

Nos. 16-1276, 16-1335

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

MINTEQ INTERNATIONAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO**

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**

ROBERT J. ENGLEHART
Supervisory Attorney

ERIC WEITZ
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2978
(202) 273-3757

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

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

MINTEQ INTERNATIONAL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 16-1276, 16-1335
)	
Respondent/Cross-Petitioner)	Board Case No.
)	13-CA-139974
and)	
)	
INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 150, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Intervenor

Minteq International, Inc., was the respondent before the Board in the underlying unfair-labor-practice proceeding and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. International Union of Operating Engineers, Local 150, AFL-CIO, was the charging party before the Board, and is the Intervenor in this court proceeding. The petition for review in this court proceeding was filed on behalf of Minteq International, Inc., and Specialty Minerals, Inc., wholly owned subsidiaries of

Mineral Technologies, Inc., but the cross-application for enforcement and the underlying Board Order only extend to Minteq International.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on July 29, 2016, and reported at 364 NLRB No. 63. The Board seeks full enforcement of that Order.

C. Related Cases

The case on review was not previously before this Court or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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

Dated at Washington, DC
this 6th day of February, 2017

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact	3
A. Background; the Union’s role as bargaining representative and the parties’ collective-bargaining agreement	3
B. The Company begins requiring individual employees to sign a Non-Compete and Confidentiality Agreement.....	5
C. The Company attempts to enforce the NCCA against Charles Spear; the Union files a charge.....	7
II. The Board’s conclusions and Order	8
Summary of argument.....	9
Standard of review	11
Argument.....	12
I. The Company violated Section 8(a)(5) and (1) of the Act by requiring employees to sign the Non-Compete and Confidentiality Agreement without first notifying or bargaining with the Union.....	12
A. An employer violates Section 8(a)(5) and (1) by making unilateral changes involving mandatory subjects of bargaining	12
B. The Board reasonably found the Company’s decision to implement the NCCA to be a mandatory subject of bargaining	13

1. The NCCA primarily impacts employees’ terms and conditions of employment and it is thus a mandatory subject of bargaining	14
2. The Company’s “core of entrepreneurial control” argument misconstrues precedent and must be rejected	18
3. The Company’s remaining arguments are unavailing	26
C. The Union neither exercised nor waived its right to bargain over the NCCA	29
1. The Parties’ collective-bargaining agreement does not “cover” the NCCA, and the Union never exercised its statutory bargaining right	31
2. The Union did not clearly and unmistakably waive its right to bargain over the NCCA.....	39
II. The Company violated Section 8(a)(1) of the Act by maintaining the “Interference with Relationships” and “At-Will Employee” provisions of the Non-Compete and Confidentiality Agreement.....	40
A. An employer’s rule is unlawful if employees would reasonably construe its language as prohibiting conduct protected by Section 7 of the Act	40
B. Substantial evidence supports the Board’s finding that employees would construe the “Interference with Relationships” provision of the NCCA as restricting protected conduct	42
C. Substantial evidence supports the Board’s finding that employees would construe the “At-Will Employee” provision of the NCCA as restricting protected conduct.....	44
Conclusion	47

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	15
<i>Allied-Signal, Inc.</i> , 307 NLRB 752 (1992)	40
<i>Arlington Elec., Inc.</i> , 332 NLRB 845 (2000)	43
<i>Bolton-Emerson, Inc.</i> , 293 NLRB 1124 (1989), <i>enforced</i> , 899 F.2d 104 (1st Cir. 1990).....	17
<i>Chelsea Indus., Inc. v. NLRB</i> , 285 F.3d 1073 (D.C. Cir. 2002).....	11
<i>Cintas Corp. v. NLRB</i> , 482 F.3d 463 (D.C. Cir. 2007).....	40, 44
<i>Democratic Union Org. Comm., Seafarers Int’l Union, Local 777 v. NLRB</i> , 603 F.2d 862 (D.C. Cir. 1978).....	16
<i>Dep’t of Navy v. Fed. Labor Relations Auth.</i> , 962 F.2d 48 (D.C. Cir. 1992).....	29, 30
<i>DirecTV, Inc. v. NLRB</i> , 837 F.3d 25 (D.C. Cir. 2016).....	42
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1976).....	42
<i>Enloe Med. Ctr. v. NLRB</i> , 433 F.3d 834 (D.C. Cir. 2005).....	29, 30, 31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Enter. Leasing Co. of Fla. v. NLRB</i> , 831 F.3d 534 (D.C. Cir. 2016).....	19
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	14, 18, 19, 20, 21, 22, 24
* <i>First Nat'l Maint. Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	14, 15, 16, 18, 19, 20, 21, 24
* <i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	11, 13
<i>Heartland Plymouth Court MI, LLC v. NLRB</i> , 650 F. App'x 11 (D.C. Cir. 2016)	30
<i>Holmes & Narver</i> , 309 NLRB 146 (1992)	24
<i>Int'l Bhd. of Elec. Workers, Local 47 v. NLRB</i> , 927 F.2d 635 (D.C. Cir. 1991).....	12
<i>King Soopers, Inc.</i> , 340 NLRB 628 (2003)	23
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), <i>enforced mem.</i> , 203 F.3d 52 (D.C. Cir. 1999).....	40, 41
<i>Lower Bucks Cooling & Heating</i> , 316 NLRB 16.....	17
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	40, 41

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Mental Health Servs., Nw., Inc.</i> , 300 NLRB 926 (1990)	17
<i>Mohave Elec. Coop., Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000).....	36
<i>Nat'l Ass'n of Gov't Emps.</i> , 327 NLRB 676 (1999), <i>enforced mem.</i> , 205 F.3d 1324 (2d Cir. 1999)	17
<i>Newspaper Guild of Greater Phila., Local 10 v. NLRB</i> , 636 F.2d 550 (D.C. Cir. 1980).....	21, 22, 23, 24
<i>NLRB v. C&C Plywood Corp.</i> , 385 U.S. 421 (1967).....	12
<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984).....	46
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990).....	11
<i>NLRB v. Ins. Agents' Int'l Union</i> , 361 U.S. 477 (1960).....	27
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	13
<i>NLRB v. U.S. Postal Serv.</i> , 8 F.3d 832 (D.C. Cir. 1993).....	29, 31
<i>Orlans v. Orlans</i> , 238 F.2d 31 (D.C. Cir. 1956).....	36

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Peerless Publ'ns</i> , 283 NLRB 334 (1987)	22, 23, 28
* <i>Regal Cinemas, Inc. v. NLRB</i> , 317 F.3d 300 (D.C. Cir. 2003).....	13, 14, 30, 36, 38, 39
<i>S. Jersey Reg'l Council of Carpenters, Local 623</i> , 335 NLRB 586 (2001), <i>enforced sub nom.</i> , <i>Spectacor Mgmt. Grp. v. NLRB</i> , 320 F.3d 385 (3d Cir. 2003).....	26, 46
<i>S. Nuclear Operating Co. v. NLRB</i> , 524 F.3d 1350 (D.C. Cir. 2008).....	29
<i>S. Plasma Corp.</i> , 242 NLRB 1223 (1979), <i>enforced in relevant part</i> , 626 F.2d 1287 (5th Cir. 1980)	24, 25
<i>Stanford Hosp. & Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003).....	42
<i>Stewart v. Nat'l Educ. Ass'n</i> , 471 F.3d 169 (D.C. Cir. 2006).....	33, 34
<i>Success Vill. Apartments, Inc.</i> , 348 NLRB 579 (2006)	16
<i>U.S. Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	12
<i>United Food & Commercial Workers, Local 150-A v. NLRB ("UFCW I")</i> , 880 F.2d 1422 (D.C. Cir. 1989).....	11, 13
<i>United Food & Commercial Workers, Local 150-A v. NLRB ("UFCW II")</i> , 1 F.3d 24 (D.C. Cir. 1993).....	14

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	11, 12
* <i>Va. Mason Hosp.</i> , 357 NLRB 564 (2011).....	23, 28
 Statutes	
National Labor Relations Act, as amended (29 U.S.C. §§ 151 <i>et seq.</i>)	
Section 7 (29 U.S.C. § 157)	8, 11, 27, 28, 40, 41, 42, 43, 45, 46
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 8, 11, 12, 13, 40, 41, 43, 44, 46
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 8, 11, 12, 13, 27, 28, 29, 40
Section 8(d) (29 U.S.C. § 158(d)).....	12, 13, 16, 21, 23, 27, 28
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 11, 18, 19, 23
Section 10(f) (29 U.S.C. § 160(f))	2

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. §§ 151 <i>et seq.</i>
Board	National Labor Relations Board
Company	Minteq International, Inc.
NCCA	Non-Compete and Confidentiality Agreement
Union	International Union of Operating Engineers, Local 150

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

Nos. 16-1276, 16-1335

MINTEQ INTERNATIONAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO**

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**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Minteq International, Inc. (“the Company”) for review, and the cross-application of the National Labor

Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on July 29, 2016, and reported at 364 NLRB No. 63. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. International Union of Operating Engineers, Local 150 (“the Union”) intervened in support of the Board.

STATEMENT OF THE ISSUES

1. Did the Company violate Section 8(a)(5) and (1) of the Act by requiring employees to sign a Non-Compete and Confidentiality Agreement without first notifying or bargaining with the Union, and specifically: (a) is the Board’s finding that such requirement is a mandatory subject of bargaining reasonably defensible; and (b) did the Board correctly find that the parties’ collective-bargaining agreement does not cover, and thereby privilege, such requirement?

2. Does substantial evidence support the Board’s findings that the Company separately violated Section 8(a)(1) of the Act by maintaining the “Interference with Relationships” and “At-Will Employee” provisions of the Non-Compete and Confidentiality Agreement?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union's Role as Bargaining Representative and the Parties' Collective-Bargaining Agreement

The Company provides monolithic and pre-cast refractory products and services to the steel industry. (JA 235.)¹ The Union represents the Company's employees that perform refractory-related work and patch the insides of furnaces by spraying liquid-state monolithic product into the furnaces. (JA 235 & n.2; 256, 293, 481.) There is a history of the Company and rival employers competing to be awarded the contracts to service individual furnaces in steel mills in the Chicago metropolitan area. (JA 247; 278.) The Company and the Union were parties to a collective-bargaining agreement which was effective from January 1, 2011, through December 31, 2014. (JA 235; 500-18.)

The 2011-2014 collective-bargaining agreement contains a preamble stating in part: "The Company and the Union in entering into this contract are setting forth their agreement on rates of pay, hours of work, and other conditions of employment so as to achieve the highest level of employee performance consistent

¹ "JA" references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Company's opening brief to the Court.

with safety, good health and sustained effort.” (JA 501.) Article 2 of the collective-bargaining agreement is labeled “Management Rights” and states as follows:

Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including, but not limited to, the rights: to reprimand, suspend, discharge, or otherwise discipline employees for just cause; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to transfer within the jurisdiction of this Agreement, layoff, and recall to work; to set the standards of productivity, the products and amounts of products to be used, and/or the services to be rendered; to improve the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted; to set the starting and quitting time and the number of hours and shifts to be worked; to subcontract, close down or relocate the Company’s operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, operation, or service; to control and regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to issue, amend and revise work rules and Standards of Conduct, discipline steps, policies and practices; and to take whatever action is either necessary or advisable to manage and fulfill the mission of the Company and to direct the Company’s employees. The Company’s failure to exercise any right, prerogative, or function hereby reserved to it, or the Company’s exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Company’s right to exercise such right, prerogative, or function or preclude it from exercising the same in some other way not in conflict with the express provisions of this Agreement.

(JA 501-02.)

Article 17 of the collective-bargaining agreement contains a subsection labeled “Entire Agreement of the Parties” which states in part: “This represents the entire agreement of the parties, it being understood that there is no other Agreement or understanding implied, oral or written, with respect to all bargained matters.” (JA 510-11.) Such subsection further states:

The terms of this Agreement shall be construed according to their plain, ordinary meanings and neither for nor against either party. Past practice and course of dealings shall not be a basis for creating a right or benefit that is not clearly and expressly provided for or created by the provisions of the Agreement and shall not alter the plain, ordinary meaning of the terms of the Agreement. However, past practice for purposes of determining just cause for discipline shall be a consideration.

During the negotiations resulting in this Agreement, the Company and the Union each had unlimited right and opportunity to make demands and proposals with respect to any subject matter as to which the National Labor Relations Act imposes an obligation to bargain.

(JA 511.) Beginning in November 2014, the parties negotiated a successor agreement, effective from January 1, 2015, through December 31, 2019, which contains identical terms in relevant part. (JA 236; 285, 480-90.)

B. The Company Begins Requiring Individual Employees To Sign a Non-Compete and Confidentiality Agreement

Starting in 2012, the Company began requiring new employees to sign a five-page Non-Compete and Confidentiality Agreement (“the NCCA”), which was drafted as a contract between the Company and individual signatory-employees.

(JA 235, 243-46; 286-87, 494-98.) The NCCA contains fifteen numbered sections

binding the signatory-employee in various respects. (JA 243-46; 494-98.) Most of the NCCA's provisions apply for a "Restricted Period" commencing from the date the agreement is signed and ending "eighteen months following termination of Employee's employment with the Company for whatever reason." (JA 235, 243; 494.) Other provisions create obligations on the part of the signatory-employee that apply indefinitely, "either during or after the term of his or her employment" and "[b]oth during and after the Restricted Period." (JA 244-45; 495-97.) Section 11 of the NCCA contains an assignment provision that specifies that the NCCA "shall be binding upon Employee's heirs, successors, and assignees," and Section 13 includes a remedy provision entitling the Company to proceed directly to court to obtain injunctive relief against signatory-employees who breach the agreement. (JA 246; 497.)

In part, the NCCA contains substantive provisions prohibiting signatory-employees from working for the Company's competitors during the "Restricted Period," prohibiting them from disclosing confidential or proprietary information, and requiring them to assign to the Company the rights to any inventions or "related know-how." (JA 494-98.) The Company also maintained two provisions in the NCCA that were alleged to be unfair labor practices by the Board's General Counsel. (JA 240-41.) Section 4 of the NCCA is labeled "Interference with Relationships" and states as follows:

During the Restricted Period Employee shall not, directly or indirectly, as employee, agent, consultant, stockholder, director, partner or in any other individual or representative capacity intentionally solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her or its relationship with the Company in an adverse manner.

(JA 240-41, 245; 496.) Section 12 of the NCCA is labeled “At-Will-Employee”

and states as follows:

Employee acknowledges that this Agreement does not affect Employee’s status as an employee-at-will and that no additional right is provided herein which changes such status.

(JA 241, 246; 497.) The Union was not informed of the Company’s decision to require employees to sign the NCCA, and the parties had not discussed the NCCA or its provisions during bargaining. (JA 236, 239; 255-59, 284.)

C. The Company Attempts To Enforce the NCCA Against Charles Spear; the Union Files a Charge

Charles Spear was hired by the Company and began his employment on March 21, 2013. (JA 236; 293, 297.) Spear’s first two eight-hour days of paid employment involved orientation, including computer-based training and signing paperwork. (JA 236; 297-301.) Among the various forms that Spear was required to sign during his orientation was the NCCA. (JA 236; 498.) In late 2014, Spear left his employment with the Company in order to work for a competitor that also performed refractory-related services. (JA 236; 294, 307-08.) The Company subsequently sent letters to both Spear and his new employer invoking the NCCA

and demanding that Spear cease working for a competitor of the Company.

(JA 236; 295-96, 492-93.) After receiving the Company's letter, Spear met with a representative of the Union in October 2014, and shortly thereafter the Union filed an unfair-labor-practice charge giving rise to the present case. (JA 236; 254, 302, 321.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found that the Company violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice or an opportunity to bargain over the Company's unilateral implementation of the requirement that employees sign the NCCA. (JA 236, 241.) The Board found that the implementation of the NCCA as a whole was a mandatory subject of bargaining, and that the Union's statutory right to bargain over the NCCA was neither "covered by" the parties' collective-bargaining agreement nor waived. (JA 237-39.) The Board also granted the General Counsel's exceptions to the recommended order of the administrative law judge and found that the Company separately violated Section 8(a)(1) of the Act by maintaining the "Interference with Relationships" and "At-Will Employee" provisions in the NCCA, which employees would reasonably construe as restraining conduct protected by Section 7 of the Act. (JA 240-41.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.

(JA 242.) Affirmatively, the Board's Order requires the Company to rescind the existing NCCA; notify all current and former employees who were required to sign the NCCA that it has been rescinded; bargain with the Union before implementing future changes in wages, hours, or other terms and conditions of employment; rescind the two overbroad provisions contained in the NCCA; and post a remedial notice. (JA 242.)²

SUMMARY OF ARGUMENT

The Board is entitled to considerable deference in determining whether managerial decisions constitute mandatory subjects of bargaining within the meaning of the Act. In the present case, the Board reasonably applied well-established precedent to find that the Company's unilateral decision to require union-represented employees to sign a burdensome Non-Compete and

² In response to a dispute concerning the correct identity of the respondent in this case, the Board limited its Order to the Company—Minteq International, Inc.—based out of Gary, Indiana (JA 235 n.2), and party to a collective-bargaining agreement with the Union covering unit employees working at the “USX Gary #2, USX Gary #1 Caster, and Mittal Indiana Harbor East and West” steel mills. (JA 242.) Although the petition for review to the Court was filed on behalf of “Minteq International, Inc., and Specialty Minerals, Inc., wholly owned subsidiaries of Minerals Technologies, Inc.,” the Board only seeks enforcement against Minteq International.

Confidentiality Agreement is a mandatory subject of bargaining. The NCCA directly and primarily impacts employees' terms and conditions of employment by subjecting current employees to rules governing their conduct and to possible discipline, by indefinitely binding signatory-employees in a manner that lasts beyond their employment with the Company, and by imposing significant economic costs on employees outside the workplace. The Company's arguments to the contrary largely rely on misinterpretations of precedent, and are otherwise unavailing and insufficient to overcome the deference owed to the Board.

Meanwhile, the Board reasonably found that the Union did not either exercise or waive its statutory right to bargain over implementation of the NCCA. The Board acknowledged the running dispute between itself and this Court over the correct approach to determining whether a collective-bargaining agreement privileges an employer's unilateral changes. However, the Board expressly found that under either approach—including this Court's contract-coverage standard—the parties' collective-bargaining agreement cannot fairly be read as privileging the decision to require employees to sign the NCCA. Although the Court interprets collective-bargaining agreements *de novo*, the Board's conclusion that the contract does not "cover" the Company's implementation of the NCCA is amply supported by the terms of the contract itself and by traditional canons of contract interpretation. Insofar as the NCCA is a mandatory subject of bargaining and the

Union did not either exercise or waive its bargaining rights, the Company violated Section 8(a)(5) and (1) of the Act by failing to notify or bargain with the Union.

Likewise, the Board found that employees would reasonably construe two specific provisions of the NCCA as restraining conduct protected by Section 7 of the Act. As such, the Company separately violated Section 8(a)(1) of the Act by maintaining the two unlawfully overbroad provisions in question.

STANDARD OF REVIEW

The Board has been given the “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). As a result, the Court’s review of the Board’s construction of the Act is “quite deferential,” *United Food & Commercial Workers, Local 150-A v. NLRB* (“*UFCWI*”), 880 F.2d 1422, 1433 (D.C. Cir. 1989), and the Court will “defer to the Board’s interpretation of the Act if it is reasonable,” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002). In particular, the Court must uphold the Board’s determinations regarding which collective-bargaining subjects constitute mandatory subjects of bargaining as long as the Board’s determinations are “reasonably defensible,” even if the Court might prefer a different result. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *UFCWI*, 880 F.2d at 1433.

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 488 (1951). Reviewing courts may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. The Court applies the same “familiar substantial evidence test” to the Board’s application of law to the facts. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). However, while the Board has the authority to interpret collective-bargaining agreements in order to adjudicate unfair labor practices, *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court gives “no special deference” to the Board’s contract interpretation and the Court will interpret such contracts *de novo*. *Int’l Bhd. of Elec. Workers, Local 47 v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991).

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REQUIRING EMPLOYEES TO SIGN THE NON-COMPETE AND CONFIDENTIALITY AGREEMENT WITHOUT FIRST NOTIFYING OR BARGAINING WITH THE UNION

A. An Employer Violates Section 8(a)(5) and (1) by Making Unilateral Changes Involving Mandatory Subjects of Bargaining

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively” with its employees’ chosen bargaining representative. 29 U.S.C. § 158(a)(5). In turn, Section 8(d) requires parties to bargain in good faith regarding “wages, hours, and other terms and conditions of

employment.” 29 U.S.C. § 158(d). Bargaining subjects that constitute “terms and conditions of employment” within the meaning of Section 8(d) are classified as “mandatory” subjects of bargaining. *See Ford Motor*, 441 U.S. at 495-96. An employer thus violates Section 8(a)(5), and derivatively Section 8(a)(1), by making unilateral changes involving mandatory subjects of bargaining without first bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 & n.5 (D.C. Cir. 2003).

B. The Board Reasonably Found the Company’s Decision to Implement the NCCA To Be a Mandatory Subject of Bargaining

Congress has “assigned to the Board the primary task” of classifying bargaining subjects as terms and conditions of employment within the meaning of Section 8(d), and thus the Board’s classification of bargaining subjects as mandatory is a matter for which it possesses “special expertise” and is “entitled to considerable deference.” *Ford Motor*, 441 U.S. at 495 (citation omitted). This Court has observed that the terms of Section 8(d) were left “intentionally vague in order to allow for Board interpretation.” *UFCWI*, 880 F.2d at 1433. In the present case, the Board’s determination that the implementation of the NCCA is a mandatory subject of bargaining is not only “reasonably defensible,” *id.*, but it is well supported by decades of straightforward case law.

1. The NCCA Primarily Impacts Employees' Terms and Conditions of Employment and It Is Thus a Mandatory Subject of Bargaining

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court delineated three categories of managerial decisions: first, those decisions that “have only an indirect and attenuated impact on the employment relationship,” such as advertising strategy or choice of product type and design; second, those decisions that are “almost exclusively” an aspect of the relationship between employer and employee, such as work rules or production quotas; and third, those decisions that are not primarily concerned with the employment relationship but that may have a direct impact on it, such as “a change in the scope and direction of the enterprise.” *Id.* at 676-77; see *Regal Cinemas*, 317 F.3d at 309; *United Food & Commercial Workers, Local 150-A v. NLRB* (“*UFCW II*”), 1 F.3d 24, 28-29 (D.C. Cir. 1993) (discussing the Supreme Court’s “three-part taxonomy”); cf. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).³

³ Although not properly implicated in this case for the reasons discussed below, bargaining subjects encompassed by the third category require the Board to determine whether the issue is “amenable to resolution through the bargaining process” and to determine whether the benefit to “labor-management relations and the collective-bargaining process” outweighs “the burden placed on the conduct of the business,” in order to determine whether a third-category subject is mandatory or not. *First Nat’l Maint.*, 452 U.S. at 679, 686.

Here, the decision to implement the NCCA falls squarely within the second category as a managerial decision which directly “settle[s] an aspect of the relationship between the employer and the employees,” and which is therefore a mandatory subject of bargaining. *First Nat’l Maint.*, 452 U.S. at 676 (quoting *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 177 (1971)). As the Board explained, the NCCA “affects important facets of employees’ terms and conditions of employment by limiting employees’ use of information gained at work and restricting their ability to work elsewhere, as well as imposing rules (some of them unlawful) that govern employees’ conduct while they are employed.” (JA 238.) The managerial decision to require employees to sign such a document as a condition of continued employment thus directly and primarily implicates the employer-employee relationship.

The NCCA establishes rules “as to [current employees]” by implicitly threatening them with discipline or discharge for failing to comply, binds employees in a manner that regulates their conduct even after they cease working for the Company, and imposes significant present and future economic burdens on employees. (JA 237.)⁴ Rules governing conduct in the workplace and subjecting

⁴ Future burdens imposed on current employees remain mandatory subjects of bargaining even if they will not be realized until the employees cease working for the Company. *Cf. Pittsburgh Plate Glass*, 404 U.S. at 180 (“To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.”). In

employees to possible discipline are a quintessential term and condition of employment, and thus a mandatory subject of bargaining. *See First Nat'l Maint.*, 452 U.S. at 677. Likewise, restrictions on employees' ability to secure outside employment, and burdens imposed on employees in the form of lost economic opportunities, directly affect those employees' terms and conditions of employment within the meaning of Section 8(d). *Success Vill. Apartments, Inc.*, 348 NLRB 579, 580, 630 (2006) (finding "conflict of interest" policy preventing employee from continuing part-time outside employment was mandatory subject of bargaining); *cf. Democratic Union Org. Comm., Seafarers Int'l Union, Local 777 v. NLRB*, 603 F.2d 862, 889 (D.C. Cir. 1978) (finding imposition of fee to continue taking company cab home at night was mandatory subject of bargaining, particularly where employees who took cab home were "thereby enabled to earn additional income"). Indeed, in a number of cases the Board has specifically found

finding that the NCCA in its entirety constitutes a mandatory subject of bargaining, the Board also emphasized that the NCCA carries an implicit threat of discipline for active employees who violate its provisions. (JA 237 & n.9.) The Company implausibly argues that this was "speculation." (Br. 40-43.) However, Spear and other employees were required to sign the NCCA as a condition of continued employment, and an employer-imposed document listing various requirements carries the obvious threat of workplace discipline if employees do not comply. Moreover, the Company cites no case law for the proposition that bringing a lawsuit against a current employee is any less a form of adverse action than traditional discipline or discharge.

that requiring employees to sign individual contracts containing noncompetition provisions is a mandatory subject of bargaining.⁵

As a result, the Board reasonably determined that the Company was obligated to bargain over the requirement that employees sign the NCCA in its entirety. (JA 236-38.) However, aside from the “Interference with Relationships” and “At-Will Employee” provisions discussed below, the Board either upheld or did not pass on the lawfulness of the other individual provisions contained in the NCCA, including the substantive noncompetition and confidentiality provisions. (JA 236 n.8, 240.) The Board’s Order therefore would not preclude the Company from insisting on implementing a requirement that employees sign some form of noncompetition and confidentiality agreement. The Board’s Order merely requires

⁵ *Nat’l Ass’n of Gov’t Emps.*, 327 NLRB 676, 684 & n.8 (1999) (finding employer violated Act by requiring employees to sign individual contracts dealing with terms and conditions of employment including a noncompetition provision), *enforced mem.*, 205 F.3d 1324 (2d Cir. 1999); *Bolton-Emerson, Inc.*, 293 NLRB 1124, 1130 (1989) (finding employer violated Act by unilaterally requiring employees to sign individual nondisclosure/noncompetition agreements without bargaining to impasse), *enforced*, 899 F.2d 104 (1st Cir. 1990); *see Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995) (finding employer violated Act by unilaterally asking employees to sign noncompetition clause without notifying union). While the Board in *National Association of Government Employees* did not address the specific arguments being raised in the present case (Br. 26 n.14), that does not change the fact that the Board’s finding here is well supported by precedent, and that this is not a “case of first impression” (Br. 29). The Board’s decision in *Mental Health Servs., Nw., Inc.*, 300 NLRB 926 (1990), cited by the Company (Br. 28, 34, 38), is inapposite. In that case, the Board merely held that an employer could not insist to impasse on a contractual provision prohibiting a union from engaging in outside political activities. *Id.* at 926-27.

the Company to first notify and bargain with its employees' chosen bargaining representative, as mandated by the Act.

2. The Company's "Core of Entrepreneurial Control" Argument Misconstrues Precedent and Must Be Rejected

In delineating the third category of managerial decisions in *First National Maintenance*, the Supreme Court cited in part Justice Stewart's earlier concurrence in *Fibreboard Paper Products*. See *First Nat'l Maint.*, 452 U.S. at 677. The relevant portion of that concurrence referred to managerial decisions "which lie at the core of entrepreneurial control" but which will secondarily impact the employment relationship, such as the decisions to invest in labor-saving machinery or to go out of business. *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring). In its brief to the Court (Br. 26-34), the Company attempts to radically expand existing precedent by reframing Justice Stewart's narrow "core of entrepreneurial control" language as implicating *any* unilateral change that an employer asserts is "key to its business success" (Br. 28). The Company's argument must be rejected for a variety of reasons, including the fact that it is inconsistent with *First National Maintenance* and decades of established case law concerning mandatory subjects of bargaining.

First, the Company failed to properly raise certain aspects of its argument before the Board in the first instance, and therefore this Court cannot consider those claims pursuant to Section 10(e) of the Act. 29 U.S.C. § 160(e). In its

exceptions before the Board, the Company argued that a single section of the NCCA—the provision prohibiting the disclosure of confidential or proprietary information—was not a mandatory subject of bargaining because it allegedly involves a core entrepreneurial concern. The Company relied on an inapposite discussion by the administrative law judge citing *First National Maintenance* and *Fibreboard Paper Products* (JA 248), and did not provide any further analysis or argumentation. As the Board correctly noted in response, the implementation of the NCCA does not fall within the third category of managerial decisions enumerated in *First National Maintenance*. (JA 238.) However, as discussed below, the Company is now implicitly inviting this Court to reinterpret Supreme Court precedent (Br. 29), to overrule Board precedent and expand a narrow exception created by the Board and this Court in the context of the newspaper industry (Br. 29, 31-33, 44 n.12), and to find that the NCCA as a whole—including the noncompetition provision and other provisions not directly related to the disclosure of proprietary information—is somehow “critical to [the Company’s] survival as a profitable business” (Br. 32-33). These arguments were not properly raised below, the Company did not file a motion for reconsideration with the Board, and the Court thus is without jurisdiction to consider such arguments for the first time on a petition for review. *See* 29 U.S.C. § 160(e); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550-51 (D.C. Cir. 2016).

Second, and in any event, the Company misconstrues the cases it cites. Justice Stewart's concurrence in *Fibreboard Paper Products*, as cited in part by the Supreme Court in *First National Maintenance*, was referencing core entrepreneurial decisions that are "fundamental to the basic direction of a corporate enterprise" and that are "not in themselves primarily about conditions of employment." *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring). Such decisions might include "the commitment of investment capital" or a change to the "basic scope of the enterprise," which only secondarily affect the employment relationship. *Id.* These types of decisions constitute the third category identified in *First National Maintenance*. 452 U.S. at 677; *id.* at 688 (applying third-category balancing test and finding employer's decision to close part of business was a non-mandatory subject where it "represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely").

In contrast, Justice Stewart's reasoning and the very notion of core entrepreneurial decisions potentially exempt from mandatory bargaining have no application to managerial decisions that *are* "primarily about conditions of employment." *Cf. First Nat'l Maint.*, 452 U.S. at 677; *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring). Such decisions, which directly settle an aspect of the employer-employee relationship, constitute "terms and conditions of

employment” within the meaning of Section 8(d) of the Act and are thus statutorily-mandated bargaining subjects regardless of an employer’s underlying motives or business-related interests. Clearly, for example, an employer’s ability to set “production quotas” or “work rules” is integral to its success as a competitive enterprise—yet those are precisely the types of decisions that primarily impact employees and are thus subject to mandatory collective bargaining. *First Nat’l Maint.*, 452 U.S. at 677. The Company’s contrary position would completely undermine the bargaining obligations contained in the Act and the congressional policy of encouraging collective bargaining regarding subjects that primarily impact employees’ terms and conditions of employment. *See id.* at 674-75.

The Company’s reliance on this Court’s decision in *Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), is also misplaced. Preliminarily, that case was decided prior to the Supreme Court’s decision in *First National Maintenance*, and thus any inconsistencies with the three-category framework enunciated in the latter case are not controlling. More directly, however, this Court’s decision in *Newspaper Guild* was much narrower than the Company alleges. In that case, the Court upheld the Board’s initial determination that a newspaper’s unilateral implementation of a code of ethics was not necessarily a mandatory subject of bargaining. *Newspaper Guild*, 636 F.2d at 560-61. The Court noted that the code of ethics was designed to protect the

editorial integrity that “lies at the core of publishing control,” and cited Justice Stewart’s concurrence in *Fibreboard Paper Products* for the proposition that “a subject may affect conditions of employment and still be outside the scope of [S]ection 8(d)” as a non-mandatory subject of bargaining. *Newspaper Guild*, 636 F.2d at 559-60. The Court also emphasized that in the context of a newspaper, editorial control is “within the First Amendment’s zone of protection and therefore entitled to special consideration.” *Id.* at 560.

However, contrary to the Company’s characterization of *Newspaper Guild* as having held that “not all aspects of the employer’s implemented rules were mandatory subjects of bargaining” (Br. 31-32), the Court made no such holding. Instead, the Court remanded the case to the Board to reevaluate the various rules at issue in light of the Board’s failure to consider substantive rules and disciplinary provisions as a unified whole. 636 F.2d at 563-65 (“The responsibility for making such decisions is vested in the Board.”). On remand, in *Peerless Publications*, 283 NLRB 334 (1987), the Board ultimately held that all of the employer’s rules were mandatory subjects of bargaining. In doing so, the Board established a new three-step test for evaluating newspaper codes of ethics, starting with the presumption “that a matter which affects the terms and conditions of employment *will* be a subject of mandatory bargaining.” *Peerless Publ’ns*, 283 NLRB at 335 (quoting *Newspaper Guild*, 636 F.2d at 561) (emphasis added).

Nonetheless, *Peerless Publications* and by extension this Court's prior decision in *Newspaper Guild* have no application to the present case. The Board has expressly limited the *Peerless Publications* exception to its facts and to the narrow confines of the newspaper industry. *Va. Mason Hosp.*, 357 NLRB 564, 566-68 (2011) (noting that *Peerless Publications* and *Newspaper Guild* were premised on the constitutional considerations unique to the newspaper industry); *King Soopers, Inc.*, 340 NLRB 628, 629 (2003) ("*Peerless Publications* was decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case.").⁶ Similarly, this Court has never subsequently cited *Newspaper Guild* for the proposition that there is a broad "core entrepreneurial purpose" exception to Section 8(d), as the Company now implicitly contends.

The Court's decision in *Newspaper Guild* was predicated on the newspaper context and the "special consideration[s]" of the First Amendment, aside from the Court's general observation that some managerial decisions affecting terms and

⁶ The Company acknowledges that in *King Soopers* the Board limited *Peerless Publications* to the newspaper industry, although the Company implies that the Board merely "opined" about such limitation. (Br. 44 n.12.) The Company neglects to cite subsequent cases where the Board has unequivocally held that *Peerless Publications* is "limited . . . to its facts" and that the *Peerless Publications* framework is inapplicable outside the newspaper industry. *Va. Mason Hosp.*, 357 NLRB at 567 & n.11. To the extent the Company is asking the Court to disregard subsequent precedent and extend *Peerless Publications* beyond the newspaper industry, those arguments were not properly raised before the Board and thus this Court lacks jurisdiction to entertain them in the first instance. 29 U.S.C. § 160(e).

conditions of employment will not necessarily be mandatory subjects of bargaining, in accordance with Justice Stewart's concurrence in *Fibreboard Paper Products*. See *Newspaper Guild*, 636 F.2d at 559-61. However, that preliminary observation was subsequently expanded upon by the Supreme Court's three-part taxonomy in *First National Maintenance* and its analysis regarding the so-called third category of managerial decisions. Here, as shown above, the Company's decision to implement the NCCA fell within the second category of *First National Maintenance* as a managerial decision that primarily concerns the employer-employee relationship, and for that reason it is a mandatory subject of bargaining.

Consequently, contrary to the Company's argument (Br. 33-34), the third category of decisions described in *First National Maintenance* and the inquiries concerning whether the decision would be "amenable to bargaining" or whether the Company's interests outweigh the utility of bargaining are irrelevant. See *First Nat'l Maint.*, 452 U.S. at 679-80; *Holmes & Narver*, 309 NLRB 146, 147 (1992). In any event, as the Board also found, the terms of the NCCA have a clear and direct economic impact on employees and are thus "precisely the sort of matters suitable for collective bargaining." (JA 237.) The Company and the Union could bargain, for example, over compensation for employees in return for the economic costs imposed on them, or over the specific terms and length of the NCCA as written. Cf. *S. Plasma Corp.*, 242 NLRB 1223, 1225-27 (1979) (finding that non-

unionized employees engaged in protected concerted activity by attempting to negotiate specific terms of noncompetition agreement imposed by employer), *enforced in relevant part*, 626 F.2d 1287 (5th Cir. 1980). The Company misstates the law by suggesting that the Board’s Order would permit employees to “engage in unfair competition with their employers unless their unions agree that they should not do so.” (Br. 33.) Nothing in the Board’s Order prohibits the Company from insisting on noncompetition or confidentiality provisions to protect its business interests—instead, the Board’s Order merely requires the Company to comply with federal labor law by bargaining to impasse first.

Finally, even assuming for the sake of argument that the Company’s legal premise is correct and was properly raised before the Board, the record evidence does not support the Company’s assertion that the NCCA at issue in this case is somehow “critical to [the Company’s] survival as a profitable business” (Br. 32). The NCCA was imposed on frontline employees with no apparent role in developing the Company’s proprietary refractory products, and the NCCA contains broad provisions binding signatory-employees in a manner that goes far beyond simply prohibiting the disclosure of confidential or proprietary information. Although it may be in the Company’s business interests to restrict the labor market in the refractory-services industry by preventing skilled workers from leaving to work for a competitor offering higher wages or better benefits, competitive

prudence does not privilege the Company to circumvent the Union and to avoid bargaining over the substantial burdens the NCCA imposes on employees.

3. The Company's Remaining Arguments Are Unavailing

The Court should also reject the Company's remaining arguments against the Board's reasonable finding that the implementation of the NCCA is a mandatory subject of bargaining. First, the Company unconvincingly argues that requiring new employees to sign the NCCA was a "hiring practice applied to applicants, not employees." (Br. 35.) In doing so, the Company fails to address the Board's legal conclusion that the NCCA is a mandatory subject of bargaining regardless of when employees were required to sign it, because unlike pre-employment drug testing or other hiring practices, the NCCA sets the terms and conditions of employment for signatories *as* active employees. (JA 237-38 n.12.)⁷ A contrary result would permit employers to entirely circumvent their bargaining obligations under the Act simply by requiring "applicants" to sign draconian individual contracts setting terms and conditions of employment one day prior to starting work. Moreover, as a factual matter, the only two employees who testified

⁷ The Company cites a General Counsel advice memorandum allegedly to the contrary. (Br. 35 n.16.) However, advice memoranda merely represent the position of the Board's General Counsel in deciding whether to issue unfair-labor-practice complaints, and do not constitute Board law. *See, e.g., S. Jersey Reg'l Council of Carpenters, Local 623*, 335 NLRB 586, 591 n.10 (2001), *enforced sub nom., Spectacor Mgmt. Grp. v. NLRB*, 320 F.3d 385 (3d Cir. 2003).

at the unfair-labor-practice hearing were both required to sign the NCCA—a contract between the Company and a signatory “Employee” (JA 494-98)—when they were already being paid and directed by the Company, at some point during eight-hour days of training and orientation. (JA 298-301, 305, 318.)⁸ Thus, the Board reasonably found that Spear was employed by the Company when he was required to sign the NCCA (JA 236), and that in any event the Company had a statutory obligation to bargain with the Union over the NCCA’s implementation.

Second, the Company misconstrues its bargaining obligations under the Act by suggesting that it had no duty to bargain over the NCCA because some employee conduct prohibited by that agreement might not be affirmatively protected by Section 7 of the Act. (Br. 33, 36-40.) The question of what subjects constitute “terms and conditions of employment” within the meaning of Section 8(a)(5) and (d) is wholly unrelated to the question of what actions constitute protected concerted activity entitled to the safeguards of Section 7. *Cf. NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 492-95 (1960) (discussing distinction between protected concerted activity and the collective-bargaining process). It may be true that in different circumstances the Company would be entitled to

⁸ The Company’s assertion that “almost all” new hires signed the NCCA prior to beginning their orientation (Br. 35-36) is not supported by the record evidence. The Company cites the personnel files of just three employees (Br. 7-8, 36), and all three personnel files suggest that the individuals were already being treated as employees when they signed the NCCA.

lawfully discharge employees for engaging in conduct inconsistent with certain portions of the NCCA (Br. 37)—that is, if the Company’s employees had not already exercised their Section 7 rights by choosing to be represented by the Union. Given the status of the Union as exclusive bargaining representative, however, the Company is required to bargain over changes to terms and conditions of employment regardless of whether such terms regulate conduct that would be affirmatively protected by Section 7. *See* 29 U.S.C. § 158(d).

Finally, the Company’s challenge to the scope of the Board’s Order (Br. 44-45) must be rejected. As previously discussed, *Peerless Publications* has no application outside the context of the newspaper industry—*see Va. Mason Hosp.*, 357 NLRB at 566-68—and for all of the reasons discussed above the decision to require employees to sign the NCCA is a mandatory subject of bargaining. Simply revising portions of the NCCA would not discharge the Company’s bargaining obligations under the Act or permit the Company to unilaterally require employees to sign a similar document. The Board’s Order contains standard remedial language for Section 8(a)(5) violations, requiring the Company to rescind its unilateral changes and to affirmatively comply with its Section 8(d) bargaining obligations going forward. (JA 242.) Whether specific future actions on the part of the Company would violate the Act or the Board’s Order would have to be adjudicated through subsequent proceedings.

C. The Union Neither Exercised Nor Waived Its Right To Bargain over the NCCA

In evaluating whether an employer is contractually privileged to implement a unilateral change involving a mandatory subject of bargaining, there is a running disagreement between the Board and this Court regarding the proper approach.

See Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 838 (D.C. Cir. 2005). The Board focuses on whether a union has waived its statutory bargaining right. *Id.* at 837.

As this Court has stated, “waiver occurs when a union knowingly and voluntarily

relinquishes its right to bargain about a matter,” and thereby “surrenders the

opportunity to create a set of contractual rules that bind the employer.” *S. Nuclear*

Operating Co. v. NLRB, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008) (quoting *Dep’t*

of Navy v. Fed. Labor Relations Auth., 962 F.2d 48, 57 (D.C. Cir. 1992))

(emphasis in original). For that reason, the Board and this Court require ““clear

and unmistakable’ evidence of waiver” and will “construe waivers narrowly.” *Id.*

However, under this Court’s contract-coverage approach, the question of waiver is deemed immaterial if an issue is already “covered by” the parties’ collective-bargaining agreement. *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C.

Cir. 1993). That difference reflects the “fundamental and long-running

disagreement” between the Board and this Court as to the appropriate approach by

which to determine “whether an employer has violated Section 8(a)(5) of [the Act]

when it refuses to bargain with its union over a subject allegedly contained in a

collective bargaining agreement.” *Heartland Plymouth Court MI, LLC v. NLRB*, 650 F. App’x 11, 12 (D.C. Cir. 2016) (quoting *Enloe Med. Ctr.*, 433 F.3d at 835). The application of the Court’s contract-coverage approach is premised on the notion that a union has already affirmatively “*exercised* its bargaining right,” and the covered issue has therefore been removed from the range of further bargaining. *U.S. Postal Serv.*, 8 F.3d at 836 (quoting *Dep’t of Navy*, 962 F.2d at 57) (emphasis in original). As the Board stated here, in full recognition of its long-running disagreement with the Court, it has consistently instead applied a “clear and unmistakable” waiver analysis whenever an employer claims a contractual privilege to make a unilateral change without bargaining. (JA 238 n.14.)

Nonetheless, that disagreement is not implicated in every case in which an employer asserts a contractual privilege in its defense. For instance, where the Court finds, as it should here, that an employer’s unilateral change is not in fact “covered by” the contractual clause relied upon, the Court applies the Board’s clear and unmistakable waiver analysis in determining whether a union waived its right to bargain over the unilateral change. *See Regal Cinemas*, 317 F.3d at 312-14 (rejecting employer’s “covered by” argument and affirming the Board’s finding that union did not clearly and unmistakably waive its right to bargain over a transfer of unit work; the contractual clause cited was too general to encompass

such a transfer under the “covered by” approach); *U.S. Postal Serv.*, 8 F.3d at 836 (noting that “the ‘covered by’ and ‘waiver’ inquiries are analytically distinct”).

In the present case, the Company argued to the Board that it was contractually privileged to make its unilateral change without bargaining with the Union under *either* theory, the Court’s “covered by” standard or a “clear and unmistakable” waiver analysis, and the Board expressly rejected the Company’s argument under *both* theories. (JA 238-39 & n.14.) Therefore, contrary to the Company’s assertions, the Board here did not simply repeat its “waiver analysis” in “dicta” (Br. 24-25) regarding this Court’s distinct contract-coverage standard. Rather, as shown below, the NCCA is not “covered by” the parties’ collective-bargaining agreement, and the Union did not otherwise waive its right to bargain over the Company’s unilateral decision to implement the NCCA.

1. The Parties’ Collective-Bargaining Agreement Does Not “Cover” the NCCA, and the Union Never Exercised Its Statutory Bargaining Right

The Court’s contract-coverage approach turns on its duty to enforce labor agreements “as written” by interpreting the language of the contract at issue. *Enloe Med. Ctr.*, 433 F.3d at 836-37. The Court’s analysis is thus “a matter of ordinary contract interpretation,” which the Court performs *de novo*. *Id.* at 837-39. Here, as the Board observed (JA 238 & n.14), the language of the parties’

collective-bargaining agreement does not cover the Company's unilateral decision to require employees to enter into burdensome individual contracts like the NCCA.

The 2011-2014 collective-bargaining agreement places certain limitations on the interpretation of its terms. Article 17 clarifies that the written contract constitutes the "entire agreement of the parties" with "no other Agreement or understanding implied, oral or written," and requires the terms of the contract to be "construed according to their plain, ordinary meanings and neither for nor against either party." (JA 511.) The preamble states that the parties entered into the contract in order to set forth "rates of pay, hours of work, and other conditions of employment so as to achieve the highest level of employee performance consistent with safety, good health and sustained effort." (JA 501.) As discussed below, the ordinary meanings of the contract's terms demonstrate that the Company's bargained-for rights extend only to governing conduct in the workplace and directing employees in the performance of their work, not to the unilateral imposition of non-performance-related contractual burdens like the NCCA. This is consistent with the parties' stated intent of setting conditions for "employee performance," with "no other" agreement intended to cover the terms of employment for unit employees who are exclusively represented by the Union.

Article 2 of the collective-bargaining agreement contains a detailed management-rights clause granting the Company certain enumerated rights.

(JA 501-02.) The enumerated rights are all within the ambit of traditional managerial prerogatives to control conduct in the workplace and direct employees' performance, including: disciplining employees for just cause, hiring and layoffs, setting productivity standards and operating methods, setting hours of work and subcontracting or shutting down operations, controlling job performance and the use of company facilities, and introducing new production methods. (JA 501-02.) The management-rights clause then ends by granting the Company the authority "to issue, amend and revise work rules and Standards of Conduct, discipline steps, policies and practices; and to take whatever action is either necessary or advisable to manage and fulfill the mission of the Company and to direct the Company's employees." (JA 502.) Neither one of these latter provisions can fairly be read to encompass the right to require represented employees to sign the NCCA.

First, the plain language of the provision granting the Company the right to issue "work rules" has nothing to do with the decision to require employees to sign the NCCA. In common parlance, the term "work rules" refers to company policies governing employee conduct in the workplace and company procedures directing employees in the performance of their work. That is the plain, ordinary meaning of the term, which Article 17 of the collective-bargaining agreement requires the reader to adopt. This Court also recognizes the interpretive canon of *noscitur a sociis*, which "teaches that a word is known by the company it keeps." *Stewart v.*

Nat'l Educ. Ass'n, 471 F.3d 169, 175 (D.C. Cir. 2006). In context, the work-rules provision follows a detailed list of parallel management rights, all of which refer to managerial prerogatives limited to controlling work tasks and directing employees in the workplace.⁹ No reasonable reader would characterize a separate contractual instrument which has little to do with job duties or the performance of work for the Company, which controls the signatory long after his or her employment with the Company, and which is even “binding upon [the signatory’s] heirs, successors, and assignees” (JA 497), as itself a “work rule.”

Although, as the Board noted (JA 237 & n.10), the NCCA *contains* some provisions that are properly characterized as work rules with respect to active employees—such as Section 4’s requirement that employees restrict their communications with customers (JA 496)—the NCCA also contains numerous provisions that “affect employees’ terms and conditions of employment in ways that extend *beyond* work rules governing employees’ conduct in the workplace.” (JA 237 (emphasis added).) For example, nearly all of the provisions in the NCCA, even those that might constitute “work rules” with respect to current

⁹ Furthermore, the term “work rules” is not listed in isolation, but as part of the phrase “work rules *and* Standards of Conduct,” and in series with the Company’s right to issue or revise “discipline steps.” (JA 502 (emphasis added).) Article 4 of the collective-bargaining agreement illustrates the type of policies contemplated when it lists “violations of the Standards of Conduct” as including workplace and performance-related misconduct such as “not meeting job requirements, harassment, substance abuse, insubordination, dishonesty, inefficiency, fighting, poor attendance/lateness, theft, [and] unsafe acts.” (JA 502.)

employees, bind the signatory for at least eighteen months after he or she ceases working for the Company. Many bind the signatory indefinitely, and even his or her heirs. Many provisions also impact employees outside the workplace by preventing employees from taking on outside employment or from freely utilizing personal knowledge. (JA 237.) The Company's implausible interpretation of the management-rights clause requires the existence of immutable "work rules" that survive the expiration of an individual's actual employment with the Company. Indeed, the catalyst for the present case was the Company's attempt to enforce the NCCA against a *former* employee.

The NCCA thus goes far beyond the mere issuance of work rules, even if it in part contains work rules as applied to active employees. As a result, the decision to require employees to enter into a binding contractual instrument like the NCCA is not implicated by the Company's contractual right to "issue . . . work rules" (JA 502.) The Board found that the Company violated the Act by failing to bargain over the unilateral decision to require employees to sign the NCCA and enter into the contractual instrument as a whole. The Board did not suggest that the Company would be precluded from exercising any independent contractual right it might have to issue certain *portions* of the NCCA as lawful work rules.

Second, the general provision granting the Company the right to “take whatever action is either necessary or advisable to manage and fulfill the mission of the Company and to direct the Company’s employees” (JA 502) also cannot fairly be read to include the right to unilaterally impose a separate contractual burden like the NCCA. This Court applies the interpretive canon of *ejusdem generis* and has cautioned against reading a general phrase in a management-rights clause “to include conduct wholly unlike that specified in the immediately preceding list.” *Regal Cinemas*, 317 F.3d at 313 (quoting *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1191-92 (D.C. Cir. 2000)). Here, the detailed language of the management-rights clause as a whole indicates that the parties bargained over the Company’s right to perform managerial functions involving the regulation of conduct in the workplace and the direction of employees in the performance of their work. The general provision at the end of the lengthy list referring to such functions must be interpreted accordingly.

Indeed, the general provision at issue refers to the right to take particular actions that are necessary to fulfill the mission of the Company “*and* to direct the Company’s employees.” (JA 502 (emphasis added).) The word “and” will ordinarily be read in the conjunctive, indicating here that the general provision was intended to encompass actions that perform both functions. *See, e.g., Orleans v. Orleans*, 238 F.2d 31, 32 (D.C. Cir. 1956). This reading of the general provision

only further confirms that the management-rights clause as a whole is the expression of the parties' bargained-for intention to grant the Company certain rights to *direct* its employees in the performance of their job duties and to set standards for workplace conduct. Those traditional managerial prerogatives do not grant the Company the unencumbered authority to take whatever actions it considers to be in its financial interests, such as circumventing its employees' exclusive bargaining representative and imposing non-performance-related contractual burdens on individual employees. The NCCA restricts conduct outside the workplace, encumbers employees long after they work for the Company, and is not "covered by" the detailed management-rights clause negotiated in good faith by the Union.

The Company's contrary interpretation of the collective-bargaining agreement (Br. 17-23) is not compelling. As noted, the Board's observation that certain aspects of the NCCA constitute "work rules" as applied to active employees is entirely consistent with a finding that the Company's contractual right to issue "work rules" does not encompass the right to require employees to sign the NCCA as a whole—an individual contract that also binds signatories indefinitely, that extends far "beyond work rules" governing the workplace-related conduct of active employees, and that otherwise imposes substantial burdens on signatories. The Company provides no real argumentation in support of the notion

that a reasonable reader would understand the right to issue “work rules and Standards of Conduct” as including the right to force employees into individual contracts that will follow them long after their employment with the Company.

The Company also relies on a strained reading of a provision granting it the right to “control and regulate the use of machinery, facilities, equipment and other property of the Company.” (Br. 22.) However, once again, the phrase “other property” should be interpreted in the context in which it appears, which is a list of physical property in the workplace. *See Regal Cinemas*, 317 F.3d at 313. Even assuming that “other property” could include intellectual property or proprietary information, the NCCA goes far beyond simply regulating the use of the Company’s trade secrets. The Court should not accept the Company’s vague, generalized assertions that the NCCA as a whole—including broad provisions such as the prohibition on working for a competitor in any capacity—constitutes an attempt to “control and regulate” the use of the Company’s intellectual property.

Finally, the Company’s reliance on an errant statement by union representative Michael Simms at the unfair-labor-practice hearing (Br. 21) must be rejected. In response to a series of questions and after being prevented from giving a more nuanced answer, Simms—who is not a lawyer—agreed with counsel for the Company that the Company had a contractual right to implement the NCCA. (JA 274.) However, Simms also stated the exact opposite later in the hearing.

(JA 286.) In any event, a statement several years later by a single party involved in the negotiation of a contract does not negate the contract's actual terms. (JA 239 n.17.) As a factual matter, the Board found—and the Company does not contest—that neither the NCCA nor any of its substantive provisions were discussed during the negotiation of the collective-bargaining agreement (JA 236, 239; 255-59, 284), and the total lack of relevant bargaining history thus further reinforces the Board's interpretation that the management-rights clause does not “cover” the Company's implementation of the NCCA. *See Regal Cinemas*, 317 F.3d at 313-14.¹⁰

2. The Union Did Not Clearly and Unmistakably Waive Its Right To Bargain over the NCCA

As noted, *supra* p. 30, where an employer's unilateral change is not held to be “covered by” the parties' collective-bargaining agreement, and the union has therefore not affirmatively exercised its right to bargain, this Court applies the Board's normal clear and unmistakable waiver test to determine whether a union has “waived” such right. *Regal Cinemas*, 317 F.3d at 312-14. In the present case, the Company does not challenge the Board's reasonable finding that the Union did not separately waive its right to bargain over the NCCA. (JA 238-39.) As a result, the existing NCCA that the Company began requiring employees to sign in 2012

¹⁰ The 2014-2019 agreement contains identical terms to the 2011-2014 agreement in relevant part, and thus it also does not “cover” the Company's implementation of the NCCA. Article 17 states that: “Past practice and course of dealings shall not be a basis for creating a right or benefit that is not clearly and expressly provided for or created by the provisions of the Agreement.” (JA 486.)

was unlawfully implemented without the Union having notice or an opportunity to bargain, the Company must rescind the unlawful unilateral change and notify affected employees that it has done so, and the Company must comply with its bargaining obligations under the Act going forward. (JA 242.)¹¹

II. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING THE “INTERFERENCE WITH RELATIONSHIPS” AND “AT-WILL EMPLOYEE” PROVISIONS OF THE NON-COMPETE AND CONFIDENTIALITY AGREEMENT

A. An Employer’s Rule Is Unlawful if Employees Would Reasonably Construe Its Language as Prohibiting Conduct Protected by Section 7 of the Act

Section 8(a)(1) of the Act makes it an unfair labor practice for employers to “interfere with, restrain, or coerce employees” in exercising their Section 7 rights. 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) by maintaining a rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Under the Board’s governing framework, a rule is unlawful if it explicitly restricts activities protected by Section 7. *Lutheran*

¹¹ Based on its well-reasoned finding that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union over the implementation of the NCCA, the Board did not reach the secondary issue of whether the Company instead violated Section 8(a)(5) and (1) by engaging in unlawful direct dealing with represented employees. (JA 235 n.3) *Cf. Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992) (noting that union’s waiver of bargaining rights over issue does not privilege employer to undermine union by dealing directly with employees regarding same issue).

Heritage Village-Livonia, 343 NLRB 646, 646 (2004). If the rule does not explicitly restrict protected activities, it is nonetheless unlawful if: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647; *see Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). With respect to the two NCCA provisions being contested before the Court, only the first prong of this latter analysis is at issue.

Under the first prong, in determining whether employees would reasonably construe a given rule as prohibiting protected activities, the Board will “give the rule a reasonable reading” and will “refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. The Board’s analysis turns on whether a reasonable employee “would” be chilled in the exercise of his or her statutory rights by the language in a given rule, not whether the rule “*could* be interpreted that way.” *Id.* at 647. However, if language would be considered ambiguous, any ambiguity must be construed against the employer as the party that drafted the rule. *Lafayette Park Hotel*, 326 NLRB at 828.

B. Substantial Evidence Supports the Board’s Finding that Employees Would Construe the “Interference with Relationships” Provision of the NCCA as Restricting Protected Conduct

In addition to the refusal-to-bargain violation discussed above, the Board found that the Company separately violated Section 8(a)(1) by maintaining Section 4 of the NCCA, which states:

Interference with Relationships. During the Restricted Period Employee shall not, directly or indirectly, as employee, agent, consultant, stockholder, director, partner or in any other individual or representative capacity intentionally solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her or its relationship with the Company in an adverse manner.

(JA 496.) Specifically, the Board found that employees would reasonably read such language as restricting “lawful Section 7 conduct such as, for example, asking customers to boycott [the Company’s] products in support of a labor dispute,” as well as “other forms of appeals to [the Company’s] customers.” (JA 241.) Substantial evidence supports the Board’s finding.

It is well established that employees have a Section 7 right to concertedly seek to improve their terms and conditions of employment by communicating with outside parties, including customers. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1976); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003). This includes the Section 7 right to urge customers to boycott an employer’s services under certain circumstances. *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 33

(D.C. Cir. 2016); *Arlington Elec., Inc.*, 332 NLRB 845, 846 (2000). Here, the Company's overbroad rule facially prohibits *any* employee communications that would "solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her, or its relationship with the Company in an adverse manner." (JA 496.) Such an expansive prohibition would reasonably be read to encompass protected attempts to have customers boycott the Company during a labor dispute, or to otherwise appeal to "present or future" customers in a manner that the Company might consider "adverse" to its interests.

The Company argues that employees would construe the "Interference with Relationships" provision more narrowly, and contrary to its plain language, based on the context of the NCCA as a whole. However, the Company relies on provisions from a self-contained section of the NCCA, Section 1 or the "Covenant Not to Compete," that bear no obvious relation to the separate prohibition on interfering with customer relationships. Moreover, the provisions that the Company cites do nothing to dispel the unlawful plain meaning of the overbroad language contained in Section 4 of the NCCA. Prohibiting employees from urging customers to boycott the Company during a labor dispute is entirely consistent with an intent to "protect . . . customer relationships and human capital from improper . . . interference" (Br. 49), and to "protect the Company and the goodwill of the business" (Br. 50). As presently written, employees would reasonably take

the unlawful provision as meaning what it says—that any attempt to solicit a customer to terminate or alter its relationship with the Company is prohibited—and thus by maintaining such provision the Company violated Section 8(a)(1) of the Act. *Cf. Cintas Corp.*, 482 F.3d at 469 (“And because the Company has made no effort in its rule to distinguish section 7 protected behavior from violations of company policy, we find that the Board’s determination is ‘reasonably defensible,’ and therefore entitled to our considerable deference.” (citation omitted)).

C. Substantial Evidence Supports the Board’s Finding that Employees Would Construe the “At-Will Employee” Provision of the NCCA as Restricting Protected Conduct

The Board also found that the Company separately violated Section 8(a)(1) by maintaining Section 12 of the NCCA, which states:

At-Will-Employee. Employee acknowledges that this Agreement does not affect Employee’s status as an employee-at-will and that no additional right is provided herein which changes such status.

(JA 497.) In contrast, Article 4 of the collective-bargaining agreement negotiated by the Company and the Union establishes that employees who have completed a six-month probationary period may only be disciplined or discharged for just cause. (JA 502.) Under Article 6 of the collective-bargaining agreement, employees have recourse to a contractual grievance and arbitration procedure to dispute, for example, discipline not supported by just cause. (JA 504.) However, nothing in the NCCA indicates that its provisions are limited to the first six months

of an employee's employment, and, to the contrary, nearly all of the provisions in the NCCA expressly apply at a minimum for a "Restricted Period" ending eighteen months after such employment *ends*. (JA 494-98.)

On these facts, the Board found that employees would construe Section 12 of the NCCA as conflicting with the just-cause protections in the collective-bargaining agreement. (JA 241.) Employees who were required to sign the NCCA before subsequently accruing six months of seniority would reasonably question, based on the language of Section 12, whether they would be subjected to discipline as at-will employees, or precluded from challenging such discipline through the contractual grievance and arbitration procedure. Indeed, Section 7 of the NCCA expressly states that the NCCA "sets forth the entire understanding of the parties, *and supersedes and preempts all prior oral or written understandings and agreements with respect to the subject matter thereof.*" (JA 497 (emphasis added).) Section 10 of the NCCA states that the signatory-employee "is not a party to any other agreement which will interfere with Employee's full compliance with this Agreement," and that the signatory-employee "will not enter into any agreement, whether written or oral, in conflict with the provisions of this Agreement." (JA 497.) Such provisions may not have had the actual legal effect of superseding the collective-bargaining agreement, but substantial evidence clearly supports the Board's finding that reasonable lay employees reading Section

12 of the NCCA would “doubt whether the [collective-bargaining agreement’s] ‘just cause’ provision remains in effect.” (JA 241.)

As a result, reasonable employees would be chilled in their willingness to exercise their statutory right to utilize the just-cause and grievance-arbitration provisions of the collective-bargaining agreement. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-31 (1984) (noting that an employee’s invocation of a bargained-for right is protected by Section 7 of the Act). By diminishing the perceived protections afforded to employee conduct, Section 12 of the NCCA would also more generally chill reasonable employees’ willingness to engage in protected concerted activity. (JA 241.)¹² The Company’s maintenance of the “At-Will Employee” provision thus violated Section 8(a)(1) of the Act.

¹² The Company once again cites a number of General Counsel advice memoranda (Br. 53 & n.24), which do not represent the position of the Board. *S. Jersey Reg’l Council of Carpenters*, 335 NLRB at 591 n.10. In any event, the Board’s finding in the present case was predicated on the conflict between the unlawful at-will-employee language and the specific bargained-for rights contained in the parties’ collective-bargaining agreement.

CONCLUSION

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

Respectfully submitted,

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Eric Weitz
ERIC WEITZ
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2978
(202) 273-3757

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
February 2017

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

MINTEQ INTERNATIONAL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 16-1276, 16-1335
)	
Respondent/Cross-Petitioner)	Board Case No.
)	13-CA-139974
and)	
)	
INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 150, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,191 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

Dated at Washington, DC
this 6th day of February, 2017

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

MINTEQ INTERNATIONAL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 16-1276, 16-1335
)	
Respondent/Cross-Petitioner)	Board Case No.
)	13-CA-139974
and)	
)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, 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 by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if

they are not, by serving a true and correct copy at the addresses listed below:

Maurice Baskin
Littler Mendelson PC
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006

Jonathan O. Levine
Littler Mendelson, PC
111 East Kilbourn Avenue, Suite 1000
Milwaukee, WI 53202

Alfred John Harper, III
Littler Mendelson PC
1301 McKinney, Suite 1900
Houston, TX 77010

Charles R. Kiser
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

Brian Powers
O'Donoghue & O'Donoghue LLP
4748 Wisconsin Avenue, NW
Washington, DC 20016-0000

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 6th day of February, 2017

STATUTORY ADDENDUM

Except for the following, all applicable statutes are contained in the Company's opening brief to the Court. (Br. 2-3.)

29 U.S.C. § 160(a)

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

29 U.S.C. § 160(e)

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional

evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.