

Nos. 15-1318, 15-1384

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

**WILKES-BARRE HOSPITAL COMPANY, LLC
D/B/A WILKES-BARRE GENERAL HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND
ALLIED PROFESSIONALS**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH HEANEY
Supervisory Attorney

MICHAEL R. HICKSON
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1743
(202) 273-2985

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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* Nos. 15-1318
* 15-1384
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* Board Case No.
* 04-CA-123748
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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, Intervenors, Amici

Wilkes-Barre Hospital Company, LLC doing business as Wilkes-Barre General Hospital (“the Hospital”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Pennsylvania Association of Staff Nurses and Allied Professionals (“the Union”) was the charging party before the Board and is the

intervenor before the Court. The Hospital, the Board's General Counsel, and the Union appeared before the Board in Case 04-CA-123748. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Hospital's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on July 14, 2015, reported at 362 NLRB No. 148.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. However, the parties addressed a similar issue regarding Regional Director Walsh's appointment in *ManorCare of Kingston Pa, LLC v. NLRB*, D.C. Cir. Nos. 14-1166 & 14-1200 (decided May 20, 2016).

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

Dated at Washington, DC
this 8th day of September, 2016

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Wilkes-Barre Hospital Company, LLC doing business as Wilkes-Barre General Hospital (“the Hospital”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order (362 NLRB No. 148) issued against the Hospital on July 14, 2015. (A. 573-82.)¹ Pennsylvania Association of Staff Nurses and Allied Professionals (“the Union”) has intervened on the Board’s side.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. The Hospital’s petition for review and the Board’s cross-application for enforcement were timely; the Act imposes no limit on the time for filing actions to review or enforce Board orders. The Board’s Order is final, and the Court has jurisdiction over this case pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

¹ “A.” references are to the deferred appendix. “Br.” references are to the Hospital’s opening proof brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to pay longevity-based wage increases after the collective-bargaining agreement expired.

2. Whether, after the Board ratified the Regional Director's appointment, and the Regional Director ratified his own prior actions, the Board properly rejected the Hospital's challenge to the Regional Director's authority.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Hospital and the Union were parties to a collective-bargaining agreement that provided bargaining unit employees with longevity-based wage increases as each employee advanced to a higher experience level. After the parties' agreement expired, the Hospital unilaterally, and without notice to the Union, ceased paying the employees those increases. The Union filed an unfair-labor-practice charge, and the General Counsel, after an investigation, issued a complaint alleging that the Hospital's unilateral cessation of the longevity increases unlawfully changed the employees' terms and conditions of employment

and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

Following a hearing, an administrative law judge found that the parties' contract had established the longevity-based wage increases as a term and condition of employment, and that the Hospital's failure to pay those increases post-contract expiration was an unlawful change to the status quo.² (A. 574-82.) On review, the Board found no merit to the Hospital's exceptions and adopted the judge's findings and recommended order, with minor modifications. (A. 573-74.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: Regional Director Walsh's Appointment

Dennis P. Walsh, the Regional Director for Region 4, where this case originated, was appointed in 2013 by a panel of the Board that included Members Richard Griffin and Sharon Block. *ManorCare of Kingston Pa, LLC*, 361 NLRB No. 17, 2014 WL 3919913 at *1 n.1 (Aug. 11, 2014), *enforcement denied on other grounds*, 823 F.3d 81 (D.C. Cir. 2016). Both Member Griffin and Member Block were recess appointees whose appointments the Supreme Court later invalidated. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (June 26, 2014). On July 30, 2013, the Senate confirmed four new Board members: Harry Johnson III, Philip Miscimarra, Nancy Schiffer, and Kent Hirozawa, who joined Chairman Pearce on

² The judge did not rule on several additional unfair-labor-practice allegations that had been included in the complaint and litigated at the hearing, but then severed and withdrawn at the Union's request. (A. 574-75.)

the Board. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). The new Board members were sworn in as of August 12, 2013. *See* Attachment 1, also available at: <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members> (last visited March 31, 2016). On July 18, 2014, the full five-member Board ratified nunc pro tunc and expressly authorized the selection of Regional Director Walsh. (A. 573 n.1, 577.) *See also ManorCare*, 2014 WL 3919913 at *1 n.1. On July 30, 2014, Regional Director Walsh affirmed and ratified any and all actions taken by him and on his behalf from his appointment until July 18, 2014. (A. 573 n.1.) *ManorCare*, 2014 WL 3919913 at *1 n.1.

B. The Parties; the Union Files a Charge Over the Hospital's Failure To Pay Longevity Wage Increases in 2010

The Hospital operates an acute-care medical facility in Wilkes-Barre, Pennsylvania. (A. 575; A. 142-43, 154-55.) The Union is the exclusive collective-bargaining representative of the Hospital's full-time and regular part-time graduate and registered nurses. (A.575; A. 144, 155-56, 223, 227-29.) There are approximately 450 nurses in the bargaining unit. (A. 95, 107.)

The Hospital's previous owner, Wyoming Valley Health Care System, and the Union had a collective-bargaining agreement scheduled to be in effect from October 2005 to January 2011 that provided for longevity-based raises. (A. 575, 576 n.2, 579; A. 97-99, 114, 125, 387-93.) In May 2009, Community Health

Systems (“CHS”) bought the Hospital and recognized the Union as the nurses’ representative. (A. 575; A. 98, 114, 126, 394-403.) CHS did not assume the contract in its entirety; instead, the parties entered into a memorandum of agreement that expired later that year. (A. 575, 579; A. 98, 126-27, 394-403.)

In January 2010, the Hospital failed to pay longevity-based raises, and the Union filed an unfair-labor-practice charge with the Board’s Regional Office. (A. 579; A. 127-28, 563-64.) The Regional Director dismissed the charge, and the Union appealed that decision. That appeal was still pending in January 2011, when the next longevity increases were due; the appeal was denied in mid-March 2011, while the parties were negotiating for a new contract. (A. 563-64.)

C. The Parties’ Collective-Bargaining Agreement Provides for Two Types of Wage Increases: Across-the-Board and Longevity-Based Raises

In April 2011, the parties concluded negotiations for a collective-bargaining agreement (“the Agreement”) effective April 30, 2011 until April 30, 2013. (A. 575; A. 94, 97, 115, 223-313.) The Agreement, in Article 25, entitled “Wage Minimums and Increases,” and Appendix A, entitled “Wages (Article 25),” provided for two types of wage increases: across-the-board raises and longevity-based increases. (A.575, 578-79; A. 101, 120, 269-74, 296.)

Appendix A set forth the wage scale in a chart showing minimum hourly wage rates for the acute care and health services nurses, for seven distinct

longevity levels: 0-2 years, 3-4 years, 5-9 years, 10-14 years, 15-19 years, 20-24 years, and 25 or more years. (A. 575-77; A. 94-95, 101, 130-31, 132-33, 138-39, 296.) Reading across the scale shows the across-the-board increases to the minimum rates, reading down the scale shows the longevity-based increases. (A. 576-77; A. 296.) Appendix A provided:

During the term of this Agreement, the initial wage scale and subsequent applicable increases to same for bargaining unit RN's shall be in accordance with the following:

	Acute Care			Health Services		
	May, 2011	January 2012	January 2013	May, 2011	January 2012	January 2013
0-2	\$24.90	\$25.58	\$26.10	\$19.54	\$20.08	\$20.48
3-4	\$25.76	\$26.47	\$27.00	\$20.10	\$20.65	\$21.07
5-9	\$26.55	\$27.28	\$27.83	\$21.04	\$21.62	\$22.05
10-14	\$27.87	\$28.64	\$29.21	\$22.14	\$22.75	\$23.20
15-19	\$28.74	\$29.53	\$30.12	\$22.68	\$23.30	\$23.77
20-24	\$29.17	\$29.97	\$30.57	\$23.20	\$23.84	\$24.31
25+	\$30.11	\$30.94	\$31.56	\$23.84	\$24.50	\$24.99

(A. 296.)

Sections 1, 2, and 3 of Article 25 set forth the across-the-board raises,

stating:

Section 1 — Effective upon the first full payroll period following the date of ratification, regular full-time and regular part-time registered nurses who have completed their probationary period shall be paid no less than the minimum base hourly rates set forth on Appendix A, specifically May 2011. Consequently, those who are paid less than the minimum base hourly rates set forth in Appendix A, specifically May 2011 shall be raised to those rates. Those who are already receiving higher base hourly rates than those specified in Appendix A shall retain those higher rates, but shall receive an increase only in accordance with Section 2 below.

Section 2 — Effective the first full pay period after January 27, 2012, minimum base hourly rates shall be paid as set forth in Appendix A, specifically January 2012. Those who are paid less than the minimum for their service level shall be raised to the new minimum base hourly rate. Those whose base hourly rates already equal or exceed the new minimum rates in Appendix A; specifically January 2012 shall receive a 2.75% increase in their then-existing base hourly rate if the most recent annual performance evaluation indicates the individual meets standards. Where an employee's increase to the wage scale is less than the percentage increase of his/her then-existing base hourly rate specified above, he/she shall be entitled to the percentage increase specified above if the most recent annual performance evaluation indicates the individual meets standards.

Section 3 — Effective the first full pay period after January 27, 2013, minimum base hourly rates shall be paid as set forth in Appendix A, specifically January 2013. Those who are paid less than the minimum for their service level shall be raised to the new minimum base hourly rate. Those whose base hourly rates already equal or exceed the new minimum rates in Appendix A; specifically January 2013 shall receive a 2.00% increase in their then-existing base hourly rate if the most recent annual performance evaluation indicates the individual meets standards. Where an employee's increase to the wage scale is less than the percentage increase of his/her then-existing base hourly rate specified above, he/she shall be entitled to the percentage increase specified above if the most recent annual performance evaluation indicates the individual meets standards.

(A. 575; A. 269-70.)

Thus, Sections 1-3 of Article 25 described three general wage increases during the term of the contract. Specifically, effective May 2011, January 27, 2012, and January 27, 2013, the Hospital raised each nurse's pay rate to the minimum set forth in the May 2011, January 2012, and January 2013 column for each nurse's experience group in Appendix A. (A. 575; A. 269-70, 296.)

Sections 4 and 5 of Article 25 addressed the longevity-based raises, providing:

Section 4— Wage minimums shall be based upon the employee's length of continuous service as a registered nurse in any registered nurse position(s) within Wyoming Valley Health Care System or its predecessors. Those who have been granted credit for prior registered nurse experience at other institutions shall retain such length of service credit for wage determination purposes only. New hires may be given credit for prior registered nurse experience.

Section 5— For purposes of computing compensation under this Article, the "base hourly rates" of salaried employees shall be their base bi-weekly salary divided by (80) eighty hours. Unless the effective date of an increase falls on the first day of the payroll period the increase shall actually become payable on the first day of the next payroll period. Scale increases according to longevity shall become due only upon January 27th of the year following the employee's anniversary date.

(A. 575-76; A. 101, 270.) Sections 4 and 5 therefore provided for "[s]cale increases according to longevity," which became due on January 27 of the year following each nurse's milestone work anniversary. Article 25 also separated all

nurse job classifications into two categories, acute care and health services, “[f]or purposes of applying the minimum rates set forth in [the] Appendix.” (A. 271-73.)

D. The Collective-Bargaining Agreement Expires; The Hospital Unilaterally Ceases to Pay Longevity-Based Wage Increases

The parties began negotiations for a successor agreement in February 2013. The Agreement expired on April 30, and bargaining continued without impasse through July 2014, the time of the administrative hearing in this matter. (A. 574-75, 578-79; A. 94, 100, 117, 144, 156, 223, 294, 342.)

Bargaining unit nurses continued to accumulate seniority during 2013 and beyond; some marked milestone anniversaries in 2013—3, 5, 10, 15, 20, or 25 years of service—advancing them to the next longevity level on the existing wage scale. (A. 573, 579-80; A. 96, 105-06, 108-13, 122-24, 134-35, 270, 296, 345-52.) The Hospital did not pay those nurses longevity-based wage increases in or after January 2014. (A. 577; A. 95-96, 105-06, 108-13, 122-24, 129, 138-39, 173, 343, 345-52, 353-58.) In fact, no nurses were paid any wage increase in 2014. (A. 577; A. 129.) As a result of the Hospital’s wage freeze, nurses who marked a milestone anniversary in 2013 continued, beyond January 2014, to be paid less than the minimum rate corresponding to their longevity level on the wage scale. Those nurses also continued to be paid less than their coworkers in the same longevity level, including coworkers who were hired into that level after the Agreement

expired. (A. 573, 575, 579-80; A. 109-13, 122-24, 134-35, 136-37, 270, 296, 349-50, 352, 353-58.)

It is undisputed that the Hospital did not give the Union prior notice of its intention to discontinue longevity-based pay increases in 2014, nor did it afford the Union an opportunity to bargain over that decision. (A. 578-79; A. 103-04, 105, 119, 173, 343.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hirozawa, Johnson, and McFerran), in agreement with the administrative law judge, found that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to pay longevity-based wage increases after the Agreement expired, without providing the Union prior notice and an opportunity to bargain. (A. 573.) To remedy the Hospital's unfair labor practice, the Board's order directs it to cease and desist from engaging in the violation found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (A. 573-74, 580-81.) Affirmatively, the order directs the Hospital to notify and, on request, bargain with the Union before implementing any changes in its employees' terms or conditions of employment; resume paying longevity-based increases to employees' base hourly wage rates as described in Article 25, Sections 4 and 5 and the chart at Appendix A of the expired collective-bargaining

agreement, until reaching either an agreement or a lawful impasse in negotiations with the Union; make employees whole for any losses sustained as a result of the Hospital's unlawful conduct; and post a remedial notice. (A. 573-74, 580-81.)

STANDARD OF REVIEW

The Board is vested with “the primary responsibility of marking out the scope . . . of the statutory duty to bargain,” and “[c]onstruing and applying [that] duty . . . [lies] at the heart of the Board’s function.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). *Accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991). Accordingly, the Board’s construction of Section 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) is “entitled to considerable deference,” and must be upheld as long as it is “reasonably defensible.” *Ford Motor*, 441 U.S. at 495, 497. *Accord Litton Fin. Printing*, 501 U.S. at 200. The Board also is empowered to interpret collective-bargaining agreements in resolving unfair-labor-practice cases, though its contractual interpretations are not entitled to judicial deference. *Litton Fin. Printing*, 501 U.S. at 202-03; *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 132 (D.C. Cir. 2001).

Additionally, the Board’s findings of fact 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, 477-85 (1951). Substantial evidence is “less than a preponderance of the evidence, albeit more than a scintilla.” *Inova*

Health Sys. v. NLRB, 795 F.3d 68, 80 (D.C. Cir. 2015). Such review is “highly deferential.” *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996). Indeed, this Court will reverse the Board for lack of substantial evidence “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Inova Health*, 795 F.3d at 80. *Accord Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004). The Board’s application of the law to the facts is also reviewed under the substantial-evidence standard. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Further, the Court “owe[s] substantial deference to [the Board’s] inferences drawn from the facts.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s finding that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its nurses’ longevity-based wage increases after the parties’ collective-bargaining agreement expired. It is black-letter law that, upon the expiration of a collective-bargaining agreement, an employer has a statutory bargaining obligation to continue as status quo the terms and conditions of employment, and to refrain from making unilateral changes to those terms.

It is undisputed that following the expiration of the parties’ collective-bargaining agreement and while the parties were continuing to bargain for a

successor agreement, the Hospital unilaterally ceased paying longevity-based increases. In finding that this cessation constituted an unlawful unilateral change, the Board properly looked to the substantive terms of the parties' agreement to determine the post-expiration status quo. And it correctly found that those terms—specifically, the wage scale at Appendix A and Sections 4 and 5 of Article 25—established a status quo of longevity-based raises every January for each nurse who had advanced to the next highest experience level on the wage scale during the previous year. Accordingly, the Board reasonably determined that the Hospital unlawfully altered the post-contract expiration status quo by disregarding the established wage scale, freezing employee wages, and refusing to grant longevity increases to eligible employees.

The Board properly rejected the Hospital's arguments that the Agreement's language and the parties' past practice established a status quo that required termination of the longevity increases. First, the Board correctly dismissed the Hospital's improper attempt to conflate Sections 1-3 of Article 25, which addressed the separate matter of three across-the-board raises that were tied to three dates certain, with the nurses' distinct rights to longevity scale increases, which were expressed by the terms of the agreement as perennial entitlements. Next, the Board properly found meritless the Hospital's contention that the Agreement's general durational clause—“[d]uring the term of this Agreement”—

meant that the nurses' right to longevity increases expired with the contract. It is well-established that an expired contract's substantive terms define the statutory status quo, and thus continue in effect beyond the contract's life as a matter of law, notwithstanding such general durational language. Moreover, the Hospital failed to show any past practice of Union acquiescence to the Hospital's prior failures to pay longevity raises.

Further, the Board correctly found that the Hospital's proffered waiver defense did not excuse its unilateral conduct. The Hospital failed to meet its burden of proving that the Union clearly and unmistakably waived its statutory right to the post-expiration continuation of the status quo. Settled precedent establishes that, owing to the fundamental difference between contractual and statutory rights, this right is not waived by contractual language merely stating that benefits will be provided during the term of the agreement. Thus, the Board properly found that the durational language of Appendix A, which does exactly that and no more, did not demonstrate a clear and unmistakable waiver. Moreover, the Hospital's reliance on purported bargaining history and past practice lacks record support and fails to advance its waiver claim.

The Hospital gains no ground with its additional argument that Regional Director Dennis Walsh, appointed by an invalid Board, lacked authority to issue the complaint. The Board's ratification and express authorization of Walsh's

appointment, and Walsh's subsequent affirmation and ratification of all actions he took between his initial appointment and the Board's ratification of that appointment, cured any defect. These curative actions were consistent with this Court's precedent approving ratification as a remedy for decisions issued by improperly appointed government officials or bodies.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CEASING TO PAY LONGEVITY-BASED WAGE INCREASES

A. The Hospital Owed a Statutory Duty To Maintain the Status Quo After the Expiration of the Collective-Bargaining Agreement

As set forth in the initial section of the statute, one of the primary purposes of the Act is to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. *See generally Ford Motor Co. v. NLRB*, 441 U.S. 488, 498-99, 502 (1979). Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) implements that purpose by requiring an employer to bargain with its employees' chosen representative over wages and terms and conditions of their employment, including *inter alia* pay raises. *See* 29 U.S.C. § 158(d); *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410 (D.C. Cir. 1996) (merit-increase program was mandatory bargaining subject because it involved employee wages).

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing unit employees' terms and conditions of employment, without bargaining to impasse or affording the union sufficient notice and an opportunity to bargain.³ *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962); *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 127 (D.C. Cir. 2001); *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). An employer's "unilateral change of an existing term or condition of employment" unlawfully alters the status quo. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Such unilateral action "is a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743.

The Act's proscription against unilateral changes applies with equal force after the expiration of a collective-bargaining agreement. *Litton Fin. Printing*, 501 U.S. at 198; *Laborers Health & Welfare Trust Fund For N. California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 553 (1988); *Honeywell*, 253 F.3d at 127-28, 131; *Sw. Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113-14 (D.C. Cir. 1986). Accordingly, "it is clear that an expired collective bargaining agreement continues to define the status quo as to wages and working conditions, and that

³ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

[the] employer is required to maintain that status quo . . . until the parties negotiate to a new agreement or bargain in good faith to impasse.” *Cauthorne*, 691 F.2d at 1025 (internal quotation marks omitted). *Accord Litton Fin. Printing*, 501 U.S. at 206 (expired agreement “continue[s] in effect by operation of the [Act],” as concerns mandatory bargaining subjects). Thus, an employer that “fail[s] to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement” breaches its bargaining obligation under the Act. *Laborers Health & Welfare Trust Fund for N. California v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985), *aff’d*, 484 U.S. 539 (1988). *Accord Litton Fin. Printing*, 501 U.S. at 198, 206-07.

Importantly, however, the continuing duty to maintain the status quo after the contract’s expiration derives from the Act, not the contract. *Litton Fin. Printing*, 501 U.S. at 198, 206-07; *Advanced Lightweight*, 484 U.S. at 553; *Honeywell*, 253 F.3d at 128, 131. The Supreme Court has described this distinction between contractual and statutory rights as “elemental”—elaborating that the terms and conditions of an expired agreement: “continue in effect by operation of the [Act]. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.” *Litton Fin. Printing*, 501 U.S. at 206. *Accord Honeywell*, 253 F.3d at 128 (“the *Katz* rule often presupposes the end of a collective bargaining agreement and

guarantees the continuation of existing benefits *as a matter of law*”) (emphasis in original).

The post-expiration duty to preserve the status quo is essential to the Act’s policy of encouraging collective bargaining. It “fosters the bargaining process by protecting the union’s position as the representative of the employees on subjects of mandatory bargaining, and by maintaining a stable environment for negotiations.” *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1053 n.7 (D.C. Cir. 1995), *aff’d*, 518 U.S. 231 (1996). *Accord Litton Fin. Printing*, 501 U.S. at 198, 206 (post-expiration duty “protect[s] the statutory right to bargain” because “it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations”); *Advanced Lightweight*, 484 U.S. at 553 (post-expiration duty “protect[s] the collective-bargaining process”).

B. The Board Reasonably Determined that the Hospital Violated Its Statutory Obligation To Maintain the Status Quo when It Unilaterally Ceased Paying Its Employees Longevity-Based Wage Increases

Substantial evidence supports the Board’s finding that the Hospital violated the Act when, after the contract expired, it unilaterally, and without giving the Union notice or an opportunity to bargain, ceased providing longevity wage increases. The Hospital does not dispute its unilateral action, and it recognizes that it has a duty to maintain the status quo post-contract expiration. It argues,

however, that the longevity-based wage increases terminated with the contract, and that maintenance of the status quo required cessation of those increases. Thus, as the Board explained (A. 578-79), the dispute in this case “revolves around what status quo means in this particular situation.” In answering that question, the Board properly determined that in order to meet its statutory duty of maintaining the status quo, the Hospital had to continue providing longevity raises after the contract expired.

1. The substantive terms of the Agreement established a post-expiration status quo of longevity-based wage increases each January 27 for employees who marked a milestone anniversary the previous year

As this Court instructed in *Cauthorne*, the substantive terms of the collective-bargaining agreement define the post-expiration status quo. 691 F.2d at 1025. In accordance with that principle, the Board properly found that the parties’ Agreement “established a practice that nurses would receive hourly wage rate increases the year after they reached one of the milestone work anniversaries,” thereby creating “an expectation of receiving a raise when they advanced in experience level.” (A. 579.) The Board based this determination on the terms of the expired Agreement, specifically Appendix A and Sections 4 and 5 of Article 25, which it found “set forth the nurses’ rights as to longevity-based wage rate increases.” (A. 579.) Thus, the Hospital was statutorily bound “to continue to apply” those contractual provisions after the Agreement expired. (A. 580.) *See*

Honeywell, 253 F.3d at 127-28 (agreement’s severance-pay provision determined post-expiration status quo on that subject, since severance pay was thus “an established term of employment under the parties’ [agreement]”); *Sw. Steel*, 806 F.2d at 1113 (“generally, provisions of the expired collective-bargaining agreement that relate to mandatory subjects [of bargaining] are said to survive the agreement’s expiration”); *Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993) (“the [expired] contract language itself . . . defines the status quo”); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (“the status quo is quite obviously defined by reference to the substantive terms of the expired contract”).

The Board correctly determined that the chart in Appendix A and Sections 4 and 5 established the nurses’ rights to longevity-based increases, and together defined a post-expiration status quo that “entail[ed] paying nurses increased hourly wage rates” on January 27 “in the year following a milestone anniversary that moved them into the next higher experience level.” (A. 580.) Appendix A and its chart established the wage scale specifying the minimum pay rate owed to the employees in each longevity level. (A. 296.) As an employee’s length of service increases from one level to the next, the chart shows a corresponding increase in the employee’s wage rate. (A. 296.)

Sections 4 and 5 of Article 25 established the employees' "right to wage rate increases when they advanced to the next experience level," as reflected in the wage scale. (A. 579.) Section 4 instructs: "Wage minimums *shall* be based upon the employee's length of continuous service" (A. 270.) (emphasis added.) Section 5 then further commands that "[s]cale increases according to longevity *shall* become due . . . upon January 27th of the year following the employee's anniversary date." (A. 270.) (emphasis added.) Sections 4 and 5 by their terms require that the specific, longevity-based raises shown at Appendix A must be paid effective January 27 every year to each nurse who marked a milestone anniversary the previous year. Accordingly, the Board properly relied on this language to determine that the Hospital's post-expiration duty to preserve the status quo required that it continue "paying increases to the unit employees' base hourly wage rate based on experience levels . . . until an agreement has been reached with the Union or a lawful impasse in negotiations occurs." (A. 581.)

The Hospital's unilateral decision to forgo longevity wage increases effectively imposed a two-tier pay system. (A. 573 n.2, 579-80.) After January 2014, nurses who reached a milestone anniversary the previous year were paid less than coworkers who shared the same longevity level. For example, rehabilitation department nurse Catherine Kull attained the 5-9 year longevity level in 2013; after January 2014, the Hospital kept her pay at \$27.00 per hour while it paid \$27.83 per

hour to nurses in the same department who had advanced to the same longevity level in 2012 (Amanda Diltz) or who were hired into that level in 2013, after the Agreement expired (Terry Alberico-Rarig). (A. 296, 352.) Similarly, medical-surgical nurses Suzanne Sisk, Marilyn McCormick, and Tori Spencer each advanced to the 3-4 year longevity level in 2013; after January 2014, the Hospital kept their pay at \$26.10 per hour while it paid \$27.00 per hour to medical-surgical nurses who had attained the same longevity level in 2012 (Katherine Belsky) or who were hired into that level in 2014 (Lauren Dessoie). (A. 296, 349-50.) This de facto installation of a second, lower pay tier at every level of the wage scale—separating coworkers who share the same longevity—underscores the change in status quo effectuated by the Hospital's action.

Thus, the Board properly found that by freezing wages for all nurses, the Hospital changed the nurses' wages and terms and conditions of employment. (A. 579.) As noted, the Hospital concedes (Br. 10-11) that it froze nurses' pay at the moment the Agreement expired, and refused to grant longevity-based increases in January 2014. In doing so, it suppressed many nurses' wages below the prescribed minimum rate—denying the pay increase accompanying advancement in longevity level, per Article 25 and Appendix A. In effect, the Hospital discarded the established wage scale and disregarded its duty to annually reconcile employee pay with that scale, thereby changing the status quo in violation of Section 8(a)(5) and

(1) of the Act. *See Honeywell*, 253 F.3d at 127-28, 131-32 (post-expiration failure to pay severance benefits); *Sw. Steel*, 806 F.2d at 1112-15 (post-expiration failure to pay contributions to welfare plan and pension trust); *Intermountain Rural Elec.*, 984 F.2d at 1567 (post-expiration failure to increase health-insurance premium payments); *Finley Hosp.*, 362 NLRB No. 102, 2015 WL 3511793 at *2-*3, *6 (June 3, 2015) (post-expiration failure to increase wages on employee anniversaries), *enforcement denied*, ___ F.3d ___, 2016 WL 3511487 (8th Cir. June 27, 2016).

The Hospital contends (Br. 26-30) that the Board erred in reading the provisions regarding longevity wage increases separate from the provisions regarding across-the-board raises. Specifically, the Hospital argues that “Section 5 [of Article 25] and Sections 1-3 are all referencing the same three . . . wage increases.” (Br. 29.) The Hospital claims, therefore, that the nurses’ rights to longevity scale increases were limited to the “three, specified dates certain” (Br. 27) that appear in Sections 1-3, and it would have been “impossible” (Br. 27, 29) to grant longevity raises in January 2014 without also granting across-the-board raises. The Board, however, properly dismissed this contention as an “attempt[] to subvert the employees’ rights under the contract.” (A. 579.)

The Agreement’s language does not support the Hospital’s argument that across-the-board raises go hand-in-hand with longevity-based wage increases.

In finding that the two wage increases are “distinct rights,” the Board correctly found that Article 25 “provided for two different types of wage increases.” (A. 575.) While Sections 4 and 5 established longevity-based increases, Sections 1-3 “relate[d] to annual across-the-board raises, that are not at issue in this case.” (A. 579.) The Board’s findings follow from Article 25’s straightforward terms. Sections 1-3—in stark contrast to Sections 4 and 5—expressly tied their raises to three unique, specific dates. As the Board noted, Section 5 “does not state that it is limited to 2012 and 2013.” (A. 578.) Rather, unlike Sections 1-3, Sections 4 and 5 are expressed by their terms as perennial directives. (A. 578.) Further, Sections 1-3 plainly were across the board—those raises applied to everyone, irrespective of longevity level or milestone work anniversary.

The Agreement’s language, therefore, supports the Board’s finding (A. 579) that the across-the-board wage increases are “distinct” from the nurses’ rights to longevity-based increases. Indeed, as the Board explained, “[i]t was not impossible, nor even difficult or confusing, to apply the longevity scale increases just because there were no concomitant across-the-board raises.” (A. 579.) And, as the Board further clarified (A. 579), while “the pay rates in the chart remained stagnant, as set forth in [A]ppendix A” and “[t]hose dollar amounts did not increase in January 2014 via an across-the-board raise,” there was “no reason the nurses could not move up the pay scale when they reached the next higher

experience level.” Put simply, the Board’s decision does not require that the Hospital change the pay rates post-expiration; rather, it requires only that the Hospital adhere to the terms that already existed in the contract and grant the hourly wage rate increases as specified in the agreed-upon wage scale.

2. Freezing wages does not maintain the status quo

The Hospital contends that it met its bargaining obligation by freezing wages at the moment of contract expiration. As shown below, the Hospital’s argument lacks merit and demonstrates its fundamental misunderstanding of its statutory obligation, as set forth in *Litton*, to maintain the status quo following the contract’s expiration.

a. The substantive terms of the contract required continuation of the longevity-based wage increases

The Hospital claims (Br. 41-43) that the post-expiration status quo is defined by the facts that happened to characterize each worker’s experience at the moment a contract expired—e.g., a snapshot of the pay rate earned by each employee on the day of expiration. In the same vein, it asserts (Br. 41-43) that wage increases can never be part of the statutory status quo. Both of these claims are incorrect. As explained above (pp. 17-18, 20-21), it is settled that, in the post-expiration context, the substantive terms of the expired contract define the status quo (*see, e.g., Litton Fin. Printing*, 501 U.S. at 206), and therefore can include increases in wages or other benefits. *See Intermountain Rural Elec.*, 984 F.2d at 1567 (contract stated

employer would pay 100 percent of health premiums; post-expiration status quo required employer to increase premium payments to cover 100 percent of increased premium costs); *Finley Hosp.*, 2015 WL 3511793 at *2-*3, *6 (contract provided for annual 3 percent wage increase; post-expiration status quo required employer to continue granting those increases on employee anniversaries).

The Hospital likewise errs in positing (Br. 27-28) that the non-substantive, durational language of Appendix A (“[d]uring the term of this Agreement . . .”) should have factored into the Board’s status-quo determination. Because “the provisions of the expired collective-bargaining agreement *that relate to mandatory subjects* are said to survive the agreement’s expiration,” this durational clause does not affect the employees’ continuing right to longevity pay. *Sw. Steel*, 806 F.2d at 1113 (emphasis added). As this Court explained in *Honeywell*, such general durational language cannot “vitiate” or “supercede[]” the statutory obligation to maintain the status quo post-contract expiration. 253 F.3d at 127-28, 133 (substantive severance-pay provisions defined post-expiration status quo, notwithstanding contract’s durational language). *See also NLRB v. Gen. Tire & Rubber Co.*, 795 F.2d 585, 587-88 (6th Cir. 1986) (substantive benefit provisions defined post-expiration status quo, notwithstanding durational language); *KBMS, Inc.*, 278 NLRB 826, 849-51 (1986) (same).

b. Past practice did not require discontinuation of the longevity increases

The Hospital further claims that past practice required it to freeze wages upon expiration. It first argues that the status-quo determination here could be made only after an initial finding that longevity-based wage increases had “become established past practice . . . paid over a sufficient length of time.” (Br. 31-32.) This argument fails because *Litton*’s controlling precept—that the contract’s substantive terms define the post-expiration status quo—does not hinge on the particular contract’s duration, or the vintage of the provisions involved. *See Honeywell*, 253 F.3d 125 (new severance provisions in less-than-three-year contract defined status quo); *Intermountain Rural Elec.*, 984 F.2d 1562 (health-insurance provisions of one-year contract defined status quo); *Finley Hosp.*, 2015 WL 3511793 (wage provisions of one-year contract defined status quo). The two cases cited by the Hospital (Br. 31-32) are inapposite; neither involved a status-quo finding concerning an employment term that the parties had, as here, codified and memorialized in an expired collective-bargaining agreement. *See Phelps Dodge Min. Co. v. NLRB*, 22 F.3d 1493 (10th Cir. 1994); *NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399 (9th Cir. 1974).

The Hospital next contends that in January 2010 and January 2011, during the contract-hiatus period preceding the Agreement, the Union “acquiesced to” and “accept[ed]” (Br. 31, 33) the Hospital’s non-payment of longevity increases,

purportedly establishing a past practice and a status quo of no post-expiration longevity increases. (Br. 31-35) This contention lacks record support. As the Board found, “there is no longstanding practice of, or any history of, unilateral changes by the [Hospital] going unchallenged by the Union.” (A. 579.) To the contrary, it is undisputed (Br. 7, 33) that in 2010, the Union filed an unfair-labor-practice charge with the Board’s Regional Office challenging the Hospital’s failure to pay longevity increases in January of that year. (A. 579; A. 128.) *See* p. 6.

Moreover, as the Board further found (A. 579)—and the Hospital concedes (Br. 33-34)—the General Counsel’s dismissal of the Union’s 2010 charge was entirely non-precedential and did not establish acquiescence. *See O’Dovero v. NLRB*, 193 F.3d 532, 536 (D.C. Cir. 1999) (“Prosecutorial decisions by the Regional Director and General Counsel are not adjudications and have no preclusive effect on future actions of the Board.”); *Carrier Corp.*, 319 NLRB 184, 195 (1995) (“a General Counsel’s refusal to issue a complaint. . . . is . . . of no precedential value”); *Kelly’s Private Car Serv.*, 289 NLRB 30, 39 (1988) (“It is well settled that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given to these actions”), *enforced, sub. nom. NLRB v. W.A.D. Rentals Ltd.*, 919 F.2d 839 (2d Cir. 1990). And, despite the Hospital’s suggestion (Br. 32-34), there is no evidence that the Union ever

disavowed its position—advocated through that charge—that its members were statutorily entitled to post-expiration longevity scale increases.

Further, the Hospital’s claim that it did not pay longevity raises in January 2011 and that the Union did not file an unfair-labor-practice charge does not advance its position. Initially, the record is unclear as to whether the Hospital paid longevity raises in January 2011, and no finding was made in that regard.⁴

However, even assuming it did not, a failure by the Union to file a second unfair-labor-practice charge would not demonstrate a “past practice,” as the Hospital contends. (Br. 34.) *See Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005) (“two isolated and dated” prior occurrences of union acquiescence to similar unilateral actions were “insufficient to constitute a practice that is incorporated implicitly into the terms and conditions of employment”). Nor would a single instance in which the Union may have failed to contest one unilateral change override the status quo established by the terms of the Agreement, replacing it with a status quo that would permit the Hospital to effect unilateral changes at will. As the Board rightly found, the cases cited by the Hospital—where there was a longstanding history of union acquiescence to

⁴ Although the Hospital’s Chief Human Resources Officer, Lisa Goble, testified that no increases were paid in January 2011 (A. 127-28), Union Staff Representative Teresa Marcavage testified that she believed longevity raises were paid in January 2011, and that not one of the bargaining unit’s 450 nurses had told her otherwise. (A. 116.) There is no other evidence on this point.

repeated unilateral changes—are “not remotely similar” to the situation here, and therefore do not support the Hospital’s claim. (A. 579.) *See E.I. Du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 66-67 (D.C. Cir. 2012) (unchallenged unilateral changes made annually for at least six years at one location, at least eight years at other location); *The Courier-Journal*, 342 NLRB 1148 (2004) (“numerous” unchallenged unilateral changes made during term of contract, and more such changes made in July 2000, July 2001, and January 2002, before union challenged similar change made in January 2003).⁵

In sum, the Board reasonably found (A. 579) that “the Union did not acquiesce” to the Hospital’s past failure to pay the longevity increases. Therefore, the Hospital’s repeatedly invoked mantra—that the parties “shared the understanding” (Br. 32-34) that the post-Agreement status quo would license the Hospital to unilaterally disregard the longevity wage scale—is pure invention.

c. The Board’s status quo determination adheres to well-settled precedent

The Hospital argues (Br. 45) that the Board’s decision is contrary to *H.K. Porter’s* holding that the Board cannot compel a party “to agree to any substantive

⁵ While the Hospital also cites *Mt. Clemens Gen. Hosp.*, 344 NLRB 450 (2005), the judge’s finding in that case is non-precedential, as no exceptions were filed. *See id.* at 450 n.2 (noting absence of exceptions); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (finding of administrative law judge adopted by Board in absence of exceptions has no precedential value). In any event, *Mt. Clemens* involved “a 20 year history of . . . unilateral changes . . . accepted without opposition by the Union.” 344 NLRB at 460.

contractual provision.” *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 102 (1970.) But this contention demonstrates the Hospital’s misunderstanding of the status quo upon contract expiration. By requiring the Hospital to pay longevity wage increases post-expiration, the Board is not, as the Hospital contends (Br. 45), imposing “new terms and conditions of employment” that must be adhered to in a successor agreement. On the contrary, the Board is merely requiring the Hospital to comply with *Litton’s* instruction that the terms and conditions of an expired contract “continue in effect” and define the post-expiration status quo as a means of fostering the bargaining process. 501 U.S. at 206.

Moreover, the Board does not—as the Hospital claims—require it to pay longevity-based increases “*ad infinitum*” or “in perpetuity.” (Br. 29, 45-46.) Since the Hospital’s duty to maintain the status quo derives from its statutory bargaining obligation, the duty only extends “until the parties negotiate to a new agreement or bargain in good faith to impasse.” *Cauthorne*, 691 F.2d at 1025. Indeed, the text of the Board’s Order expressly reflects that limitation.⁶ (A. 581.)

Finally, the Hospital claims (Br. 45-48) that the Board’s purportedly new approach to the post-expiration status quo will undermine the Act’s policy of facilitating the collective-bargaining process. As demonstrated, however, there is

⁶ The Order, at paragraph 2(b), states: “Resume paying increases to the unit employees’ base hourly wage rate based on experience levels as described in . . . [the Agreement] *until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.*” (A. 581.) (emphasis added.)

nothing new about the Board's status quo finding; it is firmly grounded in long-settled principles and consistent with established precedent. Moreover, this Court and the Supreme Court have agreed with the Board's sound judgment that requiring maintenance of the post-contract expiration status quo vitally supports collective bargaining. *Litton Fin. Printing*, 501 U.S. at 198, 206; *Advanced Lightweight*, 484 U.S. at 553; *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1053 n.7 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

C. The Hospital Raises No Meritorious Defense to Its Failure To Maintain the Status Quo

The Hospital claims that its unilateral change to the status quo of longevity-based raises was lawful because the Union waived its right to bargain over such a change, or because the "contract coverage" doctrine excused the unilateral change. As demonstrated below, these claims fail.

1. The Hospital's defense of "clear and unmistakable" waiver must be rejected

The Hospital argues (Br. 37-40) that the Union waived its statutory right to bargain over the post-expiration cessation of longevity-based pay increases, relying on the Agreement's language, as well as purported bargaining history and past practice. The Hospital, however, failed to meet its burden of showing that the Union "consciously yielded" its right to bargain over the cessation of longevity

raises when the contract expired. *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008).

a. Waiver of the statutory right to have the status quo maintained post-expiration must be “clear and unmistakable”

A union may waive its statutory right to bargain, thereby permitting the employer to unilaterally change status-quo terms and conditions of employment. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983); *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007) (“the employer’s authority to act unilaterally is predicated on the union’s *waiver* of its right to insist on bargaining”) (emphasis in original). The waiver inquiry is broad and encompasses “an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.” *Columbus Elec. Co.*, 270 NLRB 686, 686 (1984), *affirmed sub nom. Int’l Bhd. of Elec. Workers Local 1466, AFL-CIO v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986).

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.” *S. Nuclear*, 524 F.3d at 1357 (internal

quotation marks omitted) (emphasis in original). For that reason, this Court requires “clear and unmistakable evidence of waiver” and “construe[s] waivers narrowly.” *Id.* See also *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133-34 (D.C. Cir. 2001) (“the Board correctly concluded that the [u]nion did not clearly and unmistakably waive its protection against post-expiration unilateral termination of severance benefits”). 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.” *S. Nuclear*, 524 F.3d at 1357-58 (internal quotation marks omitted). The party asserting waiver bears the burden of proof. *Resorts Int’l Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993); *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989); *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) (citations omitted), *enforced sub nom. Honeywell*, 253 F.3d 125.

Where, as here, it is claimed that contractual language constitutes a waiver of a union’s statutory right to bargain post-contract-expiration, close attention must be paid to the distinction between the union’s contractual rights and its statutory rights. A provision in a collective-bargaining agreement stipulating that a union’s *contractual* rights extend for a particular period of time does not clearly and unmistakably show that the union’s *statutory* rights are coterminous. To the contrary, the unilateral-change doctrine “often presupposes the end of a collective

bargaining agreement, ensuring the continuation of existing benefits beyond the term of the agreement as a *matter of law*.” *Honeywell*, 253 F.3d at 133 (emphasis in original). Thus, it “would effectively drain the unilateral change doctrine of any coherent meaning were [the Court] to hold that a general contract duration clause . . . vitiates a [u]nion’s *statutory* claim to continued status quo benefits.” *Id.* (emphasis in original).

b. The Union did not clearly and unmistakably waive its right to the continuation of longevity-based wage increases post-contract expiration

As the Board reasonably found (A. 578-80), the Hospital did not prove that the Union clearly and unmistakably waived its right to bargain over the post-contract cessation of longevity scale increases. In arguing waiver, the Hospital points to the Agreement, stating that “the conclusory language of [Article 25] and Appendix A . . . indicate that the wage increases prescribed therein were intended to last only as long as the [Agreement] was effective.” (Br. 39.) Other than this general reference, however, the Hospital fails to cite any specific contract language to support its assertion. As an initial matter, to the extent that the Hospital relies on the three dates specified in Sections 1-3 of Article 25, it again improperly conflates the right to longevity increases with the across-the-board raises, as discussed above, pp. 24-26.

Further, the durational language of Appendix A also does not demonstrate waiver. That language, immediately preceding the wage scale, states: “During the term of this Agreement, the initial wage scale and subsequent applicable increases to same for bargaining unit RN’s shall be in accordance with the following.” (A. 296.) As the Board found, “[t]his addresses what should occur regarding longevity raises during the term of the contract but does not address what should occur upon its expiration.” (A. 578.) Indeed, Article 25 and Appendix A “say[] nothing about nurses receiving longevity-based wage increases after the contract expired.” (A. 578.) As the Board explained, “[a]bsent language specifically limiting the applicability of the provision for wage rate increases based on experience level to the term of the contract, that provision continues in effect.” (*Id.*) Therefore, because the Agreement is “silent” (A. 578) regarding such post-expiration rights and duties, the Board properly found that the Agreement’s language does not evince a clear and unmistakable waiver on that subject. (A. 578-80.)

The Board’s refusal (A. 578-80) to read into this durational language a clear and unmistakable waiver is supported by settled precedent. Indeed, the Board—with court approval—has long held that such language is insufficient to demonstrate a waiver of statutory rights following contract expiration. For example, in *Honeywell*, a collective-bargaining agreement providing laid-off employees with severance benefits contained durational language stating that it

would remain effective “until midnight on June 6, 1997, but not thereafter unless renewed or extended in writing by the parties.” 253 F.3d at 130. On June 7, 1997, the agreement expired without renewal or extension, and Honeywell unilaterally ceased providing severance benefits to any employee who was laid off on June 7 or after. Affirming the Board’s findings, this Court held that Honeywell had thereby violated the Act and rejected the contention that the union, by agreeing to the durational clause, had contractually waived its right to bargain over the post-expiration continuation of severance benefits. As the Court explained, the agreement “makes it clear that the [u]nion’s *contractual* right to severance benefits ended on June 6, 1997; but the provision is silent on the [u]nion’s *statutory* rights In other words, the duration clause in no way evinces a clear and unmistakable waiver by the [u]nion.” *Id.* at 134 (emphasis in original).

In *General Tire & Rubber Company*, the Sixth Circuit similarly found no waiver of the union’s statutory right to bargain over post-expiration changes. In support of its waiver claim, the employer in that case relied on a contractual clause requiring it to provide benefits for exactly 90 days after the contract’s termination: “Notwithstanding the termination of the Agreement . . . the benefits described herein shall be provided for ninety (90) days following termination.” 795 F.2d 585, 587-88 (6th Cir. 1986). Notably, the clause directly addressed the employer’s post-expiration obligations. However, the clause was “silent on the treatment of

benefits after the ninety-day period,” and “no language in the agreement purported to divest the union of its statutorily-protected right to bargain over the issue of benefits.” *Id.* at 588. Thus, the Sixth Circuit concluded that by agreeing to the clause, the union had not clearly and unmistakably waived its right to the continuation of benefits after the 90-day post-expiration period. *Id.*

Consistent with *Honeywell* and *General Tire*, the Board has repeatedly rejected similar language as insufficient to establish a waiver of a union’s statutory right to post-expiration maintenance of the status quo. *See Finley Hosp.*, 362 NLRB No. 102, 2015 WL 3511793 at *2, *4 (June 3, 2015) (no waiver concerning post-expiration annual wage increases, where agreement provided: “[f]or the duration of this Agreement, the [employer] will adjust the pay of [employees] on his/her anniversary date. Such pay increases . . . during the term of this Agreement will be three (3) percent”); *Natico, Inc.*, 302 NLRB 668, 668, 684-85 (1991) (no waiver regarding post-expiration pension contributions, where agreement stated that “the pension program . . . will remain in effect for the term of this agreement”); *KBMS, Inc.*, 278 NLRB 826, 849 (1986) (no waiver concerning post-expiration contributions to benefit funds, where agreement provided that “said contributions shall continue to be paid as long as a[n] [employer] is so obligated pursuant to said collective bargaining agreements”). Given the Agreement’s similar language, the Board properly found no waiver.

The Hospital does not advance its cause by asserting that “[t]he parties’ bargaining history indicates a shared understanding that the status quo was the non-payment of wage increases after contract expiration.” (Br. 39-40.) The Hospital bears the burden of proof regarding waiver, but it cites no record evidence to support this bare assertion. Indeed, there is no evidence of bargaining history. Not one witness testified as to the content of the negotiations that led to the Agreement; not one exhibit addresses that subject. Chief Human Resources Officer Lisa Goble, the only Hospital agent to testify, made clear that she “really was not involved” in that bargaining, and “was not there for any of the negotiations.” (A. 129A.) Thus, there is no evidence that the parties ever discussed (much less agreed upon) the meaning of the durational language in Appendix A or, more generally, what would happen to longevity-based scale increases after the contract expired. Under the clear and unmistakable waiver standard, “the subject in question must have been explored and the waiver expressed in unequivocal terms,” and “[t]he [u]nion ‘cannot be held to have waived the right to bargain over an issue that was never proposed.’” *Vico Products Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003) (quoting *Vincent Indus. Plastics v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000)).

Finally, the Hospital claims (Br. 38-40) that the parties’ supposed “past practice” supports a waiver finding, or shows that they “agreed” there would be no

post-expiration longevity increases. (Br. 39) This contention fails. As explained (pp. 28-31), there was no “past practice” of union acquiescence to non-payment of longevity increases. Moreover, the Hospital’s argument “is contrary to the well-established principle that a union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.” *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005) (internal quotation marks omitted). *Accord S. Nuclear*, 524 F.3d at 1358. Accordingly, the Hospital plainly fails to satisfy its burden of proving that the Union waived its statutory right to bargain.

2. The “contract coverage” doctrine does not justify the Hospital’s actions

The Hospital contends (Br. 35-37) that the Board should not have applied the “clear and unmistakable waiver” standard because this Court has held the doctrine to be inapplicable where the collective-bargaining contract “covers” the subject at issue. *See, e.g., Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993). Under the contract coverage doctrine, “the inquiry is whether the subject that is the focus of the dispute is ‘covered by’ the agreement.” *Enloe*, 433 F.3d at 838. The Hospital, again relying on the language of Sections 1-3 of Article 25 and the durational term in Appendix A, argues that the Agreement “covered” the expiration of the longevity wage increases.

This Court considered and rejected a similar argument in *Honeywell*, finding that a “standard contract duration clause without more, cannot defeat the unilateral change doctrine,” and soundly dismissing the employer’s claim that “the duration clause . . . somehow superceded [that] doctrine.” 253 F.3d at 133. *Honeywell’s* reasoning controls here, though the Hospital does not acknowledge the case. Like the contract in *Honeywell*, the Agreement “does not say” that the nurses’ right to longevity wage increases is “terminated at the expiration of the [contract]” or “tie[d] . . . to dates certain,” and its durational language is “silent” on the Hospital’s statutory duty to continue paying those increases when the contract expired. *Id.* at 132, 134. Thus, as in *Honeywell*, the Agreement does not “cover” the continuation of the longevity raises post-expiration, and the Court should reject the Hospital’s contention that “the ‘contract coverage’ doctrine . . . trump[s] the unilateral change doctrine.” *Id.* at 128.

II. THE HOSPITAL’S CHALLENGE TO THE REGIONAL DIRECTOR’S AUTHORITY MUST BE REJECTED

The Hospital argues (Br. 21-25) that the Court should deny enforcement of the Board’s Order because Regional Director Walsh, who issued the complaint against the Hospital, was appointed by a Board that included two members whose recess appointments were invalidated by *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (June 26, 2014). As shown below, this argument fails.

On July 18, 2014, following the Supreme Court's decision in *Noel Canning*, the Board "ratif[ied] *nunc pro tunc*" and "expressly authorize[d]" the selection of Mr. Walsh as Regional Director. See Attachment 2, also available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf> (last visited March 31, 2016). And on July 30, Regional Director Walsh "affirm[ed] and ratif[ied] any and all actions taken by [him] or on [his] behalf" from his appointment until July 18. See Attachment 3, also available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3302/region4.pdf> (last visited March 31, 2016). Walsh's ratification of his prior actions encompassed "all actions in unfair labor practice cases, including but not limited to conducting investigations . . . [and] issuing complaints." *Id.*

These ratifications, curing any defect in Walsh's appointment and his actions prior to the Board's ratification, are in accord with similar actions taken by other agencies and approved by this Court.⁷ See *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998) (Court upheld cease-and-desist order issued by the validly appointed Director of the Office of Thrift Supervision, which effectively ratified action of the "acting director" who initiated the case, even if acting director was, as the bank claimed, illegally appointed);

⁷ Given the curative effect of the Board's and Walsh's ratifications, this Court need not address the circumstances of Walsh's appointment in 2013.

FEC v. Legi-Tech, Inc., 75 F.3d 704, 707 (D.C. Cir. 1996) (Court held that reconstituted FEC could properly ratify prior decisions made when it was unconstitutionally constituted); *see also Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (in holding that two-member Board lacked required quorum, Court suggested that “a properly constituted Board . . . may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating . . . previous decisions”).

The Board’s ratification of Walsh’s appointment is not, as the Hospital contends, an “attempt to achieve an improper end.” (Br. 25.) As shown, agency ratification is a proper and accepted practice, approved by the courts as a remedy for actions taken by improperly appointed government officials or bodies. *Doolin*, 139 F.3d 203; *Legi-Tech, Inc.*, 75 F.3d 704; *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (Court upheld decision of board after new members—appointed to cure Appointments Clause violation—reviewed record developed under previous board and issued decision); *Action for Bos. Cmty. Dev., Inc. v. Shalala*, 136 F.3d 29, 34 (1st Cir. 1998) (court held that official with authority to deny priority to Head Start provider validly ratified decision to do so by official lacking requisite authority). Despite the Hospital’s claim (Br. 25), *Noel Canning* and *New Process Steel* do not call into question the ratification doctrine. *See* 134 S. Ct. 2550; *New Process Steel, L.P. v.*

NLRB, 560 U.S. 674 (2010). Moreover, the Company has shown no basis to support any claim of improper motive. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (courts apply a “presumption of regularity” under which they presume that public officials have properly discharged their official duties, absent “clear evidence to the contrary”) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Accordingly, the Hospital’s attacks on Walsh’s appointment provide no basis to deny enforcement of the Board’s Order.⁸

⁸ The Hospital, citing *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016), also questions “the General Counsel’s authority to issue [c]omplaints.” (Br. 24 n.5.) *SW General*, however, addresses the validity of former Acting General Counsel Lafe Solomon’s (“AGC Solomon”) designation pursuant to the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345, *et seq.* The complaint here was issued on behalf of General Counsel Richard Griffin, not AGC Solomon. In any event, the Hospital did not raise to the Board any challenge to the General Counsel’s authority, thereby barring the Court from considering the matter. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act precludes court from reviewing claim not raised to the Board); *SW General*, 796 F.3d at 83 (Court “doubt[ed]” it would address a Vacancies Act challenge not raised to the Board, given exhaustion requirements of Section 10(e)). And, its challenge here, consisting of a one-sentence footnote bare of any supporting facts or argument, is insufficient to raise the issue to the Court. *See N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not raised in employer’s opening brief are waived); Fed. R. App. P. 28(a)(8)(A).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Hospital's petition for review and enforce the Board's Order in full.

Respectfully submitted,

/s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

/s/ Michael R. Hickson

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-1743

(202) 273-2985

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

September 2016

ATTACHMENT 1

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The National Labor Relations Board Has Five Senate Confirmed Members

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August 12, 2013

(August 12, 2013) Today, for the first time since August 21, 2003, the National Labor Relations Board has a full complement of five Senate confirmed members. Four new members, all nominated by President Barack Obama and confirmed last month by the U.S. Senate have been sworn into office. NLRB Chairman Mark Gaston Pearce was also confirmed last month to an additional five year term on the Board. Biographies of the five members of the Board are below:

- Mark Gaston Pearce is currently Chairman of the National Labor Relations Board (NLRB), a position he has held since August 2011. He has served as a Member of the NLRB since March 2010. Mr. Pearce was a founding partner at Creighton, Pearce, Johnsen & Giroux and previously a partner at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was a district trial specialist for the NLRB in Buffalo, NY. He has served by appointment of the Governor as a Board Member of the New York State Industrial Board of Appeals, and he has taught labor studies courses at Cornell University's School of Industrial Labor Relations Extension. Mr. Pearce received a B.A. from Cornell University and a J.D. from State University of New York at Buffalo. Board Chairman Pearce will be sworn in later this month for a term ending August 27, 2018, and the President has designated him to continue to serve as Chairman.
- Nancy Schiffer was Associate General Counsel to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) from 2000 to 2012. Previously, she was Deputy General Counsel to the United Auto Workers (UAW) from 1998 to 2000. She also worked as Associate General Counsel for the UAW from 1982 to 1998. Earlier in her career, Ms. Schiffer was a staff attorney in the Detroit Regional Office of the National Labor Relations Board and worked as an attorney in private practice. Ms. Schiffer received her B.A. from Michigan State University and her J.D. from the University of Michigan Law School. Board Member Schiffer was sworn in on August 2, 2013, for a term ending December 16, 2014.
- Harry I. Johnson, III was a partner with law firm Arent Fox LLP, a position he held since 2010. Previously, Mr. Johnson worked at the Jones Day law firm as a partner from 2006 to 2010 and as an associate from 1994 to 2005. In 2011, he was recognized by The Daily Journal as one of the "Top Labor & Employment Attorneys in California". Mr. Johnson received a B.A. from Johns Hopkins University, an M.A.L.D. from Tufts University's Fletcher School of Law and Diplomacy, and a J.D. from Harvard Law School. Board Member Johnson was sworn in on August 12, 2013 for a term that expires on August 27, 2015.
- Kent Hirozawa was chief counsel to National Labor Relations Board (NLRB) Chairman Mark Pearce. Before joining the NLRB staff in 2010, Mr. Hirozawa was a partner in the New York law firm Gladstein, Reif and Meginniss LLP, where he advised clients on a variety of legal and strategic issues, including Federal and state labor and employment law matters. Mr. Hirozawa previously served as a field attorney for the NLRB from 1984 to 1986. He was a pro se law clerk for the U.S. Court of Appeals for the Second Circuit from 1982 to 1984. He received a B.A. from Yale University and a J.D. from New York University School of Law. Board Member Hirozawa was sworn in on August 5, 2013 for a term that expires on August 27, 2016.

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Attachment 1

- Philip A. Miscimarra was a partner in the Labor and Employment Group of Morgan Lewis & Bockius LLP, a position he held since 2005. Since 1997, Mr. Miscimarra has been a senior fellow at the University of Pennsylvania's Wharton Business School. Mr. Miscimarra worked at Seyfarth Shaw LLP as a partner from 1990 to 2005 and as an associate from 1987 to 1989. Mr. Miscimarra received a B.A. from Duquesne University, an M.B.A. from the University of Pennsylvania's Wharton School of Business, and a J.D. from the University of Pennsylvania Law School. Board Member Miscimarra was sworn in on August 7, 2013 for a term that expires on December 16, 2017.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employers and employees from unfair labor practices, and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

ATTACHMENT 2

Minute of Board Action

July 18, 2014

In *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, __ S. Ct. __, 2014 WL 2882090 (June 26, 2014), the Supreme Court held that three Board members who received recess appointments on January 4, 2012 were not validly appointed. During the time period from January 4, 2012 until August 5, 2013, when the Board regained a quorum after the confirmation of five Presidentially-appointed Board Members, the Board acted on numerous administrative, personnel, and procurement matters including but not limited to appointments of various Regional Directors, Administrative Law Judges, and Senior Executives, and restructurings of regional and headquarters offices. Prior to the recess appointments of January 4, 2012, the Board issued an Order contingently delegating certain authorities to other NLRB officials.¹

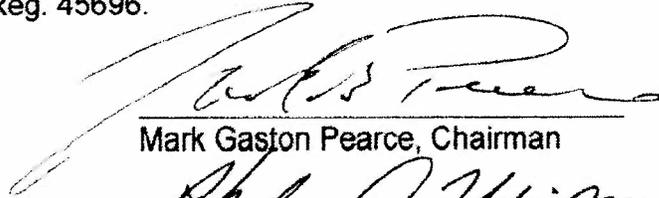
We believe that all the administrative, personnel and procurement matters described above were timely and appropriate. Nevertheless, in an abundance of caution, with a full complement of five Board Members we now confirm, adopt and ratify *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive. This action is intended to remove any question that may arise concerning the validity of the administrative, personnel, and procurement matters undertaken during that period.

In a further abundance of caution, and in an effort to bring an end to ongoing litigation regarding the actions of the Board and its personnel between January 4, 2012 and August 5, 2013, having considered the relevant supporting materials, the Board hereby expressly authorizes the following actions:

1. The selection of Dennis Walsh as Regional Director for Region 4 (Philadelphia);
2. The selection of Margaret Diaz as Regional Director for Region 12 (Tampa);
3. The selection of Mori Rubin as Regional Director for Region 31 (Los Angeles);
4. The selection of Kenneth Chu, Christine Dibble, Melissa Olivero, Susan Flynn, and Donna Dawson as Administrative Law Judges;
5. The Amendment of Statement of Organization and Functions and the Restructuring of National Labor Relations Board's Field Offices described in notices published in the Federal Register on December 6, 2012, and July 24, 2013, 77 Fed Reg. 72886 and 78 Fed Reg. 44602, and all related actions in furtherance thereof;

¹ See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011).

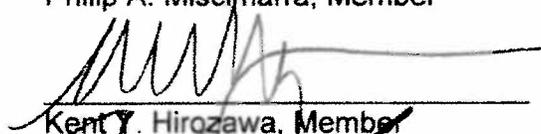
- 6. The Restructuring of National Labor Relations Board's Headquarters' Offices described in the notice published in the Federal Register on July 25, 2013, 78 Fed Reg. 44981; and
- 7. The Further Amendment to Memorandum Describing Authority and Assigned Responsibilities of the General Counsel described in the notices published in the Federal Register on July 23, 2012 and August 1, 2012, 77 Fed Reg. 43127 and 77 Fed Reg. 45696.



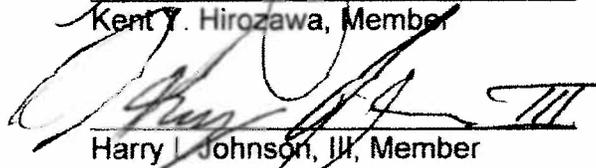
Mark Gaston Pearce, Chairman



Philip A. Miscimarra, Member



Kent Y. Hirozawa, Member



Harry I. Johnson, III, Member



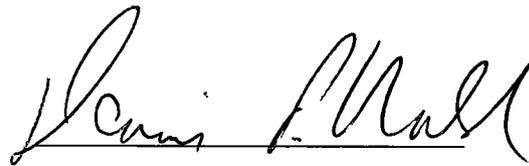
Nancy Schiffer, Member

ATTACHMENT 3

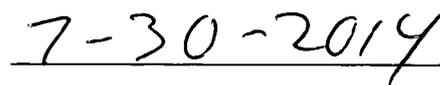
Ratification of Regional Director Actions

The National Labor Relations Board appointed me Regional Director of Region 4 on March 10, 2013, pursuant to its authority under Section 4 of the National Labor Relations Act. In *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, __ S. Ct. __, 2014 WL 2882090 (June 26, 2014), the Supreme Court held that three Board members who received recess appointments on January 4, 2012 were not validly appointed. On July 18, 2014, in an abundance of caution and with a full complement of five Members, the Board ratified *nunc pro tunc* and expressly authorized my appointment as Regional Director.

I believe that the actions I took between my initial appointment and the ratification were legally authorized and entirely proper. To avoid any possible uncertainty, however, I hereby affirm and ratify any and all actions taken by me or on my behalf during that period, including all personnel and administrative decisions; all actions in representation case matters, including but not limited to approving stipulated and consent election agreements, issuing decisions and directions of election, conducting elections, issuing certifications, holding hearings, and approving settlements; and all actions in unfair labor practice cases, including but not limited to conducting investigations, approving withdrawal requests, issuing complaints, holding hearings, and approving settlements.



Signature



Date

Kaitlin Kasetta, Attorney
Carmody & Carmody, LLP
73 Bogard Street
Charleston, South Carolina 29403

Jonathan Walters
Markowitz & Richman
123 South Broad Street, Suite 2020
Philadelphia, PA 19107-0000

/s/Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of September, 2016

STATUTORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 1 of the Act (29 U.S.C. § 151) provides in relevant part:

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 8(d) of the Act (29 U.S.C. § 158(d)) provides in relevant part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

* * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) 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 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 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. . . . 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.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . 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 . . . 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.

* * *

THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 28(a) (Fed. R. App. P. 28(a)) provides in relevant part:

The appellant's brief must contain, under appropriate headings and in the order indicated:

* * *

(8) the argument, which must contain:

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

* * *