

Nos. 16-1261 & 16-1319

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

COLORADO FIRE SPRINKLER, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**ROAD SPRINKLER FITTERS
LOCAL UNION NO. 669, U.A., 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**

USHA DHEENAN
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-2989

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

1. Colorado Fire Sprinkler, Inc. (“the Company”) was the respondent before the Board (Board Case No. 27-CA-115977) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, was the charging party before the Board and is the Intervenor before the Court.

4. Robert Blackwell filed an amicus brief before the Board and in this proceeding on behalf of the Company.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on July 22, 2016, reported at 364 NLRB No. 55.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this 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 29th day of March, 2017

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GLOSSARY

“the Board” National Labor Relations Board

“Br.” Company’s opening brief

“the Act” National Labor Relations Act, 29 U.S.C. § 151, et seq.,
as amended

“the Company” Colorado Fire Sprinkler, Inc.

“the Union” Road Sprinkler Fitters Local Union No. 669, U.A., AFL-
CIO

“Tr.” Transcript of hearing before administrative law judge

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STATEMENT OF JURISDICTION

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

Relations Board for enforcement, of a Board Order issued against the Company, reported at 364 NLRB No. 55, 2016 WL 3971435 (July 22, 2016) (DA 655-69.)¹ The Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“the Union”), which has intervened on the Board’s behalf, was the charging party before the Board.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act,” 29 U.S.C. §§ 151, 160(a)). The Board’s Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides for the filing of petitions for review in this Circuit. The petition and cross-application were timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUE

Did the Board reasonably find, based on substantial evidence, that the Company and the Union had a Section 9(a) bargaining relationship, so that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing

¹ “DA” refers to the amended deferred appendix. “Br” refers to the Company’s opening brief; “Amicus Br.” refers to the brief filed by Amicus Curiae Robert Blackwell. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

employees' terms and conditions of employment, and reasonably find that the Union's charge was not time barred?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF THE CASE

This case involves a collective-bargaining relationship between parties in the construction industry. As a general matter, construction-industry employers and unions enjoy different rights and responsibilities depending on whether their relationship is governed by Section 9(a) or Section 8(f) of the Act, 29 U.S.C. § 159(a), § 158(f).² As discussed below, collective-bargaining agreements in the construction industry are presumed to be governed by Section 8(f), which does not require a union's showing of, or offer to show, majority support. Upon expiration of an 8(f) agreement, the Act imposes no further obligations on the parties.

² Section 9(a) provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. § 159(a).

Section 8(f) provides an exception to 9(a) and permits employers engaged primarily in the building and construction industries to “enter into a bargaining agreement even though the majority status of such labor organization has not been established under the provisions of section 9 of this Act . . . prior to the making of such agreement.” 29 U.S.C. § 158(f).

An employer and a union in the construction industry can establish a Section 9(a) relationship, absent an election, if the union requests recognition, the employer recognizes the union as the majority representative of its employees, and the employer bases its recognition on the union having shown, or having offered to show, evidence of its majority status. *See Staunton Fuel & Material, Inc., d/b/a Cent. Ill. Constr.*, 335 NLRB 717, 719-20 (2001). Upon expiration of a 9(a) agreement, the union enjoys a continuing presumption of majority support and the employer remains obligated to recognize and bargain with the union. These principles provide a framework for understanding the procedural history of this case, and the Board's findings of fact and conclusions, summarized below.

Here, on the basis of an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that, based on its Section 9(a) relationship with the Union, the Company had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally discontinuing its contractually obligated contributions to the Union's Welfare Fund, Pension Fund, Education Fund, and Sprinkler Fitter Industry Supplemental (SIS) Defined Contribution Pension Fund (collectively "the benefit funds"), and implementing a new health insurance plan, after the parties' contract had expired. (DA 662.) After a one-day hearing, an administrative law judge issued a decision and recommended order finding that the parties' collective-bargaining relationship was

governed by Section 9(a), (DA 664-65), and that the Company unlawfully implemented a new health insurance plan (DA 667). The judge dismissed, however, the charge as to the Company's cessation of benefit-funds contributions, finding it was time barred under Section 10(b) of the Act, 29 U.S.C. § 160(b), which requires that a party file a charge within 6 months of an unfair labor practice. (DA 666-67.) On review, the Board affirmed the judge's 9(a) determination and its finding that the Company's unilateral implementation a new health-insurance plan violated the Act, but reversed the judge's 10(b) determination. (DA 655-56.) In particular, the Board agreed that the parties' 2005 "Assent and Interim Agreement" established that they had entered into a 9(a) relationship under the Board's standard articulated in *Staunton Fuel*, and thus the Company remained obligated to bargain with the Union even after that agreement expired.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company, located in Pueblo, Colorado, is a construction-industry employer that installs, services, and inspects fire sprinkler systems. Kent Stringer owns the Company. (DA 662; DA 103 ¶ 3.) The Union is a national labor organization representing journeymen sprinkler fitters and apprentices. (DA 662;

DA 103 ¶ 2.) Richard Gessner is the Union's business agent responsible for the Company's represented employees. (DA 662; DA 5-6.)

B. The Parties Enter Into A Series of Assent Agreements

In 1991, the Company and the Union entered into an "Assent and Interim Agreement," which provided that the Union would represent the Company's journeymen sprinkler fitters and apprentices. (DA 662; DA 426-28.) The parties entered into successive assent agreements through March 31, 2013. (DA 662; DA 102-04 ¶¶ 1, 9, 11, 13, DA 107-08 (2005), DA 167-68 (2007), DA 250-52 (2010), DA 479-80 (1994), DA 524-25 (1997), DA 574-75 (2000).) Those agreements bound the parties to the associated national collective-bargaining agreements between the National Fire Safety Association, Inc., on behalf of contractor members, and the Union. (DA 662; DA 104-05 ¶¶ 10, 12, 14, 16, DA 109-66 (2005), DA 169-249 (2007), DA 253-331 (2010), DA 429-78 (1991), DA 481-523 (1994), DA 526-73 (1997), DA 576-622 (2000).)

In 2005, the parties entered into an Assent Agreement stating that the Company "hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act . . . , and that the Union has offered to provide the [Company] with confirmation of its support by a majority of

such employees.” (DA 662; DA 107.) Separately, the 2005 national agreement included the following recognition provision:

The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

(DA 662; DA 112.)

The parties’ 2007 and 2010 assent agreements each reaffirmed that “[t]he [Company] hereby freely and unequivocally acknowledges that it has previously confirmed to its full satisfaction and continues to recognize the Union’s status as the exclusive bargaining representative of its employees pursuant to Section 9(a)” of the Act. (DA 662-63; DA 167 (2007), DA 250 (2010).) Likewise, the Company agreed to be bound by the 2007 and 2010 national agreements between the National Fire Safety Association and the Union, which contained the identical recognition provision as quoted above. (DA 663; DA 172 (2007), 257 (2010).)

Throughout this time, the Union and Company did not engage in collective-bargaining negotiations. Instead, the Union sent the Company new assent agreements, which the Company signed and returned. (DA 663; DA 26-27.)

The 2010 national agreement required the Company to make monthly contributions to various benefit funds maintained by the National Automatic

Sprinkler Industry, including its Welfare Fund, Pension Fund, Education Fund, and Sprinkler Fitter Industry Supplemental Defined Contribution Pension Fund.

(DA 663; DA 103 ¶ 5, 279-86.) The Welfare Fund contribution enabled the

Company's employees, as well as Stringer, to obtain health-insurance coverage

through the Union. (DA 663; DA 104 ¶ 7.) The Company's benefit-fund

contributions were due on the 15th of each month for the preceding month.

(DA 663; DA 7.) If an employer failed to make a contribution, it was reflected on

a monthly delinquency report that the Union's business agent received the month

after it was due. (DA 663; DA 15.) For example, a payment for January would be

due February 15, and, if unpaid, would be reflected on a March delinquency report.

(DA 663; DA 15.)

C. In 2013, After Experiencing Financial Difficulties, the Company Stops Making Benefit-Funds Contributions and Refuses To Sign a New National Agreement or Assent Agreement

After many years of successful business operations, the Respondent began experiencing financial difficulties in 2010. (DA 663; DA 29-31, 38-39.)

According to Stringer, those difficulties were the result of the poor economy, particularly in Pueblo, as well as competition from nonunion companies. (DA 663;

DA 25-26, 40-41.)

In November 2012, the Union notified the Company in writing of its intent to terminate the 2010 national agreement and negotiate a new national contract.

(DA 663; DA 332-34.) Around that time, Stringer met with Gessner and informed him that the Company was struggling financially and would not sign a new contract without receiving some type of economic relief from the Union. (DA 663; DA 33.) In January 2013, the Company stopped making its monthly benefit-funds contributions. (DA 663 & n.2; DA 18, 30.)

In February 2013, with the 2010 assent agreement set to expire March 31, the Union sent the Company another assent agreement. (DA 663; DA 34.) Gessner later asked Stringer whether he would sign the agreement. (DA 663; DA 34.) Stringer responded that he would not enter into a contract that he could not comply with. (DA 663; DA 34.)

Gessner heard from employees that, at an April 5 meeting, Stringer told them that the Company would go nonunion because he could no longer afford to be a union contractor. (DA 663; DA 8, 10.) Thereafter, Stringer informed Gessner that the national agreement's wages and benefits were too much and that he could not compete with a nonunion competitor. (DA 663; DA 11-12.) Gessner replied that Stringer needed to continue the agreement's terms and negotiate a new contract. (DA 663; DA 12.) Stringer said he was unaware that he needed to do either. (DA 663; DA 12-13.) Gessner stated that Stringer was behind on his benefit-fund contributions, noting that the National Automatic Sprinkler Industry made settlement agreements regarding such payments. (DA 663; DA 14.) Stringer

said he would “catch up the funds through the end of the contract” that had expired on March 31. (DA 663; DA 42.) Stringer later said that he wanted to remain a union contractor but could not afford the benefits funds. (DA 663; DA 17.)

On April 25, the Union filed an unfair-labor-practice charge with the Board alleging that the Company unlawfully discontinued contributions to the benefit funds. (DA 633; DA 73.) At that time, the Company was delinquent on its contributions from January through March. (DA 663; DA 76.) Stringer asked the Union to withdraw the charge and instead negotiate a new contract and work to resolve the benefits issue. (DA 663; DA 43, 74-75.) The Union agreed. (DA 663 & n.3; DA 19, 77, 94.)

The parties held a bargaining session on June 21, at which they discussed the Company’s financial difficulties. (DA 664; DA 21-22.) The Company made a written proposal that included eliminating all benefit-funds contributions and providing employees with a different health insurance plan. (DA 664 & n.5; DA 95-98.)

At some point after the June 21 session, but prior to the next bargaining session on October 29, the Company offered its unit employees the opportunity to join the health insurance plan used by its non-unit office employees, which at least seven employees chose to do. (DA 664; DA 32, 104 ¶ 8.) The Company did this without first notifying or bargaining with the Union. (DA 664; DA 104 ¶ 8.)

Also after June 21, the Company paid off its delinquent benefit-funds contributions through March 31. (DA 664; DA 20.) It did not, however, make its contributions from April, which came due on May 15, forward. (DA 656; DA 16, 103 ¶ 6.)

The parties met again on October 29. Gessner told Stringer that some or all unit employees had lost their health insurance, and Stringer responded that he allowed them to join the office employees' health-insurance plan. (DA 664; DA 35.) Gessner stated that doing so violated the contract and that the Union would file a charge with the Board. (DA 664; DA 35.) He asked the Company for a copy of the health insurance plan. (DA 664; DA 37, 101.) Gessner also told Stringer that the Company needed to catch up on its payments to the benefit funds and showed Stringer a copy of a letter indicating that the Company would owe \$1.2 million if it withdrew from the plans. (DA 664; DA 36, 99-100.)

On the same day as the October 29 bargaining session, the Union filed its charge with the Board. (DA 664; DA 55.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Hirozawa and McFerran, Member Miscimarra dissenting) found (DA 655, 664-65), in agreement with the judge, that the parties' 2005 assent agreement met the three-part test set forth in *Staunton Fuel*, 335 NLRB at 719-20, to establish a 9(a) relationship. Moreover, because the

Company was obligated to bargain for a successor contract by nature of its 9(a) relationship with the Union, the Board found that it failed to bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act, by unilaterally ceasing to make contributions to the Union's benefit funds and implementing a new health insurance plan. (DA 655-56.) In so finding, the Board disagreed with the judge's finding that the Union's charge as to the cessation of payments was time barred by Section 10(b). (DA 656.) To remedy those violations, the Board ordered the Company to, upon request, rescind the unilaterally implemented changes; make whole bargaining-unit employees; notify and on request bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees; and post a remedial notice. (DA 657.)

SUMMARY OF ARGUMENT

The Company explicitly acknowledged, in multiple agreements, the Union's status as a Section 9(a) representative, and proceeded accordingly for over 20 years. It then abruptly changed course to avoid its bargaining obligations by claiming that the parties' relationship instead was governed by Section 8(f). Its position is not supported by the record or precedent. In the 2005, 2007, and 2010 agreements, the Company acknowledged that it had "verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a)," and that the Union had "offered to provide the Employer with confirmation of its

support by a majority of such employees.” Only when the Company began experiencing financial difficulties and asserted competition from nonunion contractors did it claim that the relationship was governed by Section 8(f), which would privilege unilateral elimination and alteration of employee benefits after the contract expired. The Board’s finding that the Union is the Section 9(a) collective-bargaining representative is supported by the language of the parties’ 2005 Assent Agreement (DA 107), which met the stringent requirements of *Staunton Fuel*.

The Company insists that, under *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), an agreement alone can never establish a Union’s majority status. *Nova Plumbing* does not go so far as to require extrinsic evidence of majority status; it instead requires that the Board consider any evidence indicating that the parties had only a section 8(f) relationship. *Id.* at 537. Here, neither the Company nor amicus Robert Blackwell, a 12-year bargaining-unit employee who filed amicus briefs before the Board and this Court, presented any evidence affirmatively demonstrating that the Union lacked majority support at the time the Company entered into the 2005 Assent Agreement.

Because the Union had attained 9(a) status, it enjoyed a continuing presumption of majority support and the Company remained obligated to bargain and to refrain from unilaterally implementing terms and conditions of employment. Here, the Company breached that obligation, in violation of Section 8(a)(5) and (1)

of the Act, by ceasing its benefit-fund contributions after the parties' agreement expired on March 31, 2013, and unilaterally implementing a new health insurance plan.

The Company insists that the Union's unfair-labor-practice charge alleging that violation was filed more than 6 months after the Company indicated its intent to stop making those contributions, and thus time barred. It is well established, however, that the limitations period only commences when a party engages in an unfair labor practice, not when it announces its intent to do so in the future. Here, the Union filed its charge within 6 months of the Company's unlawful conduct.

Finally, the Company briefly asserts, with no support, that the Board's remedy is improper. It is evident, however, that in ordering the Company to bargain with the Union, rescind its unlawful unilateral changes, make whole the employees, and make all required benefit-fund contributions, the Board was acting well within its broad remedial discretion.

STANDARD OF REVIEW

The Board's construction of the Act is entitled to affirmance if it is "reasonably defensible," even if the Court would have preferred another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 477 (1951). The Court owes the Board's findings the same degree of deference even when, as here, the Board disagrees with the administrative law judge, provided that the Board has considered the judge's position along with the record evidence. *Universal Camera Corp.*, 340 U.S. at 496 ("the 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree"); *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 995 (D.C. Cir. 1979). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488; accord *UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). A Board decision "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012). "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011).

ARGUMENT

THE BOARD REASONABLY FOUND THAT, BECAUSE THE PARTIES HAD A SECTION 9(a) BARGAINING RELATIONSHIP, THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING EMPLOYEES' BENEFITS, AND THAT THE UNION'S CHARGE WAS NOT TIME BARRED

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees.” 29 U.S.C. §158(a)(5).³ As discussed below, an employer may terminate a Section 8(f) relationship upon expiration of a collective-bargaining agreement, and thereby end that bargaining obligation. Under Section 9(a), however, an employer remains obligated to recognize and bargain with the union, and refrain from unilaterally implementing changes to its employees’ terms and conditions of employment.

Allied Mech. Servs., 668 F.3d at 768.

Here, the Company does not contest, and indeed has stipulated (DA 103-06 ¶¶ 6, 8), that it stopped making benefit-funds contributions after the contract

³ “[A]n employer who violates section 8(a)(5) also derivatively violates section 8(a)(1)” of the Act, [29 U.S.C. § 158(a)(1)].” *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of the rights guaranteed” in Section 7 of the Act, 29 U.S.C. § 158(a)(1), which includes the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and to refrain from any of these activities. 29 U.S.C. § 157.

expired on March 31, 2013, and unilaterally implemented a new health insurance plan months later without first bargaining with the Union. Instead, it maintains that its relationship with the Union was governed by Section 8(f), so it was entitled to do so, and that, in any event, the Union's charge as to the Company's cessation of benefit-funds contributions was time barred. As shown below, however, the Board reasonably rejected those defenses.

A. Applicable Principles

1. General Principles Governing Collective-Bargaining Relationships Under Sections 9(a) and 8(f) of the Act

As noted, Section 9(a) of the Act provides that “a labor organization designated or selected for the purposes of collective bargaining by a majority of the employees in an appropriate unit is the exclusive collective-bargaining representative of all of the unit employees.” 29 U.S.C. § 159(a). A union can attain the status of a Section 9(a) majority representative through either Board certification or voluntary recognition by an employer. *See Allied Mech. Servs.*, 668 F.3d at 761. Section 8(f) of the Act, 29 U.S.C. § 158(f), provides a limited exception to that general requirement by permitting a construction-industry employer and a union to enter into a collective-bargaining contract before the union has established its majority status or before the employer has even hired any employees on the project or projects to be covered by the contract. *Nova Plumbing*, 330 F.3d at 534. Congress created these “pre-hire” agreements so that

construction companies can estimate labor costs before bidding on potential projects and obtain a supply of skilled employees on short notice. *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987) (citing S. Rep. No. 187, and H. Rep. No. 741 (1959)), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988); *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 348-49 (1978); *Nova Plumbing*, 330 F.3d at 534. These agreements also help alleviate the difficulty of establishing majority support among employees in an industry characterized by sporadic employment relationships in which employees often work on short-term projects for multiple employers. *Id.*

The distinction between a Section 9(a) and 8(f) bargaining relationship is significant. *Staunton Fuel*, 335 NLRB at 718. Under Section 8(f), either party may terminate the bargaining relationship upon expiration of a collective-bargaining agreement, and an employee or other party may seek to decertify the union at any time. *Id.*; *Allied Mech. Servs.*, 668 F.3d at 768. Once a union has achieved 9(a) status, however, it enjoys a presumption of majority status. That presumption is ordinarily irrebuttable for one year following recognition or certification and during the term of a collective-bargaining agreement of three years or fewer. Thereafter, it becomes rebuttable. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). That presumption obligates an employer to

recognize and bargain with the union, even after contract expiration, unless and until it has been shown to have lost majority support. *Allied Mech. Servs.*, 668 F.3d at 768; *Deklewa*, 282 NLRB at 1387 n.53. Absent such a showing, an employer violates Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the exclusive representative or by making unilateral changes. *See NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 785 (1980).

2. Principles Governing Whether a Collective-Bargaining Relationship is Established Pursuant to Section 9(a) or 8(f)

A bargaining relationship in the construction industry is presumed to be established under Section 8(f). *Deklewa*, 282 NLRB at 1386; *see also Allied Mech. Servs.*, 668 F.3d at 766. Nevertheless, the Board has made clear that unions do not have “less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.” *Deklewa*, 282 NLRB at 1387 n.53. Accordingly, under Section 8(f), a construction union can achieve 9(a) status either through a Board certification proceeding or “from voluntary recognition accorded . . . by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees.” *Id.* A party seeking to establish that a bargaining relationship is governed by Section 9(a) bears the burden of proof. *Id.* at 1385 n.41; *Allied Mech. Servs.*, 668 F.3d at 766.

In *Staunton Fuel*, the Board, adopting the approach articulated by the Tenth Circuit, held that a written agreement between an employer and union will establish a 9(a) relationship if the language unequivocally shows that: (1) the union requested recognition as the employees' 9(a) representative; (2) the employer recognized the union as such; and (3) the employer's recognition was based on the union's showing, or offer to show, evidence that a majority of employees support the union. 335 NLRB at 719 (citing *NLRB v. Triple C Maint., Inc.*, 219 F.3d 1147, 1155 (10th Cir. 2000); *NLRB v. Okla. Installation Co.*, 219 F.3d 1160, 1164 (10th Cir. 2000)); see also *Sheet Metal Workers Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 241-42 (3d Cir. 1999). If those criteria are met, the Board, with court approval, does not require that a union also show extrinsic evidence (such as authorization cards or an employer-conducted poll) to overcome the 8(f) presumption. *Staunton Fuel*, 335 NLRB at 717, 719-20; *Diponio Const. Co.*, 357 NLRB 1206, 1210 (2011); *Golden West Elec.*, 307 NLRB 1494, 1495 (1992); see also *Triple C Maint.*, 219 F.3d at 1156; *Herre Bros.*, 201 F.3d at 242. If the agreement meets the *Staunton Fuel* requirements, and thus "conclusively notifies the parties that a 9(a) relationship is intended," the 8(f) presumption has been rebutted. *Madison Indus., Inc.*, 349 NLRB 1306, 1308 (2007).

In *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), the Court addressed with some skepticism the Board's *Staunton Fuel* standard. It recognized that employee choice and majority rule remain the paramount concerns in protecting employees' Section 7 rights. Nevertheless, it did not preclude the Board from finding a 9(a) relationship based on agreement language alone. Rather, the Court held that actual evidence of a lack of majority support will defeat contract language purporting to establish a 9(a) relationship where "the record contains strong indications that the parties had only a section 8(f) relationship." *Id.* at 537; *see Allied Mech. Servs.*, 668 F.3d at 766-67. That holding followed from the Supreme Court's holding in *International Ladies' Garment Workers' Union v. NLRB*, that an agreement explicitly creating a Section 9(a) relationship cannot overcome proof that the union actually lacked majority support when the agreement was executed. 366 U.S. 731, 737-38 (1961).

Courts are to uphold the Board's decision of whether a Section 8(f) or 9(a) relationship exists provided that it is reasonable and if the Board's factual findings underlying that decision are supported by substantial evidence. *Allied Mech. Servs.*, 668 F.3d at 772 (citing *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189 (D.C. Cir. 2008) (deferring to Board's finding of Section 9(a) status)).

B. The Board Reasonably Found that the Company and the Union Had a Section 9(a) Bargaining Relationship and Therefore that the Company Violated the Act By Unilaterally Ceasing Benefit-Funds Contributions and Implementing a New Health Insurance Plan

Substantial evidence supports the Board's finding that the 2005 assent agreement established that the Union enjoyed majority support among the Company's journeymen sprinkler fitters and apprentices. Accordingly, the Board reasonably found that the parties' relationship was governed by Section 9(a) of the Act, and the Company was therefore obligated to continue making benefit-funds contributions after their contract with the Union expired on March 31, 2013, and to bargain with the Union. The Company violated the Act by breaching those obligations.

In the 2005 assent agreement, the Company acknowledged "freely and unequivocally that it ha[d] verified the Union's status as exclusive bargaining representative of its employees pursuant to Section 9(a) of the [Act] and that the Union ha[d] offered to provide the [Company] with confirmation of its support by a majority of such employees." (DA 107.) As found by the Board (DA 665), that language "fairly implie[s]" that the first *Staunton Fuel* prong has been met – that the union requested recognition as the employees' 9(a) representative. And the agreement explicitly establishes the second and third *Staunton Fuel* prongs – that the Company recognized the Union as a 9(a) representative and that the recognition was based on the Union's showing or offer to show evidence that a

majority of employees supported the Union. (DA 665.) Nothing in the 2007 or 2010 assent agreements, or any national agreement, conflicts with the Union's 9(a) status. (DA 665.) The Board's finding is consistent with its decision in *King's Fire Protection, Inc.*, 362 NLRB No. 129, 2015 WL 3897802 (June 23, 2015), involving identical contract language.

The Company does not challenge the Board's finding that the 2005 assent agreement satisfies the requirements of *Staunton Fuel*. Instead, it challenges the Board's 9(a) determination based on its assertion that in *Nova Plumbing* this Court held that an employer and union can never, through contract language alone, establish a 9(a) relationship. As discussed above (p. 21), however, while the Board cannot ignore evidence showing that a union actually lacked majority support when a contract purporting to establish a 9(a) relationship was executed, in the absence of such evidence, a contract that meets the strictures of *Staunton Fuel* is sufficient. This is consistent with the Court's explanation that "contract language and intent . . . are perfectly legitimate *factors* that the Board may consider in determining whether the *Deklewa* [8(f)] presumption has been overcome," but they "cannot be dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship." *Nova Plumbing*, 330 F.3d at 537.

In *Allied Mechanical Services*, the Court clarified that “[t]he precise holding of *Nova Plumbing* is that an employer and union in the construction industry are not free to ‘convert’ an 8(f) relationship into a 9(a) bargaining relationship that ‘lacks support of a majority of employees.’” 668 F.3d at 768-69 (quoting *Nova Plumbing*, 330 F.3d at 537). The Court explained that this clarification was necessary because, in the intervening decision *M&M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047, 1050 (D.C. Cir. 2006), the Court suggested that *Nova Plumbing* required actual proof of a union’s majority support, not just an offer of proof. *Allied Mech. Servs.*, 668 F.3d at 769. That statement, the Court explained in *Allied Mechanical Services*, “is *dicta*, both because it reflects an overreading of *Nova Plumbing* and it is unnecessary to the decision in *M&M Backhoe*.” *Id.* See also *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 770 (8th Cir. 2012) (“We agree with *Nova Plumbing* that, no matter how clearly a 9(a) agreement may be set out in a contract, all the evidence must be considered.”). Thus, the Board does not, as the Company contends (Br. 28), read *Allied Mechanical Services* as “restrict[ing]” *Nova Plumbing*, but rather as explaining the limited nature of that earlier holding – that the Board must account for any extrinsic evidence providing “strong indications” that the parties had only a 8(f) relationship.

Here, the Company had every opportunity at the hearing before the administrative law judge to introduce evidence undermining its own “free[] and

unequivocal[ly] acknowledge[ment]” in the 2005 assent agreement that it had verified the union’s majority status. The sole evidence offered on this point was Stringer answering “[n]ot to my knowledge” when asked at the hearing whether employees had ever indicated majority support for the Union. (DA 28.) The Board reasonably found (DA 655 & n.4) that this testimony did not affirmatively demonstrate an actual lack of majority support.⁴ This stands in stark contrast to the evidence that led the D.C. Circuit and Supreme Court to find that contracts purporting to establish a 9(a) relationship can be overcome by affirmative evidence that the union in fact lacked majority support. *See Nova Plumbing*, 330 F.3d at 537 (“uncontradicted testimony indicates that even senior employees who had been longtime union members . . . opposed the union’s representation”); *Garment Workers*, 366 U.S. at 734 & n.4 (parties had good faith but mistaken belief that the union had majority support when contract was executed).⁵ In short, while the Board must consider evidence showing that a union lacked majority support,

⁴ Notably, amicus Robert Blackwell, who testified at the hearing (DA 44-54), also failed to offer any evidence suggesting that the Union lacked majority support when the 2005 assent agreement was executed. As a 12-year employee, who was also Stringer’s son-in-law, Blackwell was uniquely positioned to possess such evidence.

⁵ Amicus Blackwell’s attempt (Amicus Br. 8-9) to analogize this case to those in which employers unlawfully assisted unions to become a majority representative is misplaced. In those cases, positive evidence was adduced establishing improper assistance. Here, although the Company seeks to cast doubt on its own assertion in the 2005 assent agreement that it had verified the Union’s majority status, it presented no evidence suggesting that assertion was untrue.

thereby undermining the veracity of a contract that on its face satisfies *Staunton Fuel*, absent any such evidence it is reasonable for the Board to find, based on an agreement that satisfies *Staunton Fuel*, that parties established a 9(a) relationship. Accordingly, the Board's finding that the parties' 2005 assent agreement established a 9(a) relationship does not run afoul of *Nova Plumbing*.⁶

The Company also makes several meritless factual arguments challenging the Board's 9(a) determination. It complains (Br. 27) that Stringer "simply signed successive boilerplate asset agreements mailed to him," without negotiations with the Union." But as the Board found (DA 665), he signed the 2005 assent agreements, and all others, as the Company's president, and is thus bound by their terms. *See, e.g., O'Malley Glass & Millwork Co.*, 195 NLRB 548, 551 n.5 (1972) ("As a general principle, one who accepts a written contract is conclusively presumed to know its contents and to assent to them") (internal quotation omitted); *Paterson v. Reeves*, 304 F.2d 950, 951 (D.C. Cir. 1962) (per curiam) ("One who signs a contract which he had an opportunity to read and understand is bound by its provisions."). The Company (Br. 27) and Amicus (Amicus Br. 2), also assert that the Company had no employees in 1991, but that is irrelevant, for

⁶ The Company's assertion (Br. 27) that "there was no record evidence that the Union ever verified that it had majority employee support" ignores the fact that the Union offered to show the Company such evidence and that the Company acknowledged that it verified the Union's majority status.

the basis of the Board's 9(a) determination is the 2005 assent agreement, at which time it was stipulated the Company employed approximately 12 journeymen sprinkler fitters and apprentices. (DA 665; DA 103 ¶ 4.) *See also King's Fire Protection, Inc.*, 362 NLRB No. 129, 2015 WL 3897802, at *2 n.3 (June 23, 2015).

Because the Union held 9(a) status, once its agreement with the Company expired on March 31, 2013, it enjoyed a continuing presumption of majority status. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). As a result, the Company remained obligated to recognize and bargain with the Union, and refrain from unilaterally implementing changes to its employees' terms and conditions of employment. *See Allied Mech. Servs.*, 668 F.3d at 768. The Board reasonably found (DA 655-56) that by ceasing its contractually obligated benefit-fund contributions, including payments to the Union's Welfare Fund that provided employees with health insurance, and unilaterally implementing its own health insurance plan, the Company violated Section 8(a)(5) of the Act.

C. The Union Filed Its Unfair-Labor-Practice Charge Within Six Months After Learning that the Company had Unilaterally Ceased Making Benefit-Fund Contributions; Thus it was Timely Under Section 10(b) of the Act

The Company argues (Br. 31-40) that the Union filed its unfair-labor-practice charge challenging the Company's unilateral cessation of benefit-funds contributions outside the 6-month limitation period established by Section 10(b) of

the Act, 29 U.S.C. § 160(b).⁷ Substantial evidence supports the Board's finding that the Union's charge was timely and that the Board's chosen remedy is well within its broad remedial discretion.

Section 10(b) of the Act, 29 U.S.C. § 160(b), establishes a 6-month limitations period for filing unfair-labor-practice charges with the Board.⁸ "The Board's interpretation of § 10(b), provided it is reasonable, is entitled to judicial deference." *Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995) (citing *Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017, 1021 (D.C. Cir.1995)). The burden to show otherwise rests with the party asserting the 10(b) defense. *Id.* at 805.

The Board's long-settled rule, accepted by the courts, is that "the 6-month 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act." *United Kiser Servs., LLC*, 355 NLRB 319, 319 (2010) (internal quotation omitted); *see also Leach Corp.*, 312 NLRB 990, 991 (1993), *enforced*, 54 F.3d 802 (D.C. Cir. 1995); *accord NLRB v. Pub. Serv. Elec. & Gas Co.*, 157 F.3d 222, 227 (3d Cir. 1998); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d

⁷ The Company does not assert that the charge challenging the unilateral implementation of a new health-insurance plan, which the parties stipulated took place between June and October 2013 (DA 104 ¶ 8), was time barred.

⁸ Section 10(b) provides that "[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b).

892, 899; (6th Cir. 1996); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir.1989).

This stringent requirement ensures that a charge need not be filed based on speculation that an unfair labor practice may occur in the future. *See Esmark, Inc.*, 887 F.2d at 746 (“individuals should not be forced to file anticipatory or premature charges, challenging tentative or merely hypothetical decisions, in order to protect their statutory rights”); *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 684 (2d Cir. 1990) (“The unequivocal notice rule rests on the fundamental procedural objective of promoting prompt filing of ripe charges while not precipitating premature filing.”).

Substantial evidence supports the Board’s finding (DA 657) that the Company only provided clear and unequivocal notice that it was unilaterally ceasing its benefit-funds contributions on May 15, which was within 6 months of the Union filing its charge on October 29, 2013.⁹ Although the parties stipulated that the Company fell behind on its contributions in January 2013, the Company made its contributions for January through March before the Union filed its charge. The April payment, the first that came due after the agreement expired on

⁹ Contrary to the Company’s suggestion (Br. 33-34) the Board did not apply a continuing violation theory and argue that the 10(b) period renewed each time the Company failed to make a monthly fund contribution.

March 31, did not come due until May 15, which was within 6 months of the Union's charge.¹⁰

Moreover, the Board found (DA 656 n.7) that even after the agreement expired the Company engaged in "ambiguous conduct" and sent "conflicting signals" about whether it would continue to make benefit contributions after the agreement expired. Such conduct undermined a finding that the Company provided clear and unequivocal outside the 10(b) period. For example, on May 2, Stringer asked the Union to withdraw an earlier unfair-labor-practice charge – alleging the Company violated the Act by unilaterally ceasing its benefit-funds contributions – and negotiate "to resolve the benefits issues." (DA 663; DA 74-75.) Notably, the Company did not limit this to benefits due prior to the contract's March 31 expiration, nor did it state that it had discontinued its contributions. And at the June 21 bargaining session, Stringer merely stated that the funds contributions were too expensive and he wanted to negotiate a new contract. (DA 664.) Those actions are inconsistent with the Company's assertion (Br. 35),

¹⁰ The Board also noted (DA 656 n.8, 663), that the Union did not learn that the Company missed the April payment until June, when it received its monthly delinquency report from the fund, which operates on a 2-month delay.

The Company's claim (Br. 36) that the Board agreed with the judge that the Union knew or should have known that the Company would not make any payments following contract expiration is untrue. The Board *acknowledged* the judge's finding that the missed January payment was the "operative event" that served to put the Union on notice of its intent to cease payments (DA 656), but, as discussed above, rejected that finding.

accepted by the judge (DA 666), that Stringer “consistently told the union he would not sign a successor agreement that included benefit fund contributions.” Accordingly, it was reasonable for the Board to find (DA 656) that the Union lacked clear and unequivocal notice, until at least May 15, that the Company decided to cease making benefit-fund contributions.

The Company’s challenge to the Board’s 10(b) determination (Br. 31-41) is rooted in its mistaken assertion that the 10(b) period began to run when it provided “notice of [its] intent to stop benefit contributions.” (Br. 16.) The Board, with this Court’s approval, has rejected that very argument, explaining “it is well established that ‘a statement of intent or threat to commit an unfair labor practice does not start the statutory six months running. The running of the limitations period can begin only when the unfair labor practice occurs.’” *Leach Corp.*, 312 NLRB at 991 (quoting *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983)); *enforced*, 54 F.3d at 806-07 (“advance notice of [the employer’s] intent to withdraw recognition of the [u]nion and repudiate the [parties’] contract . . . did not trigger the running of [Section] 10(b)”); *see also Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004) (10(b) period begins running when employer unlawfully refused to arbitrate claim, not when parties had reached agreement, months earlier, purporting to bar such claims). Only in discriminatory discharge cases does the 10(b) period run from when an employee has unequivocal notice of

intent to commit an unfair labor practice in the future. *See Leach Corp.*, 312 NLRB at 991 n.7; *see also Leach Corp.*, 54 F.3d at 806; *see also Postal Serv. Marine Ctr.*, 271 NLRB 397, 398-400 (1984) (announcing that in discrimination cases, Board will follow Supreme Court's Title VII jurisprudence holding that period for filing EEOC charge runs from date employee has notice of adverse employment decision, rather than date action takes effect).¹¹

The Company's lengthy challenge (Br. 36-40) to the Board's reliance on *Peerless Roofing Co.*, 247 NLRB 500, 501, 504 (1980), *enforced* 641 F.2d 734 (9th Cir. 1981), is likewise misplaced. In *Peerless Roofing*, the parties' agreement expired on April 30, 1978, and the employer did not make any benefit-fund contributions for May, which came due on June 20, or thereafter. *Id.* at 501, 504. The Board found that, because the union "could not claim or demand payment of the funds until they were due" on June 20, the union's December 7 unfair-labor-

¹¹ The Company thus misconstrues *Leach Corp.* (Br. 40), by insisting that only in plant-relocation cases does the 10(b) period not run until an unfair labor practice actually occurs, and suggesting that in other cases, including this one, a notice of intent to commit an unfair labor practice is sufficient. Indeed, in finding that the "notice of intent" standard does not start the 10(b) clock running in contract repudiation and refusal to bargain cases, the Board cited two cases that did not involve plant relocations. 312 NLRB at 991 at n.7 (citing *U.S. Can Co.*, 305 NLRB 1127, 1141 (1992) (10(b) period ran from time employer closed plants, not from when decision to close plants was announced), *enforced*, 984 F.2d 864 (7th Cir. 1993); *Howard Elec. & Mech., Inc.*, 293 NLRB 472, 475 (1989) (in refusal to bargain case, 10(b) period ran from date employer unlawfully implemented contract proposals, not date employer announced its intention to implement)).

practice charge was filed within 6 months and therefore timely. *Id.* at 504.¹² Here, too, the Company's obligation to make its April contribution – the first due after the contract expired on March 31 – did not arise until May 15, within the 10(b) period. Whether or not Stringer indicated before May 15 that the Company could no longer afford benefit-funds contributions, it was not until it missed the May 15 payment that the Union knew unequivocally that the Company would not meet its obligation.

The Board's application of this standard does not, as the Company suggests (Br. 37), amount to an "implicit reject[ion]" of prior Board law. In the cases the Company cites (Br. 36), the Board did not establish that the 10(b) period begins to

¹² As the Company points out (Br. 37), in *Peerless Roofing*, the union had no notice, prior to June 20, that the employer planned on discontinuing its contributions following contract expiration. 641 F.2d 734, 736 (9th Cir. 1981). Regardless, having found that the operative date was June 20, when the first missed payment came due, 247 NLRB at 504, the Board did not indicate that the 10(b) period would have started earlier had the employer announced in advance that it would not make the May payment. Moreover, the Ninth Circuit later reiterated that "[b]ecause notice of the intention to commit an unfair labor practice does not trigger section 10(b), only notice received after [an employer] misse[s] its first pension fund payment could have provided actual notice to the Union." *Am. Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983) (as amended on denial of rehearing) (internal citation omitted). Here, although the Board mistakenly stated (DA 656) that the employer in *Peerless* had provided advanced notice that it did not intend to make payments under the expired contract, that error is immaterial because the Board ultimately applied the correct standard. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999) (finding judge's misstatement of Board's *Wright Line* standard for assessing discriminatory motive was "immaterial" where substantial evidence supported Board's finding that employer had unlawful motive).

run before an employer misses a fund contribution provided it stated its intent to do so. Rather, they stand for the proposition that even when an employer does not explicitly announce that it has stopped making contributions after an agreement expires, a union has adequate notice when the employer has not made contributions for a lengthy period of time. For instance, in *Natico, Inc.*, the Board found the union's charge untimely because it was filed 28 months after the employer made its last fund contribution: "[t]he failure to make the payments month after month was itself tantamount to repudiation, and the Union was put on notice of the repudiation by the 'sheer length of time during which [the employer] consistently failed to make payments.'" 302 NLRB 668, 671 & n.10 (1991) (quoting *Park Inn Home for Adults*, 293 NLRB 1082, 1082 (1989)); see also *Chemung Contracting Corp.*, 291 NLRB 773, 773-74 (1988) (charge untimely when filed 15 months after employer discontinued contributions). Here, the Company's failure to make contributions from January through March did not serve to put the Union on notice that it was discontinuing contributions, because the Company corrected that delinquency. Accordingly, the first time the Union had actual notice that the Company withheld a contribution was on May 15, when the April payment came due.

D. The Board's Remedy is Appropriate

The Company also complains (Br. 41), without support, that the Board's remedy is improper. Congress conferred upon the Board broad discretion to remedy violations of the Act. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). The Board acted well within that discretion by ordering the Company to, “[u]pon request of the Union, rescind the unilaterally implemented changes to unit employees’ terms and conditions of employment” and “make all bargaining unit employees whole.” (DA 657.)¹³ Remedying unlawful unilateral changes in this manner is consistent with court-approved Board cases dating back decades. *See Goya Foods of Fl.*, 356 NLRB 1461 (2011) (collecting cases). Simply put, rescission of the unilateral changes, upon the Union’s request, is properly tailored to “restor[e] the economic status quo that would have obtained but for the company's wrongful [action.]” *Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir.1995) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1970)).

The Company fails to offer any argument as to why the Board should depart from that remedy here. It suggests (Br. 41) that it cannot afford the Union plan, but the Board’s Order (DA 657) simply requires that the Company, upon request of

¹³ In discussing the remedy, the Company (Br. 41) quotes the administrative law judge’s recommended order (DA 668), which the Board modified in its final Order. (DA 655 & n.2.)

the Union, rescind the unilaterally implemented changes and bargain with the Union in good faith before implementing other changes. Thus, the Company will have the opportunity to propose affordable alternatives. The Company also asserts (Br. 41) that the status quo is the plan that it unilaterally implemented “after talking to the Union in an effort to maintain some continuity of coverage.” That is wrong as both a factual and legal matter. The Company stipulated before the Board (DA 104 ¶ 8) that it implemented a new health-insurance plan without first bargaining with the Union. And it is self-evident that restoration of the status quo ante – designed to place the Union in the same position it was in before bargaining began – is not the unlawfully implemented plan, but rather that which was in effect before bargaining began. *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 740 (D.C. Cir. 2015).

CONCLUSION

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

s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

s/ Jeffrey W. Burritt

JEFFREY W. BURRITT

Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2989

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board
March 2017

**UNITED STATES COURT OF APPEALS
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)	Nos. 16-1261 & 16-1319
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)	27-CA-120823
Respondent/Cross-Petitioner)	
)	
and)	
)	
ROAD SPRINKLER FITTERS LOCAL UNION)	
NO. 669, U.A., AFL-CIO)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 8,641 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 29th day of March, 2017

STATUTORY ADDENDUM

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STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Section 7 (29 U.S.C. § 157)2

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....2

Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....2

Section 8(f) (29 U.S.C. § 158(f)) 2

Section 9(a) (29 U.S.C. § 159(a)) 3

Section 10(a) (29 U.S.C. § 160(a))3

Section 10(b) (29 U.S.C. § 160(b))..... 4

Section 10(e) (29 U.S.C. § 160(e))4

Section 10(f) (29 U.S.C. § 160(f))5

NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157): Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

...

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the

agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.

- (a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

- (a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

- (b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

- (e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and

enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions 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.

(f) Review of final order of Board on petition to court

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, the foregoing document was electronically filed 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 further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system

/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 29th day of March, 2017