Oral Argument Not Yet Scheduled

Nos. 15-71924, 15-72563, 15-73259

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 878, AFL-CIO
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD
Respondent

REMINGTON LODGING & HOSPITALITY, LLC,
d/b/a SHERATON ANCHORAGE
Petitioner/Cross-Respondent
v.
NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petitions of UNITE HERE! Local 878, AFL-CIO ("the Union") and Remington Lodging & Hospitality, LLC, d/b/a Sheraton Anchorage ("Remington" or "the Hotel") to review, and the cross-application of the National Labor Relations Board ("the Board") against

Remington to enforce, the Board's Order in *The Sheraton Anchorage*, 362 NLRB No. 123 (June 18, 2015). (ER 6-14.)[1] The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 151, 160(a). The Board's Order is final with respect to all parties..

The Union filed its petition for review with this Court on June 24, 2015. Remington filed its petition for review in the United States Court of Appeals for the Fifth Circuit on June 29, 2015, and the Fifth Circuit subsequently granted the Board's motion to transfer the case to this Court. The Board filed its cross-application for enforcement against Remington with this Court on October 23, 2015. These filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). because the unfair labor practices were committed in Alaska.

STATEMENT OF ISSUES

1. Whether the Board is entitled to summary enforcement of its Order remedying findings that were not contested before the Board or are not contested in Remington's opening brief.

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[1] Citations are to Excerpts of Record ("ER") filed with the Union's brief, to Supplemental Excerpts of Record ("SER") filed with Remington's brief, and to Second Supplemental Excerpts of Record ("SSER") filed with the Board's brief. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that Remington violated Section 8(a)(5) and (1) of the Act by unilaterally changing bargaining-unit employees' working conditions on October 17, 2009, because Remington failed to first provide at least 30 days' notice to the Federal Mediation and Conciliation Service, as required by Section 8(d)(3) of the Act.

3. Whether substantial evidence supports the Board's findings that the parties' negotiations in March 2010 broke a preexisting bargaining impasse and, consequently, that Remington violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a newly offered health plan in May 2010.

4. Whether substantial evidence supports the Board's finding that the areas outside the Hotel's front and rear entrances, underneath porte cocheres, were non-work areas so that Remington violated Section 8(a)(3) and (1) of the Act by discharging four employees for distributing boycott handbills there during their non-working time.

5. Whether substantial evidence supports the Board's finding that Remington violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on July 2, 2010 based on a tainted decertification petition.

6. Whether the Court has jurisdiction under Section 10(e) of the Act to consider the Union's argument that the Board erred in modifying the administrative law judge's recommended remedy.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that Remington violated Sections 8(a)(1), (3), and (5) of the Act by maintaining and/or enforcing several employment policies restrictive of employee rights, disciplining nine employees for presenting a boycott petition to a manager, discharging four employees for distributing handbills during non-working time outside the Hotel's front and rear entrances, unilaterally changing certain working conditions without first providing timely notice to the Federal Mediation and Conciliation Service ("the FMCS"), unilaterally changing certain other terms and conditions of employment in the absence of a valid bargaining impasse, coercing employees into signing a decertification petition, and, then withdrawing recognition from the Union based on that tainted decertification petition. (ER 204.) Following a hearing, an administrative law judge found merit to many of the General Counsel's allegations and issued a decision and recommended order on August 25, 2011. (ER 89.)

After considering the parties' exceptions, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order on April 24, 2013, finding that Remington violated the Act consistent with the judge's decision, with minor modifications and exceptions. (ER 15.) On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct.

2550 (2014), holding that the appointments of Members Griffin and Block to the Board were invalid. Thereafter, the Board issued an order setting aside the April 24, 2013 Decision and Order and retaining the case on its docket for further appropriate action.

On June 18, 2015, a three-member panel of the Board issued the Decision and Order currently before this Court, which incorporated by reference the Board's previous Decision and Order and further explained why Remington's withdrawal of recognition, based on the decertification petition it encouraged and assisted, violated the Act. (ER 6.)

The Board's findings of fact are set forth below, followed by a summary of the Board's conclusions and order.

I. THE BOARD'S FINDINGS OF FACT

A. Background and Employee Handbook

Remington operates the Sheraton Anchorage Hotel in Anchorage, Alaska. The Union has long represented the Hotel's workers in a bargaining unit that numbers approximately 180 workers in various job classifications. (ER 25-26.) Remington and the Union were parties to a collective-bargaining agreement effective from March 1, 2005, to February 28, 2009 ("the 2005 Agreement"). (ER 26.)

Remington maintains an employee handbook, which it distributes to employees. (ER 31.) The handbook contains, among other rules, eight rules that prohibit employees from: (1) accessing the Hotel outside of working hours without management approval; (2) leaving the area of their job assignment and work duties; (3) distributing literature in a guest area or work area or soliciting guests at any time; (4) divulging "confidential information," including "personnel file information" and "labor relations" information; (5) furnishing information to the news media about the Hotel or its employees; (6) having a conflict of interest with the Hotel; (7) engaging in behavior that is "indecent, immoral, or publicly embarrassing to the [H]otel"; and (8) being insubordinate or refusing to perform one's job duties. (ER 16-17.)

B. Negotiations for a Successor Agreement

Before the 2005 Agreement expired, the parties bargained on October 27 and 28, 2008, for a successor contract. Those initial bargaining sessions did not produce a new agreement, and the parties ultimately agreed to extend the 2005 Agreement to August 31, 2009. (ER 37.) The parties exchanged written proposals in early April 2009 (ER 34; SER 357) and bargained in June and July of 2009 (ER 35-39). Again, they were unable to reach a successor agreement. Later, on August 21, 2009, Remington furnished the Union with its last, best, and final offer. (ER

37; SER 255-296.) The Union did not accept it and continued to ask Remington for additional negotiations though October. (ER 40; SER 339.)

The Board found, and no party now disputes, that Remington and the Union bargained to impasse by mid-October 2009. (ER 60.) The subjects of bargaining that separated the parties included, among others:

- **Health plan:** Remington insisted on withdrawing from the Union's Taft-Hartley health plan and adopting a new health plan administered by CIGNA ("the CIGNA health plan") while making health benefits subject to annual review and change at Remington's discretion for "sound business reasons." (SER 288.) The Union insisted on retaining its Taft-Hartley health plan with increased employer-contribution rates. (SER 357-58; SSER 81.)
- **Room quota for housekeepers:** Remington proposed increasing the maximum number of rooms that housekeepers clean per day from 15 to 17. The Union stood firm on a 15-room maximum.
- **Meal periods**: Remington insisted on discontinuing its practice of paying employees for a 30-minute meal period and on imposing, for the first time, a $1 charge to employees for their meals. The Union opposed those two proposed changes.

- **Sick days and holidays**: The Hotel proposed reducing the number of paid sick days from 12 to 5 days and reducing the number of paid holidays from 9 to 8 days. The Union opposed those two proposals.
- **Wages:** Remington proposed an initial wage freeze and a 2% wage increase for all employees on September 1, 2010. The Union proposed a 3% annual wage increase for tipped employees and a 4% increase for non-tipped employees in the agreement's first year, declining to a 2% increase for non-tipped employees by the final year.

Among those items, health care was the most important issue separating the parties, and the room quota had also been "a major dispute." (ER 59, 63; SER 33.)

C. Remington Unilaterally Changes Terms and Conditions

On October 17, 2009, Remington, without first notifying the FMCS of the parties' labor dispute, unilaterally implemented certain of its final proposed changes to unit employees' terms and conditions of employment, including its final proposals on room quota, elimination of compensation for employees' 30-minute meal period, the imposition of a $1 charge for employee meals, and the reduction of paid sick days and holidays. (ER 40, 60; SER 316-17.) The Hotel refrained from unilaterally implementing its health-care proposal, leaving in place employees' participation in the Union's Taft-Hartley health plan. (SER 239.)

On February 3, 2010, Remington, for the first time, notified the FMCS of the parties' labor dispute by filing with that agency a Form F-7 "Notice to Mediation Agencies." (ER 40, 61; SER 326.)

D. Remington Unilaterally Assigns Security Duties to Its Engineers

Remington employed security guards to patrol the hotel premises. (ER 38.) In July 2009, without notifying or bargaining with the Union, Remington began reducing its security guards' hours and correspondingly assigning security duties to its bargaining-unit engineers. In September 2009, Remington laid off the remainder of its security force. During the next month, engineers performed all security duties. Sometime in October 2009, Remington rehired a dedicated security staff. (ER 38.)

E. Remington Disciplines Nine Employees for Presenting a Boycott Petition

On November 17, 2009, unit employees held a boycott rally outside the Hotel to protest Remington's bargaining tactics. (ER 41; SSER 35-40.) A delegation of nine off-duty unit employees broke off from the rally to enter the Hotel and present a boycott petition to General Manager Dennis Artiles. None had received prior management approval to enter the Hotel during this off-duty time. The employees did not chant, make noise, or engage in any disrespectful conduct while presenting the petition. (ER 41.) On November 19, Remington issued the employees disciplinary notices (*i.e.*, written warnings), and initially suspended five

of them, because they had allegedly violated the employee handbook's rules prohibiting off-duty access to the premises absent prior approval, being outside one's assigned work area, engaging in publicly embarrassing behavior, and having a conflict of interest with the Hotel. (ER 41-42.)

F. Remington Discharges Four Employees for Distributing Boycott Flyers Outside the Hotel's Two Entrances

On February 2, 2010, four unit employees – Lucy Dudek, Joanna Littau, Troy Prichacharn, and Gina Tubman – distributed flyers outside the Hotel's front and rear entrances. (ER 43, SSER 17, 25-31.) Those two entrances are under porte cocheres, *i.e.*, overhangs where vehicles are covered when they drop off or pick up persons or luggage. (ER 43; SSER 71, 73.) The flyers announced the Union's boycott of the Hotel and urged the public not to patronize the Hotel because of the labor dispute. The employees stood under the porte cocheres, approximately 4 to 6 feet away from the entrance doors and did not impede the ingress or egress of passersby. (ER 66, 67; SSER 19, 25-26.) The employees were off duty and had not asked management's permission to be on the Hotel's property. (ER 66.)

As is standard in the hotel industry, doormen, bellmen, and security guards perform some work under the porte cochere area not far from where the four employees distributed the flyers, 4 to 6 feet away from the entrance doors. (ER 67; SER 99, 156-58.) The doormen and bellmen are stationed inside the doors, in the

lobby, and come out to help guests with their luggage. (SSER 66-67.) The bellmen also work on the hotel floors, assisting guests. (SER 10.) When Remington's Human Resources Director, Jamie Fullenkamp, approached the four off-duty employees distributing flyers, she did not see any other employees working near them. (Tr. 6519.)

A short time after the four employees arrived, several managers approached Prichacharn and Littau at the rear entrance. Fullenkamp told the off-duty employees that they were on private property and, therefore, they must move to the public sidewalk or she would summon the police. (ER 43; SSER 22-23.) Union agent Daniel Esparza then approached Fullenkamp and asked if Fullenkamp was going to discipline the two employees or call the police. Fullenkamp responded that the police had already been called. Prichacharn and Littau then left the property. (ER 43; SSER 22-23.)

Turning her attention to the front entrance, Fullenkamp confronted Dudek and Tubman and ordered them to leave the premises. (ER 43; SSER 28.) The employees countered that they had a right to be there. Fullenkamp went back into the Hotel and then returned to state that she had summoned the police, who would arrive shortly. Dudek and Tubman then departed. (ER 44; SSER 29-30.)

The next day, the four employees were suspended pending investigation. (ER 30; SSER 31, 41.) Remington discharged them approximately 2 weeks later

for distributing flyers to hotel guests and refusing to leave the property, as instructed. (ER 44; Tr. 34.)

In July 2010, five months after they were discharged, Remington reinstated the four discharged workers to their jobs with full backpay and seniority. (ER 44, 66; SSER 9-14.)

G. The Parties Recommence Bargaining in March 2010

At Remington's request, the parties resumed bargaining on March 10 and 11, 2010. (ER 44-45.) Each party came to the table with proposals that differed from their proposals when they bargained to impasse back in October 2009. Importantly, both Remington and the Union substantially revised their respective proposals on the "key" issue of health care. In place of the CIGNA health plan on which Remington had previously insisted to impasse, Remington proposed an entirely new health plan ("the AETNA plan"). (ER 45, SSER 97-102.) The terms of the AETNA plan were "significantly different" from the CIGNA plan. (ER 61.) The Hotel's chief negotiator, Arch Stokes, described the AETNA plan as "a new, different and better plan" when he unveiled it on March 10. (SSER 99.) Stokes informed the Union's negotiators that the Hotel had recently shopped around and determined that the AETNA plan was the best medical insurance available for the money. (ER 61-62; SSER 99.) Later during that session, Stokes reiterated that

"we looked at Cigna and other plans [and] it seems to us that the Aetna is better." (SSER 101.)

During the March 10, 2010 meeting, management negotiator Villareal made an approximately 90-minute presentation to the Union's negotiators regarding the terms of the AETNA plan. (ER 45.) The AETNA plan differed significantly from the previously-offered CIGNA plan in terms of benefits coverage, employee copayments for hospital visits and prescription drugs, and maximum lifetime benefits. (SER 207-14, SSER 82.) For example, the AETNA plan had significantly lower employee-paid deductibles for in-network individual coverage and family coverage compared to the CIGNA plan.[2] Additionally, the AETNA plan required no employee copayment for hospital admissions, unlike the CIGNA plan, which charged employees 20% of expenses for admissions to in-network hospitals and 40% of charges for admissions to out-of-network hospitals. Moreover, the AETNA plan capped an individual's lifetime maximum health benefits at $5,000,000 (SSER 82) while the CIGNA plan had a much lower cap of $2,000,000 (SER 207-12).

[2] Under the AETNA plan, in-network deductibles were $250 for individual coverage and $750 for family coverage. (SSER 82.) By comparison, the CIGNA plan deductibles were $500 for individual coverage and $1,500 for family coverage, no matter whether services were provided in-network or out-of-network. (SER 208.)

Additionally, in a few respects, AETNA plan was less beneficial to employees when compared to the CIGNA plan. For example, the AETNA plan had higher yearly out-of-pocket maximum expenses for employees and a higher copayment for emergency-room visits. (SER 207-214, SSER 82.) Remington's new offer of the AETNA plan did not modify language from its prior offer permitting Remington to annually "shop and compare" health plans and to change plans at its discretion.

The Union, too, arrived at the March 10 bargaining session with substantially revised proposals on health care, room quota, and wages. Regarding the all-important issue related to health care, the Union's March 10 offer significantly reduced the rates at which Remington would contribute to the Taft-Hartley health plan, as compared to the Union's offer at impasse. (ER 81; SER 230.) The Union's offer pending at impasse had required Remington to contribute to the Taft-Hartley health plan at the following rates: "$3.50 (2009), $3.78 (2010), $4.20 (2011), and $4.69 (2012)." (SSER 81; SER 84-86) Under the Union's new March proposal, Remington would contribute to that plan at the lower rates of $3.15 per hour worked in 2010, $3.35 per hour in 2011, and $3.55 per hour in 2012. (SER 230.) Thus, the Union reduced its proposed contribution rates by $0.63 per hour for 2010, by $0.85 per hour for 2011, and by $1.14 per hour for 2012.

The Union also gave ground on other subjects at the March 10 bargaining session. Specifically, the Union offered to increase the housekeepers' room quota to 16 rooms per day for the first 2 years of the contract, to be returned to 15 rooms per day for the final 2 years of the contract. (SER 230.) At impasse in October 2009, the Union had proposed 15 rooms per day, and Remington had proposed 17 rooms per day. The Union also moved on wages. Its proposal pending at impasse was a 3% annual wage increase for tipped employees and a 4% increase for non-tipped employees in the first year, declining to 2% by the final year. (ER 34.) By March 10, the Union was willing to accept a wage freeze in 2010, followed by 2% increases in each of the next 3 years for tipped and non-tipped employees alike. As a point of reference, Remington's proposal pending at impasse was an initial wage freeze followed by a single 2% wage increase on September 1, 2010. (SER 296.) The Union's March 10 offer provided that "[s]hould any part of the sum be rejected, the proposal and all of its parts are to be considered withdrawn and the Union's prior position prevails." (SER 230.)

At the March 11 bargaining session, the Union accepted the Hotel's proposed contribution rate to the Union's pension fund of $0.48 per hour for the duration of the agreement. (ER 45; SSER 109.)[3] The negotiators, Stokes for the

[3] The Union's proposal pending at impasse required Remington to contribute to the pension fund at $0.51 per hour starting on March 1, 2009, $0.54 per hour

Hotel and Sawyer for the Union, began discussing job titles and duties, and the meeting soured. (ER 45; SSER 110-13.) Specifically, Sawyer asked Stokes about the duties for certain of Remington's proposed job classifications. (SSER 111.) Stokes responded that the job-classification offer had been on the table since July 2009 and opined that most companies wanted to reduce, not expand job categories. (SSER 112.) Sawyer replied that he had never before participated in negotiations where an employer sought to reduce job classifications from 46 to 28 and that he, Sawyer, simply wanted his concerns addressed. (SSER 112.) Stokes abruptly declared that the parties were at impasse, and Sawyer disagreed. Heated words were exchanged, and Sawyer led the Union's bargaining team out of the room. This ended the parties' negotiations. (ER 45; SSER 112-13.)

H. Remington Unilaterally Implements an Incentive Bonus Program

On March 18, 2010, Remington implemented an incentive bonus plan for its housekeepers. (ER 18, 45-50.) On that date, Remington posted a memo to the housekeeping employees detailing the new plan. Remington did not notify or bargain with the Union before deciding upon and announcing the plan. (ER 18.)

I. Remington Unilaterally Implements the New AETNA Health Plan

By letter dated March 19, 2010, Remington informed the Union that it believed that the parties remained at impasse and that it would "implement[] anew

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starting on March 1, 2010, $0.57 per hour starting on March 1, 2011, and $0.62 starting on March 1, 2012. (SER 358.)

its August 21 [2009] offer, except that as of May 1, 2010, the AETNA plan will be implemented in place of the union health and welfare plan that is currently in effect." (ER 46, SER 240-42.) On March 24, General Manager, Dennis Artiles, told a group of employees that Remington intended to implement the AETNA plan. (ER 75.) On March 26, Remington more generally announced to employees that it would implement the AETNA plan effective May 1, 2010. (ER 48.)

By letter dated April 1, 2010, Union responded to Remington's March 19 letter. The Union disputed Remington's assertion that the parties were at impasse. (SSER 83-85) The Union emphasized that it had not yet responded to the Hotel's recently offered AETNA health plan; it had not been asked to do so; and could not yet respond because it had questions about the AETNA plan.

Nevertheless, and without any further negotiations, on May 1, 2010, Remington unilaterally implemented the AETNA health plan and ceased making contributions to the Union's Taft-Hartley health plan. (ER 63.)

J. Remington Confiscates Union Buttons

On December 8, 2009, Remington's Director of Operations, Eduardo Canes, ordered unit employee Elda Buezo to remove a union button from her clothing and confiscated that button and several others, which Buezo had planned to distribute to her coworkers. (ER 73.)

K. Remington Coerces Employees into Signing a Decertification Petition and Withdraws Recognition from the Union

Between March and June 2010, a petition circulated among hotel employees seeking to decertify the Union as the employees' collective-bargaining representative. In mid-May, Supervisor Ed Emmsley made repeated efforts to get unit employee Dexter Wray to sign the decertification petition. On May 18, Emmsley sent Wray a text message stating "Just sign it I will never put u on the spot," and "you know I'll always cover your black ass." (ER 48-49; SSER 74-76.) After sending that text message, Emmsley told Wray that, if he did not sign, he would "be one of the first ones let loose." (ER 49, 77; SSER 43.) Worn down, Wray signed. (ER 49.)

Also in mid-May, Supervisor Glen Rydin directed a newly-hired unit employee, Jose Lantigua, to sign the decertification petition. Specifically, Rydin said, "I'm going to need you to sign over here because the Union only takes money and you do not receive benefits." Lantigua complied with Rydin's directive and signed the petition. (ER 50; SSER 55-56.)

Separately, Supervisor Rydin summoned unit employee Esusebio Bristol to his office and asked him to sign the decertification petition. Bristol, whose primary language is Tagalog, complied. Bristol testified that he did not understand what he was signing or what it would mean. (ER 50.) On July 2, 2010, Remington withdrew recognition from the Union based on the decertification petition, which

contained the signatures of 110 of the 161 unit employees, including the signatures of Wray, Lantigua, and Bristol.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that Remington violated Section 8(a)(1) of the Act by maintaining the eight cited rules in its employee handbook and/or by enforcing those rules against employees engaged in union activity (ER 6 & n.4, 16-17, 68-70); by confiscating union buttons from an employee (ER 15 n.2, 73) ; by disparaging the Union (ER 15 n.2, 75), and by soliciting employees to sign a decertification petition and threatening to discharge an employee if he did not sign it (ER 76-77). Additionally, the Board found, in agreement with the judge, that Remington violated Section 8(a)(3) and (1) of the Act by issuing written disciplinary warnings to the nine employees who had delivered the boycott petition (ER 16) and by discharging the four employees who had distributed flyers outside the Hotel's two entrances, under porte cocheres (ER 65-68). In further agreement with the judge, the Board found that Remington violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' terms and conditions of employment in October 2009 without first giving timely notice to the FMCS about the parties' labor dispute (ER 15-16, 60); by unilaterally substituting the AETNA health plan for the status quo Taft-Hartley health plan (ER 61-63); by unilaterally

assigning security duties to engineers (ER 71-72); and by withdrawing recognition from the Union based on a tainted decertification petition (ER 6 n.2, 76-80). Finally, contrary to the judge, the Board found that Remington violated Section 8(a)(5) and (1) of the Act by unilaterally implementing an incentive bonus program for its housekeepers. (ER 18-19.)

The Board's Order requires Remington 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 their statutory rights. (ER 7.) Affirmatively, the Order directs Remington, on request of the Union, to recognize and bargain with the Union to rescind the unlawful unilateral changes (other than the October 2009 changes). (ER 7-8.) Further, the Order directs Remington to rescind the unlawful discipline issued to the nine employees, to offer reinstatement to the four unlawfully discharged employees, to remove from its files any reference to the unlawful discipline or discharges, to make whole employees for the losses they suffered as a result of Remington's unlawful unilateral changes, unlawful discipline, and unlawful discharges, and to rescind or revise the unlawful handbook rules. (ER 7-9.) In remedying the unlawful October 2009 unilateral changes, the Board modified the judge's recommended remedy by tolling the backpay liability as of March 5, 2010 (*i.e.*, 30 days after Remington belatedly notified the FMCS)

and deleted the portion of the recommended remedy that would have required Remington to rescind those changes and restore the status quo ante. (ER 19.)

SUMMARY OF THE ARGUMENT

1. Remington does not contest numerous Board findings that it violated Section 8(a)(1), (3), and (5) of the Act. It is well settled that the Board is entitled to summary enforcement of those portions of its Order that were not contested before the Board and/or are not contested in the parties' opening briefs.

2. Substantial evidence supports the Board's finding that Remington violated Section 8(a)(5) and (1) by unilaterally changing working conditions on October 17, 2009. Although the parties were then at impasse, in order to lawfully implement unilateral changes, Section 8(d)(3) of the Act required Remington, as the party desiring to modify or terminate the parties' expired agreement, to notify the FMCS of the parties' labor dispute at least 30 days before changing terms. Remington failed to notify the FMCS until February 2010. Remington's asserted defense to that finding is not supported by record evidence.

3. The Board's finding that Remington violated Section 8(a)(5) and (1) by unilaterally substituting the AETNA health plan for the status quo health plan because the parties were no longer at impasse when Remington made that May 1, 2010 change is also supported by substantial evidence. The 2009 impasse was broken in March 2010 when the parties recommenced bargaining and Remington

offered a completely new health plan, the Union reduced its demands on health care, wages, and housekeepers' room quota, and the parties reached agreement on pension contribution rate.

4. The Board's finding that Remington violated Section 8(a)(3) and (1) by discharging four employees for distributing boycott flyers to guests during their off-duty time outside the Hotel's front and rear entrances is similarly reasonable and amply supported by the record evidence. It is well settled that employees have a right to distribute such literature in non-work areas during their non-work time. The exterior of the Hotel's entrances, under porte cocheres, are non-work areas despite some incidental work performed there by bellmen, valets, and security personnel.

5. The Board also reasonably found that Remington violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. As proof that the Union lost majority support, Remington improperly relies on a decertification petition that was tainted by its own conduct in coercing employees into signing it. Accordingly, that circumstance gives rise to a conclusive presumption that the tainted petition does not reflect the employees' uncoerced representational desires and cannot support a withdrawal of recognition.

6. Finally, the Court lacks jurisdiction under Section 10(e) of the Act to consider the Union's argument that the Board erred in modifying the administrative

law judge's recommended remedy regarding the October 2009 unilateral changes. The Union failed to raise the issue to the Board in a motion for reconsideration or otherwise properly present its arguments to the Board. The Court therefore may not review the Union's newly-minted arguments.

STANDARD OF REVIEW

The Board's legal conclusions may not be disturbed so long as they are "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). The Board's application of the law to the facts is reviewed under the substantial evidence standard. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968). The Board's findings of fact are "conclusive" under Section 10(e) of the Act (29 U.S.C. § 160(e)) if they are supported by substantial evidence on the record as a whole. A reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1477 (9th Cir. 1986).

ARGUMENT

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

Section 10(e) of the Act provides that "[n]o 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). Accordingly, a party that fails to take specific exception to an administrative law judge's findings is jurisdictionally barred from obtaining appellate review of those findings. *See Woelke & Romero Framing, Inc., v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011).

Remington failed to file exceptions to the judge's findings that it violated Section 8(a)(1) of the Act by confiscating union buttons from employee Buezo and by denigrating the Union when it informed employees that it would unilaterally implement a new health insurance plan and violated Section 8(a)(3) and (1) by disciplining nine employees for presenting a boycott petition. (ER 15 n.2, 16.) Accordingly, those issues are jurisdictionally barred from court review, and the Board is entitled to summary enforcement of the portions of its Order corresponding to those three uncontested findings. *See Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 295-96 (9th Cir. 2011).

Additionally, Remington has waived any challenge to other of the Board's findings by failing to contest them in its opening brief. Under Rule 28 of the Federal Rules of Appellate Procedure, issues that are not raised in a party's opening brief are deemed waived. Fed. R. App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief); *see also Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995). This Court has accordingly held that where a party fails to sufficiently challenge an unfair-labor-practice finding in its opening brief, any argument over that issue is abandoned, and the Board is entitled to summary enforcement of the corresponding aspects of its order. *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000); *Legacy Health Sys.*, 662 F.3d at 1126.

Specifically, Remington's opening brief does not challenge the Board's additional findings that Remington violated Section 8(a)(1) of the Act by soliciting and instructing employees to sign a decertification petition by threatening to discharge an employee if he did not sign it and by maintaining and/or enforcing the eight rules in its employee handbook set forth above. Also, Remington's opening brief does not challenge the Board's finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally assigning security duties to its engineers and by unilaterally implementing an incentive bonus program for housekeepers.

Accordingly, the Board is entitled to summary enforcement of the aspects of its Order corresponding to these Section 8(a)(1), (3), and (5) findings.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT REMINGTON VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING WORKING CONDITIONS ON OCTOBER 17, 2009 BECAUSE REMINGTON FAILED TO FIRST PROVIDE AT LEAST 30 DAYS' NOTICE TO THE FMCS, AS REQUIRED BY SECTION 8(d)(3) OF THE ACT

A. Applicable Principles

Section 8(d) of the Act, which defines the duty to bargain, provides that no party to an existing collective-bargaining contract "shall terminate or modify such contract, unless the party desiring such termination or modification-

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . .
> * * *
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . .
> (4) continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . . ."

29 U.S.C. § 158(d).

The notice requirements of Section 8(d)(3) ensure the participation of qualified mediation services in labor disputes before the terms of a collective-bargaining agreement are modified. That participation constitutes "an important

and principal policy interest embodied in Section 8(d)." *United Artists Commc'ns, Inc.*, 274 NLRB 75, 76 (1985), *affirmed sub nom. IATSE v. NLRB*, 779 F.2d 552 (9th Cir. 1985). To serve that interest, the "initiating party who gives untimely Section 8(d)(3) notice to the Federal Mediation and Conciliation Service commits an unfair labor practice by resorting to . . . [a] unilateral modification within thirty days of such notice even when the action occurs more than 60 days after notice to the other party." *See NLRB v. Weathercraft Co. of Topeka, Inc.*, 832 F.2d 1229, 1232 (10th Cir. 1987); *see also Hooker Chem. & Plastics Corp. v. NLRB*, 573 NLRB F.2d 965, 969 (7th Cir. 1978); *United Furniture Workers of Am., Local 270 v. NLRB*, 336 F.2d 738, 740-41 (D.C. Cir. 1964).

Implementing the clear text of Section 8(d) of the Act, the Board requires the notification to the FMCS be made by "the party desiring such termination or modification." *Mar-Len Cabinets, Inc.*, 243 NLRB 523, 534-35 (1979) (quoting Section 8(d) (emphasis added)), *enforcement denied in relevant part*, 659 F.2d 995 (9th Cir. 1981), *on remand*, 262 NLRB 1398 (1982). The Board holds, with court approval, that notification to the FMCS by the non-initiating party fails to satisfy the clear terms of Section 8(d) of the Act. *Id.*; *Bi-County Beverage Distrib.*, 291 NLRB 466, 469 (1988); *NLRB v. Whitesell Corp.*, 638 F.3d 883, 894 (8th Cir. 2011); *cf. Amax Coal Co., v. NLRB*, 614 F.2d 872, 889 (3d Cir. 1980) (holding that notice-requirement of Section 8(d)(3) is not satisfied when FMCS has independent

knowledge of a labor dispute)), *reversed on other grounds*, 453 U.S. 322 (1981); *United Artists Commc'ns, Inc.*, 274 NLRB at 76 ("Thus, it is evident from a fair reading of Section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on "the party desiring such termination or modification.").

B. Remington's Untimely Section 8(d)(3) Notice

Here, by letter dated October 23, 2008, Remington sought to engage the Union in negotiations for a successor agreement. (ER 31, 55; SSER 69, 70). Remington does not contest the Board's conclusion that Remington was "the party desiring such termination or modification" within the meaning of Section 8(d)(3). (ER 16, 55.) As the initiating party, Remington was required by Section 8(d)(3) of the Act to notify the FMCS of its labor dispute with the Union within 30 days thereafter. However, it is undisputed that Remington did not notify the FMCS of the parties' labor dispute until February 3, 2010, when it filed a standard Form F-7 with that agency. (ER 61; SER 326, Remington Br. at 23).

Having failed to timely comply with Section 8(d)(3) of the Act, Remington was required, as the Board explained (ER 15-16, 19), to continue in full force and effect the terms of the parties' existing collective-bargaining agreement until March 5, 2010, 30 days after the FMCS received notice from Remington. By unilaterally changing unit employees' terms and conditions of employment on

October 17, 2009, without having furnished timely notice to the FMCS, Remington violated Section 8(a)(5) and (1) of the Act.

There is no merit to Remington's argument (Br. 22-25) that its unilateral changes were lawful because the FMCS allegedly received a Form F-7 Notice *from the Union* at least 30 days before those changes were implemented (*i.e.*, by September 17, 2009). First, as explained above (p. 27), the Board has held, with court approval, that Section 8(d) of the Act requires the *initiating party* to notify the FMCS—and notice furnished by the non-initiating party does not satisfy the clear statutory requirement. *See Mar-Len Cabinets, Inc.*, 243 NLRB at 535, and cases cited at pp. 27-28. Thus, even assuming for argument's sake that the Union notified the FMCS by September 17, 2009, Remington was not permitted to modify the existing agreement until 30 days after it furnished its own notice to the FMCS on February 3, 2010.

C. The Record Does Not Establish that the Union Furnished Timely Notice to the FMCS

Remington contends (Br. 23-25) that it should be relieved of liability for not filing a timely notice to the FMCS because the Union filed a timely notice. To the contrary, the Board found (ER 16 n.5) that Remington's argument is not supported by the record, which contains no evidence to establish when the notice was filed. Accordingly, this Court's holding, which is in disagreement with Board precedent, that Section 8(d) of the Act is satisfied when the FMCS receives timely notice

from either the initiating party or the non-initiating party, *see NLRB v. Mar-Len Cabinets, Inc*., 659 F.2d 995 (9th Cir. 1981), is not implicated here because that alternative is not supported on this record.

Specifically, contrary to Remington's argument (Br. at 24-25), neither the testimony of Remington's lawyer and chief negotiator, Arch Stokes, nor the standard language in FMCS Form F-7 demonstrate that the Union filed its notice with the FMCS at least 30 days before Remington implemented its changes on October 17, 2009. Stokes did not testify that he had any personal knowledge that the Union filed notice with the FMCS by September 17, 2009. Rather, Stokes merely testified that he "thought that the Union had notified the FMCS" at some unspecified point in time. (SSER 49.) When asked why he believed that the Union had notified the FMCS, Stokes testified "[s]omebody had made a comment about that and also in the [separate] Hilton negotiations Mr. Sawyer–it had been reported to us that Mr. Sawyer had requested mediation and they had refused to mediate." (SSER 49.) Moreover, in testimony not cited by Remington, Stokes conceded that he could not recall *when* he heard the comments giving rise to his belief, leaving open the distinct possibility at any such comments were made *after* Remington implemented its unilateral changes.

> Q: Was it before or after you learned that the company – well, before or after Remington made the determination to implement?

> A: I think it was – I think we heard that probably – I can't remember. I can't remember when I heard that.

(SSER 49-50.) Thus, contrary to Remington's suggestion, Stokes' vague hearsay testimony utterly fails to establish that Union notified the FMCS about the parties' labor dispute at least 30 days prior to October 17, 2009.

Further, there is no merit to Remington's argument that the Board was required to "presume[]" that the Union notified the FMCS no later than September 17, 2009, based on preprinted language in a standard FMCS Form F-7. (Br. at 24-25). That preprinted language provides, "You are hereby notified that written notice of the termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that no agreement has been reached." (SER 326.) According to Remington (Br. at 25), the Union "presumably" filed its F-7 Notice with the FMCS within 30 days after December 16, 2008, when the Union sent a letter to Remington expressing its desire to bargain. Remington argues that Section 8(d) of the Act required the Union to file a notice in that timeframe, and hence such a presumption is warranted. However, as this Court has held, a non-initiating party, such as the Union here, has *no duty* under Section 8(d) of the Act to file a timely notice with the FMCS. *IATSE v. NLRB*, 779 F.2d 552 (9th Cir. 1985). Accordingly, the Board did not err in failing to presume that the Union notified the FMCS within 30 days of its December 16, 2008 letter. In short, as the Board explained, even if this Court's interpretation of

Section 8(d) of the Act were applied, which is not necessary here, Remington's October 2009 unilateral changes would be unlawful because Remington "failed to prove that the Union filed its notice [with the FMCS] at least 30 days before the Respondent implemented its October 2009 changes." (ER 16 n.5.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE PARTIES' NEGOTIATIONS IN MARCH 2010 BROKE THE PREEXISTING IMPASSE AND, CONSEQUENTLY, REMINGTON VIOLATED THE ACT BY UNILATERALLY IMPLEMENTING ITS NEWLY OFFERED AETNA HEALTH PLAN

A. Applicable Principles

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." A lawful impasse does not eliminate an employer's bargaining obligation for all time. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (impasse is a "recurring feature in the bargaining process . . . 'which in almost all cases is eventually broken'") (citation omitted). Rather, "a genuine impasse merely suspends the duty to bargain . . . until changes in circumstances indicate that an agreement may be possible." *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996). *See also Providence Med. Ctr.*, 243 NLRB 714, 714 n.2 (1979); *Financial Inst. Employees of Am. v. NLRB*, 738 F.2d 1038, 1043 (9th Cir. 1984) (explaining that impasse in almost all cases is

eventually broken by either "a change of mind" or application of economic force) (quoting *Charles D. Bonanno Linen Service*, 454 U.S. at 412).

"Historically, the Board has not required major changes in circumstances to find that an impasse has been broken." *Airflow Research & Mfg.*, 320 NLRB at 862. The Board has explained that "[a]nything that creates a new possibility of fruitful discussion (*even if it does not create a likelihood of agreement*) breaks an impasse . . . . " *Id.* (emphasis added) (quoting *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983)); *see also Hotel Bel Air*, 358 NLRB 1527, 1533 (2012) incorporated by reference in 361 NLRB No. 91 (2014). Thus, the Board's inquiry is not whether new proposals are likely to be accepted, but rather whether they (or other changed circumstances) create a new possibility that further negotiations will move the parties toward an agreement. Events that may create a new possibility of fruitful discussion include "bargaining concessions, implied or explicit." *Raven Gov't Servs., Inc.*, 331 NLRB 651, 658-59 (2000) (quoting *Gulf States Mfg. v. NLRB*, 704 F.2d at 1399), *enforced*, 315 F.3d 499 (5th Cir. 2002).

The Court has repeatedly recognized the Board's special expertise in evaluating impasse issues and the deference it affords to the Board's conclusions in this area *Walnut Creek Honda Assoc. 2, Inc. v. NLRB*, 89 F.3d 645, 648-49 (9th Cir. 1996); *Financial Inst. Employees of Am.*, 738 F.2d at 1043. Specifically, the Court has explained that "impasse is a question of fact involving [NLRB's]

presumed experience and knowledge of bargaining problems" and that "in the whole complex of industrial relations few issues are less well suited to appellate judicial appraisal than evaluation of the bargaining processes or better suited to the expert experience of the [B]oard which deals constantly with such problems." *Walnut Creek Honda Assoc. 2, Inc.*, 89 F.3d at 648-49.

B. Substantial Evidence Supports the Board's Finding that the Parties' March 2010 Negotiations, Which Included New Proposals on Several Key Issues and Agreement on Pension Contribution Rate, Broke the Existing Impasse

Exercising its expertise in this area, the Board reasonably concluded that the fresh proposals exchanged by the parties in March 2010 created a new possibility of fruitful discussion, thereby breaking the October 2009 bargaining impasse. (ER 61-63.) The most important issue separating the parties at impasse in October 2009 was health insurance, and both parties returned to the bargaining table in March 2010 with new offers on that critical subject. Additionally, the Union made new, concessionary proposals on room quota and wages, and the parties reached agreement on Remington's contribution rate to the pension fund.

During the March negotiations, Remington proposed an entirely new health plan, the AETNA plan, that differed significantly from the previously-offered CIGNA plan. Among other differences (*see* pp. 13-14, above), the AETNA plan contained significantly lower employee-paid deductibles and copayments, a much higher lifetime maximum limit on benefits, different benefits coverage for

substance abuse and mental health issues, and higher yearly out-of-pocket maximum expenditures for beneficiaries. (SSER 82, SER 207-212.) At the bargaining table, Remington itself touted the AETNA plan as "better" than the CIGNA plan that was on the table when the parties reached impasse back in October 2009. (ER 61-62; SSER 99, 101.)

Remington was not alone in moving on the key issue of health benefits. When the Union returned to the negotiating table on March 10, it significantly reduced the rates at which it proposed Remington contribute to the Taft-Hartley health plan. Compared to its proposal pending at impasse, the Union's new proposal dramatically lowered those rates by $0.63 per hour (or 16%) for 2010, by $0.85 per hour (or 20%) for 2011, and by $1.14 per hour (or 24%) for 2012. (SSER 81; SER 84-86, 230.)

The Board has previously found that such a significant shift in health care proposals can serve to break an impasse. For example, in *Comau, Inc.*, 356 NLRB 75, 83 (2010), *enforcement denied on other grounds*, 671 F.3d 1232 (D.C. Cir. 2012), the Board found that an impasse was broken when an employer significantly increased the per-employee contribution that it was willing to make to healthcare plan that had been on the bargaining table. *See also Pavilions at Forrestal*, 356 NLRB 5, 5 n.3 (2010) (finding impasse broken when employees'

coverage under status quo health plan lapsed and employer implemented a new health plan), *enforced*, 684 F.3d 1310 (D.C. Cir. 2012).

In this case, health insurance was a critical issue, with Remington emphasizing its strong desire to lower its healthcare-related expenses. Five months after the impasse was reached, the parties recommenced negotiations with an exchange of proposals: Remington presented the Union with an entirely new and "better" health plan, and the Union cut back significantly on its proposed rates that Remington contribute to the status quo benefit plan. In short, the parties altered their bargaining positions and moved toward each other on this important issue. *See Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1318 (D.C. Cir. 2012) ("Because the principal issue in dispute between the parties was the rate at which the [e]mployer would contribute to the fund, the changed circumstance that led the [u]nion to consider other health plans was sufficient 'to suggest that future bargaining would be fruitful' and thereby to break any impasse.").

Of course, the parties' new and substantially different proposals on health benefits was not the only grounds for the Board's finding that the impasse was broken in March. The Board also relied on the Union's new proposals regarding the housekeepers' room-cleaning quota and wages, as well as the parties' March 11, 2010 agreement on Remington's contribution rates to the Union's pension fund. (ER 61-62.) The housekeepers' room quota had been another important

issue that divided the parties (ER 63), and the Union moved one-quarter of the distance that had separated the parties at impasse.[4] Additionally, the Union lowered its demand for wage increases to rates equal to or lower than Remington's then-pending wage offers for 2010 and 2011 (ER 45; SER 230, 296) and simultaneously accepted Remington's proposed contribution rate to the Union's pension fund (ER 45; SSER 109).

Thus, the March 2010 negotiations involved significant movement by both parties on the important issue of health care; agreement by the parties on pension contribution rate; and significant concessionary movement by the Union on room quota and wages. In light of those substantially changed circumstances on a variety of bargaining issues, the Board reasonably concluded that the parties' March 2010 negotiations created a new possibility for fruitful discussion and broke the 5-month long impasse.

C. **There Is No Merit to Remington's Challenges to the Board's Finding that Impasse Was Broken**.

There is no merit to Remington's argument that "the Board failed to apply the correct law." (R. Br. at 34.) Remington faults the Board for citing two cases (ER 63), *CJC Holding, Inc.*, 320 NLRB 1041 (1996), and *Whitesell Corp.*, 352

[4] At impasse in mid-October 2009, Remington proposed 17 rooms per day, and the Union countered with 15 rooms per day. (ER 57.) On March 10, 2010, the Union proposed 16 rooms per day in the contract's first two years, and 15 rooms per day in the contract's final two years. (ER 61.)

NLRB 1196 (2008), because both cases involved whether impasse was ever reached, not whether an existing impasse was broken. However, the judge, whose decision the Board adopted, specifically cited *Gulf States Manufacturing*, 704 F.2d 1390, for the proposition that "[l]egal impasse may end suddenly." (ER 61.) As described above, *Gulf States Manufacturing.* is the precedent upon which the Board relied in *Airflow Research & Manufacturing*, 320 NLRB at 862, when it explained that "[a]nything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse . . . . " Applying that principle, the judge found, and the Board agreed, that "the proposals made by the Union in its Package Proposal of March 10 and by [Remington] in its proposed AETNA medical insurance plan made that same day were significant changes in the positions that the parties had previously taken in contract negotiations, and served to break the impasse that had previously existed in bargaining between the parties." (ER 62.) The Board agreed with the judge's findings that the various proposals were in fact different from the parties' prior pending offers and his conclusion that "[t]he new proposals made by both the Union and [Remington] warranted serious consideration and further negotiations by the parties." (ER 63.) Thus, the Board did not misapprehend applicable law.

Remington further contends that, under applicable law, the Board erred in finding that the March 2010 negotiations were adequate to break the impasse.

While Remington concedes that significant differences exist between the AETNA and CIGNA plans (Br. at 13, 18), it contends that such differences "are immaterial" (Br. at 40), citing language in its final pre-impasse offer, retained in March 2010, making health benefits subject to "annual review and change" at its discretion "for sound business reasons." (SER 288). However, notwithstanding that aspect of Remington's proposal, the Board acted reasonably in finding that Remington's new AETNA proposal contributed to a break in impasse. If the Union were to accept Remington's offer, the unit employees would be covered by the AETNA plan (rather than the CIGNA plan) for at least the first year of the collective-bargaining agreement. Additionally, should Remington choose to shop and compare after the first year, the AETNA plan (rather than the CIGNA plan) would constitute the status quo, and Remington's offer permitted a change in health benefits only for "sound business reasons." (SER 288.) Consequently, Remington's new proposal to have the AETNA plan (rather than the previously offered CIGNA plan) replace the Union's Taft-Hartley Plan constituted a significant changed circumstance. *See Atrium of Princeton, LLC v. NLRB*, 684 F.3d at 1318; *Comau, Inc.*, 356 NLRB at 83.

Further, there is no merit to Remington's argument that the newly proposed AETNA plan could not help serve to break the preexisting impasse merely because the Union had consistently wanted to remain in the Union's Taft-Hartley plan.

(Remington Br. at 40.) The Union accepted Remington's proposed contribution rate to the pension plan and moved on the issue of room quota, thereby demonstrated a willingness to move on issues. In any event, there is no evidence in the record (or finding by the Board) that the Union was bargaining with a closed mind or would not consider in good faith a proposal for an alternative health plan. As the judge explained, "hard bargaining does not make bad faith bargaining." (ER 30.); *see also Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1227 (9th Cir. 1981). Remington put a substantially different, and in numerous ways more generous, health plan on the table in March 2010. The Union's prior position to remain in the Taft-Hartley plan does not render that development insignificant. Had Remington not declared that the parties remained at impasse and prematurely announced that it would unilaterally implement the AETNA plan mere days after unveiling its new proposal, the Union, bargaining in good faith, might have accepted Remington's proposal or modified its own health-care offer in response. *Cf. Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273-74 (9th Cir. 1988) (holding that, after parties' reached impasse, employer failed to give union adequate notice and opportunity to bargain over a new proposal before unilaterally implementing days after announcing it). In short, the Board reasonably concluded that Remington's proposed AETNA Plan was one of several changed circumstances that created a new possibility of fruitful discussion.

Likewise unavailing is Remington's argument that the Board erred by relying in part on *the Union's* new March 2010 health care proposal to find impasse broken because it allegedly was regressive compared to something discussed in a confidential internal union document. That document had been slipped under the hotel door of a management negotiator during informal discussions in December 2009. (ER 42-43; SER 254.) The document set forth slightly higher employer contribution rates for 2010 and 2011 than did the Union's March 10 proposal. Also, it capped rate increases at the rates set forth in the Union's original April 9, 2009 offer while the Union's March 10 offer did not. (SER 254.) For these reasons, Remington complains that the Union's March 10 health-care proposal was less attractive to Remington than the terms shown in the internal union document.

However, the Board found that the internal union document was not in fact a contract offer by the Union capable of being accepted by Remington, but rather "an informal trial balloon." (ER 43; ER 61.) In contrast, on March 10, 2010, the Union made *an actual offer*, capable of being accepted, that contained contribution rates significantly lower than the Union's offer pending at impasse. In short, the Board reasonably found that the terms set forth in the internal union document did not render insignificant the Union's movement on health benefits in March 2010. *See NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 315 (4th Cir. 1966) (holding

that union's post-impasse concession on subject of holidays supported the Board's finding that impasse was broken "[w]hether or not" the union's concession "had been wholly or partially foreshadowed by statements made in a [previous] bargaining session"). It was not unreasonable for the Board to conclude that the Union's actual offer, which moved from its position at impasse toward Remington's position, was a significant development tending to create the possibility of further fruitful discussions.

Regarding the Union's March proposal on room quota, Remington concedes that it constituted "an actual move" (Br. at 38), but attempts to diminish its significance by noting that the Union's offer, by its terms, provided that "[s]hould any part of the sum be rejected, the proposal and all of its parts are to be considered withdrawn and the Union's prior position prevails." (SER 230.) According to Remington, this "effectively guaranteed that the Hotel would not accept any part of its March proposal" because Remington was committed to adopting a new health plan, whereas the Union's March 10 offer retained the Taft-Hartley Plan. (Br. at 38.) However, as explained above, the Board will find that a new bargaining proposal breaks an impasse where it creates "a new possibility of fruitful discussion (even if it does not create a likelihood of agreement)." *Airflow Research & Mfg.*, 320 NLRB at 862 (quoting *Gulf States Mfg.*, 704 F.2d at 1399). Granting that Remington might not have accepted the Union's March offer

outright, the Board, exercising its expertise, reasonably concluded that the Union's new offer reflected real movement and that it created a new possibility of fruitful discussion and warranted further good-faith negotiations.

There is no merit to Remington's argument (Br. 35-36) that *Civic Motor Inns*, 300 NLRB 773 (1990), and *Strange & Lindsey Beverage/Pepsi Cola*, 219 NLRB 1200 (1975), support a finding that the parties' new proposals in March 2010 were insubstantial and that the Board was compelled to conclude that the impasse was not broken. In *Civic Motor Inns*, the Board held that impasse was not broken by the union's "bare assertions of 'flexibility' on open issues and its generalized promises of 'new' proposals" where the union failed to actually make a new offer. 300 NLRB at 775. Similarly, in *Strange & Lindsey Beverage/Pepsi Cola*, the Board found that impasse was not broken where the union merely offered to "adjust the language" of its proposal without actually making a new offer. 219 NLRB at 1200. The union in that case had simultaneously made reference to another agreement that it had recently negotiated with a different employer. However, because that agreement was not in the record, the Board found that "it [wa]s impossible to determine whether [the union's] reference to the terms of that contract constituted any change, much less a substantial change, from the [u]nion's prior position in negotiations." *Id.* Here, unlike in *Civic Motor Inns* and *Strange & Lindsey Beverage/Pepsi Cola*, both parties' conduct involved far more than

post-impasse statements that they were flexible or willing to adjust their offers. Here, the parties gave detailed new offers with significant movement on two key issues (health benefits and room quota), significant movement on less hotly contested issues (wages), and agreement by the parties on another material issue (pension contribution rate).

There is no merit to Remington's argument that it was privileged to implement the AETNA plan "even without bargaining to impasse" because the Union allegedly avoided bargaining with Remington. (Br. 42-43 (citing *Auto Fast Freight v. NLRB*, 793 F.2d 1126, 1129 (9th Cir. 1986).) Remington relies on the fact that union negotiator Sawyer walked out of the March 11, 2010 bargaining session and never thereafter made any counteroffers or contacted Remington's health insurance broker to request additional information about the AETNA plan. (*Id.*) However, the Board found that "it is clear that the Union's premature departure from the bargaining table on March 11 was not intended to serve as an end to negotiations," but was instead "an obvious response to Stokes' statement that the parties were at impasse, which statement seemed to be out of context, and was certainly unrelated to the significant proposals that each side had brought to the bargaining table." (ER 63; SSER 112.) The Union did not avoid bargaining, but rather expressed to Remington, in a letter dated April 1, 2010, its willingness to

"continue meaningful discussions and offer proposals in an attempt to reach agreement." (ER 63; SER 346.)

Additionally, the Union's failure to thereafter contact Remington's insurance broker is understandable and did not signal avoidance of the Union's bargaining obligation, as Remington had already informed the Union on March 19, 2010, that it would unilaterally implement the AETNA Plan on May 1, 2010. Thus, in the face of this presented *fait accompli*, the Union's failure to further investigate the features of the AETNA plan did not excuse Remington's unilateral actions. *See Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d at 274 (holding that union's failure to respond to employer's new proposals during impasse did not constitute waiver where employer failed to give union adequate notice and opportunity to bargain about those proposed changes).

In sum, substantial evidence supports the Board's factual findings, and the Board reasonably concluded that the parties' negotiations in March 2010--including Remington's proposal for a completely new health plan, the Union's concessionary proposals on health-fund contributions, room quota, and wages, and the parties' agreement on contribution rate to the pension fund – created "a new possibility of fruitful discussion" and broke the preexisting impasse. *Airflow Research & Mfg.*, 320 NLRB at 862. Accordingly, the Board reasonably concluded that Remington violated Section 8(a)(5) and (1) of the Act on May 1,

2010, by unilaterally implementing the AETNA health plan and by unilaterally withdrawing from the Union's Taft-Hartley health plan.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT REMINGTON UNLAWFULLY DISCHARGED FOUR OFF-DUTY EMPLOYEES FOR DISTRIBUTING BOYCOTT FLYERS IN NON-WORK AREAS

It is well settled that an employer may not prohibit employees from distributing union literature in non-work areas during their non-work time without a showing that a ban is necessary to maintain plant discipline or production. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621-22 (1962); *see also Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Before this Court, Remington does not contest the Board's finding that the four employees were engaged in lawful union activity when they distributed flyers urging the public not to patronize the Hotel. (ER 66-67.) Moreover, there is no contention, much less any evidence, that the four handbillers actually interfered with the work of any Hotel employee as they distributed the flyers. Remington challenges only the Board's finding that the locations where the flyers were distributed were *non-work areas*. (Br. at 43-46.) Remington asserts that those areas, outside the Hotel's front and rear entrances, under porte cocheres, are work areas because, as is common in the hotel industry, bellmen and doormen sometimes "facilitate guest loading and unloading" there. (Br. 43, 45.) Specifically, upon guests' arrival or departure, a Hotel employee will

assist the guests by transporting their luggage between their vehicle and the Hotel. (SSER 66-67, SER 156-158.)

The Board's conclusion that the areas outside the Hotel's front and rear entrances, each under a porte cochere, are non-work areas is consistent with well-settled law. The Board has long recognized that, even though at least some work tasks are performed in all, or virtually all, areas of every employer's property, an employer's entire property may not be deemed a "work area" for purposes of determining the legality of rules prohibiting distribution. *See United States Steel Corp.*, 223 NLRB 1246, 1248 (1976); *see also DHL Express, Inc. v. NLRB*, 813 F.3d 365 (D.C. Cir. 2006) ("The Board has 'long held that merely because a work function or functions occur in a given space does not render that space a 'work area' within the meaning of the Board's rules regarding distribution.'") (quoting *Brockton Hosp.*, 333 NLRB 1367, 1375 (2001) (vestibule at front entrance of hospital held "non-work area" even though employees assisted patients through it, janitors cleaned it, and a security guard was sometimes stationed there), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002).

In determining whether a particular area of an employer's property constitutes a "work area," the Board considers not just whether any work at all is performed there, but also the relationship between any such work and the employer's primary business purpose as well as whether the area in question is

open to individuals who are not performing actual work tasks. *See Beth Israel Hospital v. NLRB*, 437 U.S. 483, 490, 502, 505-06 (1978); *United States Steel Corp.*, 223 NLRB at 1247-48.

Specifically, with regard to the porte cochere area of a hotel-casino, the Board has held, with court approval, that it is a non-work area despite tasks performed there by doormen, bellmen, and valets. *See New-York, New-York, LLC v. NLRB*, 676 F.3d 193, 197 (D.C. Cir. 2012); *Santa Fe Hotel & Casino*, 331 NLRB 723, 723 (2000). In *Santa Fe Hotel & Casino*, the Board explained that the main function of a hotel-casino "is to lodge people and permit them to gamble." 331 NLRB at 723. The Board found that the work performed under the porte cochere, including tasks performed by doormen, valet, security, and maintenance personnel, was incidental to lodging the hotel-casino's guests and permitting them to gamble. *Id.* at 723, 727; *see also New-York, New York, LLC*, 676 F.3d at 193. The Board further explained that, to hold that a porte cochere is a work area (where handbilling cannot occur) would "effectively destroy the right of employees to distribute literature" to the hotel-casino's guests. *Id.* at 723.

Here, the Board reasonably applied its precedent when it concluded that the porte cochere areas are "non-work areas" despite the occasional work performed there by the Hotel's bellmen, doorman, valets and security personnel. Under *Santa Fe Hotel & Casino* and *New-York, New-York, LLC*, that occasional work –

performed in an outdoor area that is open to non-working individuals–was "incidental" to the Hotel's primary function of lodging guests and did not render the porte cocheres "work areas" where distribution may be prohibited. (ER 67 (citing *Santa Fe Hotel & Casino*, 331 NLRB 723.)[5] Consequently, this Court should defer to the Board's finding that the porte cochere was a non-work area and thereby affirm the Board's finding that Remington unlawfully discharged the four employees who were lawfully distributing union literature there during their non-work time. *See New-York, New York, LLC*, 676 F.3d at 197.

There is no merit to Remington's argument (Br. at 46) that the Board was required to distinguish *Santa Fe Hotel & Casino* on factual grounds. Remington claims that the off-duty employees here, unlike there, "had the option to communicate with Hotel guests from [a nearby] public sidewalk." (Br. at 46) The fault with Remington's asserted factual distinction is that it erroneously treats the four off-duty employees, who have a statutory right to distribute union literature in

[5] Contrary to Remington's argument, *Santa Fe Hotel & Casino*'s holding on porte cocheres is not "questionable" in light of *Marshall Field v. NLRB*, 200 F.2d 375 (7th Cir. 1952), which held that the Board had erred in finding that a department store violated the Act by prohibiting solicitation in certain interior non-selling areas open to the public, including a restaurant, a public waiting room, and restrooms. Unlike those areas, the Hotel's porte cocheres are outdoor areas where guests and other non-working individuals pass and where only incidental work is performed.

non-work areas *on the Hotel's premises*, as *non-employees* who lack similar rights. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).[6]

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT REMINGTON UNLAWFULLY WITHDREW RECOGNITION FROM THE UNION

A. If No Contract Is in Effect, an Employer with Clean Hands May Withdraw Recognition from a Union that Has Actually Lost Majority Support

The principles governing an employer's withdrawal of recognition from an incumbent union are well settled. 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. To promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). The presumption of majority status is irrebuttable for up to 3 years during the term of a collective-bargaining agreement; after 3 years or upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Id.* at 785-87; *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1187 (D.C. Cir. 2008).

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[6] Remington does not assert that it rebutted the presumption of invalidity by demonstrating special circumstances rendering a ban on distribution necessary to maintain plant discipline or production.

Once the presumption becomes rebuttable, an employer may lawfully withdraw recognition from a union if it has objective evidence that the union actually lacked majority support at the time recognition was withdrawn. *See, e.g.*, *Frankl v. HTH Corp.*, 693 F.3d 1051, 1060 (9th Cir. 2012) (citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001)). Generally, a petition signed by a majority of employees stating that they no longer wish to be represented by the union meets the employer's burden, absent countervailing evidence. *See Levitz*, 333 NLRB at 725 n.49.

B. An Employer May Not Withdraw Recognition Based On a Decertification Petition That It Unlawfully Assisted, Supported, or Encouraged

The Board has long held that "an employer may not withdraw recognition based on a petition that it unlawfully assisted, supported, or otherwise unlawfully encouraged, even absent specific proof of the misconduct's effect on employee choice." *SFO Good-Nite Inn, LLC*, 357 NLRB 79, 79 (2011), *enforced*, 700 F.3d 1 (D.C. Cir. 2012) (citing *Hearst Corp.*, 281 NLRB 764 (1986), *enforced mem.*, 837 F.3d 1088 (5th Cir. 1988)). This rule is well-settled, and Board decisions applying it have been enforced by this Court and a number of others.[7] As the Seventh

[7] *United Union of Roofers, Waterproofers & Allied Workers Union No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990) (stating it is illegal for an employer to solicit signatures for a petition, and that "[a]n employer's withdrawal of recognition predicated on such a 'tainted' petition will be held unlawful"); *Enterprise Leasing Co. of Florida*, No. 15-1200, 2016 WL 4150930, __ F.3d __ (D.C. Cir. Aug. 5,

Circuit explained, "[t]he Board has long taken the view that an employer-assisted decertification petition ought to be canceled and the party returned to the status quo ante. The petition, tainted by the employer's unfair labor practices, is a nullity." *Ron Tirapelli*, 987 F.2d at 442 (footnote omitted). Accordingly, a withdrawal of recognition based on a tainted decertification petition violates Section 8(a)(5) and (1) of the Act. *Bentonite Performance Minerals*, 355 NLRB 582 (2010), *enforced*, 456 Fed. Appx. 2 (D.C. Cir. 2012); *Texaco*, 722 F.2d at 1235-36.

The Board made clear in *SFO Good-Nite Inn*, with court approval, that its long-held policy is based on a "conclusive presumption" that an employer's unlawful support of a decertification campaign taints a resulting petition, and therefore there is no need for specific proof of the misconduct's effect on employee choice. 357 NLRB at 81. As the Board explained, that policy is reasonably premised on the foreseeable result of such employer misconduct. Moreover, such a clear rule encourages employers to comply with the law by preventing them from

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2016); *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281 (6th Cir. 1999) (stating that, where employer assisted decertification petition, "the petition was tainted and [the employer] therefore cannot in fact rely upon the petition as the basis of Union decertification"); *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993); *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433-34 (8th Cir. 1991) (stating employer's "illegal solicitation of withdrawal cards tainted its withdrawal of recognition"); *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1235 (5th Cir. 1984) (finding withdrawal of recognition illegal where "it was based upon the anti-union petition which had been tainted by the [c]ompany's unlawful encouragement and assistance").

enjoying the fruits of their unfair labor practices. The Board's policy is reasonable, consistent with the Act, and based on decades of experience in this area. It is therefore entitled to deference from this Court. *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012).

There is no merit to Remington's arguments that the longstanding conclusive presumption recognized and reaffirmed by the Board in *SFO Good-Nite Inn* is irrational or contrary to the Act. (Br. at 47-53.) Remington argues that the Board in *SFO Good-Nite Inn* failed to give adequate weight to the Act's policy of promoting free choice. (Br. at 51.) In particular, Remington complains that the record only shows that it coerced three employees into signing the petition and that numerous other employees who signed testified that they were unaware of Remington's coercive actions. (Br. at 47-53.) However, as explained in *SFO Good-Nite*, the Board and the courts have long recognized the "inherent unreliability" of employee testimony, elicited by an employer, regarding their reasons for signing documents supporting or rejecting a union. 357 NLRB at 83. Moreover, the Board explained that, "when an employer unlawfully foists itself into an employee decertification campaign, it 'cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions,' but rather 'must be held responsible for the foreseeable consequence of its conduct.'" *SFO Good-Nite*, 357 NLRB at 81 (quoting *Hearst*, 281 NLRB at 765).

In short, the Board, exercising its expertise, determined that employee free choice is best promoted in this context by conclusively presuming that an unlawfully supported decertification petition does not reflect the uncoerced desires of a majority of unit employees.

C. The Board Reasonably Found that Remington Was Prohibited from Withdrawing Recognition Based On the Decertification Petition Because It Provided Unlawful Assistance to the Decertification Effort

As shown above, Remington committed unfair labor practices that were "directly related to furthering" a decertification effort. (ER 48-50, 77.) As explained above (p. 25), Remington does not challenge the Board's findings that it violated Section 8(a)(1) of the Act by soliciting and instructing employees to sign the decertification petition and by threatening to discharge an employee if he did not sign it. Specifically, supervisor Emmsley unlawfully assisted the decertification effort by repeatedly soliciting employee Wray to sign the petition, eventually instructing him to sign while texting, "you know I'll always cover your black ass." (ER 49, 77.) Ultimately, Emmsley threatened Wray that he would "be one of the first ones let loose" (*i.e.*, discharged) if he refused to sign. (ER 49, 77) Similarly, supervisor Rydin unlawfully assisted the decertification campaign by preying upon two employees. Rydin directed Lantigua, a new employee, to sign the petition and solicited the signature of Bristol, whose primary language is

Tagalog and who credibly testified that he did not understand the effect of signing. All three employees capitulated and signed. (ER 50).

Remington's unlawful assistance to the decertification campaign gives rise to a "conclusive presumption" that the petition is tainted and that it does not reflect the uncoerced representational desires of the unit employees. *SFO Good-Nite Inn*, 357 NLRB at 81. Accordingly, the Board reasonably found that Remington violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union based on the tainted decertification petition.[8]

VI. THE COURT LACKS JURISDICTION UNDER SECTION 10(e) OF THE ACT TO CONSIDER THE UNION'S ARGUMENT THAT THE BOARD ERRED IN MODIFYING THE JUDGE'S RECOMMENDED REMEDY

In this proceeding, the Union argues for the first time that the Board should not have modified the judge's recommended remedy for Remington's unlawful

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[8] Because the Board found that Remington's withdrawal of recognition was unlawful under *SFO Good-Nite Inn*, it did not reach whether Remington's numerous other serious unfair labor practices tainted the decertification petition under the separate doctrine of *Master Slack Corp.*, 271 NLRB 78, 78 n.1 (1984), which applies where an employer commits unfair labor practices unrelated to a decertification petition. (ER 6 n.2.) Remington's other unfair labor practices include the unlawful unilateral changes in terms and conditions of employment in October 2009 and May 2010, the discipline of nine employees and discharge of four employees for engaging in union activities, and the maintenance and enforcement of a host of invalid handbook rules. If this Court were to grant Remington's petition for review regarding the application of *SFO Good-Nite Inn*, the Court should remand this case for the Board to undertake a *Master Slack* analysis. (Remington Br. at 52.)

unilateral changes committed in October 2009. Specifically, despite not having first raised any such argument to the Board, the Union urges this Court to find that the Board should not have modified the recommended Order by: (1) limiting the make whole relief for the October 2009 unlawful unilateral changes to 30 days after Remington belatedly notified the FMCS of the parties' labor dispute on February 3, 2010; and (2) deleting a provision in the judge's recommended Order requiring Remington to rescind those changes and to restore the status quo ante.

Under Section 10(e) of the Act, as shown at p. 24, this Court is without jurisdiction to consider those challenges. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, . . . [absent] extraordinary circumstances."); *see also Woelke & Romero Framing, Inc., v. NLRB*, 456 U.S. 645, 665 (1982) ("[t]he § 10(e) bar applies even though the Board [dismissed the complaint because the petitioner] could have objected to the Board's decision in a petition for reconsideration or rehearing"). More specifically, this Court also has previously held that Section 10(e) "bars judicial review of a newly minted objection to a remedial order when a party fails to move for reconsideration of the Board's *sua*

sponte modification." *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1127 (9th Cir. 2011) (citing *NLRB v. Sambo's Rest., Inc.*, 641 F.2d 794 (9th Cir. 1981)). [9]

The Union never argued to the Board that the Board's modifications to the judge's recommended remedy were inconsistent with any Board precedent or any provision of the Act. The Union failed to file a motion for reconsideration with the Board—either after the Board's invalid April 24, 2013 Decision and Order or after the Board's June 18, 2015 Decision and Order now under review—and failed to present to the Board the arguments regarding the remedy that it now presents to this Court. Accordingly, Section 10(e) of the Act bars judicial review of the Union's remedial challenges. [10]

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[9] *See also Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. J&R Flooring, Inc.*, 656 F.3d 860, 867 (9th Cir. 2011); *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054, 1064 (3d Cir. 1980); *NLRB v. Allied Prods. Corp.*, 548 F.3d 644, 653 (6th Cir. 1977).

[10] Although Section 10(e) precludes review, we note that the Board precedents cited by the Union involve employers who not only failed to give 30 days' notice to the FMCS before implementing unilateral changes, as required by Section 8(d) of the Act, but who also either failed to bargain to impasse before implementing their changes or implemented changes that were not reasonably encompassed by their final offer. *See Whitesell Corp.*, 352 NLRB 1196, 1197 (2008) (holding that parties were not at valid impasse when employer implemented unilateral changes), incorporated by reference in 355 NLRB 635 (2010), *enforced*, 638 F.3d 883 (8th Cir. 2011); *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 144 (2007) (same), *enforced*, 550 F.3d 1183 (D.C. Cir. 2008); *Days Hotel of Southfield*, 306 NLRB 949, 955 (1992) (same); *Petroleum Maintenance Co.*, 290 NLRB 462, 469 (1988) ("the changes in wage rates were not reasonably comprehended within the proposals [r]espondent had offered to the [u]nion during the bargaining"). The Board's standard remedy in such cases is an order requiring the employer to restore the status quo ante and to make employees whole for the

In reply, the Union might argue that it should be recognized for having raised these remedial issues to the Board in February 2015. Any such argument would be without merit. Long after the briefing period had closed, on February 13, 2015, the Union filed with the Board a motion for leave to file a supplemental brief. (SSER 114).[11] By letter dated February 20, 2015, the Board's Associate Executive Secretary properly denied the Union's motion for leave to file a supplemental brief, and the Union's supplemental brief was not accepted. (SSER 136.) The Associate Executive Secretary's letter informed the Union that "the briefing period for this case has ended" and that "[t]he Board is not permitting any additional briefing at this time." (SSER 136.) The Union does not challenge that ruling here.

In any event, thereafter, on June 18, 2015, the Board issued the decision under review, which modified the remedy in the two respects now challenged by the Union in this Court. After the Board issued its decision, the Union had an opportunity to file a motion for reconsideration to raise any challenges to the Board's modifications to the judge's recommended remedy. *See* Section 102.48(d)

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losses they suffered until such time as the status quo ante is restored. *See, e.g.*, *North Star Steel Co.*, 305 NLRB 45, 46 (1991), *enforced*, 974 F.2d 68 (8th Cir. 1992). Here, unlike in the cases relied on by the Union, the parties were at impasse in October 2009, and the changes implemented were contained in Remington's last best offer pending at that time.

[11] The period for filing briefs with the Board in this case closed back in late 2011. See Section 102.46 of the Board's Rules & Regulations (29 C.F.R. § 102.46).

of the Board's Rules & Regulations (29 C.F.R. § 102.48(d)). The Union chose not to avail itself of that opportunity, and Section 10(e) bars the Court from considering those arguments here. *Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. J&R Flooring, Inc.*, 656 F.3d at 867.

CONCLUSION

The Board respectfully request that the Court enter a judgment denying Remington's and the Union's petitions for review and enforcing the Board's Order against Remington in full.

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National Labor Relations Board

August 2016

STATEMENT OF RELATED CASES

Board counsel are not aware of any related cases pending in this Circuit other than the case identified by Remington in its Statement of Related Cases, *National Labor Relations Board v. Remington Lodging & Hospitality, LLC d/b/a the Sheraton Anchorage*; Case No. 16-71194.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 878, AFL-CIO Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	)	No. 15-71924 Board Case No. 19-CA-032148
REMINGTON LODGING & HOSPITALITY, LLC, d/b/a SHERATON ANCHORAGE Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	Nos. 15-72563, 15-73259 Board Case No. 19-CA-032148

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,881 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 18th day of August, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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