’” on the part of Local 1700. Local 1700’s claim (Br. 44) that there is “no evidence” it acted arbitrarily or in bad faith fails to grapple with the forgoing factual findings.

The Board’s finding that Local 1700’s actions constituted bad faith or impermissible arbitrary conduct comports with analogous Board precedent, despite Local 1700’s assertions (Br. 43-45) that its actions cannot qualify as either. For instance, the Board, with court approval, found a union acted in bad faith where, among other things, its agent representing the grievant submitted self-serving, misleading, and adverse information to the investigating committee (without the grievant’s knowledge), while failing to disclose exculpatory information. *Roadway*

⁷ Therefore, because the substance of her statement need not be disclosed, Faircloth’s personal safety would not necessarily be at risk, contrary to Local 1700’s contentions (Br. 41, 42, 44).

Express, 355 NLRB at 202, *enforced mem.*, 427 F. App'x 838 (11th Cir. 2011).

Likewise, the Board, with approval from this Court, found a union's conduct to be arbitrary or in bad faith where, among other things, it purposely kept the grievant uninformed and misinformed about her grievance, including providing an incorrect day or date of a meeting and falsely stating that it had not heard from the employer about the grievance. *Local 1640, AFSCME (Children's Home of Detroit)*, 344 NLRB 441, 445-46 (2005), *enforced mem.*, 2006 WL 2519732, at *5 (6th Cir. 2006). Similarly, a union acted in bad faith where its agent representing the grievant failed to disclose to the grievant his knowledge about a key document, obstructing a defense that otherwise would have been available to the grievant and that should have been made on his behalf. *Pac. Intermountain Express Co.*, 215 NLRB 588, 598 (1974). Moreover, a union acted in bad faith where, among other things, the agent representing the grievant submitted an altered document to the investigating board that undercut the grievant's defense of lack of knowledge of changed work rules, conduct the grievant remained ignorant of until the subsequent arbitration. *Local Union No. 896, affiliated with Int'l Bhd. of Teamsters (Anheuser-Busch, Inc.)*, 280 NLRB 565, 575-76 (1986). The Board therefore reasonably found, based on substantial evidence, that Local 1700's foregoing actions constituted bad faith, or at the very least impermissible arbitrary conduct,

because they were so far outside a wide range of reasonableness as to be irrational. As shown below, Local 1700's arguments to the contrary lack merit.

Challenging the Board's finding that Faircloth was not present, Local 1700 asserts (Br. 36-38) that (1) substantial evidence does not support the Board's finding that Faircloth was not present, (2) evidence of her presence can be read as consistent with Hudson's credited testimony, and (3) the Board improperly "overlooked" (Br. 37) its cited evidence. Contrary to Local 1700's claims, the Board properly exercised its discretion to credit Hudson's testimony that Faircloth was not present, to find that the incident occurred as described, and not to find other facts. Under the highly deferential standard of review, the "Board's choice between two equally plausible and reasonable inferences from the facts," *Exum*, 546 F.3d at 724, as well as its credibility determinations, are not overturned on appeal even if the Court would have reached a different decision based on de novo review, *Painting Co.*, 298 F.3d at 499. This same deferential standard applies where, as here, "[t]he Board's choice [is] between conflicting testimony." *Local Union No. 948*, 697 F.2d at 117. As the Court has pointedly remarked, "[i]t is not this Court's function to resolve questions of fact and credibility when there is conflict in the testimony." *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276 (6th Cir. 1999). Furthermore, even assuming that Faircloth was present, the Board's unfair-labor-practice finding is not necessarily undermined because it is based on

three cumulative facts, which would consist of Faircloth's now "true" statement being adverse to Powell, Powell not knowing about it, and Faircloth representing Powell at step 1.

There is also no merit to Local 1700's claim (Br. 29-31) that the Board erred in finding that Faircloth represented Powell at the step 1 grievance meeting. Despite its assertion (Br. 29, 30) that there was no step 1 "meeting," the evidence supports the Board's finding that Faircloth met with Walle on May 18 when presenting Powell's grievance. (A. 252-55, 284-85, 287-88.) Further, contrary to its claim (Br. 29), Faircloth's representation of Powell at step 1 without disclosing her prior statement was not the "lynchpin" of the Board's unfair-labor-practice finding. Rather, as shown (*supra* p. 16-17), three facts in conjunction form the basis of the Board's finding, of which this fact—although significant under the circumstances—is only one. Conversely, Local 1700's attempt to downplay, if not eliminate, Faircloth's involvement in Powell's grievance (Br. 29-30) is undermined by the fact that Faircloth, an elected union steward, wrote the grievance and then began the process by meeting with Walle and presenting Powell's grievance.

In addition, notwithstanding Local 1700's claim (Br. 31), the Board did not fail to apply precedent that a union has no duty to act as an advocate at early investigative stages. Local 1700's assertion appears to derive from its mistaken belief (Br. 30, 31) that the Board confused the May 12 and May 18 meetings and

Faircloth's role in them. The Board, however, did not find that the May 12 meeting triggered Local 1700's advocacy duty, that it breached its duty on that date, or that Faircloth represented Powell on May 12. Nor did it confuse the May 12 investigative meeting with the May 18 step 1 grievance meeting. As shown (*supra* p. 9), the Board found (A. 1186) that on May 12, Powell, with Davis and Faircloth in attendance, met with Walle as part of the Company's investigation into her alleged threat. The Board further found that on May 18, Faircloth met with Walle and presented Powell's grievance at step 1 of the grievance process. Only the latter finding played a role in the Board's Section 8(b)(1)(A) analysis of Local 1700's grievance handling. (A. 1178).

C. Local 1700's Remaining Challenges are Not Properly Before the Court

Local 1700 additionally asserts that (1) its failure to disclose Faircloth's statement is immaterial because it had no duty to file Powell's unmeritorious grievance (Br. 27-28), (2) the Board erred in not finding that its actions more than likely affected Powell's grievance (Br. 34-36), and (3) the Board improperly imposed a new, onerous duty on unions (Br. 38-43). With respect to the balance of Local 1700's challenges, the Court lacks jurisdiction to entertain them because Local 1700 failed to specifically assert them before the Board—either in its answering brief in response to the General Counsel's exceptions to the administrative law judge's decision (A. 1095-1138) or through a motion for

reconsideration following the issuance of the Board’s decision—and it presents no extraordinary circumstances to excuse its failure. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 (6th Cir. 2006) (citing § 160(e)); *S. Moldings, Inc. v. NLRB*, 728 F.2d 805, 806 (6th Cir. 1984) (court lacks jurisdiction to consider issue not raised before Board prior to its decision, or afterward upon reconsideration) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)).

The statutory purpose underlying Section 10(e) is that a party must provide the Board with adequate notice of the basis of its objection, and thus the opportunity to respond, before the party may pursue it in court. *See Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999). Specifically, where Local 1700 prevailed before the administrative law judge, the General Counsel filed exceptions to the judge’s failure to find that Local 1700 violated the Act. (A. 975.) In order to preserve the challenges it now raises, and defend the favorable judge’s decision, Local 1700 needed to respond to the General Counsel’s exceptions by filing an answering brief containing those specific arguments. *See* 29 C.F.R. § 102.46(d), (g); *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (to preserve issue for appeal, party should have raised it in answering brief in response to General Counsel’s exceptions). By doing so, Local 1700 would

have provided notice to the Board of its reasons why the judge's finding of no violation was correct, and why the General Counsel's assertions to the contrary were unfounded. *See* 29 C.F.R. 102.48(b), (c); *Parkwood*, 521 F.3d at 410 (answering brief would have alerted Board to employer's concerns with remedy sought by General Counsel in exceptions).

The importance of providing notice to the Board is particularly significant where, as here, the Board reversed the administrative law judge to find a breach of the Local 1700's duty of fair representation; in that context, it was incumbent on Local 1700 to file a motion for reconsideration if it believed the Board's decision contained material errors. Specifically, the rules and regulations provide that a "party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration . . . after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on." 29 C.F.R. § 102.48(d)(1). Because Local 1700 failed to raise its remaining arguments before the Board, the Court lacks jurisdiction to consider them pursuant to Section 10(e). *Woelke & Romero Framing*, 456 U.S. at 665-66 (where party failed to raise issue prior to Board's decision, Section 10(e) bar applied because party subsequently could have raised issue to Board on motion for reconsideration).

In any event, Local 1700's challenges are meritless. First, Local 1700 asserts (Br. 27-28) that its failure to disclose Faircloth's statement to Powell is "immaterial" as it had no duty in the first instance to file, or later to negotiate the settlement of, Powell's grievance because it was "unmeritorious." While unions have discretion in determining whether and how to pursue a grievance, *Local Union No. 896*, 280 NLRB at 575, Local 1700 offers no support (and Board counsel is aware of none) for the proposition (Br. 27) that, once it files a grievance, a union's breach of its duty arising from its processing of a grievance subsequently is excused if the grievance is found to be meritless.⁸ Such an exception risks potentially swallowing the rule. Further, to the extent Local 1700 is claiming (Br. 28) that any breach of its duty is immaterial, and that it in fact "went above and beyond its duty of fair representation," because it knowingly filed a gratuitous, unmeritorious grievance, its actions belie that contention.⁹ Having elected to file

⁸ Local 1700's cited cases (Br. 27) merely stand for the accepted principle that unions do not breach their duty of fair representation if, in the exercise of their discretion, they decline to file an unmeritorious grievance. Where, as here (A. 1179-80, citing *Iron Workers Local Union 377 (Alamillio Steel Corp.)*, 326 NLRB 375 (1988)), the Board has ordered a remedy that includes the possibility of make-whole relief, a grievance's merits may be litigated but only in a subsequent compliance proceeding.

⁹ As shown, Local 1700 choose to file a grievance on Powell's behalf, advance it after it was denied at step 1, and negotiate a settlement at step 2. It did not exercise its discretion to decline to pursue the grievance because it determined it to be meritless; its actions instead gave the opposite impression, that Powell's grievance had merit.

Powell's grievance and to continue to process it, Local 1700 cannot hide behind its unsupported claim that its conduct in breach of its duty of fair representation is immaterial because it had no duty to pursue an unmeritorious grievance.¹⁰

Second, Local 1700's assertion (Br. 34-36) that the Board improperly failed to find that its actions "more than likely affected" the grievance's outcome, and its related, repeated claims (Br. 32-34, *see also id.* at 28, 30-31) that the Board instead simply made unsupported, speculative findings as to what Powell "might have" done, are misplaced. The circuit case law cited by Local 1700 (Br. 35) applies to distinct "Section 301 hybrid" cases, where an employee must prove that the employer violated the bargaining agreement, the union breached its duty of fair representation, and—importantly—the union's breach contributed to an erroneous arbitral outcome. *See White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559-60 (6th Cir. 1990). Board law governing duty-of-fair-representation cases imposes no

¹⁰ Local 1700 twice states (Br. 28) that the Board found it was "justified" in having Powell *fired*. The Board, however, simply found (A. 1176-77) that Local 1700 did not violate the Act in *reporting* Powell's threat to the Company. Further, contrary to its assertions (Br. 20, 40), the Board's decision comports with Local 1700's obligation to "balance" Powell's interests against the interests of the rest of the unit. As shown, because the Board found it was not unlawful for Local 1700 to report Powell's threat to management, or for Faircloth to provide a statement, it did not require Local 1700 to promote Powell's interests at the expense of the unit's interests.

such requirement that the breach affect the grievance's outcome.¹¹ *See Local 307, Nat'l Postal Mail Handlers Union (U.S. Postal Service)*, 338 NLRB 1154, 1155 (2003) (Chairman Battista, concurring) (discussing union's request that Board harmonize its duty of fair representation jurisprudence with Section 301 hybrid cases, where effect on outcome is an element). Consequently, the Board was not required to—and did not—make any factual findings on that point; instead, the challenged speculative “findings,” properly understood, are simply the Board elucidating how Powell may have acted had she known of Faircloth's statement.

Lastly, Local 1700's rhetoric aside (Br. 38-43), the Board's decision does not espouse a new theory that “imposes a hypertechnical duty on [it] to act as a professional legal ethicists or attorney” As shown (*supra* p. 16-21), the Board's decision applies established principles and comports with analogous cases finding that unions breached their duty of fair representation—it did not, as Local 1700 contends (Br. 45), utilize a “strict liability theory.” The Board therefore reasonably found, based on substantial evidence, that Local 1700 breached its duty of fair representation and violated Section 8(b)(1)(A).

¹¹ As noted (*supra* n.8), whether a grievance would have been successful if properly processed is relevant only in a subsequent compliance proceeding where the Board has ordered make-whole relief. *See Iron Workers Local Union 377*, 326 NLRB at 377, 379-80. The limited exception to this rule is where the union and the Board's General Counsel agree, with approval from the Board, to litigate the grievance's merits in the unfair-labor-practice hearing. *See Local 1640*, 344 NLRB at 442.

CONCLUSION

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

Respectfully submitted,

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June 2016

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

INTERNATIONAL UNION, UNITED AUTOMOBILE,	*
AEROSPACE AND AGRICULTURAL IMPLEMENT	*
WORKERS OF AMERICA; INTERNATIONAL	*
UNION, UNITED AUTOMOBILE, AEROSPACE AND	*
AGRICULTURAL IMPLEMENT WORKERS	*
OF AMERICA, LOCAL 1700	*
	* Nos. 15-2305 &
Petitioners/Cross-Respondents	* 15-2478
	*
v.	*
	* Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	* 07-CA-081195
	* 07-CB-082391
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,638 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 14th day of June, 2016

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

INTERNATIONAL UNION, UNITED AUTOMOBILE,	*
AEROSPACE AND AGRICULTURAL IMPLEMENT	*
WORKERS OF AMERICA; INTERNATIONAL	*
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AGRICULTURAL IMPLEMENT WORKERS	*
OF AMERICA, LOCAL 1700	*
	* Nos. 15-2305 &
Petitioners/Cross-Respondents	* 15-2478
	*
v.	*
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Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those 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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