

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

AMPERSAND PUBLISHING, LLC d/b/a)
SANTA BARBARA NEWS-PRESS)

Petitioner/Cross-Respondent)

v.)

Nos. 15-1074, 15-1130

NATIONAL LABOR RELATIONS)
BOARD)

Board Case Nos.
31-CA-028589 et al.

Respondent/Cross-Petitioner)

and)

GRAPHICS COMMUNICATIONS)
CONFERENCE OF THE INTERNATIONAL)
BROTHERHOOD OF TEAMSTERS)

Intervenor)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, and Amici: Ampersand Publishing, LLC (“the Company”) 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. Graphics Communications Conference of the International Brotherhood of Teamsters (“the Union”) was the charging party before the Board and is the

intervenor before the Court. The Board's General Counsel was also a party before the Board.

B. Ruling Under Review: This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on March 17, 2015, and reported at 362 NLRB No. 26. That Decision and Order incorporated by reference a Decision and Order issued on September 27, 2012, and reported at 358 NLRB 1415, and an Order Denying Motion for Reconsideration and Modifying Remedy issued on May 31, 2013, and reported at 359 NLRB No. 127.

C. Related Cases: This case has not previously been before this or any other court. The Decision and Order reported at 358 NLRB 1415 was previously before the Court on a petition for review the Company filed November 14, 2012. *Ampersand Publishing, LLC v. NLRB*, Case 12-1450. The Board set aside that Decision and Order in response to the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), and the Court granted its motion to dismiss the petition for review on August 11, 2014. No. 12-1450, Doc. No. 1507062.

The Company, the Board, and the Union were previously involved in a separate unfair-labor-practice case, *Ampersand Publishing, LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012) ("*Ampersand I*"). On January 23, 2014, the Company filed a Petition for Writ of Mandamus to Enforce the Court's Mandate in *Ampersand I*,

requesting “a writ of mandamus or prohibition to prevent the Board from prosecuting unfair-labor-practice complaints, and any related proceedings under 29 U.S.C. 160(e) and (f), on behalf of a union organized for the improper purpose of wresting control of the content of the News-Press from Ampersand in violation of the First Amendment.” *In re: Ampersand Publishing, LLC*, Case 14-1011, Doc. No. 1476517, pp.3-4 (Jan. 23, 2014). The Court denied that petition on March 21, 2014. *In re: Ampersand Publishing, LLC*, No. 14-1011, Doc. No. 1484863.

The Company and the Board are also involved in a separate unfair-labor-practice case currently pending in this Court, *Ampersand Publishing, LLC v. NLRB*, Nos. 15-1082 & 15-1154.

/s/ Linda Dreeben
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Dated at Washington, DC
this 30th day of November 2016

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GLOSSARY

Act	National Labor Relations Act
<i>Ampersand I</i>	<i>Ampersand Publishing, LLC v. NLRB</i> , 702 F.3d 51 (D.C. Cir. 2012)
Board	National Labor Relations Board
Br.	Opening brief of Ampersand Publishing, LLC d/b/a Santa Barbara News-Press
Company	Ampersand Publishing, LLC d/b/a Santa Barbara News-Press
JDA	Joint Deferred Appendix
Tr.	Transcript
Union	Graphics Communications Conference of the International Brotherhood of Teamsters

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v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**GRAPHICS COMMUNICATIONS CONFERENCE OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

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**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Ampersand Publishing, LLC,
d/b/a Santa Barbara News-Press (“the Company”) to review, and on the cross-

application of the National Labor Relations Board to enforce, a Board order issued against the Company. The Graphics Communications Conference of the International Brotherhood of Teamsters (“the Union”) intervened.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). Because the Board’s Decision and Order, 362 NLRB No. 26 (Mar. 17, 2015), is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160 (e) and (f)), the Court has jurisdiction over the Company’s petition and the Board’s cross-application, both of which are timely.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portions of its Order addressing numerous unfair-labor-practice violations that the Company does not specifically contest, provided the Court rejects the Company’s First Amendment defense?

2. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) by failing to timely respond to union information requests; unilaterally discontinuing its established practice of annual wage increases; and unilaterally announcing a new one-story-a-day productivity standard?

3. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) by offering its counsel to represent employees

contacted by Board agents investigating unfair-labor-practice charges against the Company, and by instructing employees to keep confidential the contents of a meeting concerning terms and conditions of employment?

4. Whether substantial evidence supports the Board's finding that the Company bargained in bad faith by insisting on proposals that would have stripped the Union of its representational role and left employees and the Union worse off than with no contract at all, while simultaneously undermining the Union by committing numerous unfair labor practices?

5. Whether the Court is jurisdictionally barred from considering First Amendment arguments the Company did not raise to the Board, and whether those arguments are, in any event, meritless?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Company's brief.

STATEMENT OF THE CASE

I. THE PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint. (JDA19.)¹ Following a hearing, an administrative law judge issued a decision finding that the Company committed multiple violations of Section 8(a)(1), (3), and (5) of the Act. (JDA2019-20.)

¹ "JDA" refers to the joint deferred appendix. "Tr." refers to transcript pages inadvertently omitted from the appendix.

On September 27, 2012, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against the Company, adopting most of the judge's findings and recommended order. (358 NLRB 1415.) The Company petitioned the Court for review (No. 12-1450) and filed a motion for reconsideration, which the Board denied on May 31, 2013. (359 NLRB No. 127.) Thereafter, the Supreme Court decided *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that three recess appointments to the Board in January 2012, including those of Members Griffin and Block, were invalid under the Recess Appointments Clause. Accordingly, the Board vacated its Decision and Order and Order Denying Reconsideration, and the Court dismissed the Company's petition.

On March 17, 2015, a properly constituted Board (Chairman Pearce and Members Hirozawa and McFerran) issued the Decision and Order now before the Court. (362 NLRB No. 26.) The Board "considered de novo the judge's decision and the record in light of the exceptions and briefs," as well as the now-vacated 2012 Decision and Order and Order Denying Reconsideration. (JDA2048.) In its Order, the Board agreed with, adopted, and incorporated by reference the 2012 Decision and Order and Order Denying Reconsideration. (JDA2048.)

II. THE BOARD'S FINDINGS OF FACT

A. Newsroom Employees Select the Union as Their Collective-Bargaining Representative; the Company Unilaterally Diverts Their Work to Temps and Discontinues Its Practice of Merit-Based Pay Increases

The Company has published a newspaper, the Santa Barbara News-Press, since 2000. (JDA1943;1429,1456-57.) In an election held on September 27, 2006, its newsroom employees voted 33 to 6 to be represented by the Union. (JDA1943,1958,1961;524.)²

Thereafter, the Company made significant changes to employees' terms and conditions of employment without notifying the Union or offering to bargain. (JDA1959,1995;1596-97.) In May 2007, the Company began assigning work previously performed by bargaining-unit employees to temporary employees provided by third-party agencies ("temps"). (JDA1954,1961;229.) By November 2007, the number of unit employees had dropped from 42 to 24, and the Company was using 10 temps to perform bargaining-unit work. (JDA1957-61;98,204-21.) Over the next year, temps made up one-fifth to one-third of the individuals performing unit work. (JDA1961-62;204-21,139,1459-60.) Before the election,

² On August 16, 2007, the Board (Chairman Battista and Members Kirsanow and Walsh) overruled the Company's objections to the election and issued an order certifying the Union as the collective-bargaining representative of a bargaining unit consisting of the Company's news-department writers, reporters, copy editors, photographers, and graphic artists. (JDA1941,1942;524.)

the Company had not used temps for over five years, having discontinued the practice in 2002 as too costly. (JDA1953-54;229,1430-33.)

After the election, the Company also unilaterally discontinued its practice of giving annual merit-based pay increases to newsroom employees.

(JDA1994;85,1447-48,1714-15.) For each year between 2000 and 2005, employees who scored above a certain number on their annual performance evaluations had received increases set at a fixed percentage of their salaries, unless they had reached a salary cap. (JDA1994;85,1436-43,1714-15,1505-06,1528-29,1551,Tr.1160.) By contrast, starting at the end of 2006—the year employees chose union representation—the Company ceased granting them merit increases. (JDA1994;1443-45.)

B. The Parties Begin Bargaining; the Company Proposes a Management-Rights Clause Reserving Unfettered Control over Many Terms and Conditions of Employment and Waiving the Union’s Right To Bargain over Changes; the Company Delays Providing Information About Temps and Misstates Its Merit-Increase History

The parties began bargaining in November 2007. Their initial proposals staked out dramatically different positions on employee discipline, grievance resolution, and management rights—three issues that the Union considered “the heart of the negotiations.” (JDA2010;1631-32.)

The Union’s opening proposals, submitted on November 1, included just-cause discipline and discharge and a multi-step grievance-resolution process

culminating in binding arbitration before a neutral third party. (JDA2008;58-59.)

In response, the Company proposed a broad management-rights clause embodying “the status quo” as it existed before the Union’s arrival. (JDA2008-09;304.) Section 1 specified that, “[e]xcept as expressly modified” elsewhere in the collective-bargaining agreement, the Company would retain all of its rights “as [they] existed prior to the time any Union became the bargaining representative of [unit] employees.” (JDA2009;304.) Section 2 contained a long, nonexclusive list of the Company’s reserved rights, including the right to unilaterally “issue, amend and revise policies, rules, regulations, or practices” and establish “productivity standards.” (JDA2009;303.) Section 2 also specified that management rights “not abridged” by a collective-bargaining agreement “shall include, but are not limited, to” the ones listed. (JDA2009;303.) Sections 3 and 5 reserved the Company’s right to transfer unit work to independent contractors, freelancers, supervisors, or managers. (JDA2009;303.) Section 6 provided that the management-rights clause would continue in effect indefinitely after the agreement expired, unless and until another agreement was reached. (JDA2009;303.)

As described below (pp.9-13), throughout negotiations the Union objected that this management-rights proposal lacked any meaningful limitations on the Company’s discretion and required the Union to waive its statutory right to bargain over changes to employees’ terms and conditions of employment. The Company,

however, never altered or deviated from the language of its initial management-rights proposal. (JDA1642-44,1647-48,391.)

Regarding discipline and discharge, the Company proposed “at-will employment,” with the Company retaining sole discretion to determine whether, and to what degree, to “punish[] or penalize[e] employees.” (JDA2009-10;303,305,391,1647-48.) The Company proposed a nonexclusive list of misconduct that would warrant punishment. (JDA2009-10;305.) In subsequent bargaining, the Company never altered its proposal beyond minor adjustments regarding its right to search employees’ vehicles and personal effects. (JDA1647-48,391.)

During the initial bargaining sessions on November 13 and 14, the Union said it had learned that the Company was using numerous temps in the newsroom. (JDA1955;473,250.) It expressed concern that the Company was replacing unit employees with temps—an objection it continued to voice throughout bargaining (JDA141)—and requested information on the subject. (JDA1955,1964;1564,250.) On November 16, the Union followed up in writing, asking how temps were hired and who supervised them. (JDA1955-56,1964;1565,73.) The Company did not provide that information until January 23, 2008. (JDA1956,1965;96.) In the meantime, on December 3, 2007, the Union had requested additional information about temps, including their dates of employment, names, and sending agencies.

(JDA1956-57,1965;76.) The Company did not provide it until January 30, 2008.

(JDA1957,1966;98.)

In November, the parties also discussed merit increases, which the Company had withheld for 2006. The Union repeatedly advised the Company that during negotiations, it expected the Company to continue its past practices with regard to merit increases. (JDA1563,80.) When the Union tried to find out what that practice was, the Company incorrectly responded, “some years we [give merit wage increases] and some years we don’t.” (JDA1993-94;1563,1715.) In January 2008, the Company provided a chart of past increases and reiterated—again, incorrectly—that “from 2000 to the present, there have been several years in which no increases were awarded.” (JDA1993-94;83,85,1715.)

C. The Company Demands the Final Say on Grievances; the Union Objects that the Company’s Demands for Total Control Are Unheard of; the Company Continues To Mischaracterize Its Merit-Increase History

In February 2008, the Company presented its first grievance proposal. (JDA2010;1568,1635,326.) In lieu of arbitration, it reserved final grievance-resolution authority to the Company’s management. (JDA2010;1568-69,326.) Throughout bargaining, the Company made minor procedural changes, but continued to insist at all times that grievances end with its binding and unreviewable decision. (JDA2015;391,1601,1647-48.)

During February negotiations, the Union expressed great concern that the Company's proposals placed no substantive limits on its discretion over key areas—discipline and discharge, management rights, and grievance resolution. (JDA2010;278-79,272,494.) The Union emphasized the need for objective standards, noting, for example, that although it did not oppose the Company's proposal to treat biased reporting as a basis for discipline, the parties needed an understanding of what constituted bias. (JDA2014;1575,1608,256-57,272.) Similarly, the Union acknowledged the Company's right to establish productivity standards, but stated that they should be reasonable. (JDA2014;483,272.) The Union also emphasized the importance of having a neutral third party resolve disputes. (JDA1569,261.) The Company responded that it intended to retain the "final say." (JDA2010;487.)

On February 14, the Union expressed frustration that the Company had thus far proposed nothing but the pre-representational "status quo across the board." (JDA261,1570-71.) Later that month, the Union complained that the Company was proposing "nothing more than what the employees already have," and that its demand for "total control" over disputes was "unheard of." (JDA2011;278-79,1572,498.)

With regard to annual merit increases, the Union adhered to its position that the Company was required to act as it had before the union election.

(JDA343,1572-73.) It also questioned the Company's claim that no employees received raises in multiple past years. (JDA256, 258,262,265.) The Company insisted that was the case. (JDA1566-67,256,480.)

D. The Union Objects to the Company's Continued Insistence on Unilateral Control over Grievances and Unwillingness To Deviate from the Status Quo

At sessions on April 2 and 3, the Company slightly modified its grievance proposal, adding a step involving a mediator, but it still reserved the final decision. (JDA2011;1577,1603,1606-07,348,351.) The Union objected that while a mediator could be helpful, it "can't be a substitute for an impartial third-party arbitrator." (JDA1603,1605,281.) The Company argued that thousands of workplaces lack arbitration, but the Union responded that the parties should focus on conditions typically found in collective-bargaining agreements, rather than in nonunion environments. (JDA2011;282,1578.) The Union reiterated that its core issues were grievance resolution, management rights, and discipline and discharge. (JDA2011;1630.) It offered to remove just-cause language from its proposed grievance procedure if the Company would agree to final and binding resolution by a third party. (JDA2011;281.)

By letter, the Union further criticized the Company's "overarching and virtually uniform refusal to deviate from the status quo on any significant matter." (JDA2011-12;105.) In particular, it asserted that the Company's insistence on retaining "its pre-existing, one-sided non-binding 'procedures' leading to a unilateral resolution to a contractual dispute" was "predictably unacceptable," demonstrating that the Company had no interest in reaching an agreement. (JDA2012;105.)

E. The Company Unilaterally Contracts with Robert Eringer To Perform Bargaining-Unit Work as a Freelancer

In May 2008, the Company contracted with a reporter, Robert Eringer, to do investigative and crime-related reporting on a freelance basis. (JDA1932-33,1972-73;1462.) Before the union election, that work had been performed by bargaining-unit employees. (JDA1932-33,1974.) The Company did not notify or offer to bargain with the Union before arranging to have Eringer do the work as a freelancer. (JDA1972-74;1590.)

F. The Company Rejects the Union's Proposed Limitations on Management-Rights Language; the Union Agrees that the Company Has the Exclusive Right To Control the Paper's Content

On June 3, the Union provided comments on the Company's management-rights proposals. (JDA2012;1581-82,367,285.) Regarding Section 2(a), which reserved the Company's right to determine content, the Union said it did not disagree; it only had concerns about the "integrity and reputation of the involved employees." (JDA367,285.)

The next day, the Union offered a management-rights counterproposal based on the Company's language, but inserting the word "reasonable" as a limitation on certain Company actions, requiring the Company to bargain before making substantial changes to employment terms, and adding just cause for discipline and discharge. (JDA2012;373,288.) The proposal conceded the Company's exclusive right "[t]o determine the content of the *Santa Barbara News-Press*." (JDA372.)

The Company complained that under the Union's proposal, it would have to bargain before changing terms and conditions of employment, which was contrary to everything the Company was trying to achieve. (JDA2012-13;1583-84,1609.) The Union explained that if it were to accept the Company's proposals, there would be no reason to have a collective-bargaining agreement at all. (JDA2012-13;289.)

G. The Company Offers Its Attorneys To Represent Employees Contacted by the Board

On August 9, a temp agency informed the Company that it had given the Board contact information for temps working for the Company.

(JDA1975;225,1428-29,1712-13.) In mid-August, a Board agent investigating unfair-labor-practice charges in this case called a non-newsroom employee who had previously been a temp. In a voicemail, she identified herself as a Board agent, said that she would like to speak with the employee about her employment as a temp at the Company, and asked the employee to call her back. (JDA1975-76;1673-74,1676-77). The employee informed the Company about the call. (JDA1976;1679-80.)

On August 22, the Company's owner distributed a letter to all unit employees, stating that she had learned the "disturbing news" that a Board agent had contacted employees by telephone. (JDA1976;1680,1710,147.) In her letter, the owner assured employees that the Company had not provided non-newsroom employees' contact information to the Board. (JDA1976;147.) Her letter also stated:

I cannot direct you not to speak with the [Board]'s agents should they, in some way, contact you. However, please note that the [Company] has retained lawyers for these matters. As [company] employees, you may state to the [Board] agent or any [union] operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.

(JDA1976;147.)

H. The Company Suspends and Discharges Unit-Employee and Bargaining-Committee-Member Dennis Moran, then Belatedly Provides Information About Personnel Changes

In August 2008, Dennis Moran was the only employee member of the Union's bargaining team who regularly attended bargaining sessions.

(JDA1996;196,1514-16.) The Company suspended him on August 23, stating that it was doing so pending an investigation of his role in the sports department's failure to cover a golf tournament. (JDA1999;1517,1658,1659,718.) A tournament organizer had told the Company that an employee named Dennis was responsible for the lapse, and although the Company had two employees by that name in the understaffed sports department, it focused its scrutiny solely on Moran. (JDA1996-2005.)

On August 30, the Company discharged Moran, presenting him with a letter accusing him of numerous acts of dishonesty and inadequate performance.

(JDA2000;1518-19,197.) At the unfair-labor-practice hearing, the Company asserted that it discharged Moran because a former employee, who had quit after lying about his resignation, had claimed that Moran had cleaned out his desk for him. (JDA2000;1659,1660,1709.) Moran had not, in fact, done that, but the Company made no effort to investigate before discharging him. (JDA2000,2005-2006;1446,1476-79,1482-86,1520-21,1522-27.)

In the meantime, in a letter dated August 6, the Union had asked the Company to notify it when employees performing bargaining-unit work were hired or terminated or had a change in employment terms. (JDA1980;126.) The Union had explained that it could not “rely on rumor with regard to employees being hired or leaving.” (JDA1980;126.) The Company did not provide responsive information until October 22, 11 weeks later, when it noted, among other personnel changes, that it no longer employed Moran. (JDA1980-81;385,1585.) The Union also requested information regarding the status of specific temps performing unit work on September 9, which the Company did not provide until October 24. (JDA1980-81;128,130,1586.)

I. The Company Holds a Meeting, Orders Employees To Keep Its Contents Confidential, and Unilaterally Imposes a New Productivity Requirement

On December 3, the Company’s Director of News Operations, Don Katich, gathered newsroom employees and managers for a meeting. (JDA1984-86;1535-36,1549,1699-1700,1684,1496-98,1507,1649.) He began by stating that the Company had imposed layoffs, but that no one in the newsroom was affected. (JDA1984-85;1701.) He said the meeting’s contents were “a trade secret” and “shall not leave the confines of this building.” (JDA1985;1500,1502, 1537,1539,1654-55,1661-62,1670-71,1690,1706.)

Katich then told employees that “starting immediately,” there would be numerous changes at the paper, including new story-assignment policies (JDA1985;1318), and a requirement that reporters produce at least one story per day (JDA1984-87;1498,1509,1537,1550,1651-52,1685,1704-05,1707,1318). Soon thereafter, two employees met with company managers to learn how the one-story-a-day rule would be applied. (JDA1985-86;1540-42,1543,1656,1690-92.) The managers explained specifically how employees could meet the standard. (JDA1985-86;1664-69,1686-89,1690-92.) Although the parties had exchanged proposals on productivity standards at the bargaining table (JDA305,344,345,356, 1575-76,1578-79), the Company did not notify or offer to bargain with the Union before announcing the one-story-a-day requirement (JDA1986;1593-95).

J. The Company Lays Off Richard Mineards Without Notifying or Bargaining with the Union, then Deals Directly with Him, and Delays Providing Information About His Layoff

On January 7, 2009, the Company laid off unit employee Richard Mineards, eliminating his column. (JDA1968;1466,1586-87,1589,1639,1641.) Katich told Mineards that the decision “was nothing to do with the column but merely a cost-cutting measure.” (JDA1968;1467-69.) About a week later, Katich contacted Mineards to propose that he write the column on a freelance basis. (JDA1968;1469-71.) They met on January 15, but ultimately could not agree on Mineards’ pay and duties. (JDA1968;1470-75.) The Company did not notify the

Union or offer to bargain about Mineards' status before laying him off and offering to reemploy him as a freelancer. (JDA1968;1586-87.)

In the meantime, the Union learned indirectly about Mineards' layoff from a blog posting. (JDA1968;296-97,1586-87.) On January 14, 2009, the day before Katich met with Mineards to discuss freelancing, the Union asked the Company for information about his status. (JDA1968;1587.) The Company's lead negotiator said he knew nothing about Mineards, but would look into it. (JDA1968;1587.) The Union asked about Mineards again the next day. (JDA1968;1588.) The Company did not furnish responsive information until February 9, 26 days after the Union first requested it. (JDA1968;144.)

K. The Company Unilaterally Changes the Timing of Meetings To Discuss Employee Performance Evaluations for 2008

Since the early 2000s, supervisors typically held one-on-one meetings with unit employees around the end of each year, shortly after preparing their annual evaluations. The timing of those meetings gave employees an opportunity to persuade their supervisors to reconsider and possibly improve their ratings. (JDA1988-90;1434-35,1450-51,1452-54,1495,1512-13,1530-31,1532-33,1534,1681-82,1683,1708.)

The Company departed from that practice for the 2008 performance year, moving employee-supervisor meetings to May 2009, months after evaluations had been completed. That delay made it more difficult for employees to influence their

scores. (JDA1988-91;1434-35,1450-51,1452-54,1495,1512-13,1530-31,1532-33,1534,1681-82,1683,1708.) The Company did not notify or offer to bargain with the Union before making that change. (JDA1989.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by:

- unreasonably delaying furnishing the Union with requested information relevant and necessary for the Union to perform its duties as unit employees' collective-bargaining representative;
- failing to notify and offer to bargain with the Union before taking the following unilateral actions:
 - discontinuing its past practice of granting unit employees merit pay increases for their performance in 2006, 2007, and 2008;
 - transferring unit work to nonunit temps;
 - assigning unit work to freelancer Eringer;
 - laying off unit employee Mineards;
 - changing the timing of employees' meetings with supervisors as part of the performance-evaluation system;

- announcing a new requirement that unit employees produce at least one story per day;
- bypassing the Union and dealing directly with Mineards by offering to employ him as a freelancer; and
- bargaining in bad faith by insisting, as a condition of reaching agreement on a collective-bargaining contract, that the Company retain unilateral control over many terms and conditions of employment, thereby leaving employees and the Union with substantially fewer rights and protections than they would have without any contract, while engaging in other unlawful conduct away from the bargaining table.

(JDA2048,2019-2020.)

Also in agreement with the judge, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Moran because of his union activities. (JDA2048.) The Board, agreeing with the judge, further found (JDA2048) that the Company's transfer of unit work to temps and freelancers (JDA1932-33,1974) violated Section 8(a)(3) and (1) of the Act because those actions were undertaken "to weaken and undermine the Union in its representative capacity and to discourage employees' union activities."

(JDA1975.)

Finally, the Board found that the Company violated Section 8(a)(1) of the Act by issuing a memorandum offering to provide its attorney to represent employees contacted by Board agents investigating unfair-labor-practice charges against the Company, and by instructing employees that anything said at a meeting concerning their terms and conditions of employment was confidential.

(JDA2048;2019-20.)³

To remedy those violations, the Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order mandates that the Company bargain with the Union, on request, and embody any understanding in a signed agreement; reimburse the Union for bargaining expenses; make unit employees whole for any losses suffered as a result of its discontinuing merit pay raises, changing the timing of performance evaluation meetings, and unlawfully using temps or freelancers; on request, rescind the one-story-per-day standard and the unlawful transfer of unit work to temps and freelancers; offer Moran and Mineards reinstatement and make-whole relief; compensate unit employees for any adverse tax consequences of

³ The Board did not pass on the judge's findings that the Company violated Section 8(a)(5) by failing to notify and offer to bargain with the Union about Moran's suspension and discharge (JDA2048n.1), and that the Company's August 22, 2008 memorandum independently violated Section 8(a)(1) by discouraging employees from cooperating with the Board's investigation. (JDA2048,1932n.2).

receiving lump-sum backpay awards; remove from its files any reference to unlawful employment actions; post a remedial notice, and have a management official or Board agent publicly read it. (JDA2049-50.)

SUMMARY OF ARGUMENT

1. The Company does not specifically contest numerous Board findings that it violated Section 8(a)(1), (3), and (5) of the Act. Instead, it seeks blanket immunity based on an unsupported First Amendment argument which it improperly raises for the first time before the Court. If the Court rejects that argument, it should summarily enforce the portions of the Board's order addressing the otherwise uncontested findings.

2. Substantial evidence supports the Board's bargaining-related findings that the Company contests. First, the Board reasonably determined that merit increases employees had received every year from 2000 to 2005 were an established term of employment. The Company therefore violated the Act by discontinuing those increases without notifying and offering to bargain with the Union.

Second, the Board properly found that the Company unlawfully announced a unilateral change in employment terms by telling employees they would be required to produce at least one story a day. The imposition of a numerical productivity standard where none existed was a material change the Company

could not lawfully impose without first notifying the Union and offering to bargain.

Third, the Company took weeks or months to provide information the Union urgently needed to understand who was performing bargaining-unit work. The relevance of that information was clear; without it, the Union could not meaningfully bargain over subcontracting or evaluate whether the Company was unlawfully dissipating unit work without bargaining. And contrary to the Company's claims, the Union properly requested ongoing updates on the status of individuals performing unit work.

Finally, the Board reasonably found that the Company bargained in bad faith throughout negotiations. From the start, the Company insisted on extreme proposals that would have stripped the Union of its representational role and left employees and the Union worse off than with no contract at all. Meanwhile, the Company engaged in a series of unfair labor practices demonstrating total disregard for its bargaining obligations. Thus, at the same time that the Company was insisting at the table that the Union abandon its rights to effectively represent unit employees, the Company's actions away from the table demonstrated that it would ignore those rights regardless. Under established law, that course of conduct demonstrated bad faith. The Company fails to identify any union conduct during bargaining that could excuse it.

3. Substantial evidence supports the Board's findings that the Company coerced and interfered with employee rights under the Act by ordering employees to keep confidential the contents of the meeting where it announced the new one-story-a-day requirement, and by offering its own counsel to represent employees contacted by Board agents investigating allegations against the Company. Because employees' employment terms—including those the Company unilaterally changed—were at issue in the meeting, the Company could not lawfully order employees to keep its contents secret. And well-settled law establishes that an employer under Board investigation coerces employees by offering them representation from an attorney who already represents the employer's interests in the matter.

4. The Company argues that because the Union previously pursued unprotected aims involving the Company's editorial discretion, the First Amendment gives it license to violate the Act in perpetuity. That argument fails. First, the Company never presented it to the Board, so the Court lacks jurisdiction to consider it. Second, it is an untimely, improper attack on the Union's certification. Third, it is contrary to the facts, which demonstrate that during bargaining the Union clearly and repeatedly disclaimed any unprotected goals. And finally, it is unsupported by

law. This case is not *Ampersand I*,⁴ and neither that case nor any other permits the Company to forever disregard its basic labor law obligations.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference; the Court upholds them if they are "reasonable and consistent with applicable precedent." *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007) (quotation omitted). The Board's findings of fact are conclusive if supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The courts grant special deference to Board findings relating to the collective-bargaining process. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). In particular, "determining whether a party has violated its duty to confer in good faith is particularly within the expertise of the Board." *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (per curiam) (quotations and alterations omitted). Accordingly, the courts "do not lightly disregard the Board's informed judgment in the especially delicate task of judging whether, in context, a strategy of bargaining is more likely calculated to obstruct agreement than to bring about the best compromise possible." *E. Maine Med. Ctr. v. NLRB*, 658 F.2d 1, 10 (1st Cir. 1981).

⁴ *Ampersand Publishing, LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012).

Although the Court does not defer to the Board's resolution of constitutional questions, *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009), it recognizes that the Board "possesses the requisite special expertise for making specific determinations in th[e] highly delicate field which encompasses both labor relations and the workings of the press." *Newspaper Guild of Greater Phila., Local 10 v. NLRB*, 636 F.2d 550, 563 (D.C. Cir. 1980).

ARGUMENT

I. THE COURT SHOULD SUMMARILY ENFORCE PORTIONS OF THE BOARD'S ORDER ADDRESSING FINDINGS THE COMPANY DOES NOT SPECIFICALLY CONTEST

Before the Court, the Company leaves uncontested many violations the Board found. Instead, for the first time on appeal, it argues that the First Amendment in effect absolves it of liability for all of its unfair labor practices in perpetuity. As explained below (pp.71-80), that argument is not properly before the Court, and it is, in any event, meritless.

When an employer does not challenge in its opening brief Board findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement of the corresponding portions of its Order. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011). Accordingly, if the Court rejects the Company's blanket First Amendment defense

(see pp.71-80), it should summarily enforce the Board's Order addressing its findings that the Company violated the Act by:

- transferring a substantial portion of bargaining-unit work to non-employee temps without notifying and offering to bargain with the Union (JDA1958-63,2020);
- laying off unit employee Mineards without notifying or offering to bargain with the Union, and dealing directly with him (JDA1969-70,2020);
- unreasonably delaying a response to union requests for information regarding Mineards' status (JDA1971-72,2020);
- contracting with nonemployee Eringer to perform unit work, without notifying and offering to bargain with the Union (JDA1932-33&n.4,1973-74,2020);
- unilaterally changing the timing of employees' meetings with supervisors to discuss their 2008 performance without notifying and offering to bargain with the Union (JDA1990-91); and
- suspending and discharging Moran in retaliation for his union activities (JDA2003-06,2020).

Those violations do not disappear simply because the Company has not challenged them. Rather, they "lend[] their aroma to the context in which the

[remaining] issues are considered.” *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982). In particular, they “remain relevant in determining whether [the Company] bargained in bad faith.” *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993).

The Company has also waived any challenge to the Board’s remedial order, which it merely mentions (Br.81&n.16) in passing without supporting authority. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (argument merely referenced in opening brief is waived); *Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004). Similarly, the Court should summarily reject the Company’s procedurally improper and legally unsupported request for an injunction. (Br.81-82.)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY SUSPENDING WAGE INCREASES, IMPOSING A NEW PRODUCTION REQUIREMENT, AND FAILING TO TIMELY RESPOND TO UNION INFORMATION REQUESTS

Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by “refus[ing] to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Under Section 8(d) of the Act, “the duty to bargain collectively” requires the parties to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). During bargaining, the Company repeatedly breached that duty, in

violation of Section 8(a)(5) and (1),⁵ by unilaterally withholding wage increases, imposing a new daily-minimum production standard, and failing to timely furnish requested information.

A. The Company Unilaterally Withheld Wage Increases that Were a Term of Employment

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employees' established terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743-47 (1962). Making those changes without first notifying and giving the union an opportunity to bargain "plainly frustrates the statutory objective of establishing working conditions through bargaining," *id.* at 744, and interferes with employees' rights "by emphasizing to [them] that there is no necessity for a collective bargaining agent," *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

Accordingly, an employer is not at liberty to unilaterally discontinue annual wage increases that are part of employees' established compensation system. *See Daily News of L.A. v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996). Whether such increases are an established practice turns largely on whether employees "had come to view [them] as fixed terms or conditions of employment." *Id.* at 412 n.3. Factors relevant to that determination include "the number of years that the

⁵ Because a refusal to bargain interferes with employee rights under the Act, "an employer who violates [S]ection 8(a)(5) also, derivatively, violates Section 8(a)(1)." *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.” *Rural/Metro Med. Servs.*, 327 NLRB 49, 51 (1998). *Accord Dynatron/Bondo Corp.*, 323 NLRB 1263, 1264-65 (1997), *enforced*, 176 F.3d 1310 (11th Cir. 1999). Where, as here, an employer’s “criteria for determining wage increases are fixed,” the law “demands that the Company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously.” *Daily News*, 73 F.3d at 412.

Ample evidence supports the Board’s finding (JDA1994-95) that the Company had an established practice of awarding annual merit increases, which it discontinued without notifying or offering to bargain with the Union. First, “the number of years that the program ha[d] been in place” indicates that merit increases had become a term or condition of employment. *United Rentals*, 349 NLRB 853, 854 (2007) (quotation omitted). The Board found (JDA1994), and the Company does not dispute, that it granted merit increases for every year from 2000 to 2005. (See p.6.) *See Vico Prods. Co. v. NLRB*, 333 F.3d 198, 205, 208-09 (D.C. Cir. 2003) (employer unlawfully unilaterally withheld increase given in preceding 5 years); *Daily News*, 73 F.3d at 408, 412 (4 years).

Second, “the regularity with which raises [we]re granted” supports the Board’s finding that annual merit increases had become an “established practice regularly expected by the employees.” *United Rentals*, 349 NLRB at 854 (quotation omitted). Each year, as the Board found, the Company awarded increases “in the late part of the performance year or very early in the following year.” (JDA1994;85,1529.) *See Daily News*, 73 F.3d at 408 (employees received raises “on or about the anniversary” of hire or last promotion); *Bryant & Stratton Bus. Inst. v. NLRB*, 140 F.3d 169, 181 (2d Cir. 1998).

Third, the Company “used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.” *United Rentals*, 349 NLRB at 854 (quotation omitted). As the Board found (JDA1992,1994), increases were based on merit—employees rated at 3 or above, on a scale of 1 to 5, received a fixed-percentage increase in their salaries unless they had reached a predetermined salary cap. (*See p.6.*) *See Daily News*, 73 F.3d at 412. Indeed, the Company emphasized to employees that increases would be linked to their annual evaluation scores pursuant to a “structured system” that was “objective and rational” and “clear and consistent.” (JDA1991-92;228,199,1449,Tr.1156-57,Tr.1159-60.)

The Company does not dispute that it discontinued merit increases “[f]or the 2006 performance year and thereafter.” (JDA1994;1443-45.) By failing to adequately notify and offer to bargain with the Union before withholding increases for 2006, 2007, or 2008, the Company violated the Act. (JDA1995;1596-97.)

Citing handbook language promulgated in 2000, the Company erroneously asserts (Br.64) that its merit increase program was discretionary and could be discontinued at will. As the Board (JDA1991-95) properly found, notwithstanding that language, the Company’s subsequent actions and statements established a practice employees could reasonably expect to continue. In any event, to the extent a merit-increase program involved discretion before employees were represented, the discretionary element “‘bec[ame] a matter as to which the bargaining agent [wa]s entitled to be consulted.’” *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1163 (D.C. Cir. 1992) (Edwards., J., concurring) (quoting *Oneita Knitting Mills*, 205 NLRB 500, 500 n.1 (1973)). Thus, the Company errs in suggesting it would have violated the Act “no matter what it chose to do.” (Br.64.) What the law required it to do was notify and offer to bargain with the Union.

The Company also errs in suggesting it was free to act unilaterally in 2006 because it “had not yet begun bargaining with the Union” (Br.65). Although election objections were pending until the Union’s August 2007 certification,

“[u]nder well-established Board precedent, ‘absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during th[at] period.’” *Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 876 (7th Cir. 2016) (quoting *Mike O’Connor Chevrolet*, 209 NLRB 701, 703 (1974)). *Accord UFCW v. NLRB*, 519 F.3d 490, 496 (D.C. Cir. 2008); *NLRB v. Westinghouse Broad. & Cable Inc.*, 849 F.2d 15, 20-22 (1st Cir. 1988). Precedent also refutes the Company’s claim (Br.65) that it met its obligations by continuing to conduct performance evaluations. The employer whose unilateral change violated the Act in *Daily News*, 73 F.3d at 409, did exactly that. *Accord Dynatron/Bondo*, 323 NLRB at 1263, 1264 n.11.

The Company also fails to establish that the Union waived bargaining. It could not do so because the Company never provided “express” and “detailed notice” of an intention to change its past practice. *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444-45 (9th Cir. 1983). On the contrary, throughout bargaining, the Company misled the Union by denying any established practice of granting merit increases every year. (JDA1994;141.)⁶ That obfuscation rendered a “clear and unmistakable” waiver impossible. *See Vico*, 333 F.3d at 208 (rejecting waiver where union “was unaware of the past practice of annual wage increases,” because

⁶ The Union’s December 2007 attempt to find out what the Company’s past practice was (JDA80) does not support the Company’s waiver argument, and the language it quotes (Br.66) regarding bonuses is irrelevant. Bonuses were distinct from merit increases (JDA83,1672,473), and are not at issue here.

“the subject in question must have been explored and the waiver expressed in unequivocal terms”).

Meanwhile, the Union expressly did not authorize the Company to discontinue increases. Instead, as the Company admits (Br.65-66), the Union consistently took the position that the Company was required to maintain the status quo. (*See* pp.9,11.) As shown (pp.29-32), that status quo was the pre-election policy of granting increases each year—not the unlawful, unilaterally imposed policy of withholding them.

B. The Company Unilaterally Announced a New One-Story-a-Day Requirement

It is settled that productivity standards are a term of employment an employer may not unilaterally change. *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981); *Somerville Mills*, 308 NLRB 425, 425 n.1 (1992), *enforced*, 19 F.3d 1433 (6th Cir. 1994). The Board reasonably found that the Company announced a new productivity standard in a December 3, 2008 meeting without having notified and offered to bargain with the Union. (JDA1987,2020.) As the Board found (JDA1987), Katich made clear that he was announcing a new standard: “starting immediately,” he said, employees would be required to produce at least one story a day. (*See* p.17.) The Company disagrees with the Board’s credibility-based finding as to what Katich said, but provides no basis for

overturning it. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (Court accepts credibility determinations unless “hopelessly incredible, self-contradictory, or patently unsupportable.” (quotations omitted)).

The record amply supports the Board’s finding (JDA1987) that the Company previously had no minimum daily standard for story production, as the Company admitted (JDA243,1547-48,1552-60). Unit employees were uniformly unaware of any such standard (JDA1458,1492,1493-94,1503,1539,1693,Tr.1160-61), and none existed in writing (JDA1661). Additionally, as the Board found (JDA1988), the Company’s later discussion of the one-story-a-day requirement confirms its novelty. When employees from the newspaper’s life section met with management to ask whether the new requirement would apply to their work, the Company did not disavow the new standard, but rather told employees how they could meet it. (*See p.17.*)

The performance reviews the Company cites (Br.45) do not show otherwise. As the Board found (JDA1987), those documents quantified and evaluated employees’ productivity after the fact, but did not allude to any preexisting uniform rule. Similarly, the Company misses the mark in arguing (Br.47-51) that employees’ hours did not significantly change. As the Board recognized, the announcement, *ex ante*, of an across-the-board standard represented a “substantial” change from the Company’s prior practice of evaluating employees’ productivity

only after the fact. (JDA1987 (quoting *Alwin Mfg. Co.*, 314 NLRB 564, 568 (1994)) (internal quotation marks omitted).) *See Tenneco Chems., Inc.*, 249 NLRB 1176, 1179-80 (1980) (employer's unilateral imposition of production standards was a "radical departure" because it previously lacked "a clear, precise, or specific measure of production"). Moreover, as the Board explained (JDA1987), it is immaterial whether the Company enforced the new standard. *See Flambeau Airmold Corp.*, 334 NLRB 165, 165-66 (2001). The violation was the unilateral announcement itself. *See Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155 (1998), *enforced mem.*, 208 F.3d 214 (6th Cir. 2000).

Furthermore, the Court has observed that even "apparently unimportant change[s]" can be unlawful where, as here, they are part of a larger effort to undermine the union. *Microimage Display v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). Here, as discussed below (pp.54-57,60-61), at the bargaining table the Company demanded "sole and exclusive" authority to unilaterally establish "productivity standards." (JDA303,283,504-05,506-08.) Its unilateral arrogation of that authority away from the table "was an action that could not help but undermine support for the Union [by] . . . telegraphing to the employees that the Union was irrelevant." *Id.* (quotation omitted). In that context, the Board properly

found (JDA1987-88) that the unilateral imposition of a new production standard was not “de minimis.” *Id.*⁷

Arguing otherwise, the Company relies primarily (Br.47-51) on an administrative-law-judge decision that was not reviewed by the Board and “has no precedential value” in other cases. *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109, 114 n.3 (D.C. Cir. 2012). In any event, that case is distinguishable; it involved a change in instructions for how to clean rooms, not the introduction of productivity standards where none previously existed.

C. The Company Unreasonably Delayed Responding to Union Information Requests

An employer’s duty to bargain includes the duty “to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005). An employer therefore violates Section 8(a)(5) and (1) of the Act by failing to timely provide relevant information upon request. *Acme*, 385 U.S. at 435-36; *Brewers & Maltsters*, 414 F.3d at 45-46.

⁷ The Company faults the Board (Br.45, 47) for making no express “materiality” finding. But as in *Microimage Display*, it was enough for the Board to explain why, in context, the change mattered. 924 F.2d at 253 n.4.

Information pertaining to bargaining-unit employees, including names, addresses, wage rates, and job classifications, is presumptively relevant. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Information about nonunit employees, while not presumptively relevant, must be provided if it meets a liberal “discovery-type standard.” *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983). That standard is not demanding: “a union need not demonstrate that the information is certainly relevant or clearly dispositive of the basic issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation to provide it.” *Id.* (quotations and ellipses omitted). Whether information is relevant “is, in the first instance, a matter for the NLRB, and the Board’s conclusions are given great weight by the courts.” *Id.* at 360.

1. The Company unreasonably delayed providing information

At issue are the Company’s unreasonably delayed responses to four union requests for information.⁸ The Union requested information:

- on November 16, 2007 (JDA73) which the Company did not provide until January 23, 2008 (JDA96);

⁸ As noted (p.27), the Company does not specifically contest the Board’s finding that its 26-day delay responding to the Union’s request about Mineards’ status was unlawful.

- on December 3, 2007 (JDA76), which the Company did not provide until January 30, 2008 (JDA98);
- on August 6, 2008 (JDA126), which the Company did not provide until October 22 (JDA385); and
- on September 9, 2008 (JDA128), which the Company did not provide until October 24 (JDA130).

The Board found those delays unreasonable. *See, e.g., Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996) (17-day delay in providing “simple and readily accessible” information as to “who [had received wage increases], how much, when, and why” was unreasonable); *Postal Service*, 308 NLRB 547, 547n.1, 551 (1992) (4-week delay in supplying uncomplicated and easily acquired information was unreasonable). The Company declines to offer, and thus forfeits, any legal argument otherwise. (*See* pp.26-28.) Instead, the Company claims only that the Union sought irrelevant information and improperly requested updates. Those claims must be rejected.

2. The Union demonstrated the obvious relevance of its requests regarding temps the Company unlawfully used to perform unit work

In November and December 2007, at the outset of negotiations, the Union asked the Company for information about its use of temps to perform bargaining-unit work. (*See* pp.8-9.) Ignoring the text and context of those requests, the

Company erroneously argues (Br.57-60) that the Union failed to establish relevance.

As the Board noted (JDA1963-64), the November 16 request followed up on concerns the Union expressed at the bargaining table that the Company's temp use was unlawful. (JDA1964;1610.) In the request, the Union explained that it needed to know how and when temps had been hired because they were "clearly (and undisputedly) performing bargaining unit work" while the number of unit employees steadily dropped, which "appear[ed] to be a serious and fundamental violation of the Act." (JDA1964;73,1611.) On December 3, the Union reiterated those concerns, stating, "[t]he information we've received to date strongly suggests that the [Company] is evading its obligation to bargain and attempting to dilute if not eliminate the bargaining unit . . . by subcontracting bargaining unit work to [temps]." (JDA76.) It therefore sought further details about temps. (JDA1965;76.)

In support of those requests, the Union cited patently on-point cases (JDA73), including *Torrington Industries*, where an employer violated the Act by "laying off unit employees and replacing them with a nonunit employee, without first giving the Union notice and an opportunity to bargain," 307 NLRB 809, 809 (1992)—precisely what the Union accurately accused the Company of doing. The Union also cited *St. George Warehouse*, where information about temps hired post-

election was “clearly relevant to the [u]nion’s investigation” of the employer’s use of nonunit workers “to supplant the unit work force.” 341 NLRB 904, 925 (2004), *enforced*, 420 F.3d 294 (3d Cir. 2005).

As the Board found (JDA1966,2019-20), the Company was in fact unlawfully shifting unit work to temps, so that their work “ha[d] a potential impact on bargaining unit employees’ terms and conditions of employment.” (JDA1966-67.) Thus, as in *St. George Warehouse*, 341 NLRB at 925, information about the work temps were doing and the circumstances of their hire was pertinent to the Union’s decision whether to legally contest the Company’s conduct. (JDA1967.)

The Company’s contrary arguments fail. Although the Company states (Br.55-56) that it had already provided the information the Union requested on December 3, the updated information the Union belatedly received on January 30, 2008, was new—it noted 2 temps who had left, and 4 new ones who had arrived. (JDA100.) Similarly, the Company’s citation of information provided October 24, 2008, cannot show that the Union had that information in 2007. (Br.59 (citing JDA130).) Finally, the Company is wrong to claim that information about its hiring process was not “relevant to any alleged violation of the [Act].” (Br.59.) As the Board explained, the Company’s extensive, direct involvement with temp hiring refuted its claim that it sought temps to lighten the burden on its

“overwhelmed” human resources office, rather than to undermine the Union.

(JDA1962.)

3. The Union’s requests for updates on employees performing unit work were proper

On August 6, 2008, the Union asked to be notified about changes in the employment status of individuals doing unit work. (JDA1980;126.) Receiving no response, the Union made a separate request in September for information on the status of specific individuals. (JDA1980;128,1584-86,1628-29.)

The Company erroneously argues that its delay in responding should be excused because the August request was a legally unauthorized “standing information request.” (Br.60-62.) Ongoing requests are not unheard of,⁹ and the Board has found noncompliance with them unlawful. *See Salem Hosp. Corp.*, 359 NLRB No. 82, 2013 WL 1192307, at *4 (2013), *incorporated by reference*, 361 NLRB No. 110 (2014) (union made “an ongoing request” for documentation of employee discipline “imposed in the future”), *review pending* No. 15-1353 (3d Cir.).

⁹ *See Monmouth Care Ctr.*, 354 NLRB 11, 39 (2009) (union request for reports specifying, “[t]his information should be provided on a monthly basis . . . and the request is made on an ongoing basis”), *incorporated by reference*, 356 NLRB 152 (2010), *enforced*, 672 F.3d 1085 (D.C. Cir. 2012); *Albertson’s, Inc.*, 351 NLRB 254, 296 (2007) (request for information on status of unit employees, specifying, “this is an ongoing request for changes,” and “not a one-time request”).

In any event, the Company's theoretical objection to the "standing" nature of the request is irrelevant. The Board's unfair-labor-practice finding was not based on the Company's failure to continue sending updates, but rather its 11-week delay in providing anything. (JDA1984&n.28.) As the Board found, the request operated, at least, as a one-time request for current information. (JDA1984.) Moreover, under settled law, it was the Company's burden, if it thought the request unreasonable, to propose an accommodation. *U.S. Testing*, 160 F.3d at 21. *See, e.g., Lodges 743 & 1746, IAM v. United Aircraft Corp.*, 534 F.2d 422, 462 (2d Cir. 1975) (where union requested voluminous personnel documents "on a continuing basis," employer was entitled to demand cost reimbursement). The Company did not do that. Accordingly, as the Board found (JDA1981-82), the Company violated the Act by failing to respond to the August and September requests for 11 and 6 weeks, respectively.¹⁰

¹⁰ The Company inaccurately represents that a list of unit employees it provided on September 3 was "[i]n response" to the Union's August 6 request. (Br.56.) That document, entitled "2007 Earnings," responded to an earlier request for a breakdown of employees' hours. (JDA134,287,379,.1625-26,511.) That it was not an update on staffing as of September 2008 is clear from the fact that it listed employees who no longer worked there. (JDA1996,2000.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY'S OFFER OF ITS COUNSEL INTERFERED WITH EMPLOYEES' RIGHTS IN VIOLATION OF SECTION 8(a)(1)

Section 7 of the Act guarantees employees “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.” 29 U.S.C. § 157. The Board has long interpreted that language to protect employees “in seeking vindication” of their rights through Board proceedings. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *enforcement denied on other grounds*, 344 F.2d 617 (8th Cir. 1965). *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (Section 7 protects “resort to administrative and judicial forums”).

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Proof of actual coercion is unnecessary; an employer violates the Act if its conduct “may reasonably be said to tend to interfere with the free exercise of employee rights under the Act.” *Joy Silk Mills v. NLRB*, 185 F.2d 732, 743-44 (D.C. Cir. 1950). *Accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). “The question of whether an employer’s comments are coercive is a factual one,” *Procter & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 984 (4th Cir. 1981), which the Board must answer “tak[ing]

into account the economic dependence of the employees on their employers,”

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

The Board has long held that an employer violates Section 8(a)(1) of the Act by offering its own counsel to represent employees in communications with Board agents investigating unfair-labor-practice charges against the employer. *S.E.*

Nichols, Inc., 284 NLRB 556, 582 (1987), *enforced in relevant part*, 862 F.2d 952

(2d Cir. 1988); *KFMB Stations*, 349 NLRB 373, 387 (2007), *petition for review*

denied sub nom. AFTRA v. NLRB, 301 F. App'x 730 (9th Cir. 2008). Such offers

coerce and interfere with employees' rights by “telling employees that *they* might

need protection” from the Board, which is investigating the employer's alleged

violations of their rights. (JDA1978 (quoting *S.E. Nichols*, 284 NLRB at 559 n.9).)

That suggestion interferes with employees' exercise of their protected right to

“cooperat[e] with the Board.” (JDA1978 (quoting *S.E. Nichols*, 284 NLRB at 559

n.9).)

The offer also violates the Act because it proposes to furnish employees the

“protection” of an attorney with a “serious conflict of interest[.]” (JDA1978

(quoting *S.E. Nichols*, 284 NLRB at 559 n.9).) Counsel bound to defend the

employer cannot zealously represent the interests of the very employees whose

Section 7 rights the employer is alleged to have violated.

That conflict is particularly acute with regard to employees' statements to Board agents. An employer's "mere request" that employees provide copies of statements given to a Board agent is coercive, *Retail Clerks Int'l Ass'n v. NLRB*, 373 F.2d 655, 658 (D.C. Cir. 1967), due to the "intense leverage" employers have over their employees, and employees' likely inhibition by fear of their "capacity for reprisal and harassment." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). The same inhibition is felt by an employee who wishes to give a statement to Board agents, but has accepted representation from employer counsel. As the Board has noted, if a mere request to see an affidavit is coercive, "a fortiori, the presence of the employer's counsel when such statements are given would be coercive." *S.E. Nichols*, 284 NLRB at 582.

Applying those principles, the Board reasonably found that the Company's August 22, 2008 memorandum violated the Act. (JDA1932n.2,1977-78,2048n.1.) The memorandum informed employees that Board agents were seeking to contact them. (JDA1976;147.) It then offered "our lawyers" to represent employees in their interactions with Board agents investigating unfair-labor-practice charges against the Company (JDA1976;147), proposing an arrangement that would interfere with employees' exercising their right to supply evidence to the Board and "imply[ing] the need for protection" from Board agents. *S.E. Nichols*, 862 F.2d at 959. It reinforced that implication by describing contact from the Board as

“disturbing,” suggesting employees might “not feel comfortable speaking to the [Board] agents,” and asking them “not to be afraid or intimidated by the [Board]’s ‘investigation’ tactics.” (JDA1976.) The Company’s offer was therefore unlawful.

The Company primarily argues (Br.33-39) that the judge erred in relying on *Certain-Teed Products Corp.*, 147 NLRB 1517 (1964), where an employer unlawfully informed employees they were not obligated to talk to the Board. But the judge cited *Certain-Teed* only to support his recommended finding that the Company unlawfully discouraged employees from cooperating with Board investigations. (JDA1978.) Because the Board expressly did not pass on that finding (JDA1932n.2,2048n.1), the judge’s application of *Certain-Teed* is irrelevant. The Company’s discussion (Br.33-34) of Section 8(c) of the Act also misses the mark because its offer of counsel “was conduct beyond mere expression of opinion, and, thus, beyond the protection of § 8(c).” *Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 253 (2d Cir. 2000) (quotation omitted).

Finally, *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979), is distinguishable because the employer there did not offer its own counsel; it advised employees of their right to retain “independent counsel.” *S.E. Nichols*, 284 NLRB at 559 n.9. Its offer to merely help “put [employees] in touch” with an attorney does not implicate the same conflict-of-interest concerns at issue here, and its

language did not emphasize a need for protection from Board agents. *Fla. Steel*, 587 F.2d at 750. And here, unlike in *Florida Steel*, the communication came in the midst of numerous serious unfair labor practices. *See S.E. Nichols*, 862 F.2d at 959 (finding offer of counsel coercive where it occurred “in the midst of an anti-union campaign in which four union activists had been fired”).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY PROHIBITING EMPLOYEES FROM DISCUSSING THE CONTENTS OF THE DECEMBER 2008 MEETING

Section 7 of the Act protects “an employee’s right to discuss the terms and conditions of her employment with other employees and with nonemployees,” including union representatives. *Cintas Corp. v. NLRB*, 482 F.3d 463, 466-69 (D.C. Cir. 2007) (citations omitted). It also “protects employee communications to the public that are part of and related to an ongoing labor dispute.” *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252-53 (2007), *enforced*, 358 F. App’x 783 (9th Cir. 2000). *Accord Stanford*, 325 F.3d at 343. Accordingly, an employer interferes with employees’ Section 7 rights in violation of Section 8(a)(1) by issuing orders that employees would reasonably understand to restrict discussion of employment terms or labor disputes with union representatives or the media. *Cintas*, 482 F.3d at 467.¹¹ In reviewing the Board’s interpretation of an employer’s orders, the

¹¹ An employer may demonstrate “a legitimate and substantial business justification” for an otherwise unlawful confidentiality rule. *Hyundai Am.*

Court defers to “reasonable inferences it draws from the evidence.” *Id.* at 468 (quotation omitted).

Applying those principles, the Board reasonably found unlawful the confidentiality order Katich issued at the outset of the December 3 meeting. (JDA1932n.2,1985-87,2049.) Relying on the judge’s credibility determinations, the Board found that Katich told employees, “[t]he contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building.” (JDA1985-86.) As the Board found, “reasonable employees would have perceived” that Katich’s “broad and essentially total blackout or ‘keep secret’ admonition” prohibited them from talking to one another, the Union, or the media regarding the contents of the meeting. (JDA1985-86.)

Those contents plainly included “terms and conditions of employment.” (JDA1932n.2.) In particular, Katich addressed productivity standards, which were at issue in bargaining, and therefore part of a labor dispute. (JDA1985-86;280,283,305,344,345,356,1575-80.) *See Valley Hosp.*, 351 NLRB at 1253 (employee’s comments to the media during bargaining about staffing levels “related to an ongoing labor dispute”). Thus, the Board properly found that the Company violated the Act by “[i]nstructing employees that anything said at an

Shipping Agency, Inc. v. NLRB, 805 F.3d 309, 314 (D.C. Cir. 2015). The Company offers none here.

employee meeting concerning employees' terms and conditions of employment is confidential." (JDA2049.)

In arguing that Katich did not mandate confidentiality (Br.52), the Company "fights the record evidence," *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015), but it cannot overcome the Board's credibility-based findings, *Cadbury*, 160 F.3d at 28. The Company also battles the facts in asserting that the order only shielded "specific proprietary information" from competitors or did not bar communications with the Union. (Br.52.) Katich did not articulate those caveats. (JDA1511,1663-64.) *See Cintas*, 482 F.3d at 468-69 ("all-encompassing" confidentiality rule was unlawful where it "made no effort in its rule to distinguish [S]ection 7 protected behavior from violations of company policy"); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014). His subjective, unstated intentions (Br.41-42) are irrelevant. As the Board properly stated, the "standard [it] applied" was "an objective one of determining what reasonable employees would have perceived." (JDA1985.) *See Cintas*, 482 F.3d at 467.¹²

¹² The Company also argues that *Crowne Plaza Hotel*, 352 NLRB 382 (2008) is distinguishable. The Board, however, expressly did not rely on that case. (JDA2048n.1.)

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING OF OVERALL BAD-FAITH BARGAINING

The duty to bargain in good faith under the Act “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” *NLRB v. Ins. Agents’ Union*, 361 U.S. 477, 485 (1960). It imposes on the parties “an obligation to make a sincere, serious effort to adjust differences and to reach an acceptable common ground.” *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981).

To determine whether a party has met that obligation, the Board considers “the totality of bargaining conduct.” *Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 F. App’x 444 (D.C. Cir. 2002). *Accord Pub. Serv. Co. of Okla. v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003). That inquiry encompasses conduct “both away from the bargaining table and at the table, including the substance of the proposals on which [the employer] has insisted.” *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991).

At the table, an employer’s “unrealistically harsh or extreme proposals can serve as evidence that [it] lacks a serious intent to adjust differences and reach an acceptable common ground.” *Liquor Indus.*, 333 NLRB at 1220. In particular, it is well established that employer proposals which “undermin[e] the Union’s ability to function as the employees’ bargaining representative demonstrate[] that [the employer] could not seriously have expected meaningful collective bargaining.”

Pub. Serv., 318 F.3d at 1177 (quotation omitted). The same inference arises from proposals which give employees and the Union fewer rights than they enjoy without any contract at all, *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir. 1984), or which “exclude the labor organization from any effective means of participation in important decisions affecting [employees’] terms and conditions of employment,” *United Contractors Inc.*, 244 NLRB 72, 73 (1979), *enforced mem.*, 631 F.2d 735 (7th Cir. 1980). The Board may properly infer bad faith from such proposals alone. *A-1 King*, 732 F.2d at 873, 877.

An employer’s course of unlawful conduct away from the table may also demonstrate bad faith. *Radisson*, 987 F.2d at 1381-82. Such conduct includes “attempts to bypass the Union and deal directly with the employees, its unilateral changes in terms and conditions of employment, failure to provide relevant information, as well as its conduct in violation of Section 8(a)(1).” *Mid-Continent Concrete*, 336 NLRB 258, 261 (2001), *enforced sub nom. NLRB v. Hardesty Co., Inc.*, 308 F.3d 859 (8th Cir. 2002). In particular, an employer’s unilateral changes in areas where bargaining is ongoing provides strong evidence that it lacks interest in reaching good-faith agreement on those issues at the table. *See NLRB v. Bonham Cotton Mills, Inc.*, 289 F.2d 903, 903 (5th Cir. 1961) (per curiam).

A. The Board Reasonably Inferred Bad Faith from the Company's Extreme Proposals and Pattern of Unlawful Conduct

Applying the foregoing principles, the Board reasonably found that the Company failed to bargain in good faith. As the Board found, from the outset, the Company insisted on proposals “so extreme that they would leave employees and the Union with fewer rights and protections than they would have without any contract at all.” (JDA1934,2018.) Meanwhile, as shown below, the Company's conduct away from the table “demonstrated its calculated strategy to reduce negotiations to a sham and undercut the Union's bargaining strength, so that employees would perceive collective bargaining to be futile.” (JDA1935,2019.)

1. Throughout bargaining, the Company insisted on proposals that would have eviscerated the Union's representational role

As explained above (pp.28-37), even without a contract, a collective-bargaining representative has the right to notice of, and a meaningful opportunity to bargain over, proposed changes to employees' terms and conditions of employment. *Katz*, 369 U.S. at 743. *See Prentice-Hall, Inc.*, 290 NLRB 646, 646 (1988). Here, as the Board found (JDA1934-35,2016-18), the Company insisted, as a condition of obtaining a contract, that the Union cede those rights and permit the Company to act as if there were no union.

Management Rights. As the Board explained, the Company's management-rights proposal sought to return "not just to the status quo of the state of affairs when the Union was representing employees without a contract," but in effect to the "earlier 'pre-representation' time when there was no[] employee representative and the [Company] could take actions and make decisions without the duty or obligation to bargain." (JDA2014.) To that end, proposed Section 1 expressly retained all of the rights, prerogatives, and functions the Company had held when there was no union. (JDA1935,2016;303.) Except as expressly provided elsewhere in the agreement, its power to make changes without bargaining would be unrestrained. (JDA1934-35,2016.)

As the Board properly recognized (JDA2016-17), the Company proposed no real restraints on that power. Section 2 of the proposal not only set forth 18 categories of decisions the Company could make without bargaining, it also specified that management's rights were "not limited" to those enumerated. (JDA2016-17;303.) And Section 2 further provided that the Company's rights to act unilaterally in those areas could not be "abridged" by anything else in the agreement. (JDA303.) Thus, the possibility of other limitations on management rights was illusory. *See E. Maine*, 658 F.2d at 11 (finding bad faith where employer's "encyclopedic" management-rights clause reserving "unilateral control over [nearly] every aspect of the employment relationship" would generally

“prevail over other inconsistent provisions”); *Hydrotherm*, 302 NLRB at 991 (broad management-rights clause was “arguably subject to any limitations specified in other provisions of the contract,” but other provisions “essentially retained all the discretion for the [employer]”).

The unlimited prerogatives the Company reserved would have deprived the Union of its right to represent employees in important, mandatory areas of bargaining.¹³ For example, the Board noted (JDA2017), Section 2 reserved “unlimited license” to assign unit work to unrepresented contractors, supervisors, or managers, as to which the Company would otherwise have to bargain. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) (“[A]n employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling [its] statutory duty to bargain.”); *Hampton House*, 317 NLRB 1005, 1005 (1995) (employer must bargain over transfer of unit work to supervisors). Likewise, the Company proposed to eliminate its obligation to bargain before laying off employees. *See Tri-Tech Servs., Inc.*, 340 NLRB 894, 894-95 (2003). Together, those provisions would have allowed the Company to “effectively dissipate unit work” at will, *Liquor Indus.*, 333 NLRB at 1221,

¹³ Mandatory subjects of bargaining are those which concern “wages, hours, and other terms and conditions of employment,” and about which unions and employers cannot lawfully refuse to bargain. *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988) (quoting 29 U.S.C. § 158(d)).

reducing the size of the unit and thus the Union's prospective bargaining strength (JDA1963).

More broadly still, the Company's management-rights language gave it unlimited discretion to "issue, amend and revise policies, rules, regulations, and practices." (JDA1934-35;303.) That would have left the Union without a voice as to innumerable changes over which it would otherwise be entitled to bargain. *See Radisson*, 987 F.2d at 1382 (finding surface bargaining where employer's proposals would have allowed it to "change working conditions whenever it pleased").

Finally, the Board emphasized (JDA1935,2017) that Section 6 of the Company's management-rights proposal would extend its provisions past the expiration of the collective-bargaining agreement. Under settled law, those waivers otherwise would end with the contract, restoring the Union's right to bargain over changes until the parties reached a new agreement. *See Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481-82 (6th Cir. 2002). Thus, the Board properly recognized that, under Section 6, "the Union's representational role as envisioned by the [Act] and Section 8(a)(5) would be eviscerated in perpetuity." (JDA1935,2017.) *See NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 999 (9th Cir. 1981) (per curiam) (employer's proposals of "an extremely strong 'management rights' package that would have required the union

effectively to abrogate its representation of the employees” was evidence of intention not to reach agreement).

Discipline and Discharge. Meanwhile, the Company sought to eliminate its duty to bargain over discipline and discharge by demanding “at-will employment.” (JDA1935,305.) It proposed unlimited discretion to impose discipline and discharge, declining to limit itself to the 20 offenses it listed by way of example; as its chief negotiator acknowledged, the Company would “not [be] constrained by anything in th[at] clause.” (JDA1935,2017;305,1633-34.) And it steadfastly opposed the Union’s just-cause proposal for discipline and discharge, “a common non-controversial clause.” *A-1 King*, 732 F.2d at 876. *See also Basic Patterns in Union Contracts* 7 (14th ed. 2003) (noting that 92 percent of contracts surveyed require “cause” or “just cause” for discharge). Thus, as the Board recognized (JDA2017), the Company insisted on “unfettered discretion” to punish employees for any reason, denying the Union any role in bargaining about disciplinary policies or their application to specific employees. *See A-1 King*, 732 F.2d at 876 (employer engaged in surface bargaining where, among other things, it proposed to “retain[] unfettered control over discharges and discipline”).

Grievance and Arbitration. In addition, the Company adamantly opposed any “mechanism of third-party adjudication of disputes such as an arbitration clause.” (JDA2017;326,391.) Arbitration is a near-universal component in

collective-bargaining agreements. *See Basic Patterns in Union Contracts* 37 (noting that 99 percent of contracts surveyed provide for arbitration). And the Supreme Court has long recognized that arbitrators “are indispensable agencies in a continuous collective bargaining process.” *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). *Accord United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) (noting “congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration”). Nonetheless, the Company insisted on “absolute power” to make “unreviewable final decisions” (JDA2017;1602), denying the Union any meaningful role in dispute resolution.

Proposals as a Whole. In analyzing the Company’s proposals, the Board properly considered how, taken together, they would impact the Union’s ability to represent employees. (JDA2016-18.) *See E. Maine*, 658 F.2d at 12 (considering “interlocking” nature of management rights and other proposals to evaluate surface-bargaining allegation). As shown, the Company’s proposals on management rights, discipline and discharge, and grievance and arbitration, in conjunction, demanded “unilateral control over virtually all significant terms and conditions of employment, including discharge, discipline, layoff, recall, subcontracting and assignment of unit work to supervisors.” *A-1 King*, 732 F.2d at 877.

The Board correctly found that combination of proposals “predictably unacceptable” to any union seeking to fulfill its role as a collective-bargaining representative. (JDA2015.) It is well established that insistence on such proposals is inconsistent with good-faith bargaining. *See Blevins Popcorn*, 659 F.2d at 1188 (“If a company insists on terms that no self-respecting union could brook, it may not be fulfilling its obligation to bargain.” (quotations omitted)); *A-1 King*, 732 F.2d at 877 (“The Board correctly inferred bad faith from the [employer]’s insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable.”); *Mar-Len*, 659 F.2d at 999.

Moreover, as the Board properly found, the Company’s proposals would have rendered “the Union and the unit employees . . . very much worse off than if they simply settled for never having entered into an agreement at all.” (JDA2017.) It is settled that an employer’s insistence on contract proposals which have that effect demonstrates bad faith.¹⁴ As the Board recognized, insisting on proposals that “vest nearly total discretion in the employer while offering little in return” is not “the conduct of an employer sincerely attempting to reach agreement.” (JDA2018 (citing *Hydrotherm*, 302 NLRB at 995).) *See Liquor Indus.*, 333 NLRB at 1221 (“extreme” proposal “made without any corresponding incentives to secure

¹⁴ *See, e.g., A-1 King*, 732 F.2d at 877; *NLRB v. Johnson Mfg. Co.*, 458 F.2d 453, 455 (5th Cir. 1972); *Regency Serv. Carts, Inc.*, 345 NLRB 671, 676 (2005); *Modern Mfg. Co.*, 292 NLRB 10, 10-11 (1988).

the Union's assent" was evidence that employers "w[ere] not negotiating in good faith").

2. During bargaining, the Company unlawfully undermined the Union's representational role

The Board properly found (JDA1935,2018-19) that while the Company was making proposals at the table that would have eliminated any meaningful representational role for the Union, it was conducting itself away from the table as if that role had already been eliminated. That unwillingness to accept the Union's legitimacy demonstrates bad faith. *See Radisson*, 987 F.2d at 1382 (finding surface bargaining where employer "treated the unions as irrelevant with respect to issues of vital significance, including wage and schedule changes, and then refused to provide the unions with basic information concerning unit employees").

As the Board found (JDA1935,2019), the Company undermined the Union throughout negotiations by its unilateral changes and other violations. For example, by unilaterally transferring away large portions of the unit's work—a violation the Company no longer contests—it seized the very power its management-rights clause proposed. (JDA303.) Moreover, it did so deliberately "to weaken and undermine the Union in its representative capacity." (JDA1935, 1975,2019.) *Cf. NLRB v. Brown-Graves Lumber Co.*, 949 F.2d 194, 197 (6th Cir. 1991) ("[H]iring people outside the unit to do [unit] work . . . impair[s] the unit's integrity."). And in declining to notify or offer to bargain with the Union before

laying off Mineards, and then delaying providing information about him, the Company simply acted as if its proposed layoff language were already in effect. (JDA303.) It conducted itself likewise, as shown above (pp.34-37), with regard to productivity standards.

Similarly, the Company undermined the Union when it unilaterally changed—and then repeatedly misrepresented in bargaining—its established practice with regard to annual merit increases. (JDA2019) As the Court has recognized, such unilateral changes “denigrate[] the Union and the viability of the process of collective bargaining itself, in the eyes of unit employees.” *Vico*, 333 F.3d at 208. *Accord Hardesty*, 308 F.3d at 865. Further, the Company’s repeated unlawful delay in providing important information “obstructed the bargaining process.” (JDA1935.) *See Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992) (employer’s “stall[ing] in responding to the Union’s . . . request for an updated list of basic information about the unit employees” indicated surface bargaining), *enforced*, 987 F.2d 1376 (8th Cir. 1993).

In sum, the Company’s pattern of unilateral changes and other violations “evidence[d] an intention to by-pass, undermine and discredit the Union as the exclusive bargaining agent” of unit employees. *Cont’l Ins. Co. v. NLRB*, 495 F.2d 44, 50 (2d Cir. 1974). The Board reasonably found bad-faith bargaining based on the Company’s entire course of conduct. (JDA2018-19.)

3. The Company fails to refute the Board's findings

The Company's challenges to the Board's finding of bad faith are meritless. The Company notes (Br.76) that an employer's proposal of a broad management-rights clause is not a per se violation of the Act. But as the Company concedes, "such a position may suggest a party is coming to the table predetermined not to reach agreement." (Br.76.) Based on the totality of the Company's conduct, the Board found that unlawful predetermination here.

The Company does not seriously dispute the settled principle that the Board may infer bad faith where an employer's proposals would leave the Union worse off than with no contract at all. (Br.77.) Rather, the Company wrongly argues, in conclusory fashion, that its proposals would not have had that impact, suggesting that the breadth of its management-rights proposal could have been mitigated by "limiting terms" that simply had not yet been negotiated. (Br.77.) As explained above, however (pp.54-57), the Board properly found (JDA2016-17) that the interlocking language of Sections 1 and 2 left no room for real limits on company discretion. To the extent the Company suggests it would have eventually agreed to meaningful limitations, the Board properly discredited its bare assertions of flexibility. (JDA2017-18.) *See NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 610 n.8 (7th Cir. 1979) ("The fact that the employer carefully stated that it was not

‘wedded to’ any particular proposal will not exonerate it when its intransigent bargaining posture belies its words.”).

The Company also argues that its other unfair labor practices do not “determine conclusively” that it bargained in bad faith. (Br.78.) But as shown (pp.60-61), the Company’s unlawful conduct repeatedly undercut the Union in bargaining. (JDA2018-19.) Thus, the cases it cites (Br.78n.15), in which isolated violations had no impact on negotiations, are inapposite. Nor does the Company overcome the Board’s finding by pointing to the parties’ tentative agreements on a handful of issues. As the Board found (JDA2014), the parties only reached tentative agreement on “minor or less significant matters,” while the real areas of disagreement remained unsettled. *See A-1 King*, 732 F.2d at 873, 877 (finding surface bargaining even though parties reached agreement in 7 areas).

Similarly, the regularity with which the parties met (Br.79) means little, given that the Company clung to its demands for total control throughout (JDA2018). “[T]he duty to bargain in good faith is not satisfied by merely meeting with union representatives to inform them that the employer cannot or will not change its position.” *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 266 (2d Cir. 1963) (quotations omitted). *See Modern Mfg.*, 292 NLRB at 11 (finding surface bargaining even though “the [employer]’s negotiators appeared regularly at the bargaining table and the negotiations resulted in movement and agreement on some

subjects”); *E. Maine*, 658 F.2d at 11 (“22 meetings over eight months”); *A-1 King*, 732 F.2d at 873 (18 sessions over 11 months); *Cont’l Ins.*, 495 F.2d at 47 (27 sessions over 18 months). And although the Company notes (Br.79) that a federal mediator participated in negotiations, it fails to acknowledge that it initially opposed his involvement. (JDA273,277,490,495,1598.)

The Company’s observation that it withdrew no-strike language (Br.77) is equally weak. Employees had the right to strike without any contract—and without a contract they retained the right to notice and an opportunity to bargain, which the Company sought to eliminate. *Prentice-Hall*, 290 NLRB at 646. *See Johnson Mfg.*, 458 F.2d at 455 (finding surface bargaining where employer insisted on “retaining unilateral control of matters which are traditionally bargainable” while “merely providing the Union with the right to strike in protest,” thus failing to “offer any provisions which would give its employees or the Union anything more than they would have with no contract at all”). In any event, the Company’s willingness to relinquish its no-strike language after nearly 5 months of bargaining (JDA501) does not outweigh the other overwhelming evidence of bad faith. *See Wright Motors*, 603 F.2d at 609 (employer’s abandonment of its “extreme

positions on the management rights and no-strike issues” after 6 months “would not exonerate the earlier bad-faith bargaining”).¹⁵

B. The Company’s Asserted Defense of Union Bad Faith Fails

There is no merit to the Company’s additional contention (Br.67-73) that the Union’s conduct exonerates its bad-faith bargaining. That argument is based largely on the Company’s unduly broad reading of *Ampersand I*. There, the Court held that during the Union’s organizing campaign in 2006 and early 2007, employees engaged in concerted activities that were unprotected because they were motivated by an objective of gaining control over the Company’s editorial policies. 702 F.3d at 56-57. The Company makes the unwarranted leap of arguing (Br.68-70), in effect, that because of the unprotected conduct at issue there, it was entitled to bargain in bad faith in this case. As the Board correctly noted, however, the Company never argued to the Board that *Ampersand I* affected its findings here. (JDA2048 (incorporating by reference JDA2042-43n.5).) Thus, as explained below (pp.71-75), it cannot make such arguments here. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

¹⁵ The Company also errs in suggesting (Br.78) that the Board relied on violations from *Santa Barbara News-Press*, 357 NLRB 452 (2011) in finding bad-faith bargaining here. The judge cited those violations only in crafting remedies (JDA2021), and the Board unequivocally disavowed any such reliance (JDA2044-45).

In any event, the Company's reliance on *Ampersand I* is unavailing. In an effort to conflate the facts of that case with those at issue here, the Company simply ignores the timing of the events it describes. For instance, it inappropriately quotes *Ampersand I*, 702 F.3d at 55, for the proposition that the Union ““undertook continual action”” to influence the Company's editorial policies. (Br.68.) But it forgets that the complaint in *Ampersand I* issued on May 31, 2007, and no subsequent events were before the Board or the Court. See *Santa Barbara News-Press*, 357 NLRB at 464. The Court could not—and did not—address union goals and motivations during bargaining that had not yet come to pass.

Similarly, the Company points (Br.69) to union and employee conduct “[a]way from the table” that, it claims, shows union bad faith. But the events it cites took place between July 2006 and February 2007, long before the parties came to the table.¹⁶

The Company's claim (Br.70-73) that its bad faith is excused by the Union's proposals at the table is also flawed. The Board properly rejected the Company's claim, which the record contradicts, that the Union sought editorial control during

¹⁶ Before the Court, the Company has not challenged the Board's finding (JDA1951-52) that any economic pressure the Union brought to bear *after* bargaining began did not excuse the Company's bad-faith bargaining. Any such argument is therefore waived. *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

bargaining. (JDA2043-44.) As the Board found (JDA2043), in negotiations the Union expressly abandoned the unprotected goals at issue in *Ampersand I*, and repeatedly conceded that the Company had the absolute right to determine its newspaper's content. Substantial evidence supports that finding.

As the Board found (JDA2043), during bargaining the Union agreed that the Company had the "sole and exclusive" right "to determine the content" of its newspaper. (JDA303.) Indeed, its first written response to the Company's management-rights proposal stated, "[t]he Union does not disagree that Management has a right to determine the content of the paper." (JDA367,285.) And the Union's own management-rights proposal gave the Company the sole right "[t]o determine the content of [the newspaper], including, but not limited to, editing, presentation and placement of all stories, columns, and photos." (JDA372.)

The Union consistently disputed any contrary assertions from the Company, for example by assuring the Company on May 23, 2008, that its "questions and comments have nothing to do with an attempt to control the content of the paper." (JDA111.) Repeating that assurance, the Union told the Company on July 11 that it "continue[s] to recognize that content is ultimately the responsibility of the Publisher." (JDA378.) On October 6, the Union again confirmed that it was "not seeking to control the paper." (JDA1357.) Indeed, the Company's own February

26, 2009 bargaining notes acknowledged the Union's insistence that "it's not [the Union's] position to take control of the newspaper." (JDA517.)

Finally, as the Board emphasized (JDA2043-44), the Union itself offered language mandating that nothing in its proposals "shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper." (JDA2013;377.) In responding to the Union's recognition of the Company's right to control its paper's content, the Company simply "refused to take 'yes' for an answer," as the Board aptly noted. (JDA2044.)

Notwithstanding the Union's assurances to the contrary, the Company argues erroneously (Br.70) that the Union sought authority "to challenge the publisher's content decisions," and that its proposals on management rights, grievance and arbitration, and discipline and discharge somehow transferred decisionmaking on editorial matters to the Union. Those assertions are unsupported by the record materials the Company cites, which instead demonstrate the Union's legitimate desire for just-cause language and binding-arbitration procedures commonly found in collective-bargaining agreements.

The Company also fails to show (Br.70) that the Union proposed work-assignment or employee-integrity clauses in bad faith. Although the Union proposed that employees be consulted about changes to their work, it made clear that the Company would have the final say. (JDA46,246,339,377.) Such purely

procedural employee rights are unexceptional in newspaper-industry collective-bargaining agreements (*see* p.69n.17 and materials cited), and the fact that the Company “goes to great lengths to characterize the issue as one involving editorial discretion” does not make it so. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1555 n.18 (D.C. Cir. 1984). The Union’s proposed clauses did not limit the Company’s right to print whatever it desired, establish its preferred editorial policies, or structure the opinion, business, and newsgathering arms of the paper as it chose. Thus, they are unlike the demands at issue in *Ampersand I* that the Court found to be “aimed at limiting the publishers’ ‘interference’ with news content.” 702 F.3d at 53.

Likewise, the Board properly found that the “byline protection clauses” the Union proposed were not “an impingement on a newspaper publisher’s right to control the content of its product.” (JDA2043 (citing *Westinghouse Broad.*, 285 NLRB 205, 215 (1987))). Such clauses, which have been commonplace in newspaper-industry contracts for over 75 years,¹⁷ permit employees to protect their

¹⁷ *See NLRB v. Citizen-News Co.*, 134 F.2d 970, 973 (9th Cir. 1943) (quoting 1940 contract); 6C Nichols Cyc. Legal Forms §§ 138:31, 138:32 (Westlaw) (providing sample employee-integrity and byline-protection language for inclusion in newspaper collective-bargaining agreements). The Union’s chief negotiator testified about a *Newsday, Inc.* contract, effective 2006 to 2010, containing byline protection. (JDA1723;1379.) For other examples of such agreements, collected by the U.S. Department of Labor, see *Associated Press* (2002), p.57, <http://digitalcommons.ilr.cornell.edu/blscontracts/533/> (“An employee’s byline shall not be used over his/her protest.”); *Washington Post* (2002), p.38, <http://digitalcommons.ilr.cornell.edu/blscontracts/533/>.

professional reputations by declining attribution for work that others have substantively changed. (JDA2043n.6.) Here, the Union explained its byline-protection proposals exclusively in terms of employees' individual interests in their professional reputations. (JDA1353,288.) And it made clear that the Company would have the unlimited "right to make the change" in an article; it would only have to "allow the reporter to remove the byline if he/she desires." (JDA1353.)

Finally, substantial evidence supports the Board's finding (JDA1953) that to the extent the Union's work-assignment and employee-integrity proposals were, as the Company argued, permissive (JDA1953,2011;2044;1599-1600,432), they did not impede bargaining. As to permissive subjects, "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). It is undisputed that, as the Board found (JDA1953), the Union did not insist to impasse on any permissive proposal.¹⁸ *See id.* Rather,

<http://digitalcommons.ilr.cornell.edu/blscontracts/93/>; *Globe Newspaper Co.* (1998), p.67, <http://digitalcommons.ilr.cornell.edu/blscontracts/99/>; *Philadelphia Newspapers, Inc.* (1993), p.48, <http://digitalcommons.ilr.cornell.edu/blscontracts/98/>; *San Francisco Newspaper Publishers Association* (1993), p.35, <http://digitalcommons.ilr.cornell.edu/blscontracts/95/>. The Court may take judicial notice of those documents. Fed. R. Evid. 201; *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

¹⁸ To the extent the Company suggests that the Union's proposals on permissive matters touching on employee ethics were inherently unprotected or in bad faith, the Court's decision in *Newspaper Guild* is to the contrary. There, the union demanded to bargain over a code of employee ethics. 636 F.2d at 556. The Court rejected the employer's argument that, under the First Amendment, it "c[ould not]

“when the [Company] asked the Union to withdraw certain proposals, it did so.” (JDA1953;46,339,362,377,128.) As the Company’s chief negotiator testified with regard to work-assignment and employee-integrity proposals, the Company “didn’t adopt a stance of—we are never going to discuss it. We had some discussion of it, but I reached a point where I asked them to withdraw it and they did.” (JDA1645-46.) Thus, the real impediment to meaningful bargaining was not the parties’ discussion of permissive subjects, but rather the Company’s repeated unfair labor practices and unwavering insistence on proposals that would have stripped the Union of any meaningful representational role.

VI. THE COMPANY’S ARGUMENTS BASED ON THE FIRST AMENDMENT ARE JURISDICTIONALLY BARRED, WAIVED, AND IN ANY EVENT MERITLESS

A. The Court Is Jurisdictionally Barred from Considering the Company’s Belatedly Raised First Amendment Arguments

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

be compelled to bargain concerning such matters.” *Id.* at 558. In remanding for the Board to determine which aspects of the code were mandatory subjects, the Court nowhere intimated that the union lost the protection of the Act by demanding to bargain about the code as a whole.

circumstances.” 29 U.S.C. § 160(e). The Court is thus jurisdictionally barred from considering arguments a party raises for the first time on appeal. *Woelke & Romero*, 456 U.S. at 665-66; *W&M Props. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008).

In its filings with the Board, the Company never argued, as it does here, that the First Amendment shields it from all charges filed by the Union because employees it represents once had unprotected motivations. (Br.20-28.) Nor did the Company ever argue to the Board that those unprotected motivations precluded any Board-ordered bargaining over the classification of individuals doing unit work because such an order would violate the First Amendment. (Br.28-31.) The various references to the First Amendment that the Company did make before the Board failed to present those specific arguments. *See N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) (broad language that does not put the Board on notice of specific contention is insufficient). Moreover, the arguments that the Company makes for the first time here were fully available to it at all times. For whatever reason, it chose not to make them to the Board, and they are therefore waived. *Woelke & Romero*, 456 U.S. at 665-66.

Nor did the Company contend to the Board that its order “directly conflicts with” (Br.27) or “disregards this Court’s instructions” (Br.31) in *Ampersand I*. Indeed, although the Company moved for reconsideration of the Board’s order

regarding a remedial issue in October 2012, it did not seek to amend its motion to place arguments before the Board based on *Ampersand I* when the decision issued in December 2012. As the Board noted in its subsequent order denying reconsideration, by failing to argue that *Ampersand I* warranted reconsideration of any violation found or remedy ordered in this case, the Company waived those claims. (JDA2048 (incorporating by reference JDA2042-43n.5).) The Court therefore lacks jurisdiction to consider them. *W&M Props.*, 514 F.3d at 1345.

Moreover, although the Company was aware of the Board's observation that Section 10(e) applies (JDA2042-43n.5), it declined to argue in its opening brief that "extraordinary circumstances" permit the Court to hear its arguments. Should it attempt to do so in reply, the Court should "decline to entertain th[at] contention[] in order to prevent the 'sandbagging' of [the Board]." *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

Nonetheless, anticipating arguments the Company may improperly raise in reply, the Board notes, first, that Section 10(e) applies even though the Board (JDA2042-45) addressed contentions based on *Ampersand I* that the Company could have raised. *See HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) ("[S]ection 10(e) bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue." (quotation omitted)). Further, the constitutional nature of the Company's belatedly raised

arguments makes no difference. *See Marine Engineers' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 43 (D.C. Cir. 2000) (constitutional argument was “not properly before the [C]ourt” because not developed in opening brief); *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1368 (11th Cir. 2012) (applying Section 10(e) to bar due-process argument). Importantly, although the Court’s review of constitutional issues is de novo, the Company’s tactical reservation of its arguments deprived the Board of the opportunity to address them applying its court-recognized expertise in this area. *Newspaper Guild*, 636 F.2d at 563. *Cf. Passaic*, 736 F.2d at 1559 (remanding to allow the Board, in the first instance, to craft a remedy consistent with the First Amendment).

Finally, the Company cannot show extraordinary circumstances based on “patent futility.” *W&M Props.*, 514 F.3d at 1346. Assertions that the Act, as applied, abridges First Amendment freedoms must be considered on the facts of each case. *See Associated Press*, 301 U.S. at 132 (“Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.”). Indeed, the Company concedes (Br.31) that the Act applies to newspaper employers, and must yield only under particular circumstances. Because that analysis is fact bound, the Company cannot show that the Board had already rejected “identical arguments” to those it makes to the Court now. *W&M Props.*, 514 F.3d at 1346. The Board’s findings on different facts in a prior case

did not foredoom all possible First Amendment arguments in this case. *See id.* (a party's "own forecast regarding how the Board might view its argument in light of the recently decided adverse precedent" cannot show that "a motion for reconsideration was clearly doomed" (quotation omitted)).

B. The Company's Arguments Are Further Waived Because They Are an Untimely Collateral Attack on the Union's Certification

In addition, the Company's First Amendment arguments are not properly before the Court because they are an untimely collateral challenge to the Union's certification. The Company argues that it has no obligation to bargain with the Union because employees selected it for unprotected reasons. (Br.20-31.) It bases that argument exclusively on facts known to it before the Union was certified. (Br.3-10.) But if the Company thought those facts privileged it to not bargain, it was required to avail itself of well-established test-of-certification procedures, namely, refusing to bargain and raising an affirmative defense against the resulting refusal-to-bargain complaint that the certification was improper. *Downtown BID*, 682 F.3d at 112.

It is settled that "[o]nce an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid." *Technicolor Gov't Servs. v. NLRB*, 739 F.2d 323, 326-27 (8th Cir. 1984). *Accord King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968). Accordingly, the Company long ago waived its claims that pre-

certification union or employee conduct absolves it of liability for bargaining-related violations.

C. In Any Event, the Company's First Amendment Arguments Are Factually and Legally Unfounded

The Supreme Court and this Court consistently have held that newspapers, like other employers, are subject to the Act. *Associated Press*, 301 U.S. at 132-33; *Newspaper Guild*, 636 F.2d at 557-58. The Company believes it is not. (Br.20-31.) Its novel contention is that because employees engaged in unprotected conduct in the past, and its responsive actions at that time were not unlawful, it is now free to violate any and all provisions of the Act indefinitely. (Br.20-31,81-82.) That unsupported argument must be rejected.

1. This case is not *Ampersand I*

The Company contends (Br.20-28), at bottom, that the Court's decision in *Ampersand I* grants it immunity for the unfair labor practices at issue in this case. But this case is not *Ampersand I*.

The Court's holding in *Ampersand I* turned on its conclusions that employees' activities were "overwhelmingly" motivated by unprotected content-related aims, and that protection of the Company's editorial discretion was therefore "the *main* issue in dispute." 702 F.3d at 54, 58 (emphasis in original). Specifically, the Court concluded that the Union's chief demand was for the Company to "[r]estore journalism ethics" by "implement[ing] and maintain[ing] a

clear separation between the opinion/business side of the paper and the news-gathering side.” *Id.* at 53-54. At issue was “a specific demand by a union campaign regarding the publisher’s preparation of content for its newspaper—i.e., the separation of the [Company]’s news and editorial sections.” *McDermott v. Ampersand Pub. LLC*, No. 08-1551, 2008 WL 8628728, at *11 (C.D. Cal. May 22, 2008), *aff’d*, 593 F.3d 950 (9th Cir. 2010).

The Company fails to show that such a demand was ever advanced by the Union in bargaining. (JDA1620,46.) On the contrary, as shown (pp.53-71), the Union sought bargaining over a broad range of bread-and-butter issues and proposed standard contract language found throughout the newspaper industry. And it repeatedly reaffirmed the Company’s right to establish editorial policies and determine content. (See pp.66-71.) Thus, unlike in *Ampersand I*, editorial discretion was never genuinely in dispute at the bargaining table here because the Union conceded it. (JDA2043-44.) The Company does not address, much less refute, that Board finding.

As the Courts and the Board have recognized, the motives actuating a union or employer are not immutable. *See NLRB v. Fla. Med. Ctr., Inc.*, 576 F.2d 666, 674 (5th Cir. 1978) (“While there is substantial evidence to support a finding of extreme union animus at the beginning of this episode, there is little if any evidence to support a theory that the fire had not burned down by the time of the

[later] incident.”); *Springfield Hosp.*, 281 NLRB 643, 687 (1986). In accordance with that reality, longstanding Board law does not presume that a party which has acted unlawfully in the past will continue to do so forever. See *Handy Andy*, 228 NLRB 447, 453 (1977) (Board will not “conclude that there will be further unlawful conduct solely” because a union previously discriminated). Here, the Board properly found that the motives found unprotected in *Ampersand I* did not actuate the Union in bargaining. That factual finding regarding motive is entitled to great deference, *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005), and the Company cites nothing to undermine it. Accordingly, the Company’s request for a blanket exemption from the Act is without support in the record or the law, and must be rejected.

2. The Board’s Order is constitutionally proper

To the extent the Company separately argues that any legally imposed restrictions on its staffing decisions violate its right to choose newspaper content, the Supreme Court long ago ruled otherwise. In *Associated Press v. NLRB*, over the employer’s First Amendment objections, the Supreme Court upheld a Board order to reinstate an editorial employee. 301 U.S. at 130-33. Although that order was a union-backed government mandate restricting the employer’s “right to select its writers” (Br.30), the Supreme Court held that it “in nowise circumscribe[d] the full freedom and liberty of the [employer] to publish the news as it desires it

published.” *Id.* at 133. Like the reinstatement order upheld in *Associated Press*, the Board’s order here imposes no restraint, prior or otherwise, on what the Company can print.

For example, the Board found that the Company unilaterally transferred unit work to a freelancer and temps. (JDA1958-61,1973-74.) But its order remedying that violation “simply does not address the content of the work.” (JDA1974.) Instead, it requires the Company to bargain about how those performing unit work will be classified—as temps, freelancers, or unit employees—and under what terms and conditions they will perform it.

It is settled that the Company’s right to publish content of its choice does not authorize it to do so by unlawful means. *See Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946-49 (7th Cir. 2015) (statute prohibiting obtaining personal information from motor vehicle records did not violate freedom of the press). Thus, the law does not privilege the Company to hire reporters as temps in contravention of its duty to bargain any more than it permits it to hire reporters on terms that violate the Fair Labor Standards Act. *See Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192-93 (1946). To the extent that generally applicable legal duties—including the duty to pay the minimum wage or bargain under the Act—have “incidental effects on [the press’s] ability to gather and report the news,” such attenuated impacts are not cognizable as First Amendment violations.

Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); *Associated Press*, 301 U.S. at 133.

In sum, the Board's order is fully consistent with the First Amendment. It does not "compel the Company to publish what it prefers to withhold." *Passaic*, 736 F.2d at 1557. Nor does it sanction the Company for resisting unprotected "employee[] demands for editorial control." *Ampersand*, 702 F.3d at 57. Rather, it requires the Company to remedy its unfair labor practices and bargain over employee terms and conditions with a Union which, as the Board found, has made clear it seeks no such control.

CONCLUSION

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

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November 2016

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMPERSAND PUBLISHING, LLC, D/B/A)	
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)	Nos. 15-1074, 15-1130
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	31-CA-028589 et al.
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
GRAPHICS COMMUNICATIONS)	
CONFERENCE OF THE INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 16,998 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 30th day of November 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 30th day of November 2016