

**Nos. 15-1200 & 15-1255**

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

**ENTERPRISE LEASING COMPANY OF FLORIDA, d/b/a  
ALAMO RENT-A-CAR**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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FLORIDA, d/b/a ALAMO RENT-A-CAR	)	
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Petitioner/Cross-Respondent	)	Nos. 15-1200,
	)	15-1255
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	12-CA-026588

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

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

A. ***Parties and Amici:*** Enterprise Leasing Company of Florida, d/b/a Alamo Rent-A-Car (“Enterprise”), is the petitioner before the Court; it was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board.

B. ***Ruling Under Review:*** The case involves Enterprise’s petition to review, and the Board’s cross-application to enforce, a Decision and Order the Board issued June 26, 2015 (362 NLRB No. 135).

C. ***Related Cases:*** The ruling under review has not previously been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court. The Board is not aware

of any related cases pending in or about to be presented to this Court or any other court.

s/Linda Dreeben  
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Deputy Associate General Counsel  
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1015 Half Street SE  
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Dated at Washington, DC  
this 19th day of January, 2016

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## **GLOSSARY**

2013 Order	The Decision and Order issued by the Board on July 2, 2013 (359 NLRB No. 149)
2015 Order	The Decision and Order issued by the Board on June 26, 2015 (362 NLRB No. 135)
Act	The National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i> )
Alamo	Alamo Rent-a-Car
Board	The National Labor Relations Board
Br.	The opening brief of Enterprise to this Court
CBA	The collective-bargaining agreement between Enterprise and the Union covering the unit employees, effective from November 29, 2005, through January 2, 2010
Enterprise	Enterprise Leasing Company of Florida, d/b/a Alamo Rent-A-Car
Group Plan	Comprehensive Group Insurance Plan referred to in article 23, section 1 of the CBA
National	National Car Rental
Union	Teamsters Local Union No. 769 affiliated with International Brotherhood of Teamsters
Unit employees	The employees represented by the Union at Enterprise's Alamo Miami facility
Vanguard	Vanguard Car Rental, USA
Vanguard Plan	Vanguard Car Rental USA, Inc. Short-Term Disability Plan

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Enterprise Leasing Company of Florida, d/b/a Alamo Rent-A-Car (“Enterprise”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board

Decision and Order issued against Enterprise on June 26, 2015, and reported at 362 NLRB No. 135. (A. 2215-23.)<sup>1</sup>

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Enterprise’s petition for review and the Board’s cross-application for enforcement are timely, as the Act imposes no time limit on such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that Enterprise violated Section 8(a)(1) of the Act by coercively interrogating employees about, and soliciting them to withdraw, their union membership.

2. Whether substantial evidence supports the Board’s findings that Enterprise violated Section 8(a)(1) of the Act by telling employees it was terminating their short-term disability benefits because of their union

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<sup>1</sup> “A.” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

representation, and encouraging them to circulate a petition to decertify the Union as their bargaining representative.

3. Whether substantial evidence supports the Board's finding that Enterprise violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating employees' short-term disability benefits, and interfering with the Union's contractual right of access to Enterprise's facility.

4. Whether substantial evidence supports the Board's finding that Enterprise violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the employees' bargaining representative, unilaterally making post-withdrawal changes to employees' terms and conditions of employment, refusing to bargain with the Union regarding an employee grievance, and refusing to deduct and remit dues to the Union.

5. Whether the Board abused its broad remedial discretion in ordering Enterprise to reimburse the Union for dues that Enterprise had unlawfully failed to deduct and remit.

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are contained in the attached Addendum.

### **STATEMENT OF THE CASE**

After investigation of charges filed by Teamsters Local Union No. 769 affiliated with International Brotherhood of Teamsters ("the Union"), the Board's

Acting General Counsel issued a complaint primarily alleging that Enterprise violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the employees' collective-bargaining representative. (A. 2198.) The complaint further alleged that, before withdrawing recognition, Enterprise violated Section 8(a)(1) by telling employees that they will lose their short-term disability benefits because of their union representation, and by encouraging them to circulate a petition to decertify the Union as their bargaining representative. The complaint also alleged that, prior to withdrawing recognition, Enterprise violated Section 8(a)(5) and (1) by unilaterally eliminating short-term disability benefits, and interfering with the Union's contractual right of access to Enterprise's facility. (A. 2199.) Finally, the Complaint alleged that, after withdrawing recognition, Enterprise violated Section 8(a)(1) by interrogating employees and soliciting them to withdraw their union memberships, and violated Section 8(a)(5) and (1) by making unilateral changes to employees' wages and other terms and conditions of employment, and refusing to deduct and remit dues to the Union and process an employee grievance. (*Id.*)

After a hearing, the administrative law judge found that Enterprise violated the Act as alleged. (A. 2198-2212.) Enterprise and the Acting General Counsel filed exceptions. On July 2, 2013, the Board (Chairman Pearce, and Members Griffin and Block) affirmed, as modified, the judge's findings and recommended

order.<sup>2</sup> (A. 2193-97 & nn. 2-11) (“the 2013 Order.”) The Company petitioned this Court for review.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including those of Members Griffin and Block. On June 26, 2015, after the Court dismissed Enterprise’s challenge to the 2013 Order, which the Board had vacated, a properly constituted Board panel (Chairman Pearce, and Members Miscimarra and McFerran) issued the Decision and Order now before the Court (the “2015 Order”), which incorporates the 2013 Order. (A. 2215-23.)

## **I. THE BOARD’S FINDINGS OF FACT**

### **A. Background; Enterprise’s Operations and Its Collective-Bargaining Relationship with the Union**

Enterprise, a national car-rental business, operates a facility at the Miami International Airport, where it rents cars under three brands—Enterprise, National Car Rental (“National”) and Alamo Rent-a-Car (“Alamo”). This case involves the Alamo operation at the Miami airport. Enterprise obtained that operation, along

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<sup>2</sup> The Board found it unnecessary to address the judge’s finding that Enterprise also violated Section 8(a)(3) of the Act by eliminating short-term disability benefits because such a finding would not materially affect the remedy. (A. 2194 n.7.)

with the National business, when it acquired Vanguard Car Rental, USA (“Vanguard”) in August 2007. (A. 2194, 2199 & n.5; 13.)

The Union had represented the Alamo Miami employees in a wall-to-wall bargaining unit (“the unit employees”) since its Board certification in 2005. (A. 2199, 2208; 14, 43, 397, 691.) The Union and Vanguard, Enterprise’s predecessor, negotiated a first collective-bargaining agreement for the Alamo employees, effective from November 29, 2005, through January 2, 2010 (“the agreement” or “the CBA”). (A. 2199; 13, 28, 368-95.) When Enterprise purchased Vanguard in 2007, it adopted the agreement and recognized the Union as the collective-bargaining representative of the unit employees. (*Id.*)

In September 2009, the Union requested that Enterprise negotiate a successor agreement. By December 28, 2009, the parties had agreed to meet in late February or early March 2010, and to extend the existing agreement through March 31, 2010. No such meetings occurred because Enterprise withdrew recognition from the Union on January 19, 2010. (A. 2199-2200; 13, 28, 396.)

**B. Enterprise Terminates the Vanguard Plan that Provided Short-Term Disability Benefits Pursuant to the CBA, but Continues To Offer Such Benefits on a Self-Insured Basis**

Until August 1, 2009, Enterprise provided unit employees with short-term disability benefits pursuant to the Comprehensive Group Insurance Plan (“the Group Plan”) referred to in article 23, section 1 of the CBA. The Group Plan, in

turn, encompassed a subsidiary Vanguard Car Rental USA, Inc. Health and Welfare Plan, which included a Vanguard Car Rental USA, Inc. Short-Term Disability Plan (“the Vanguard Plan”). (A. 2199-2200, 2216, 2218-20 & nn.4-9; 164-67, 381, 421-24, 563, 1655.)

Enterprise terminated the Vanguard Plan on August 1, 2009. (A. 2216, 2219 & n.9; 164-67.) Although it continued to provide short-term disability benefits to unit employees for the remainder of 2009, after August 1, it no longer did so pursuant to the discontinued Vanguard Plan. (A. 2200, 2216, 2219 & n.9; 164-67.) Instead, after August 1, Enterprise provided those benefits to unit employees on a self-insured basis. It also took over the administration of those benefits, and no longer utilized Matrix Absence Management, Inc., the entity that had administered the Vanguard Plan. (A. 2216, 2219 & n.9; 159.)

**C. Enterprise Tells Employees that It Will Terminate Their Short-Term Disability Benefits Because of Their Union Representation, Then Cancels Those Benefits Without Notifying the Union or Providing an Opportunity To Bargain**

In past years, Enterprise held an annual open-enrollment period in October and November, during which employees could elect their benefits for the following year. (A. 2200; 52.) As of early November 2009, however, Enterprise had not offered open-enrollment for 2010. Noting this omission, employee and Union Steward Marjorie Wisecup asked Enterprise’s Human Resource Manager in Miami, Lisette Dow, about it. Dow responded by reviewing with Wisecup the

2010 employee-benefits package, without mentioning the planned elimination of short-term disability benefits. (A. 2200; 52.) Around this time, Dow told other unit employees not to worry if they did not have a chance to enroll because the benefits in 2010 would be identical to those in 2009. (*Id.*)

In late November or early December, after the open-enrollment period would have closed if it had been provided, Dow called Wisecup into her office to inform her that, effective January 1, 2010, “we will no longer have short-term disability at Alamo.” (A. 2200; 53.) When Wisecup asked why, Dow said it was because the agreement did not specify short-term disability benefits. Wisecup replied that such benefits were included in the Group Plan cited in article 23 of the agreement. Wisecup also asked why, given that unit employees had been represented by the Union under the same agreement for the last four years, and had kept short-term disability during that time, Enterprise was suddenly taking the benefit away. Dow replied that because article 23 did not specify short-term disability benefits, the unit employees could not have them. Wisecup responded by pointing out that they had medical, dental and other coverage even though the agreement did not specifically mention those benefits. She also talked about the impact of eliminating short-term disability benefits on unit employees, particularly those who were considering having children. Dow repeated that Enterprise was getting rid of the benefit because the agreement did not specifically refer to short-

term disability. (A. 2200; 52-53.) During their conversation, Dow never mentioned that Enterprise had terminated the Vanguard Plan and instead was providing benefits on a self-insured basis independent of the Group Plan referred to in the CBA. (*Id.*)

To address employee confusion and discontent over Enterprise's elimination of short-term disability benefits, Dow and Airport Market Manager Bridget Long conducted three meetings with unit employees in early December. Long opened one such meeting, attended by Wisecup, by saying she did not realize how much the benefits meant to employees, and by apologizing for Enterprise's delay in announcing their elimination. (A. 2193, 2200; 18, 20, 53-54, 59, 89.) Wisecup spoke up, stating that it was "devastating" to find out, after the enrollment period had ended, that employees would no longer have those benefits. Wisecup also reminded Dow that when they discussed employee benefits in early November, Dow said nothing about short-term disability being eliminated. Dow acknowledged knowing at the time about Enterprise's plan to eliminate short-term disability, but said that she had not mentioned the plan because she did not think it was "a big deal." When another employee, Andy Felgentres, asked Long why the benefits were being eliminated, Long replied, "because you're union, you can't have short-term disability." (A. 2200; 53-54.)

During another meeting on December 15, employee Wanda Rivera asked Dow if Enterprise was eliminating short-term disability benefits “because of the union contract,” and whether those benefits were being eliminated at other company locations. Dow responded that employees at non-union locations would keep their benefits. (A. 2201; 73; *see also* A. 66.) She reiterated that Enterprise was removing unit employees’ short-term disability benefits because their “location is a union location,” and the benefits were not written into the union agreement. (A. 2201; 66.) When Sara Rivera (no relation to Wanda) asked if employees would still have such benefits if not for the Union, Dow replied, yes, because “we are a union location and it’s not written in the union contract,” and Enterprise must follow the agreement in union locations. (A. 2201; 66, 70.)

During those meetings, neither Dow nor Long explained that Enterprise had terminated the Vanguard Plan in August 2009. Nor did they mention that, thereafter, Enterprise had been providing short-term disability benefits on a self-insured basis independent of the Group Plan referred to in the CBA. The unit employees remained confused and upset over Enterprise’s elimination of their benefits and discussed the loss for several days. On about December 10, Union Steward Wisecup filed a grievance protesting the elimination. (A. 2200-01; 55, 60, 66, 73, 843.)

On January 1, 2010, Enterprise eliminated the short-term disability benefits that it had been providing to unit employees on a self-insured basis since August 2009. Enterprise took the action without notifying or bargaining with the Union. (A. 2200, 2216, 2219 & n.9; 164-67.) In contrast, nonunion employees at National and Enterprise facilities in Miami and elsewhere continued to receive short-term disability benefits, although they were now getting them pursuant to time-off policies that Enterprise had recently implemented. (A. 2202; 79, 89, 674.)

**D. The Day that Enterprise Terminates the Short-Term Disability Benefits, Unit Employees Begin Circulating a Decertification Petition To Oust the Union; Enterprise Interferes with the Union's Contractual Visitation Rights, Questions an Employee about the Petition, and Directs Him To Obtain More Signatures**

Starting on about January 1, when Enterprise eliminated the unit employees' short-term disability benefits, Cirilo Garcia and other employees who were upset about the change circulated among the unit employees a petition to decertify the Union as their collective-bargaining representative. (A. 2205, 2207-08; 193-94, 1013, 1655.) Garcia himself wanted to oust the Union because he felt it had failed to keep promises to improve wages and benefits, and "took our benefits, practically." (A. 2205, 2209; 193, 195.)

On January 4, Union Business Representative Eddie Valero and two other union agents visited the Miami Alamo facility to investigate a report about a

decertification petition being circulated on company time. Upon reaching an area just outside the building, they attempted to locate a supervisor to announce their presence. (A. 2204; 29-30.) In doing so, they were following the practice established by article 5 of the CBA, which specifically provided that “after making [their] presence known to a member of management,” union representatives “shall be permitted” to enter Enterprise’s premises for the purpose of determining compliance with the agreement’s terms. The agreement and the practice did not, therefore, require advance notice.<sup>3</sup> Valero had not previously experienced any problems visiting the facility in this contractually sanctioned manner. (A. 2204-05; 30, 211, 372.)

When his group arrived and sought to notify a manager on January 4, however, Miami Human Resources Manager Dow came out of the building with her arms raised, screaming at Valero, asking why he was there. Valero replied that he was looking for a supervisor. Dow stated that she would follow him during his visit, adding that she had orders from above. Valero replied that he was there to conduct an investigation and that, if she interfered, he would file charges with the Board. Nevertheless, when Valero and his group entered the building, Dow followed them and stood next to them while they sat on a bench. After

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<sup>3</sup> Valero had previously given advance notice only when meeting with Dow to discuss specific grievances, but not where, as here, he was making an unannounced visit, as the CBA allowed. (A. 2204-05; 48.)

Valero called Enterprise's labor-relations coordinator, Airport Market Manager Long said Valero could use the break room, but reminded him not to interrupt the workforce. Valero replied that he was not interrupting anyone and that he was conducting an investigation. Dow then followed Valero and his group when they went outside, and again when they re-entered the building. Dow finally left them alone when they returned to the break room, although managers periodically monitored them until they gave up and left. Valero had not been followed or monitored like this on prior visits to the facility. (A. 2204-05; 29-30, 48, 211.)

On the morning of January 13, supervisors Larry Elsass and Rudolfo Browne spoke on company property during work hours with Cirilo Garcia, the employee who initiated the decertification petition. Elsass and Browne asked Garcia how many signatures he had obtained. When Garcia responded, Browne informed him that it "wasn't enough," and directed him "to go back and get more." (A. 2205; 78.) At this point, only 66 unit employees had signed the petition, less than a majority of the 159 unit employees. Garcia then arranged for unit employee Jesus Torres to acquire more signatures to push the number "up to the 50% mark." (A. 2208-09; 202.) Beginning on January 13, Torres solicited and obtained over 20 additional signatures, all but one of which were dated January 16 or later. The unit employees solicited by Torres were mostly rental agents and greeters who were unhappy about the loss of short-term disability

benefits. In soliciting those employees, Torres discussed the benefits they had in comparison with non-union employees, referring to a chart he had received from Dow. (A. 2208-09 & n.12; 202, 205-07, 690, 2084.)

**E. Enterprise Withdraws Recognition from the Union Based Solely on the Decertification Petition, then Interrogates Employees and Solicits them To Withdraw their Union Membership, Unilaterally Ceases Deducting and Remitting Union Dues, Makes Unilateral Changes to Employee Wages and Benefits, and Refuses To Process an Employee Grievance**

On January 19, Enterprise withdrew recognition from the Union based solely on the decertification petition signed by 89 out of 159 unit employees. (A. 2207-08; 19, 105, 118, 691, 748.) On about January 28, Enterprise, through Station Manager Johnny Betancourt, interrogated employees about, and solicited them to withdraw, their union membership. (A. 2205 n.8; 8 (amending answer to complaint to admit this allegation at A. 354, ¶ 10).)

Citing its withdrawal of recognition from the Union, Enterprise then made a series of changes to unit employees' terms and conditions of employment without notifying the Union or giving it an opportunity to bargain. *See* A. 2209-10; 350 and 354 (complaint and answer thereto); Br. 55. In February, Enterprise ceased deducting and remitting union dues for employees who had signed dues-checkoff authorizations, even though such deductions were required by the parties' agreement, which remained effective through the end of March. (A. 2209; 369, 396.) Enterprise also refused to process a contractual grievance filed by the Union

on March 3 over an employee's discharge. (A. 2210.) On October 12, Enterprise announced a wage increase for unit employees effective October 29, and improvements in vacation days and holidays effective January 1, 2011. (A. 2209.) On January 1, 2011, Enterprise made other changes to the employees' 401(k) benefits and other terms and conditions of employment. (A. 2209; 355, ¶14(e).)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting in part and concurring in part) affirmed, in the 2015 Decision and Order, the administrative law judge's findings to the extent and for the reasons stated in the 2013 Decision and Order. Specifically, the Board (Member Miscimarra, dissenting) agreed with the judge that, prior to withdrawing recognition, Enterprise violated Section 8(a)(1) by telling employees that it was eliminating their short-term disability benefits because of their union representation, and by encouraging them to circulate a petition to decertify the Union as their bargaining representative. (A. 2216 n.3.) The Board (Member Miscimarra concurring) also agreed with the judge that Enterprise violated Section 8(a)(5) and (1) before withdrawing recognition by eliminating employees' short-term disability benefits without first notifying the Union and giving it an opportunity to bargain, and by interfering with the Union's contractual right of access to employees at the Miami facility. (A. 2193 n.5, 2216,

2219.)

Moreover, the Board (Member Miscimarra concurring) agreed that Enterprise's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) because it was based solely on the decertification petition, which was tainted by the aforementioned violations, and, consequently, there was no objective evidence that the Union had actually lost majority employee support. (A. 2195, 2220.) Finally, the Board (Member Miscimarra concurring) adopted the judge's findings that, after withdrawing recognition, Enterprise admittedly violated Section 8(a)(1) by interrogating employees about, and soliciting them to withdraw, their union membership. The Board also found that Enterprise violated Section 8(a)(5) and (1) by unilaterally changing the employees' wages and other terms and conditions of employment, failing and refusing to deduct and remit dues to the Union pursuant to the contractual dues-checkoff provision during the CBA's term, and refusing to process an employee grievance. (A. 2193 n.2, 2209-10, 2220.)

The Board's Order requires Enterprise 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. 2217.) Affirmatively, the Order requires Enterprise to recognize and bargain with the Union on request, restore the

short-term disability benefits in effect before January 1, 2010, and make employees whole for any losses caused by the unlawful termination of those benefits. It also requires Enterprise, upon request, to process the employee grievance, to rescind the wage increase that was implemented on October 29, 2010, and the benefits improvements that were implemented on January 1, 2011, and to post a remedial notice. (A. 2217.)

Finally, the Board's Order requires Enterprise to reimburse the Union for the dues it unlawfully failed to deduct and remit to the Union after Enterprise unlawfully withdrew recognition from the Union and before the CBA expired. The Board (Member Miscimarra dissenting) granted the Acting General Counsel's unopposed request to modify this aspect of the remedy to bar Enterprise from recouping the dues amounts from employees. (A. 2196, 2215 n.1, 2217.)

### **STANDARD OF REVIEW**

The Court's review of the Board's unfair-labor-practice determinations is "quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). It "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted);

*accord Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 42 (D.C. Cir. 2005). Under that test, the Board’s findings are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). Further, an administrative law judge’s assessment of witness credibility, which has been adopted by the Board, is given great deference and must be upheld unless it is “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)). Finally, the Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

### **SUMMARY OF ARGUMENT**

Enterprise committed a series of unfair labor practices in an effort to rid itself of the union chosen by its employees. The Board is entitled to summary enforcement of the uncontested portions of its Order. Moreover, the Court should affirm the Board’s contested findings—that Enterprise unlawfully told employees that it would eliminate their short-term disability benefits because of their union-represented status, and then unilaterally eliminated those benefits without

bargaining with the Union; directed an employee to acquire more signatures on a petition to oust the Union; interfered with the Union's contractual right of access to the facility; and withdrew recognition from the Union based solely on a petition that was tainted by the aforementioned violations—because they are supported by substantial evidence. At each turn, Enterprise offers its own view of the record evidence, but fails to prove, as it must, that the Board's contrary view was unsupported.

Further, because Enterprise's withdrawal of recognition was unlawful, it violated the Act by then making several changes to its employees' terms and conditions of employment, and failing to process a grievance and deduct and remit union dues as required by the parties' CBA. Indeed, Enterprise claims only that those actions were lawful if its withdrawal of recognition was also lawful.

Finally, because Enterprise failed to raise its objection before the Board, this Court is jurisdictionally barred under Section 10(e) of the Act from considering its challenge to the portion of the Board's remedial order requiring it to reimburse the Union for dues it unlawfully failed to deduct and remit, without recouping the money from unit employees who were unlawfully deprived of union representation. In any event, the Board's remedy must be affirmed because it is consistent with precedent and appropriately seeks to place the Union in the

position it would have occupied but for Enterprise's unlawful withdrawal of recognition and ensuing unilateral changes.

## **ARGUMENT**

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING ITS UNCONTESTED FINDINGS**

During the Board hearing below, Enterprise admitted that it violated Section 8(a)(1) of the Act on January 28, 2010, by coercively interrogating employees about, and soliciting them to withdraw, their union membership. (*See* A. 2193 n.2, 2205 n.8; 8.) Further, in its exceptions before the Board and its opening brief to the Court, Enterprise did not dispute committing those violations, nor did it challenge the Board's inclusion of a cease-and-desist order to remedy them. The Board is therefore entitled to summary enforcement of those uncontested portions of its Order. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT ENTERPRISE VIOLATED SECTION 8(a)(1) BY TELLING EMPLOYEES THAT IT WAS TERMINATING THEIR SHORT-TERM DISABILITY BENEFITS BECAUSE OF THEIR UNION REPRESENTATION, AND ENCOURAGING THEM TO CIRCULATE A PETITION TO DECERTIFY THE UNION AS THEIR BARGAINING REPRESENTATIVE**

**A. An Employer Violates the Act by Engaging in Activity that Would Reasonably Tend to Coerce Employees’ Exercise of Their Rights**

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct has a reasonable tendency to coerce or interfere with employee rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of animus or actual coercion is unnecessary. *Avecor*, 931 F.2d at 931-32; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988). The employer’s statements “must be judged by their likely import to [the] employees.” *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978).

*Accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006)

(assessing the legality of employer statements based on whether employees would “reasonably perceive” them as threats).

The critical inquiry, then, is what an employee could reasonably have inferred from the employer’s statements or actions when viewed in context. *See, e.g., Tasty Baking Co.*, 254 F.3d at 124-25 (statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). Thus, in applying this standard, the Board considers “the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Accordingly, it is well settled that a coercive threat may be implied as well as stated expressly. *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). *Accord Tasty Baking Co.*, 254 F.2d at 124.

**B. Enterprise Unlawfully Told Unit Employees that It Was Terminating Their Short-Term Disability Benefits Because of Their Union Representation**

Applying the foregoing principles, the Board found that unit employees would reasonably view Enterprise’s statements as indicating that it was terminating their short-term disability benefits because of their union

representation. Such statements are unlawful under settled law. *See Avecor, Inc.*, 931 F.2d at 930 (employer violates the Act by threatening employees with loss of benefits for supporting union representation, or promising benefits for rejecting it); *accord Belcher Towing Co.*, 265 NLRB 1258, 1267-68 n.11 (1982) (employer may violate the Act by telling represented employees that they will not be eligible for certain benefits given to non-represented employees), *enforced in relevant part*, 726 F.2d 705, 711 & n.5 (11th Cir. 1984).

The Board's finding is well-supported by substantial record evidence, including the mutually corroborative and unrebutted testimony of the employees who heard Enterprise's statements. Their testimony, which the judge reasonably credited, shows that during a series of meetings with unit employees in December 2009, Enterprise's managers repeatedly linked the loss of short-term disability benefits to the employees' union-represented status, while confirming that non-union employees would keep those benefits.

For example, during one such meeting, when employee Felgentres asked Area Market Manager Long why the benefits were being eliminated, Long replied "because you're union, you can't have short-term disability." (A. 2201; 54.) At a subsequent meeting, when employee Wanda Rivera asked if the benefits were being cut because of the union contract, and whether they would be lost at other locations, Human Resources Manager Dow replied that "if a location was non-

union, the employees there would keep their benefits.” (A. 2201; 73.) In response to a similar question by employee Sara Rivera, Dow reiterated that “at locations where there is no union, employees would keep short-term disability benefits, and that [unit] employees could not keep this benefit because their union contract did not mention a short-term disability benefit.” (A. 2201; 66, 73.) When Sara Rivera asked again whether employees would have short-term disability benefits if not for the Union, Dow reiterated, “yes, because [Enterprise] had to follow the union contract.” (A. 2201; 66, 70.) Consistent with this credited testimony, Dow and Long conceded that they told employees their benefits were being eliminated because of their union contract, while reiterating that employees in non-union locations would keep their benefits. (A. 2202; 18-20, 102.)

As the Board found, unit employees would reasonably view Enterprise’s statements as linking the loss of benefits to their union-represented status. (A. 2194, 2202.) After all, they would likely view Enterprise’s statement that they could not have short-term disability benefits “because of their union contract” in light of its contemporaneous statements that they could not have such benefits because they “were union,” and that employees at other locations would keep those benefits if they were non-union. (A. 2201; 54, 66, 70, 73.)

The Board reasonably rejected (A. 2194) Enterprise’s claim—which it repeats here (Br. 38-44)—that it did no more than accurately and lawfully inform

unit employees that their benefits were governed by their union contract. As the Board explained (A. 2194), telling employees that their short-term disability benefits would be eliminated “because of the union contract” was less than truthful because nothing in the agreement required Enterprise to eliminate those benefits. Nor did the agreement bar Enterprise from choosing to continue them, as it had done for several years through the Vanguard Plan referenced in the CBA. Indeed, after Enterprise terminated the Vanguard Plan in August 2009, it continued for several months to provide such benefits on a self-insured basis, independent of the CBA. In those circumstances, the Board reasonably rejected (A. 2194, 2202), Enterprise’s claim (Br. 39-42) that it was merely stating that the CBA governed the unit employees’ short-term disability benefits.

The foregoing facts and analysis belie Enterprise’s related claim (Br. 40) that it had merely “emphasized that the elimination of the benefits had to do with the content of the *contract*, not representation by the Union.” (Br. 42 (emphasis in original).) Nor does Enterprise gain any ground by claiming that ““eliminating a benefit *because the contract does not require it* is materially different from eliminating a benefit *because of a union contract.*”” (Br. 40, quoting Member Miscimarra’s partial dissent at A. 2220 (emphasis in original).) While that distinction may exist in the abstract, it does not apply here because Enterprise’s statements, viewed in their entirety, would reasonably lead employees to conclude

that their employer was eliminating their benefits because of their union-represented status.

Finally, it follows that Enterprise cannot rely on (Br. 42-44) distinguishable cases where the employer did no more than accurately describe the benefits that were available to union and non-union employees. In *Unifirst Corp.*, 361 NLRB 591 (2006), for example, the employer simply recited, in response to employee questions, the fact that only its non-union employees currently received certain 401(k) retirement benefits. *Id.* at 593. Unlike Enterprise, the employer in *Unifirst* made no reference to the future elimination of benefits, much less suggest it was eliminating benefits because of the employees' union-represented status, and repeatedly disclaimed any suggestion that employees would receive additional benefits if they ousted their union. *Id.* Likewise, in *TCI Cablevision of Washington*, 329 NLRB 700 (1999), the employer merely reported the fact that only its non-union employees currently received certain benefits, and emphasized that it could not promise that currently unionized employees would receive those benefits if they were non-union. *Id.* at 701. By contrast, Enterprise, far from accurately describing the facts, made statements that would reasonably lead employees to believe that it was eliminating their short-term disability benefits because they were represented by the Union.

**C. Enterprise Unlawfully Directed the Employee Who Initiated the Decertification Petition To “Go Back and Get More Signatures”**

An employer violates the Act by directly promoting its employees’ decertification campaign, including by soliciting an employee to get others to sign a decertification petition. *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 8-10 (D.C. Cir. 2012); *Treasure Island Food Store*, 205 NLRB 394, 397 (1973).

Substantial evidence supports the Board’s finding that Enterprise committed such a violation when it directed an employee to acquire more signatures on the decertification petition. (A. 2216 n.3; 2194, 2205-06.) Specifically, after two Enterprise supervisors asked the employee who initiated the decertification campaign, Cirilo Garcia, how many signatures he had obtained, they told him it “wasn’t enough,” and directed him “to go back and get more.” (A. 2216; 78.) As the Board aptly explained, “[e]ven assuming this conversation was friendly, this direct exhortation from management could only have further impelled Cirilo to continue his campaign.” (A. 2216 n.3.) As such, this supervisory directive was a direct promotion of the decertification campaign, and was, therefore, unlawful.

Enterprise’s defense stumbles out of the gate. It mischaracterizes (Br. 48) the Board as finding that it “violated the Act when two supervisors briefly spoke with [Garcia] and informed him he had not yet collected the requisite number of

signatures on his decertification petition.” Rather, as shown, the violation occurred when they then directed Garcia to “go get more” signatures.

The Board also properly rejected (A. 2194) Enterprise’s argument (Br. 48-51) that Garcia had independently initiated the campaign and gathered some signatures before the supervisors directed him to get more. As the Court has explained, the fact that “the employee created and disseminated the petition” is immaterial to the illegality of the employer’s promotion of an on-going decertification campaign. *SFO Good-Nite*, 700 F.3d at 9; accord *Mickey’s Linen & Towel Supply*, 349 NLRB 790, 791 (2007). Enterprise ignores the gravamen of its violation, which lies not in encouraging employees to start the campaign, but in unlawfully propelling it forward by directing an employee to get more signatures.

Enterprise also misses the mark in claiming (Br. 49-51) that, absent additional misconduct such as threatening employees to obtain more signatures, it did not cross the line from lawful “ministerial aid” to unlawful assistance. However, the Board specifically stated that it did not find Enterprise “unlawfully assisted” Garcia’s decertification campaign. (A. 2216 n.3.) Instead, it found that the “direct exhortation from management” that Garcia “go back and get more” signatures unlawfully “impelled [him] to continue his campaign.” (*Id.*)

Finally, Enterprise errs in relying (Br. 49-50) on distinguishable cases such as *Lee Lumber*, 306 NLRB 408, 409 & n.9 (1992), where the employer did not

violate the Act by accurately informing employees that any decertification petition would have to be filed soon, and *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975-76 & n.2 (D.C. Cir. 1998), where the employer did no more than lawfully provide accurate information regarding the decertification process. Enterprise ignores the fundamental distinction between lawfully furnishing accurate information and its conduct here, which directly promoted the decertification campaign.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT ENTERPRISE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY ELIMINATING EMPLOYEES’ SHORT-TERM DISABILITY BENEFITS, AND INTERFERING WITH THE UNION’S CONTRACTUAL RIGHT OF ACCESS TO ITS FACILITY**

**A. Enterprise Violated the Act by Eliminating Unit Employees’ Short-Term Disability Benefits without Notifying the Union and Giving It an Opportunity To Bargain**

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), as amplified by Section 8(d), 29 U.S.C. § 158(d), requires an employer to bargain with its employees’ representative over “wages, hours, and other terms and conditions of employment.”<sup>4</sup> An employer’s unilateral change in any term or condition of employment that is a mandatory subject of bargaining violates Section 8(a)(5), for

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<sup>4</sup> Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act therefore produces a “derivative” violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

“it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal” and “must of necessity obstruct bargaining, contrary to the congressional policy.” *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). *Accord Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410-11 (D.C. Cir. 1996).

It is settled that mandatory bargaining subjects include employee benefits like sick leave or short-term disability. *Katz*, 369 U.S. at 743-47; *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 871-74 (D.C. Cir. 2000); *Am. Water Works Serv. Co., Inc.*, 361 NLRB No. 3, 2014 WL 3778330, \*3 (2014). Because bargaining over that topic is mandatory, an employer violates Section 8(a)(5) and (1) of the Act “if without bargaining to impasse, it effects a unilateral change” in its employees benefits. *See Generally Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003).

Moreover, the Act’s proscription against unilateral changes applies with equal force to existing terms and conditions of employment, irrespective of whether they stem from or are reflected in an effective collective-bargaining agreement. *Litton Fin. Printing*, 501 U.S. at 198, 206-07 (“the obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment”) (internal quotation marks omitted).

Thus, benefits that employees receive independent of the parties' agreement—such as the short-term disability benefits that Enterprise started providing in August 2009 on a self-insured basis—are subject to the Act's prohibition against unilateral change. *IBEW Local 1466 v. NLRB*, 795 F.2d 150, 153 (D.C.Cir.1986) (collecting cases); see *Riverside Cement Co.*, 296 NLRB 840, 841 (1989) (“It is well settled that a practice not included in a written contract can become an implied term and condition of employment”).

Here, Enterprise admits (Br. 21-36) that on January 1, 2010, it eliminated the unit employees' existing short-term disability benefits without notifying the Union or giving it an opportunity to bargain over the change. Enterprise defends its unilateral action mainly by contending (Br. 21-36) that the Union waived bargaining over the subject. In so claiming, Enterprise relies (Br. 24-25) on article 23, section 1 of the CBA, which made employees eligible to participate in the Group Plan—the health and welfare benefit plan that encompassed the Vanguard Plan, which in turn provided short-term disability benefits to unit employees before August 1, 2009. Enterprise also cites (Br. 25-27) article 23, section 3 of the CBA, which exempts “the above Plans” (including the Comprehensive Plan) from the CBA's grievance, arbitration, and negotiation procedures.<sup>5</sup> In addition,

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<sup>5</sup> Specifically, article 23, section 1 provides in relevant part: “All full time employees covered by this agreement will be eligible for participation

Enterprise relies (Br. 24-25) on certain underlying Group Plan documents to which the Union was not a party; those documents purportedly included a reservation of rights clause permitting Vanguard to terminate the Vanguard Plan. Enterprise also alludes (Br. 32-36) to the parties' bargaining history.

The Board, however, reasonably rejected Enterprise's defense on two independent grounds. First, as the Board explained in its 2015 Decision and Order, Enterprise's contract waiver claim fails because after August 1, 2009, it did not provide short-term disability benefits pursuant to any plan, let alone the Vanguard Plan that was part of the Group Plan referenced in the CBA. (A. 2216, 2219-20 & n. 9). Instead, Enterprise terminated the Vanguard Plan, and thereafter offered the benefits independently, on a self-insured basis. Second, as the Board also explained in its 2015 Decision and Order, which incorporated its 2013 Decision and Order by reference, the CBA would not have privileged Enterprise's unilateral action even if the Vanguard Plan had still been in effect. As shown below, substantial evidence supports both of the Board's findings.

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under the Employer's Comprehensive Group Insurance Plan." Section 2, in turn, refers to Vanguard's 401(k) plan, which is not at issue here. Section 3 states: "No matter respecting provisions of the above Plans shall be subject to the grievance, arbitration or negotiation procedure established hereunder." (A. 381.)

**1. Enterprise errs in asserting that the CBA privileged its unilateral termination of self-insured benefits**

According to Enterprise (Br. 21-36), it was privileged to end unit employees' short-term disability benefits unilaterally under article 23, sections 1 and 3, and the parties' bargaining history. Reasonably dispensing with these claims, the Board concluded (A. 2216, 2219) that Enterprise's January 1, 2010 elimination of benefits was independent of the contract language upon which it relies to justify that action. In these circumstances, the Board properly concluded that when Enterprise unilaterally eliminated short-term disability benefits for unit employees on January 1, 2010, "there was no colorable contractual waiver of bargaining by the Union in force." (A. 2216-17.)

CBA article 23, section 3 provides that no matter regarding "the above Plans"—which, as relevant here, included the Group Plan and the subsidiary Vanguard Plan for short-term disability benefits—"shall be subject to any grievance, arbitration or negotiation procedure established hereunder." (A. 381.) Thus, by its terms, article 23 covers, at most, changes respecting the provisions of those "Plans." Similarly, article 23, section 1, which made employees eligible to participate in the Group Plan, at most incorporated plan documents permitting unilateral changes to the Vanguard Plan. As noted, however, it was not the Vanguard Plan that Enterprise terminated on January 1, 2010.

Thus, as the Board emphasized, Enterprise was no longer acting pursuant that contractual language, or with respect to any of those plans, when it terminated short-term disability benefits on January 1, 2010. (A. 2216-19.) To be sure, prior to August 1, 2009, it had provided short-term disability benefits to unit employees pursuant to the Vanguard Plan that was encompassed within the Group Plan. It is undisputed, however, that—as Enterprise’s own Vice President of Benefits, Dana Beffa, testified—it terminated the Vanguard Plan on August 1, 2009, some five months before January 1, 2010, when it unilaterally ended short-term disability benefits for unit employees. (A. 2216, 2219 n.9; 164-67.) Thus, while Enterprise chose to continue providing short-term disability *benefits* to unit employees after August 1, 2009, those benefits were no longer provided pursuant to any “Plan” referenced in the agreement. (*Id.*)

As the Board reasonably found, it follows that CBA article 23, section 3 does not excuse Enterprise’s failure to bargain because its elimination of benefits effective January 1, 2010, did not involve “provisions of the above Plans” as to which unilateral action allegedly was permitted. Likewise, Enterprise’s unilateral action could not be authorized by any reservation of rights contained in the underlying Vanguard Plan documents, and allegedly incorporated by CBA article 23, section 1, because the Vanguard Plan simply did not exist when Enterprise discontinued short-term disability benefits on January 1, 2010. For similar

reasons, Enterprise also errs in relying (Br. 32-36) on prior collective-bargaining negotiations in which the parties purportedly discussed the meaning of article 23.

Enterprise offers nothing that warrants disturbing the Board's well-supported findings. It claims (Br. 28-30), without elaboration, that it continued providing Vanguard "Plan Benefits" through the end of 2009, and that this action did not impact its alleged contractual authority to terminate benefits on January 1, 2010. However, this claim simply ignores its admitted termination of the Vanguard Plan on August 1, 2009. Thus, its January 1, 2010 termination of benefits was not privileged by any contractual provision allowing unilateral termination of benefits provided pursuant to that Plan. Consequently, Enterprise unlawfully altered a term of employment that was a mandatory subject of bargaining—a violation of Section 8(a)(5) and (1) of the Act.

**2. In any event, even if the Vanguard Plan had still been in effect when Enterprise unilaterally terminated short-term disability benefits, the CBA would not privilege its action**

As shown, Enterprise's defense that the CBA allowed it to terminate short-term disability benefits without bargaining fails because it had already cancelled the Vanguard Plan months before it took the unilateral action at issue here. On that independent basis alone, the Court can affirm the Board's finding that the unilateral action was unlawful. *See* pp. 33-35. In the alternative, the Board reasonably found that the unilateral action would be unlawful even if it had been

the Vanguard Plan that Enterprise discontinued on January 1, 2010. (A. 2215; 2193-94, 2205).

To be sure, a union may waive its right to bargain, thereby permitting the employer to unilaterally change the terms and conditions of employment. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *see also Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007) (“[T]he employer’s authority to act unilaterally is predicated on the union’s *waiver* of its right to insist on bargaining.”) (emphasis in original). This Court has stated that “[a] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter . . . . [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter.” *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008) (quoting *Dep’t of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)) (emphasis in original). For that reason, this Court requires “‘clear and unmistakable’ evidence of waiver” and “construe[s] waivers narrowly.” *Id.* To find a clear and unmistakable waiver, the evidence must show “that the parties have consciously explored or fully discussed the matter on which the union has consciously yielded its rights.” *Southern Nuclear*, 524 F.3d at 1347-58 (internal quotation and citation omitted). Accordingly, contract language

proffered as a waiver of statutory rights ““will not be read expansively,”” and will be deemed to cover only those subjects specifically and unambiguously within the parties’ contemplation. *Gannett Rochester Newspaper v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993) (citations omitted).

This Court applies a slightly different standard when an employer invokes a contractual privilege to make its unilateral change without bargaining. Under the Court’s “contract coverage” theory, as enunciated in *NLRB v. United States Postal Service*, 8 F.3d 832, 836-37 (D.C. Cir. 1993), an employer is permitted to make a unilateral change in a mandatory subject of bargaining if two conditions are met: (1) the parties’ collective-bargaining agreement reveals that the union has already exercised its right to bargain over the matter, and (2) the result of the union’s having exercised its right to bargain over the matter is agreed-upon language that gives the employer the prerogative to make the disputed change to the matter unilaterally. Ultimately, the Court, like the Board, engages in basic contract interpretation, but asks only whether the employer’s actions were “embraced by the literal language” of the contractual clause relied upon. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003).

Under either analysis, article 23, section 3 of the CBA would not privilege Enterprise’s unilateral action. By its terms, section 3 simply states that “[n]o matter respecting provisions of the above Plans shall be subject to the grievance,

arbitration, or negotiation procedure established hereunder.” (A. 381.) As the Board observed (A. 2193), although the CBA detailed grievance and arbitration procedures, it did not include any reference to negotiation, let alone any provision that could be fairly characterized as a negotiation procedure. In those circumstances, the Board reasonably declined to find (A. 2193) that the contract language relied on by Enterprise evinced a “clear and unmistakable waiver” of the Union’s right to bargain over changes to short-term disability benefits. *See Gannett Rochester Newspaper*, 988 F.2d at 203 (contract language proffered as a waiver of statutory rights ““will not be read expansively,”” and will be deemed to cover only those subjects specifically and unambiguously within the parties’ contemplation). For similar reasons, this language also did not “cover” the act of making unilateral changes to short-term disability benefits. It stands to reason that a contract cannot be said to cover an issue upon which it is silent. *See Regal Cinemas, Inc.*, 317 F.3d at 313 (rejecting “contract coverage” claim where unilateral action was not “embraced by the literal language” of the contractual clause relied upon).

In response, Enterprise mistakenly relies (Br. 27) on the CBA’s recognition clause, which recognized the Union “as the exclusive bargaining representative for the bargaining unit.” (A. 369, art.1.) According to Enterprise, this can fairly be described as the “negotiation procedure established hereunder.” (Br. 27.)

While that clause may reasonably be viewed as referring to the parties' general duty to bargain, it still does not reference any particular negotiation procedure, much less "establish" one for changes to short-term disability benefits.<sup>6</sup>

Moreover, a single reference to the general duty to bargain in one section of the CBA—with no mention of any particular term or condition of employment—is a far cry from "clear and unmistakable" evidence that the parties intended to waive a union's right to bargain over benefits referred to elsewhere in the CBA. *See Honeywell Int'l, Inc. v. NLRB*, 53 F.3d 125, 133 (D.C. Cir. 2001) (the court will not infer waiver of statutory bargaining "from a general contract provision unless the waiver is 'clear and unmistakable'"). Likewise, the recognition clause cannot reasonably be characterized as "covering" an issue—the elimination of short-term disability benefits—that it simply does not address.

Enterprise fares no better in contending (Br. 24-25, 32) that the parties' CBA incorporated by reference certain Vanguard Plan documents, which included a provision giving Vanguard the right to terminate any component of the plan. The "mere mentioning" of a benefit plan in a CBA is generally insufficient to constitute incorporation by reference. *Air Line Pilots Ass'n v. Delta Air Lines*,

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<sup>6</sup> Contrary to Enterprise (Br. 26-27), this view of the recognition clause does not render the clause "superfluous." Rather, it acknowledges the plain import of the clause, namely, that Enterprise has recognized the Union as the bargaining representative of unit employees.

*Inc.*, 863 F.2d 87, 93-94 (D.C. Cir. 1988) (internal quote and citation omitted). As the Board explained (A. 2194 n.6, 2204), moreover, the underlying plan documents could not constitute a clear and unmistakable waiver—or be fairly characterized as covering the unilateral elimination of short-term disability benefits—because the Union was not a party to those documents. Nor did the Union negotiate their language or expressly or consciously agree to their incorporation into the CBA.<sup>7</sup> This view is consistent with the Court’s contract coverage analysis, which, as shown (*see* cases cited at p. 37), generally requires that the union be a party to, and involved in negotiating, the contract language in question.

Finally, Enterprise does not advance its position in arguing (Br. 32-36) that the parties’ bargaining history evinces the Union’s intent to waive its rights to bargain over the elimination of short-term disability benefits. As the Board

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<sup>7</sup> Contrary to Enterprise (Br. 24-25), this finding is not foreclosed by the Court’s decisions in *BP Amoco*, 217 F.3d at 871-74, and *Southern Nuclear*, 534 F.3d at 1359-60. To be sure, those cases found that a CBA’s direct reference to a benefits plan incorporated the plan. However, they did not reject the relevance of a Board finding, like the one here, that the Union was not a party to, did not negotiate, and therefore did not consciously agree to incorporate, the entire plan documents into the CBA. Indeed, this Court acknowledged the relevance of these considerations in *BP Amoco*, where it noted that (unlike the instant case) the parties had bargained over the terms of the plan that was allegedly incorporated by their CBA, the CBA explicitly acknowledged those negotiations, and, therefore, the union had “affirmatively agreed” to incorporate the entire plan. 273 F.3d at 871-74 (internal quotes and citation omitted).

reasonably found (A. 2193 n.6), Enterprise presented no evidence regarding the parties' bargaining history for the instant CBA. Rather, it cites (Br. 34-35) unrelated negotiations involving prior agreements covering different time periods for different bargaining units at other locations. (A. 2193 n.6; 135, 149.) On this scanty record, Enterprise gains no ground by speculating (Br. 33-34) that the prior agreement's article 23 language may have been used as a template, particularly given the admission of the company official that participated in negotiations that "there wasn't any discussion about the language" during bargaining over the CBA in effect in 2009 (A. 149).<sup>8</sup> *See Regal Cinemas*, 317 F.3d at 313-14 (employer could not offer "any specific discussion" during bargaining over instant contract showing that union adopted employer's view of management rights clause); *accord Honeywell*, 253 F.3d at 134 (refusing to infer waiver based on "ambiguous" bargaining history).

**B. Enterprise Violated the Act by Interfering with the Union's Contractual Right of Access to Its facility**

It is settled that an employer violates Section 8(a)(5) and (1) by interfering with a union's contractual right of access to the employer's facility. *See, e.g., Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997) (employer unlawfully interfered with union's right of access by attempting to unilaterally impose new

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<sup>8</sup> While that witness also claimed, contrary to his initial admission, that the parties had "basically discussed the language," he was unable to provide any particulars (A. 149.)

conditions on the exercise of that right), *enfd. in relevant part sub nom.*

*Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

Substantial evidence supports the Board's finding that Enterprise committed such a violation here. (A. 2193 n.5, 2204-05.) After all, the parties' CBA expressly granted the Union a right to access the facility. Article 5 affirmatively states that union representatives "shall be permitted" to enter Enterprise's premises for the purpose of determining compliance with the agreement's terms "after making [their] presence known to a member of management." (A. 2204; 372.) Pursuant to that provision, Union Business Representative Valero and two other union agents visited the facility on January 4. Valero credibly testified, without contradiction, that they were investigating a tip he had received that Enterprise was undermining the Union's status as the employees' bargaining representative by permitting a decertification petition to be circulated on company time. (A. 2205; 29-30.) Upon reaching an area just outside the building, they attempted to locate a supervisor to announce their presence. (A. 2204; 29-30.) In doing so, they adhered to article 5, which did not, by its terms, require advance notice, and to the Union's practice of notifying a supervisor upon arrival. Valero had not previously experienced any problems visiting the facility in this contractually sanctioned manner. (A. 2204-05; 30, 211, 372.)

Yet, when Valero's group sought to notify a manager on January 4, Enterprise accosted and followed them, delayed and limited their access, and monitored their investigatory activities. Thus, immediately upon their arrival, Miami Human Resources Manager Dow came out of the building with her arms up, screaming at Valero, asking why he was there. When Valero replied that he was looking for a supervisor so that he could announce their presence, Dow stated that she would follow him during his visit, adding that she had orders from above. Although Valero explained that he was there to conduct an investigation, Dow persisted, following the group into the building and standing next to them while they sat on a bench. Nothing in the CBA permitted Enterprise to follow the Union in those circumstances. (A. 2204-05; 29-30, 48, 211, 372.)

Moreover, after Valero complained to Enterprise's labor-relations coordinator about this interference, Airport Market Manager Long merely said the Union could use the break room, even though the CBA did not limit union access in that way. Valero replied by explaining that he was conducting an investigation, which did not concern the break room. Further, Dow continued to follow Valero and his group when they went outside, and again when they re-entered the building. And even when the group entered the break room, a manager periodically monitored them until they gave up and left. Valero had not been

followed, obstructed or monitored like this on prior visits. (A. 2204-05; 29-30, 48, 211.)

The foregoing evidence amply supports the Board's finding (A. 2193 n.5, 2205) that Enterprise interfered with the Union's contractual right of access in violation of Section 8(a)(5) and (1) of the Act. Enterprise plainly obstructed, delayed, limited and monitored union access in ways that were not contemplated by the CBA or otherwise justified. *Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997); *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777-79 (1982).

Enterprise offers nothing that warrants disturbing the Board's well-supported finding. It primarily argues (Br. 51) that the Union failed to provide advance notice of its visit, ignoring that the CBA contained no such requirement. As Valero credibly testified (A. 48), the practice was to inform a manager upon the Union's arrival, and Dow conceded (A. 92) that Valero often made impromptu visits without objection or incident. Yet, when Valero and his group did just that on January 4, Enterprise responded by repeatedly and unlawfully obstructing their access. Moreover, in so doing, Enterprise unlawfully imposed a new requirement—advance notice—without bargaining with the Union. *Frontier Hotel & Casino*, 323 NLRB at 817-18.

Nor does Enterprise support its bare, conclusory assertions (Br. 52) that the mere presence of the union representatives somehow “interfered” with its

business, or that restricting them to the breakroom was necessary to prevent further interference (Br. 53-54). It likewise fails to support its claim (Br. 52) that the Union was not there to monitor compliance with the CBA. Rather, Enterprise ignores the Board's well-supported finding (A. 2205; *see* p. 42, above) that the purpose of the visit was consistent with the CBA.

Finally, it is irrelevant to the finding of a violation whether, as Enterprise claims (Br. 54), the denial of access on January 4 "prevent[ed] Valero from uncovering any material evidence." Rather, the violation lies in interfering with the Union's contractual right of access, regardless of whether unfettered access might have yielded different results.

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ENTERPRISE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION**

**A. Enterprise's Unfair Labor Practices Directly Tainted the Decertification Petition; Accordingly, Its Withdrawal of Recognition Based Solely on the Tainted Petition Was Unlawful**

As discussed, Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. A union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement, up to three years. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786-87 (1996). Such a presumption "enabl[es] a union to concentrate on obtaining and fairly administering a collective-bargaining

agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.” *Id.* at 786 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)) (internal quotations omitted). After the contract expires, or after its third year, the presumption becomes rebuttable, and an employer may withdraw recognition if it establishes that the union actually lost its majority status. *Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341, 347 (D.C. Cir. 2011).

A petition signed by a majority of employees indicating that they do not desire union representation ordinarily constitutes sufficient objective evidence supporting an employer’s withdrawal. *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001); *see also BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 217 (D.C. Cir. 2003) (citing *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000)). Although an employer may withdraw recognition based on a decertification petition, it does so at its own peril, for if the employer ultimately fails to establish an actual loss of support it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5) of the Act. *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006).

As the Court has observed, one way in which an employer imperils itself in withdrawing recognition is when it relies on employee expressions of disaffection

where “the union’s decline in support was attributable to the employer’s misconduct.” *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999). The employer’s proof of the union’s loss of majority must be “raised in a context free of unfair labor practices of such a character as to either affect the [u]nion’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.” *Sullivan Indus. v. NLRB*, 957 F.2d 890, 897 (D.C. Cir. 1992) (internal quotation marks omitted).

Under established Board law, approved by the Court, if an employer engages in unfair labor practices that “instigate or propel a decertification campaign”—such as soliciting or encouraging the signing or filing of an employee petition seeking to decertify the bargaining representative—the Board may conclusively presume that the employer’s unlawful meddling tainted any resulting expression of employee disaffection. *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 8-10 (D.C. Cir. 2012). This presumption requires no specific proof of causation or finding of actual coercive effect. *Id.*; *Hearst Corp.*, 281 NLRB 764, 765 (1986), *enf’d mem.*, 837 F.2d 1088 (5th Cir. 1988). Rather, it is predicated on the “tendency of such conduct to interfere with the free exercise of employee rights under the Act.” *Hearst Corp.*, 281 NLRB at 765 (internal quotation marks omitted); *accord SFO Good-Nite*, 700 F.3d at 8-10. Because a tainted petition “does not represent ‘the free and uncoerced act of the employees concerned,’” a

withdrawal of recognition predicated on such a petition is unlawful. *NLRB v. United Union of Roofers Local No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990); accord *SFO Good-Nite*, 700 F.3d at 8-10.

Substantial evidence supports the Board's determination (A. 2195, 2216 n.3) that Enterprise directly and unlawfully encouraged and promoted the decertification effort. As shown (p. 27; A. 78), two Enterprise supervisors unlawfully told the employee who initiated the petition, Cirilo Garcia, that he lacked sufficient signatures, and directed him "go back and get more." As the Board reasonably found, this "direct exhortation could only have further impelled Cirilo to continue his campaign" (A. 2216 n.3), and thereby "unlawfully promoted the decertification effort." (A. 2195.) This is the kind of misconduct that the Court has agreed may conclusively taint a decertification effort by unlawfully "propel[ing]" it forward. *SFO Good-Nite*, 700 F.3d at 8. It is of no moment under this analysis whether, as Enterprise claims (Br. 51), the employees had independently initiated the petition prior to the violation. Rather, as the Court has explained, the presumption of taint applies where, as here, "the employee created and disseminated the petition," but the employer then unlawfully propelled it forward. *SFO Good-Nite*, 700 F.3d at 9. Thus, "this act alone directly tainted the petition as a whole" (A. 2195), and, accordingly, Enterprise's withdrawal of recognition based solely on the tainted petition was unlawful.

**B. Substantial Evidence Supports the Board's Alternative Finding that a Causal Connection Existed Between Enterprise's Many Unlawful Actions and the Union's Loss of Majority Support, and, Therefore, that Enterprise Violated the Act By Withdrawing Recognition from the Union**

Even if the foregoing violation did not presumptively taint the petition, Enterprise's withdrawal of recognition based on that petition would still be unlawful. This is so because the Board (A. 2193-94) reasonably found a causal link between the multiple, serious violations Enterprise committed and the Union's loss of majority support.

If there is an objective causal link between the employer's unfair labor practices and the union's loss of majority support, the employer commits an unfair labor practice by withdrawing its recognition of the union. *Vincent Indus. Plastics*, 209 F.3d at 737. In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board identified four factors relevant to evaluating this causal link: (1) the length of time between the unfair labor practices and the disaffection; (2) the nature of the illegal acts, including the possibility of a lasting detrimental effect on employees; (3) their tendency, if any, to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1236 (D.C. Cir. 1992) (approving *Master Slack* factors).

The Board's findings with respect to this causal link are to be enforced if supported by substantial evidence. *Vincent Indus. Plastics*, 209 F.3d at 734.

As the Board found (A. 2193-94), Enterprise committed a number of unfair labor practices that undermined the Union's status as bargaining representative and hindered its ability to communicate with the employees it represented. Thus, Enterprise unlawfully told unit employees it was eliminating their short-term disability benefits because of their union-represented status. Fulfilling that prophesy, Enterprise then unilaterally eliminated those benefits without bargaining with the Union. Next, capitalizing on the effects of that unilateral change, Enterprise propelled the decertification campaign forward by directing the employee who initiated it to go back and get more signatures. Moreover, when the Union attempted to investigate, Enterprise interfered with its contractual right of access to the facility, thereby preventing the Union from talking with employees about the source of their discontent. Based on its careful analysis under the *Master Slack* framework, the Board found (A. 2195, 2208-09) a sufficient and substantial causal connection between those serious unfair labor practices and the employees' decertification effort.

As the Board emphasized (A. 2195), the timing of Enterprise's unlawful actions, and their nature—they were of the kind likely to have a lasting, detrimental effect on employees and their union support—establish taint. Thus,

Garcia began circulating the petition on January 1, 2010, just a few weeks after Enterprise repeatedly and unlawfully attributed the impending elimination of short-term disability benefits to the employees' union-represented status, and on the very day that Enterprise unlawfully terminated those benefits. As shown, employees were surprised and upset by the loss of benefits, an action that directly affected the entire unit. Thus, as the Board explained, employees initiated the petition in the "immediate aftermath of actions that would have 'minimize[d] the influence of organized bargaining' and 'emphasiz[ed] to employees that there is no necessity for a collective-bargaining agent.'" (A. 2195) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)). Indeed, Garcia testified that he circulated the petition because he blamed the Union for failing to get better wages and benefits for employees, and felt it "took our benefits practically." (A. 2208-08; 195.)

Further, as shown (pp. 27-29), Enterprise's supervisors directly and unlawfully promoted the decertification effort when they directed Garcia to "go back and get more" signatures on the petition. (A. 78.) As the Board observed (A. 2195), Garcia then promptly enlisted a coworker, Torres, who secured the additional signatures needed to oust the Union. As the record shows, Torres obtained those signatures from employees who were upset by Enterprise's unlawful elimination of short-term disability benefits, a loss that Enterprise

effectively, and unlawfully, blamed on the Union. Moreover, in soliciting unit employees to sign the petition, Torres used a chart provided by management that compared their benefits to those of Enterprise's non-union employees, who were still receiving short-term disability benefits. (A. 2208 & n.12; 202, 205-07, *see* p. 14, above.)

Enterprise's attempts to downplay the impact of its unlawful actions ignore the record evidence and miss the mark entirely. For example, it gains no ground in claiming (Br. 47) that only a few employees attended the meetings at which its officials unlawfully attributed the loss of short-term disability benefits to the Union. It also errs in asserting that employees never discussed the matter. Rather, the record establishes that employees were upset by Enterprise's announcement and continued to discuss the impending loss of benefits for several days after the meetings. Further, Enterprise ignores how Torres acknowledged that benefits were a topic of discussion when he solicited signatures on the petition from over 20 employees. For his part, Garcia admitted that he was driven in part to circulate the petition because he blamed the Union for the loss of benefits.

As the Board's analysis makes plain, a strong causal connection links Enterprise's unlawful conduct to the Union's loss of majority support. This causal link could only have been enhanced when Enterprise unlawfully interfered with the Union's right of access to employees on January 4, just as the decertification

campaign was getting into full swing. Enterprise's conduct—accosting the union representatives, following them and limiting their access—would have a reasonable tendency to deter employees from approaching the union agent with any problems or concerns, thereby hindering the Union's ability to redress the employee disaffection that was fueling the petition.<sup>9</sup> Accordingly, the decertification petition was tainted by Enterprise's unlawful conduct, and its withdrawal of recognition based solely on the tainted petition was unlawful.

**C. Because Enterprise's Withdrawal of Recognition Was Unlawful, It also Violated the Act by Unilaterally Making Post-Withdrawal Changes, Refusing To Bargain with the Union Over an Employee Grievance, and Refusing To Deduct and Remit Dues to the Union**

Citing its withdrawal of recognition from the Union, Enterprise admittedly (Br. 55) made a series of changes to employees' terms and conditions of employment without notifying the Union or giving it an opportunity to bargain.

Specifically, Enterprise:

- ceased deducting and remitting union dues in February 2010 for employees who had signed dues-checkoff authorizations, even though such deductions were required by the CBA, which remained effective through the end of March 2010 (A. 2209; 369, art. 2, 396);
- refused to process a contractual grievance filed by the Union on March 3, 2010 over the discharge of an employee (A. 2210);

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<sup>9</sup> Enterprise misses the mark in arguing (Br. 52-55) that this violation was insufficient, on its own, to taint the decertification. The Board made no such finding. Rather, it found that this violation combined with the others to taint the petition.

- announced a wage increase for unit employees effective October 29, 2010, and improvements in vacation days and holidays effective January 1, 2011 (A. 2209); and
- made changes to the employees' 401(k) benefits and other terms and conditions of employment on January 1, 2011. (A. 2209; 355, ¶14(e).)

Enterprise defends its unilateral actions based solely on its prior, unlawful withdrawal of recognition from the Union. *See* A. 2209-10; Br. 55. It does not dispute that the legality of its conduct rises and falls on the legality of its withdrawal. Accordingly, so long as the Court affirms the Board's finding that Enterprise violated Section 8(a)(5) and (1) of the Act by withdrawing recognition, the Court should uphold the Board's further finding that Enterprise violated the same section of the Act by making post-withdrawal changes in employees' terms and conditions of employment.

**V. ENTERPRISE'S CHALLENGE TO THE REMEDY IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, LACKS MERIT**

In its opening brief to this Court, Enterprise argues (Br. 56-62) for the first time that the Board's remedial order inappropriately requires it to reimburse the Union for dues without allowing it to recoup those monies from employees. As shown, after unlawfully withdrawing recognition from the Union, Enterprise further violated the Act by failing to deduct and remit dues to the Union pursuant to the dues-checkoff provision of the CBA before it expired on March 31, 2010. To remedy that violation, the Board ordered Enterprise to reimburse the Union for

those dues, and directed Enterprise to do so from its own funds without recouping them from employees. (A. 2215 n.1, 2217; 2196.) In so doing, the Board granted the Acting General Counsel's unopposed exception to the administrative law judge's failure to specify that Enterprise could not recoup the dues from employees. (A. 2196.) As the Board noted, while Enterprise "answered all of the Acting General Counsel's other exceptions, it chose not to respond to this one." (*Id.*) The Board granted the exception because it was "unopposed, as well as consistent with Board precedent." (A. 2196). *See* cases cited at pp. 57-58.

Enterprise's challenge to the Board's remedy that it now presses before the Court is jurisdictionally barred from review. Section 10(e) of the Act states: "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." 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). As shown, Enterprise failed to respond to the Acting General Counsel's cross-exception requesting that the remedy be modified to bar dues recoupment. (A. 2196; 2178-90.) Even after the Board, in 2013 (A. 2196), modified the remedy to bar such recoupment, Enterprise could have filed a motion for reconsideration, but it did not do so. It failed to do so again, when the Board adopted this aspect of the remedy in 2015 (A. 2215 n.1, 2217), thereby waiving review of that argument under the Board's Rules and

Regulations. See 29 C.F.R. § 102.48(d)(1); cf. *Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341, 348-49 (D.C. Cir. 2011) (where motion for reconsideration is party's first opportunity to raise objection, party's failure to seek reconsideration precludes judicial review).

Enterprise errs in claiming (Br. 57 n.8) that it opposed the Acting General Counsel's request that the judge's remedy be modified to bar recoupment of dues. Its answering brief (A. 2178-92) contains no reference to that issue whatsoever. Nor can Enterprise rely (Br. 57 n.8) on Member Miscimarra's dissent (A. 2221) to create a right to challenge the dues-recoupment aspect of the Board's remedy. Section 10(e) requires "that the parties themselves actually raise the issue before the Board;" that requirement is not excused simply because "the [Board] members themselves engaged in its discussion." *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003). Ultimately, Enterprise had "full opportunity" to present its argument to the Board, before and after its two decisions issued, and "the mere inconvenience of severing the issues or delaying a petition for review does not constitute an extraordinary circumstance." *Id.*<sup>10</sup>

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<sup>10</sup> Enterprise's reliance (Br. 57 n.8) on *Mourning v. NLRB*, 559 F.2d 768 (D.C. Cir. 1977), is misplaced. The petitioner there raised in court arguments the General Counsel had presented to the Board. *Id.* at 771 & n.5 ("Inasmuch as the GC's brief raised this argument below, we do not believe that petitioner is precluded from pressing the issue."). Enterprise, in contrast, is not raising arguments the General Counsel presented to the Board; rather, it is belatedly opposing them based on grounds it never presented to the Board.

Nevertheless, Enterprise’s argument fails on the merits. Section 10(c) empowers the Board to order the labor-law violator “to take such affirmative action . . . as will effectuate the purposes of the Act.” 29 U.S.C. § 160(c). The Board serves that goal by crafting remedies that provide for “a restoration of the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice].” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Moreover, “[d]eterrence [of future violations], is, of course, a legitimate remedial consideration.” *Peoples Gas Sys. v. NLRB*, 629 F.2d 35, 50 (D.C. Cir. 1980); *accord Williams Enters., Inc. v. NLRB*, 50 F.3d 1280, 1290 (4th Cir. 1995). The Board’s authority in formulating remedies “is a broad discretionary one, subject to limited judicial review.” *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Thus, the Board’s order directing Enterprise to reimburse the Union for dues without recouping those amounts from employees must be enforced, unless Enterprise shows that it “is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.” *Fibreboard Corp.*, 379 U.S. at 216 (citation omitted). Enterprise fails to meet this heavy burden.

The Board’s remedy is consistent with Board precedent remedying similar violations, and appropriately places the Union in the position that it would have occupied but for the unfair labor practices. *Space Needle, LLC*, 362 NLRB No 11, 2015 WL 416476, \* 6 & n.12 (2015), *petition for review pending*, 9th Cir. No. 15-

70377; *A.W. Ferrell & Son*, 361 No. 162, 2014 WL 7223456, \*1 & n.3 (2014); *West Coast Cintas Corp.*, 291 NLRB 152, 156 & n.6 (1988). Because the Union did not receive dues as a result of Enterprise’s unlawful actions, Enterprise—rather than its employees—properly bears the financial burden of making the Union whole for those lost payments. *West Coast Cintas Corp.*, 291 NLRB at 156 & n.6. Indeed, as the Board observed (A. 2215 n.1), allowing Enterprise to recoup back dues from future employee wages—potentially while deducting current dues—would impose a burden on employees for which they might blame the Union; in such circumstances, the Union would suffer additional harm as a result of Enterprise’s unlawful actions. And, the Board further explained (*id.*), allowing Enterprise to permanently recoup those costs would fail to deter the commission of future similar violations; Enterprise could repeat the unfair labor practice knowing that employees and the Union would bear the costs. Finally, the Board’s prohibition on seeking reimbursement from employees is consistent with the established principle that “[a]ny doubts must be resolved against the party who committed the unfair labor practice.” *NLRB v. IBEW, Local 112*, 992 F.2d 990, 993 (9th Cir. 1993); accord *Virginia Elec. & Pwr Co.*, 319 U.S. 533, 544 (1943); *Tulatin Elec., Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001).

It is, therefore, unsurprising that Enterprise identifies no case rejecting the Board’s remedy. Its suggestion that the remedy is punitive (Br. 57-59) is simply

incorrect—relief that restores the circumstances that would have existed but for the violation is remedial in nature. *Phelps Dodge Corp.*, 313 U.S. at 194. Its claim that that the Union will receive a windfall is also wrong—the Board’s remedy is limited to employees who authorized dues checkoff, and will be offset by any amount the Union collected from employees covered by the dues-payment order. (A. 2215 n.1.) Moreover, Enterprise forgets that the back dues cover a period after it unlawfully withdrew recognition from the Union, an action that effectively deprived employees of union representation—the quid pro quo for paying union dues. Accordingly, Enterprise errs in asserting (Br. 58) that requiring it to reimburse the Union for unpaid dues during that period creates a windfall for the affected employees.

The Board’s remedy thus redresses the damage done to the Union and the collective-bargaining relationship by Enterprise’s failure to honor its commitment to deduct and remit dues. It provides comprehensive remedial relief for that violation, consistent with the policies of the Act. As such, the Board’s remedy is not “a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act” (*see* p. 57), and must, therefore, be affirmed.

**CONCLUSION**

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

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National Labor Relations Board  
January 2016

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

ENTERPRISE LEASING COMPANY OF	)	
FLORIDA, d/b/a ALAMO RENT-A-CAR	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 15-1200,
	)	15-1255
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	12-CA-026588

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,582 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 19th day of January, 2016

# **STATUTORY ADDENDUM**

**STATUTORY ADDENDUM**

**Sec. 7. [Sec. 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 158(a)(3) of this title].

**Sec. 8(a). [Sec. 158(a).]** [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

\* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

**Sec. 10(a). [§ 160(a).]** [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding

provision of this Act [subchapter] or has received a construction inconsistent therewith.

**Sec. 10(c) [§ 160(c).]** [Reduction of testimony to writing; findings and orders of Board] . . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter] . . . .

**Sec. 10(e). [Sec. 160(e)]** [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

**10(f) [Sec. 160(f)] [Review of final order of Board on petition to court]** 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, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Respondent/Cross-Petitioner	)	12-CA-026588
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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