

Nos. 15-1436 & 16-1037

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

**PRIME HEALTHCARE CENTINELA, LLC
d/b/a CENTINELA HOSPITAL MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SEIU UNITED HEALTHCARE WORKERS-WEST

Intervenor

**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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center (“the Hospital”), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. SEIU Healthcare Workers-West (“the Union”), intervenor herein, was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of a Board Decision and Order issued on November 24, 2015, and reported at 363 NLRB No. 44. The Board seeks enforcement of that order against the Hospital.

(C) Related Cases: This case was not previously before this Court or any other court. Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 4th day of August, 2016

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center (“the Hospital”) to review, and on

the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Hospital on November 24, 2015, and reported at 363 NLRB No. 44. (A 2296-2327.)¹ The Board found that the Hospital violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, §158 (a)(5) and (1)) (“the Act”) by failing and refusing to bargain collectively with SEIU Healthcare Workers-West (“the Union”).

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)). 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 Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in those circumstances, to cross-apply for enforcement. The Hospital filed its petition for review on December 2, 2015. The Board filed its cross-application for enforcement on February 5, 2016. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ Citations are to joint appendix filed on July 29, 2016. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with relevant information requested to evaluate the Hospital's healthcare proposals.

2. Whether the Board is entitled to summary enforcement of its uncontested finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally announcing it would be implementing its new healthcare plan.

3. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its healthcare proposal without bargaining to impasse.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Based upon charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by its conduct during negotiations for a successor collective-bargaining agreement. The complaint alleged that the Hospital failed to

provide the Union with requested information necessary for bargaining, unilaterally announced and implemented changes in terms of employment, specifically healthcare coverage, absent a bargaining impasse, and engaged in bad-faith bargaining by conditioning further bargaining on the Union's acceptance of the Hospital's last, best, and final offer.

Following a hearing, a Board administrative law judge found that the Hospital committed the violations as alleged.² The Hospital filed exceptions. The Board affirmed the judge's unfair labor practice rulings, findings, and conclusions, and adopted his recommended remedial Order as modified. (A 2296.)

II. THE BOARD'S FINDINGS OF FACT

A. Prime Healthcare's Operations; the Hospital and Union Begin Bargaining for a Successor Collective-Bargaining Agreement

Prime operates 18 hospitals, primarily in California, including the Centinela Hospital Medical Center.³ The Union has represented a unit of maintenance, technical, skilled maintenance, and business office clerical employees at Centinela since 2003. (A 2296, 2302-03; 573, 843-44.) In December 2009, the Hospital and the Union began negotiating for a successor collective-bargaining agreement to an

² The parties reached a settlement agreement as to additional complaint allegations that were subsequently withdrawn and are therefore not before the Court. (A 2301 n.2.)

³ Prime Healthcare's operations are detailed as of the time of the hearing in this case.

agreement that expired on December 31. Between December 2009 and March 2011, Daniel Bush served as chief negotiator for the Union. From February 2010 to December 2011, Mary Schottmiller served as chief negotiator for the Hospital. (A 2303; 78, 80-81, 573.)

B. The Parties Bargain over Changes to the Existing Healthcare Plans

A main issue during bargaining was the employee healthcare plan. Under the expiring contract, the Hospital offered employees a choice of an HMO (Health Maintenance Organization) and a PPO (Preferred Provider option) plan through a contracted insurance provider, Anthem Blue Cross. The Hospital's plans were "fully funded," such that the Hospital paid a premium for each employee and Anthem was responsible for insurance risk by fully funding any insurance claims made by employees. Employees were only required to contribute to premiums for the PPO options; the HMO plans were free to employees for any level of coverage whether individual or family. Employees were not required to use, and generally did not have access to, Prime's own hospitals. (A 2303; 82-83, 90.) In December 2009, the Hospital made its first bargaining proposal on healthcare and kept the existing HMO/PPO structure with some proposed modifications. (A 2303; 87, 341, 925.)

C. The Hospital Proposes a New EPO Medical Plan; the Union Expresses Concerns About Quality of Care and Cost to Employees

In February 2010, the Hospital proposed, in lieu of the existing HMO plan, a new EPO (Exclusive Provider Option) plan. Under the EPO plan, administered and self-funded by the Hospital, the Prime network would become employees' primary healthcare provider. (A 2304; 90.) In the Hospital's initial EPO proposal, employees would retain access to doctors in the broader Anthem HMO network but copays and deductibles would be cheaper for Prime hospitals and physicians. (A 2304; 98, 927-28.) The EPO plan would require employees to pay premiums except for the employee-only option.⁴ (A 2296, 2304; 927.) When the Hospital proposed the EPO plan, the Union expressed concerns about quality of care at Prime hospitals as well as concerns about increased costs to employees under the Hospital's proposal. (A 2296, 2304; 99.)

D. The Hospital Wants To Implement the EPO Plan Before a Complete Contract Is Negotiated; the Union Raises Issues of Access to Physicians and Quality of Care Under the EPO Plan

On March 26, Schottmiller sent an email to Bush stating that the Hospital wanted to "roll out" the new EPO plan by July 1. (A 2304; 932.) This was the first instance in which the Union was made aware that the Hospital wanted to implement its healthcare proposal before an overall collective-bargaining

⁴ The EPO premiums were set at biweekly contributions of \$75 for employee + spouse, \$60 for employee + child, and \$150 for employee + family. (A 2304; 927.)

agreement was reached. (A 2304; 108.) On April 19, Bush replied to Schottmiller, rejecting the Hospital's proposal and seeking continued bargaining on the subject. (A 2304; 933.) Schottmiller responded with a commitment to continue negotiating over the subject of healthcare and committing to pay 100 percent of out-of-pocket costs for employees until agreement or impasse was reached. (A 2304; 1506.) On April 23, Schottmiller sent a follow-up letter to Bush regarding upcoming bargaining and noting that "a final complete contract is dependent on resolving [the healthcare] issue." (A 2304-05; 934-36.)

On May 3, the parties held a bargaining session focused on healthcare with discussions of how the EPO plan would work and concerns about plan costs including employee premiums. The parties also discussed concerns about the size of the Prime network and concerns that it did not have a lot of pediatricians or gynecologists so that employees would still need access to the Anthem network without a referral. (A 2305; 115-16, 605, 696-97.) On May 4, Bush wrote to Schottmiller requesting information about how the self-funded plan would operate and the quality of care at Prime hospitals. (A 2305; 1087-89.) The Hospital responded with some of the requested information but stated that it would not provide information related to inpatient discharges for reasons of relevance. (A 2305; 1091-92.)

E. The Hospital Includes a Requirement in Its EPO Proposal that Employees Must Always See a Prime Physician First; the Union Counters that Employees Can Select a Non-Prime Primary Care Physician; the Hospital Rejects that Proposal

At a bargaining session on May 6, the Hospital first made the Union aware that, under the EPO plan proposal, participants would be required to obtain a referral from their Prime primary care physician before seeing any doctor in the Anthem network. (A 2305; 127-28, 1093-95.)

During bargaining sessions on June 14 and 15, the Union presented a healthcare proposal accepting the Hospital's EPO plan contingent on there being no employee premiums at any level of coverage. The Union further proposed that employees be able to select a primary care physician from either the Prime or Anthem networks. The Union also included a proposal for both a high and low PPO option. (A 2305; 1097-98.)

At a July 23 bargaining session, the Hospital presented a counterproposal on healthcare that maintained but lowered the EPO plan contributions from employees at all levels and rejected the Union's proposal to access the Anthem network without having to incur a referral expense through a gatekeeper. (A 2306; 146, 1113-14.)

F. The Union Requests Information Relating to Quality of Care at Prime Hospitals; the Hospital Refuses to Provide Any of the Information; the Union Responds; the Hospital Ultimately Provides None of the Information

On July 23, the Union gave a letter to the Hospital requesting information about the quality of care at Prime hospitals. The Union stated that the information was “both relevant and absolutely necessary for the Union to properly evaluate the EPO proposal and possible changes to the level of care the employees who select health insurance coverage from Prime may face.” (A 2306; 140, 1105-08.) The Union requested the most recent PEPPER (“Program for Evaluating Payment Patterns Electronic Report”) reports for each hospital as well as any correspondence with the state Quality Improvement Organization regarding those reports. The Union also sought all-payor claims data and hospital occupancy rates per month for a defined time period. The Union requested information about pressure ulcers, rates of septicemia, and other hospital-acquired infections including the content of all trainings given to employees regarding proper cleaning of surfaces that may contain infectious agents and prevention and treatment of pressure ulcers. The Union requested information about coding consultants used by Prime and their applicable guidelines and training materials. The Union further requested a list of Nurse Practitioners and Physician Assistances serving as hospitalists. (A 2297, 2306-07; 1106-07.) Finally, the Union offered to bargain

with the Hospital regarding the rejection or modification of any of its information requests. (A 2307; 1107.)

On August 9, the Hospital refused to provide any of the requested information. As to certain items, the Hospital objected on the basis that they were irrelevant to quality of care or that the Union sought confidential information including some information that “impinged upon statutory patient privacy rights.” The Hospital also contended that the information request was part of a campaign against the Hospital focusing on high septicemia rates at Prime’s hospitals. (A 2296, 2307; 1115-17.)

On August 17, the Union responded via letter setting forth, request by request, the reasons for seeking the information and why it was relevant and necessary. The Union stated that information requests were relevant because the employees’ current healthcare options did not include any Prime hospitals and thus the employees had no experience with Prime hospitals or physicians, which they would now be strongly encouraged to use due to the substantial expense of pursuing healthcare outside the Prime network. (A 2297, 2308; 1119-23.) The parties exchanged additional correspondence relating to the July 23 information request but the Hospital provided none of the requested information. (A 2308-09; 1128-29, 1131-34.)

G. The Hospital Announces to Employees that New EPO and PPO Plans Will Begin on January 1, 2011 Following a November 2010 Open Enrollment Period; the Parties Trade Healthcare Proposals

On September 1, the Hospital announced in a memo to employees that it would offer only the new EPO and PPO plans beginning January 1, 2011. The Hospital further told employees in the memo that there would be a November 2010 open enrollment period. The Hospital included with the memo a copy of a doctor nomination form instructing employees to fill out and submit the forms by October 1. (A 2309; 1135.)

On September 2, Bush emailed Schottmiller indicating that he had been out of town and upon his return had seen an August 23 letter from her concerning the physician nomination forms. (A 2309; 1125-27, 1130.) Bush requested that the Hospital not distribute the nomination form without first negotiating with the Union. Schottmiller responded that she did not know Bush had been out of town and the nomination forms had already been sent to employees. (A 2309; 1130.)

On September 27, the Hospital conducted an employee forum to inform employees about the new healthcare plan. The Hospital informed employees that, during open enrollment, they would have to choose between the EPO and Anthem plans. If they did not choose a plan, they would automatically be added to the EPO plan and their dependent(s)' coverage would be discontinued. (A 2309; 520-24, 531, 538-39.)

At a bargaining session on September 30, the Hospital rejected a Union proposal for high and low PPO plans, instead proposing a single PPO option. (A 2309; 195, 198, 1136-39.) The Union rejected this proposal and altered an earlier proposal to no longer seek a reduction in the outpatient copay for mental health benefits. (A 2309; 202, 1140-41.)

H. The Hospital Declares Impasse and Gives the Union a Final Offer; the Union Disagrees as to Impasse and States Quality of Care Concerns; the Parties Reach Agreement on Two Non-Healthcare Articles

On October 21, the Hospital declared impasse and presented a “Final Offer” to the Union. (A 2296, 2310; 206, 1148-1206.) The Hospital contended that the parties were at impasse with respect to healthcare and the entire contract. The Union disagreed with the Hospital’s declaration of impasse citing recent changes the Hospital had made to its most current final offer. The Union reiterated its concerns about the number of doctors in the Prime network and the quality of care at Prime hospitals. (A 2310; 206-07, 222.)

On healthcare, the Hospital’s final offer included high and low PPO options as well as the EPO plan with a gatekeeper requirement and employee premiums at all levels of coverage. On employee pay raises, the Hospital’s final offer provided that raises would be provided “on the date of contract ratification.” (A 2297; 1171, 1183-84.) At the October 21 bargaining session, the parties reached agreement on management rights and subcontracting articles. (A 2310; 1910-11.)

I. The Hospital Sends the Union a Last, Best, and Final Offer Expiring on December 31; the Union Does Not Accept Citing No Impasse and Its Outstanding Information Request; the Hospital Implements Its New Healthcare Plan

On December 15, the Hospital modified its final offer by sending the Union a “last, best and final offer” with a requirement that the Union accept the offer by December 31. In its offer, the Hospital changed the date of employee pay raises from the date of contract ratification to a retroactive date of July 1, 2010. (A 2297, 2310; 1217, 1243.) The Union did not accept this offer and continued to state that the parties were not at impasse and the Union was waiting for information it requested to evaluate the Hospital’s proposals. The Union also indicated that it was willing to bargain. (A 2310; 1273-78.)

On January 1, 2011, the Hospital implemented the new EPO and PPO plans. (A 2297.)

J. The Hospital and Union Resume Bargaining; the Union Makes Proposals; the Hospital Will Not Modify Its Last, Best, and Final Offer and Makes Further Bargaining Contingent on the Union Accepting that Offer

The parties resumed bargaining in March 2011. At a March 29 bargaining session, the Union made four bargaining proposals on employee status, compensation, vacation, and sick leave benefits. (A 2310; 239, 1286-1301.)

Throughout further correspondence and bargaining sessions, the Union continued to reiterate that the parties were not at impasse while the Hospital maintained that

it would not modify the fundamental components of its last, best, and final offer.

(A 2310-11; 240, 242, 246, 422, 436, 1302-07, 1309-16.)

The parties held their final bargaining session on December 22, 2011. The parties were scheduled to meet in January 2012. (A 2311; 441, 445, 449.)

However, the Hospital declared that further bargaining was contingent upon the Union accepting the Hospital's last, best, and final offer and no further meetings took place. (A 2311; 450, 1328.)

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) found that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to provide the Union with relevant information, announcing and implementing changes to employees' terms and conditions of employment without bargaining to impasse, and unlawfully conditioning bargaining on the Union's acceptance of its last, best, and final offer. (A 2299-2300.) To remedy these violations, the Board's Order requires the Hospital 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 them by Section 7 of the Act (29 U.S.C. §157). (A 2299-2300.)

Affirmatively, the Board's Order requires the Hospital to provide the Union with the requested information that is relevant and necessary to evaluate the Hospital's healthcare EPO proposal, as identified in the Union's July 2010 information request, to the fullest extent allowed by law. Additionally, upon the Union's request, the Hospital must rescind the unilaterally implemented changes in unit employees' healthcare coverage, copays, premiums, and healthcare provider networks, as well as make unit employees whole for any losses they may have suffered as a result of the unilateral changes. Further, before implementing any changes in wages, hours, or other terms or conditions of employment, the Hospital must notify and, on request, bargain with the Union. Finally, the Hospital must post a remedial notice. (A 2300.)

SUMMARY OF ARGUMENT

1. The Board reasonably found that the Hospital violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with relevant information it requested to evaluate the Hospital's healthcare proposals. In negotiations for a successor collective-bargaining agreement, the Hospital proposed ending its HMO healthcare plan and changing it to a self-funded EPO plan. Under the EPO, employees would utilize Prime hospitals and doctors and pay expanded premiums for coverage. The EPO plan also included a gatekeeper function whereby the employees would have to see a Prime physician before being referred out of

network. The Union expressed concerns about quality of care at Prime hospitals and, in order to evaluate the Hospital's healthcare proposal, submitted a request for information about those hospitals, which included information about infection rates and related staff training. The Board reasonably determined that the Hospital had a duty to provide that information and unlawfully failed to do so.

The Board properly rejected as unsupported by the record the Hospital's contention that the Union's information request was made in bad faith or that the Union made the request to further a corporate campaign against Prime. The Board further rejected the Hospital's assertion that the Union did not need the information because the Union agreed to an EPO plan at different Prime hospitals in different geographic locations as the Board recognized that unit employees here had no prior experience using the Prime healthcare network.

2. In its opening brief, the Hospital does not contest the Board's finding that it violated Section 8(a)(5) and (1) of the Act when, in the absence of an agreement with the Union, it unilaterally announced to employees that the Hospital would implement new EPO and PPO plans that would take effect in January 2011.

Therefore, under well-settled law, the Board is entitled to summary enforcement of its finding.

3. Substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its healthcare

proposal without bargaining to impasse. It is undisputed that the Hospital unilaterally implemented those plans, but the Hospital argues that it was privileged to do so because the parties' negotiations were at a good-faith impasse. The Board rejected the Hospital's assertion of a good-faith impasse on two independent and well-founded bases, either of which is sufficient to support the Board's conclusion.

First, the Board found the Hospital's unremedied unfair labor practices—its failure to provide relevant information and its unilateral announcement of its intent to replace the employees' healthcare plans without bargaining with the Union—to be conduct inconsistent with the conditions in which a good-faith impasse can arise. Second, based on substantial record evidence and well-settled law, the Board found that, even apart from the unremedied unfair labor practices, the totality of circumstances failed to show the parties reached impasse. Specifically, the Board found that the parties had not reached impasse on the critical issue of healthcare coverage nor, even if they had, did it lead to an overall breakdown in bargaining. Additionally, the Hospital's further uncontested, unlawful conduct of making bargaining contingent on the Union's acceptance of the Hospital's last, best, and final offer demonstrated bad faith that further supported the absence of a good-faith impasse.

STANDARD OF REVIEW

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). As the Supreme Court has observed, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Furthermore, this Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are "hopelessly

incredible, self-contradictory, or patently unsupportable.” *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1092 (D.C. Cir. 2012) (quotation omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO PROVIDE THE UNION WITH RELEVANT INFORMATION REQUESTED TO EVALUATE THE HOSPITAL’S HEALTHCARE PROPOSAL

A. Applicable Principles Regarding the Duty to Provide Requested Information

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. It is well settled that an employer’s duty to bargain includes the duty, in good-faith, “to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967). Therefore, an employer’s duty to bargain in good faith includes the duty “to supply a union with ‘requested information that will enable [the union] to negotiate effectively.’” *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011) (quoting *Oil, Chem. & Atomic Workers Local Union No. 6–418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) (alteration in original)). Accordingly, an employer’s failure to provide relevant information

upon request constitutes a violation of Section 8(a)(5) and (1) of the Act. *Acme*, 385 U.S. at 435-36.⁵

In order to facilitate the exchange of relevant information, certain categories of information are viewed as “presumptively relevant” to the union’s duty to represent the unit employees. *See Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1192 (D.C. Cir. 2000). As this Court has explained, “[i]nformation related to the wages, benefits, hours, [and] working conditions . . . of represented employees is presumptively relevant.” *Id.* at 1191. Such information enjoys a presumption of relevance because it is “central to the core of the employer-employee relationship.” *Oil, Chem. & Atomic Workers*, 711 F.2d 348 at 359 (internal citation omitted). Furthermore, as this Court has recognized, the duty to provide information relevant to the issues on the bargaining table is a “fundamental obligation” that is critical to the collective-bargaining process. *Id.* at 358.

When requesting information that is not presumptively relevant, for example, “information about employees outside the bargaining unit, the union must explain to the employer why the information is relevant.” *N.Y. &*

⁵ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7” of the Act. A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). *Accord Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

Presbyterian, 649 F.3d at 730. The Court applies a “discovery-type standard,” *Acme*, 385 U.S. at 437, under which “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *N.Y. & Presbyterian*, 649 F.3d at 730 (quoting *Oil, Chem. & Atomic Workers*, 711 F.2d at 359 (ellipsis in original)). See also *Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (information is relevant if it is germane and “has any bearing” on the subject matter of the case).

The Board’s judgment on the question of relevance is entitled to “great deference,” because “[d]etermining whether a party has violated its duty to ‘confer in good faith’ is particularly within the expertise of the Board.” *Crowley Marine Servs. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation omitted). Accord *Detroit Newspaper*, 598 F.2d at 272.

B. The Board Reasonably Determined Based on Substantial Evidence that the Hospital Violated Section 8(a)(5) and (1) of the Act by Failing To Provide the Requested Information Because the Information Is Relevant to the Bargaining Process

The Hospital “never produced any information responsive to the Union’s July 23 information request.” (A 2313.) The Board reasonably found (A 2297, 2313) that the information requested on July 23 is relevant to the parties’ collective-bargaining negotiations and, thus, the Hospital had an obligation to furnish that information to the Union.

For the bulk of the information requested, the Board determined that it was presumptively relevant “to understand the ramifications of the employer’s healthcare proposal—information concerning wages, hours, and terms and conditions of employment.” (A 2313.) *See Country Ford*, 229 F.3d at 1191 (“[i]nformation related to the . . . benefits. . . of represented employees is presumptively relevant”); *Honda of Hayward*, 314 NLRB 443, 444 (1994) (finding description of healthcare plan presumptively relevant); *Aztec Bus Lines, Inc.*, 289 NLRB 1021, 1037 (1988) (finding carrier of health benefit plan was relevant because carrier’s identity would enable union to investigate financial condition and reputation of carrier). The Board reasonably found that all of the requested information “pertaining to pressure ulcers, rates of septicemia, or other rates of hospital-acquired infection” is presumptively relevant as it relates to the care that employees would receive under the Hospital’s EPO plan and is thus related to a term and condition of their employment. (A 2297.)

As for the remaining information that was not presumptively relevant, the Board found that the Union established its relevance in its August 17 letter to the Hospital responding to the Hospital’s relevance objections to certain items. This Court has held that “context is everything in evaluating the relevance of a union’s request for information and we consider the reasons proffered by the union at the time of its request.” *N.Y. & Presbyterian*, 649 F.3d at 350 (finding relevance

where union requested information about nurse practitioners working for any employer at hospital to investigate grievance over hospital itself hiring non-union nurse practitioners). As the Board found (A 2314), monetary constraints, in the form of having to obtain a referral from a primary care physician to go outside the Prime network for healthcare and the geographic dispersion of Prime hospitals, “push employees or at least strongly encourage them to use the Prime network under the EPO plan . . . [therefore,] the aforementioned requested information is relevant for the Union to assess the new benefit plan that includes a new and different network of doctors and facilities” its members have not previously utilized.

The Board also found (A 2314) that “information regarding the training given to employees surrounding proper cleaning of surfaces or training regarding prevention and treatment of a type of ulcer often contracted during hospital stays or a list of all nurse practitioners and physician assistants serving in the hospital is . . . relevant for the Union to properly evaluate” the proposed EPO program. *See, e.g., Acme*, 385 U.S. at 438 n. 8 (noting that to deny a union information relating to bargaining proposals is to “require[e] it to play a game of blind man’s bluff” (citation omitted)). As to information relating to the Program for Evaluating Payment Patterns Electronic Report (“PEPPER”), the Board reasonably found that, even assuming the information is not presumptively relevant, the Union “easily

establishe[d]” relevance in its August 17 letter. (A 2297, 2314.) In that letter, the Union provided a “detailed” response to the Hospital’s relevance objections by giving the “rationale and basis for how each piece of requested information would enable the Union to properly evaluate” the Hospital’s healthcare proposal. (A 2314; 1119-23.) *See, e.g., New Surfside Nursing Home*, 330 NLRB 1146, 1146 n.1 (2000) (finding request for submissions to government agencies such as Medicare relevant to union’s evaluation of economic proposals). Indeed, as the Board observed (A 2314), the Union carried its “minimal burden” of establishing relevance by “detail[ing] item by item how the requested information would enable the Union to better understand and evaluate” the Hospital’s healthcare proposal. *See N.Y. & Presbyterian*, 649 F.3d at 729-30.

C. The Hospital’s Objections to the Board’s Relevance Findings are Insufficient to Overcome the Union’s Minimal Burden

The Hospital states that the standard for whether an employer violates the Act for withholding relevant information is whether the employer’s actions “frustrate[] effective collective bargaining.” (Br. 40.) The Hospital provides no authority in support of this proposition, and as discussed above, an employer’s duty to bargain in good faith includes a duty to provide relevant, requested information relating to its bargaining proposals. *See Acme*, 385 U.S. at 438 & n.8; *Crowley Marine*, 234 F.3d at 1297 (“probable or potential relevance is sufficient to give rise to an obligation” to provide requested information).

In simply stating that the “requested information was not presumptively relevant,” (Br. 42), the Hospital counters the Board’s finding to the contrary with a bare assertion. This is not enough to overcome this Court’s deference to the Board’s findings. *See Wayneview*, 664 F.3d at 348. Moreover, the Board’s finding of presumptive relevance is supported by this Court’s precedent holding that information relating to terms and conditions of employment for unit employees—including benefits—is presumptively relevant. *See Country Ford*, 229 F.3d at 1191. Finally, this Court has held that when the union’s request is for presumptively relevant information, the employer must timely provide that information unless it can show that the information is irrelevant, which again requires more than a mere assertion. *See N.Y. & Presbyterian*, 649 F.3d at 730.

While the Hospital correctly states (Br. 43) that the Board, with respect to information that is not presumptively relevant, will assess a union’s proffered reasons for relevance, the Hospital ignores that the Board made such an assessment here and found the Union met its burden. To that end, the Hospital’s reliance (Br. 43-44) on *Columbus Products Company*, 259 NLRB 220 (1981), does not negate the Board’s analysis here. In *Columbus Products*, a judge determined that an employer did not have to disclose names of employees whom the employer was not going to call as witnesses in a grievance and arbitration proceeding where the employer provided the union with the substance of those employees’ statements

about the incident being grieved. *Id.* at 223-24. In upholding the judge’s dismissal of the complaint, the Board recited a principle that is fully in line with the Board’s findings in this case—that the Board must determine whether requested information is relevant and significant to the union’s performance of its duties as collective-bargaining representative. Here, as described above, the Board found (A 2297, 2314), based on substantial evidence in the record, that the Union’s July 23 information request was relevant, and in large measure presumptively relevant, to evaluating a new benefit plan that included a new and different network of doctors than the employees had been previously required to use.

D. The Board Properly Rejected the Hospital’s Assertion that the Union’s Information Request Was Made in Bad Faith

As it did before the judge and the Board, the Hospital contends (Br. 18-19, 44-46) that the Union’s July 23 information request was made in bad faith because, according to the Hospital, the Union wanted the information to wage a corporate campaign against Prime and stall negotiations. The Board reasonably rejected this assertion as unsupported by the record and found that the Union’s request was “not made in bad faith or with an improper motive.” (A 2314.) *See N.Y. & Presbyterian*, 649 F.3d at 732 (burden on employer to offer evidence showing union acting with purpose other than carrying out its collective-bargaining duties). In any event, the “proper venue for [the Hospital] to raise its allegations about the national campaign by [the Union] would be through unfair labor charges against

the union itself,” rather than by engaging in bad-faith bargaining. *Cintas Corp. v. NLRB*, 589 F.3d 905, 913-14 (8th Cir. 2009) (finding exhibits and testimony concerning union’s conduct in national campaign inadmissible where employer contended union’s campaign designed to force employer into an unfavorable neutrality and card check agreement).

The Hospital’s continued reliance (Br. 44, 52) on *Graphic Communications Workers v. NLRB*, 977 F.2d 1168, 1169-70 (7th Cir. 1992), is, as the judge explained (A 2314), misplaced. While acknowledging that information requests can have a harassing purpose, the judge found that the Hospital did not carry its burden of demonstrating that the Union acted with any bad faith purpose as proscribed by the *Graphic Communications* Court—despite the fact that the Hospital’s arguments “directly mimic” examples in that case of potentially harassing information requests.⁶ (A 2314.) *See id.* at 1170 (affirming Board determination that employer did not have to provide requested financial records to substantiate claims that it would lose business if wage concessions not given because employer did not assert inability to pay).

⁶ As the Seventh Circuit explained, and the judge discussed (A 2314), “a request designed to harass—has a tripartite structure.” *Graphic Communications*, 977 F.2d at 1170. A union may want information because it is embarrassing and therefore could make way for bargaining concessions. A union may want an opportunity to take protected action such as a strike in response to an employer’s denial of its request. A union may want to delay “the evil day” on which the employer will take unilateral action on its bargaining demands. *Id.* at 1170.

The Hospital's argument relies (Br. 45) in part on its assertion that the July 23 request was an "attempt to obtain the same type of information" as a prior union information request in November 2009. However, as the Board found (A 2315), the July 23 request was "materially broader" because it requested information about all Prime hospitals to evaluate the Hospital's benefits proposal, whereas the November 2009 request was primarily directed at the Centinela facility because of workplace safety and staffing level concerns.⁷ By the time the Union made its broader request on July 23, the Hospital had proposed its new EPO plan, including the new gatekeeper requirement that employees would have to see a Prime primary care physician first in all instances, and the Union had expressed concerns about the Prime's healthcare network including the quality of care at Prime hospitals. (A 2315.) The Hospital had not yet, however, unilaterally announced or implemented the EPO plan nor had it made its alleged last, best, and final offer that included the EPO plan with gatekeeper requirement. (A 2315.) Therefore, as the Board explained, the parties were "in the thick of negotiations" and "actively bargaining" such that the Union needed information to assess and respond to the Hospital's "push for the drastic revision in healthcare as presented by the new restrictive EPO option." (A 2315.) Simply put, the July 23 request was "not a 'do-over' of the

⁷ The Hospital declined to provide information in response to the November 2009 request. (A 2315.)

November 2009 request” (A 2315) and the record, including the chronology of events, does not in any way support the Hospital’s assertion that the Union did not act in good faith when submitting its July 23 letter.

Furthermore, the Hospital’s belief (Br. 14) that the quality of care information should have been requested in February 2010, when the Hospital first made its EPO proposal, does nothing to undermine the relevance of that information to the Union’s evaluation of later EPO proposals. In making this argument, the Hospital relies (Br. 10-11, 15) on discredited testimony and bargaining notes of Mary Schottmiller. (A 2304.) For example, the Hospital states (Br. 11, 15) that the Union was told on February 16, 2010, that employees would have to utilize a Prime primary care physician to go to a specialist in or out of network. However, the judge found based on credited evidence that the Union was not aware of this requirement until after the May 6 bargaining session. (A 2305, 2312; 127-28, 1093-95.)

The Hospital continues its misplaced reliance (Br. 17, 45, 53) on the fact that the Union had already agreed to the EPO plan at two other Prime hospitals in Garden Grove and Encino. But the Board reasonably determined that the “mere fact that the Union represents employees at other Prime hospitals does not mean that . . . employees at Centinela do not have the right to necessary and relevant information regarding the [Hospital’s] healthcare proposal that would allow them

to be informed consumers and make informed decisions during bargaining.”⁸ (A 2316.) While the Union may negotiate agreements at various Prime hospitals, the negotiations at issue in this case are, as the Board indicated (A 2316), “distinct and separate from any earlier or future” negotiations at other Prime hospitals.⁹

⁸ The Hospital contends (Br. 23) that it believed quality-of-care concerns with the Prime network should have come from employees rather than the Union. The Hospital ignores the fact that the Union, through its request for information, was acting as the employees’ collective-bargaining representative and raising such concerns on behalf of employees.

⁹ The Hospital has waived its argument that the Union’s information request included confidential information by not raising it in its brief to this Court. *See Fox v. Gov’t of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) (argument not raised in an opening brief is forfeited). The Hospital states (Br. 39) that the judge based his decision on a conclusion that the information requested was “not confidential” but offers no assertion or argument as to the judge or the Board erring in this regard. In any event, the Board reasonably found (A 2297) that the Hospital failed to prove that any of the requested information is confidential. *See U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) (“[a]n employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations”). Nevertheless, the Board did not reject the Hospital’s confidentiality claims out of hand. Because the Hospital raised issues of patient privacy, the Board ordered it to comply with the Union’s information request “to the fullest extent allowed by law.” (A 2300.) Further, the Board’s Order does “not preclude [the Hospital] from raising patient confidentiality arguments during the compliance stage of this proceeding.” (A 2297.)

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY ANNOUNCING IT WOULD BE IMPLEMENTING NEW HEALTHCARE PLANS

In its opening brief, the Hospital does not contest the Board's finding that it violated Section 8(a)(5) and (1) of the Act on September 1, 2010, when it unilaterally announced to its employees that new healthcare plans would take effect in January 2011 and employees would need to choose a new plan during an open enrollment period beginning on November 1. (A 2298 n.9.) Under well-settled law, the Hospital's failure to contest this finding constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to this violation. *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) ("it is [this Court's] longstanding rule that '[t]he Board is entitled to summary enforcement of the uncontested portions of its order[s]'" (quoting *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006)). *Accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 736 (D.C. Cir. 2015).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING ITS HEALTHCARE PROPOSAL WITHOUT BARGAINING TO IMPASSE

It is undisputed that the Hospital unilaterally implemented its EPO plan on January 1, 2011, without bargaining with the Union. Absent a good-faith impasse, which the Board reasonably found was not reached here, the Hospital’s action violated Section 8(a)(5) and (1) of the Act because an employer is not privileged to unilaterally change employees’ terms and conditions of employment when bargaining has not reached impasse.¹⁰ See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). Such changes “injure[] the process of collective bargaining itself . . . by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (internal quotations omitted).

Here, the Board soundly rejected the Hospital’s defensive claim that the parties were at a good-faith impasse on two independent bases, either of which is sufficient to show the Hospital’s claim must fail. First, the Board relied, under

¹⁰ An employer commits an unfair labor practice in violation of Section 8(a)(5) by “refus[ing] to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). As noted previously, an employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

well-settled law, on the existence of the Hospital's unremedied unfair labor practices—its failure to provide relevant information and its unilateral announcement of the EPO plan to employees—as precluding a finding of good-faith impasse. Second, the Board determined, based on substantial record evidence and settled law, that, even apart from those unremedied unfair labor practices, the totality of circumstances failed to show that the parties had, in fact, reached impasse prior to the Hospital's implementation on January 1, 2011. When upheld by this Court, either analysis independently shows there can be no finding of a valid impasse that would privilege the Hospital's unilateral healthcare changes.

A. The Board Reasonably Found that the Hospital's Unlawful Conduct During Bargaining Precludes a Finding of Impasse

1. Applicable principles of unremedied unfair labor practices precluding impasse

This Court has recognized that unremedied unfair labor practices can contribute to the parties' inability to reach an agreement. *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999). As this Court stated, “[t]here are at least two ways in which an unremedied [unfair labor practice] can contribute to the parties’ inability to reach an agreement.” *Id.* First, an unfair labor practice can “increase friction at the bargaining table.” *Id.* Furthermore, by altering the status quo, such as by announcing a change in terms and conditions of employment that has not been bargained for, an employer’s unilateral action “may move the baseline for

negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement." *Id.*

Moreover, certain unremedied unfair labor practices can alone create a barrier to a good-faith impasse. Specifically, the Board has long recognized that a lawful impasse "cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co.*, 301 NLRB 729, 740 (1991). This Court has likewise found that a failure to provide necessary information in bargaining "frustrate[s] the parties' efforts to reach an agreement and preclude[s] a finding of genuine impasse." *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1093 (D.C. Cir. 2012). *Accord E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) (citing *U.S. Testing Co., Inc. v. NLRB*, 160 F.3d 14, 20, 22 (D.C. Cir. 1998)); *Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 505 (5th Cir. 2002); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 188-89 (2d Cir. 1991); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 449-50 (4th Cir. 1969).

When considering whether a past violation exerts a continuing effect that taints later negotiations, "[i]t may not always be easy to differentiate between an unremedied [unfair labor practice] that contributes to a deadlock and one that does not." *Alwin Mfg*, 192 F.3d at 139. Thus, the analysis "is a quintessential question of fact which is appropriately left to the Board to resolve in each case in light of its

expertise.” *Id.* (citing *Am. Fed’n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 (D.C. Cir. 1968)).

2. The Board correctly found that the Hospital’s uncontested unilateral announcement of its EPO plan to employees and its failure to provide relevant information precludes a finding of impasse

The Hospital committed two unfair labor practices which, applying the above applicable principles, so disrupted the parties’ bargaining relationship as to prevent the possibility of a good-faith impasse from even arising. First, a lawful impasse cannot exist in the face of the Hospital’s unremedied failure to provide requested information relevant to its healthcare proposal. Additionally, the Hospital does not even contest the second of these violations: its unilateral announcement of EPO plan implementation.

i. The Hospital’s failure to provide requested information precludes a finding of impasse

The Board reasonably found that the Hospital’s “failure to provide the Union with the information it requested on July 23 precludes a finding that the parties were at impasse on January 1, 2011.” (A 2297-98.) As the Board stated, as a result of the Hospital’s failure to provide the requested information, “it is unknown as to whether the Union and the [Hospital] would have bargained to impasse or reached an agreement regarding healthcare because the Union was never furnished the relevant and necessary information to evaluate key components” of the EPO

plan. (A 2318.) *See, e.g., E.I. Du Pont*, 489 F.3d at 1315 (failure to provide data underlying cost-savings calculations precluded impasse on subcontracting).

The Board specifically found that the Union’s information request “related to the core issue of the quality of care of [the Hospital’s] proposed new healthcare plan that separate[d] the parties.” (A 2318.) As this Court has recognized, “Board and court precedents reflect the principle that a denial of ‘information relevant to the core issues separating the parties’ can preclude a lawful impasse, and such a commonsense principle is certainly reasonable.” *Id.* at 1316. The Board thus reasonably found that due to the Hospital’s failure to provide the information the Union needed to evaluate the Hospital’s proposal on the core issue of healthcare, “impasse was not reached.” (A 2318.)

The reasonableness of the Board’s approach here is further illustrated by this Court’s decision in *United States Testing*. In that case, the employer, citing rising healthcare costs, sought to increase the healthcare contributions made by unit employees. The union requested claims information for all employees, even those outside the unit, to evaluate the employer’s claim and formulate a response. 160 F.3d at 20. The employer did not supply that information—although it provided summaries as well as other related information—and declared an impasse. *Id.* This Court, after reviewing the Board’s relevance findings, concluded that the impasse was unlawful stating that “this court can quickly dispose of the

[employer's] other contentions . . . [i]ts unlawful refusal to supply the requested medical claims information precluded the [employer] from declaring an impasse.”

Id. at 22. As in that case, the Hospital's failure here to provide information relevant to quality of care under its healthcare proposal precludes a finding that the Hospital lawfully declared impasse.

The Hospital argues (Br. 53) that the record lacks evidence “to support the inference that the Union may have agreed to the EPO plan” if the Hospital had provided the information on quality of care. The Hospital fails to cite any precedent showing an employer's refusal to provide relevant information does not preclude impasse if the information requested would not have caused the union to capitulate to the employer's demands. The standard, as cited above, is that an unremedied failure to provide relevant information related to a bargaining proposal precludes a good-faith bargaining impasse. *E.I. Du Pont*, 489 F.3d at 1315; *U.S. Testing*, 160 F.3d at 22. There is no additional requirement that the quality of care information would have led the Union to agree to the Hospital's terms.

ii. The Hospital's unilateral announcement tainted further negotiations

As shown in Argument Section II., the Board is entitled to summary enforcement of its uncontested finding that the Hospital violated Section 8(a)(5) and (1) of the Act on September 1, 2010, when it unilaterally announced to its employees that new healthcare plans, including the EPO plan, would take effect on

January 1, 2011. (*See* p. 30, above.) As the Board indicated, “even before the [Hospital] declared impasse in October 2011,” it had already sent a memorandum to employees “detail[ed] the process that employees would need to follow . . . well in advance of the January implementation date” thereby going “beyond simply stating a planned change” and “indicat[ing] that action was required of employees.” (A 2298 n.9, 2322; *see* 1135.)

In its announcement, the Hospital omitted any reference to ongoing negotiations instead “present[ing] the healthcare changes as a fait accompli . . . signal[ing] to employees that the [Hospital] no longer intended to deal with the Union over healthcare.” (A 2298 n.9.) Therefore, when the Hospital told employees that they would soon be signing up for the new EPO plan, “damage to the bargaining relationship had been accomplished simply by th[at] message.” (A 2322.) The employees now knew that the Hospital was “taking it on itself to set this important term and condition of employment, thereby ‘emphasizing to the employees that there is no necessity for a collective bargaining agent.’” *ABC Auto. Products Corp.*, 307 NLRB 248, 250 (1992) (quoting *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)). This uncontested unilateral action thus caused both friction in the parties’ bargaining relationship and moved the parties’ expectations in such a way as to make an agreement harder to achieve. For both of those reasons, the announcement of the EPO plan is an unremedied unfair labor

practice that supports the Board's finding that no lawful impasse could have arisen.

See Alwin Mfg., 192 F.3d at 139.

B. The Board Reasonably Found that the Totality of Circumstances Precludes a Finding of Lawful Impasse

As shown, the Hospital's unremedied unfair labor practices as a matter of law preclude a good-faith impasse from having arisen in this case. However, the Board further found (A 2298, 2319), even assuming *arguendo* that those unlawful actions did not prevent an impasse, the totality of the circumstances demonstrate that the parties did not reach impasse prior to the Hospital's unilateral implementation of its healthcare proposal.

1. Applicable principles of bargaining to impasse

"The Board does not lightly find an impasse," *Powell Elec. Mfg. Co.*, 287 NLRB 969, 973 (1987), *enforced*, 906 F.2d 1007 (5th Cir. 1990), because unilateral implementation of new terms goes against the policies of fostering stable bargaining relationships and effectuating employee choice of representative that are at the center of the Act. *Honeywell Int'l*, 253 F.3d at 131. As this Court has stated, impasse is defined as the deadlock reached by bargaining parties "after good-faith negotiations have exhausted the prospects of concluding an agreement," and there is no realistic prospect that continuing the discussion will be productive. *See Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986) (citations omitted). Impasse exists only when "good-faith negotiations have

exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful.” *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (citations omitted). The party asserting impasse bears the burden of proving it. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2012).

The Board, with this Court’s approval, considers a number of factors in determining whether impasse exists. These factors include “‘bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.’” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (quoting *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *petition for review denied sub nom. Am. Fed’n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)). The Board concludes impasse has been reached when “there is no realistic possibility that continuation of discussion at the time would have been fruitful.” *Am. Fed’n of Television & Radio Artists*, 395 F.2d at 628. In sum, the evidence must show that both parties believed that they were at the end of their bargaining rope. *See Teamsters Local 639*, 924 F.2d at 1084. In addition, “continuous negotiating progress is strong evidence against an impasse.” *Teamsters Local 175*, 788 F.2d at 31.

Because the existence of impasse is a question of fact, this Court “ordinarily defers to the Board’s fact-finding as to the existence of a bargaining impasse.” *Monmouth*, 672 F.3d at 1089 (quoting *Wayneview*, 664 F.3d at 348). Indeed, “in the whole complex of industrial relations, few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems.” *Wayneview*, 664 F.3d at 348 (quotation omitted). *Accord Dallas Gen. Drivers v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966).

2. The Board reasonably found that the totality of circumstances fails to show the parties reached impasse before the Hospital implemented its EPO plan

Even putting aside the fact that the Hospital’s unremedied unlawful conduct prior to its October 21 declaration of impasse prevented a good-faith impasse from arising, the Board found there was no actual impasse in bargaining itself. The Board’s conclusion is based on three findings. First, the parties had not reached impasse on the critical issue of healthcare. Next, even if the parties were at impasse on the single issue of healthcare, that failure to reach agreement did not lead to a breakdown in overall bargaining. Finally, to the extent there was a breakdown, the Hospital’s independently unlawful conduct of conditioning continued bargaining on the Union’s acceptance of the Hospital last, best, and final offer, demonstrates bad faith in bargaining. Significantly, again, the Hospital does

not even contest that the third finding constituted an independent unfair labor practice.

i. Substantial evidence supports the Board’s finding that the Hospital failed to establish that impasse was reached on the critical issue of healthcare

As the Board noted (A 2298, 2323), a party contending that overall impasse has been reached because of a deadlock in negotiations over a single issue must demonstrate that the issue is a critical issue, and that the impasse on this critical issue led to an overall breakdown in negotiations—“in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

First, the Hospital describes (Br. 23, 26, 27, 33) healthcare as a “critical” or “single critical” issue in bargaining. It did the same in communications during bargaining and in correspondence with the Union. (A 2323; 935-36.) However, as the Board stated (A 2323), “using the correct lingo does not relieve the [Hospital] of liability when the legal test cannot be met.” The Board found (A 2298) that “even if the evidence was sufficient” to support a finding of impasse on healthcare, the Hospital “failed to show” that such an impasse “led to an overall breakdown in bargaining” as it would have if healthcare were a single critical issue in the parties’ bargaining.

Second, the Board reasonably found (A 2298) that the Hospital “failed to show an actual impasse over healthcare.” Even at the October 21 session where the Hospital began by declaring impasse—both as to healthcare and overall—it later presented the Union with a healthcare proposal significantly changing the structure of the PPO plan. (A 2298-99; 1183-84.) Following that session, the Union requested information about doctors in the Prime network and the Hospital provided that information. (A 2320; 1934.) As the Board found (A 2299), there was no doubt that “negotiations were still progressing, including with respect to the ‘critical issue’ of healthcare.”

ii. The Board reasonably found that the Hospital failed to demonstrate an overall breakdown in bargaining

Furthermore, even assuming the evidence was sufficient to show the parties reached impasse on a single critical issue, the Hospital failed to show that any impasse on healthcare led to a breakdown in overall bargaining. *Calmat*, 331 NLRB at 1097. In finding that the Hospital did not meet its burden, the Board relied on parties’ continued negotiations after the Hospital declared impasse including reaching agreement on certain provisions and the Hospital making changes to its proposals as well as the lack of a contemporaneous understanding that the parties were at impasse. *See Teamsters Local 639*, 924 F.2d at 1083.

The Board relied (A 2298) “most significantly” on evidence showing that, even after the Hospital declared impasse, the parties “continued to negotiate and to

reach agreement on substantive provisions of the collective-bargaining agreement.”

On the same day that the Hospital declared impasse, it made meaningful changes to its centrally important healthcare proposal. (A 2298, 2320; 1183-84.) Also, following the Hospital’s declaration of impasse that day, the parties reached agreement on two substantive collective-bargaining provisions on management rights and subcontracting. (A 2299.) *See Atl. Queens Bus Corp.*, 362 NLRB No. 65, slip op. at 3 (2015) (citing late movement on key issues, including day employer declared impasse, as evidence that parties had not reached impasse).

Additionally, as the Board found, “[a]t no time after declaring impasse did the [Hospital’s] proposals remain static.” (A 2298.) In December, two months after declaring impasse, the Hospital presented the Union with a “last, best and final offer” that changed the dates of proposed employee pay raises. (A 2298; 1243.) As the Board found (A 2299), this was “yet another substantive change from the [Hospital’s] asserted final proposal, again showing that there was room for movement.” Indeed, throughout 2011, the parties continued to meet “all the while the [Hospital] was asserting impasse and the Union was offering and making proposals.” (A 2320; 1309-16.) *See Teamsters Local 175*, 788 F.2d at 31 (“continuous negotiating progress is strong evidence against an impasse”). The Board found (A 2298) that such evidence persuasively demonstrated that the Hospital was “not warranted in assuming that further bargaining would be futile.”

Indeed, the Hospital's actions would have made no sense if either of the parties believed they had already "exhausted the prospects of concluding an agreement." *Monmouth*, 672 F.3d at 1088 (quoting *Taft Broad.*, 163 NLRB at 478).

Further, substantial evidence supports the Board's finding (A 2298) that there was "no contemporaneous understanding" by the parties that they were at impasse. There was simply "no clear point where *both* parties in this case believed negotiations were at impasse."¹¹ (A 2320 (emphasis in original).) *See Monmouth*, 672 F.3d at 1090 (finding no lawful impasse where record contained no "evidence of any contemporaneous understanding that the parties were at genuine impasse"); *cf. Chicago Local No. 458-3M, Graphic Comm'ns Int'l Union v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (finding impasse where employer's attorney "stated that he believed the parties were at an impasse" and the union "did not disagree").

The Board determined that the Union "not only thought there was more to bargain over concerning the proposed EPO plan, as well as other topics but also continually requested the quality of care information and asked to engage in bargaining." (A 2320.) The Union continued to meet and correspond with the

¹¹ The Board further noted (A 2298) that the 15 bargaining sessions between December 2009 and March 2011 were not so numerous to show that the parties "reached 'the end of their rope,' especially in light of the number of contract proposals" and the dedication of some sessions to noneconomic issues. *See, e.g., Beverly Farm Foundation v. NLRB*, 144 F.3d 1048, 1052-53 (7th Cir. 1998) (finding 19 bargaining sessions over more than 1 year insufficient to show impasse where multiple sessions were dedicated to noneconomic issues).

Hospital. For example, on October 29, the Union responded to a Hospital assertion of impasse by stating that the Union “did not believe it was at impasse and that it was still waiting for information requested regarding the [EPO] proposal” and indicating that it was ready and willing to bargain. (A 2310; 1212-14.)

Furthermore, on November 2, the Union requested information regarding doctors in the Prime network under the EPO plan. (A 2310; 1934.) Thus, the Union “not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings” with the Hospital. *Grinnell Fire Protection Syst. Co.*, 328 NLRB 585, 585 (1999). Because “[b]oth parties must believe that they are at the end of their rope” for impasse to exist, the Union’s belief that further negotiations could be fruitful, and its conduct reflecting that belief, was enough to forestall a finding of impasse. *PRC Recording Co.*, 280 NLRB 615, 635 (1986). *Accord Am. Fed’n of Television & Radio Artists*, 395 F.2d at 628 (impasse not reached because there was a “realistic possibility that continuation of discussion at the time would have been fruitful”).

iii. The Hospital’s uncontested unlawful conduct in bargaining further supports the Board’s finding of no impasse

The parties’ continuing negotiations culminated in a final bargaining session on December 22, 2011. After that session, the Hospital conditioned further bargaining on the Union’s acceptance of the Hospital’s last, best, and final offer.

(A 2311, 2320; 450, 1328.) The Board found (A 2300, 2320) that by this conduct the Hospital violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union. Because the Hospital has not contested this violation, the Board is entitled to summary enforcement of this uncontested finding. *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 736 (D.C. Cir. 2015). Furthermore, the Hospital's bad faith in bargaining as evidenced by this independently unlawful conduct weighs against a finding of impasse. *See Teamsters Local 639*, 924 F.2d at 1082-84.

iv. The Hospital's additional arguments do not demonstrate that a good faith impasse was reached

The Hospital fails throughout its brief to address relevant, recent precedent from this Court on the question of whether a good-faith bargaining impasse exists. Even where it correctly states a point of law, the Hospital avoids citing actual impasse cases. For example, the Hospital recites (Br. 47) that a bargaining impasse occurs when the parties are warranted in assuming that further bargaining would be futile. In doing so, the Hospital cites *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1237 n.10 (D.C. Cir. 2012). But *Comau* was not a case where any party disputed that a good-faith impasse had occurred and thus the Court was not assessing, as it did, for example, in *Monmouth* and *Wayneview*, whether the

Board's determination that the parties were not at impasse was supported by substantial evidence.¹²

The Hospital erroneously claims in an overly simplified manner that the law provides that an impasse is reached where “the parties have declared their positions and neither party will concede to the other.” (Br. 47.) The Hospital fails to mention that the case it cites for this proposition, which is itself an incomplete statement of the law, differs considerably from the facts here. *See Bloomsburg Craftsmen*, 276 NLRB 400 (1985). In that case, the Board found that the union “at no time following the deadlock communicated any changes in either its proposal or argumentation . . . [n]o attempt was made to counter the reasons offered by the [e]mployer or to alter the stalemate by counterproposal.” *Id.* at 405. In contrast, as described above, the Union and the Hospital altered proposals and continued to meet after the Hospital communicated a supposed “deadlock” on October 21, 2010.

The Hospital then states that the Board will “not hesitate” to find impasse where a union “stalls negotiations” or “engages in tactics to forestall impasse.” (Br. 48.) However, the Board rejected (A 2322) the Hospital's assertion that the

¹² Similarly, the Hospital's misleading statement (Br. 31) about the “continuing existence” of a bargaining impasse in 2011 ignores the Board's finding, supported by substantial evidence, that no earlier impasse was reached in 2010.

Union engaged in bad-faith bargaining.¹³ For example, the Hospital's assertion (Br. 26) that the Union's "purported acceptance" of the EPO plan on September 30 was "illusory" because the Union still wanted employees to access the Anthem network without a referral does not demonstrate that the Union was acting in bad faith. The Union's acceptance of the fact that there would be an EPO option, even if it did not accede to the Hospital's entire proposal, is, as the Board stated, "not so illogical to constitute bad faith bargaining." (A 2322.)

The Hospital also asserts, without record support, that the Union "refus[ed] to cooperate in [the Hospital]'s efforts to expand the Prime network of providers" as a bad-faith bargaining tactic. (Br. 51.) To the contrary, the judge found that the Hospital used a "sham" physician nomination form to lead its employees "to believe that they could somehow add their personal primary care providers to the Prime Network without any evidence that any physician was added through a contractual relationship or proof that the physician would accept Prime's terms of employment and compensation." (A 2312.) This finding, based on evidence in the record, demonstrates that it was the Hospital itself that failed to make a good-faith effort to expand its network.

¹³ The Hospital's repeated attempts to retry the evidence before this Court wholly disregards the standard of review in this case. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Notwithstanding that the Board made no findings here that the Union engaged in “stalling” or other bad-faith “tactics,” the Hospital relies (Br. 48) on distinguishable case law in support of its point. In *Matanuska Electrical Association*, 337 NLRB 680 (2002), the Board determined, unlike here, that an employer lawfully declared impasse where the union engaged in tactics such as taking the position that “all words are ambiguous” and insisting that the employer was obliged to explain its intent and motivation as to every proposal. *Id.* at 683. Furthermore, also unlike here, in *Matanuska*, the employer specifically stated that it was willing to continue bargaining if the union submitted a proposal showing some movement. *Id.* at 684.

The Hospital next asserts (Br. 48) that the Board considers “pressing business or operational needs” when determining whether impasse has been reached. However, the Hospital’s only support for this assertion is a Board case that this Court reversed and remanded because, on the record before it, there was no legal justification for the employer’s unilateral reduction in wages. *See Bell Transit Co.*, 271 NLRB 1272 (1985), *reversed sub. nom.*, *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

Finally, the Hospital ignores (Br. 54) the Board’s finding, which is entitled to deference, that “negotiations were still progressing” and “[a]t no time after declaring impasse did the [employer]’s proposals remain static.” (A 2298-99).

This contrasts with the Board's assessment of negotiations in *E. I. Du Pont De Nemours & Co.*, 268 NLRB 1075, 1076 (1984), a case on which the Hospital principally relies (Br. 47, 49, 54, 55). In *Du Pont*, the Board determined that length of negotiations was "noteworthy" and that the parties "had exhausted the realistic possibility of reaching agreement." *Id.* Furthermore, in direct contrast to the Hospital's unremedied unfair labor practices here—one of which, the unilateral announcement of EPO plan implementation, is uncontested—the employer in *Du Pont* had "negotiated long, hard, and in good faith over job movement, and gave the [u]nion, in full, the bargaining opportunity to which it was entitled under the Act." *Id.* Accordingly, the Hospital has provided the Court with no basis to disturb the Board's finding.

CONCLUSION

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

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August 2016

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

PRIME HEALTHCARE CENTINELA, LLC	*
d/b/a CENTINELA HOSPITAL MEDICAL CENTER	*
	* Nos. 15-1436,
Petitioner/Cross-Respondent	* 16-1037
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 31-CA-030055
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
SEIU UNITED HEALTHCARE WORKERS-WEST	*
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,862 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 4th day of August, 2016

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

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 7.

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia

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