

Nos. 16-1405 & 16-1450

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

ADVANCED LIFE SYSTEMS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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**

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

ADVANCED LIFE SYSTEMS, INC)	Nos. 16-1405, 16-1450
)	
Petitioner/Cross-Respondent	)	Board Case Nos.
	)	19-CA-096464,
v.	)	19-CA-096899
)	
NATIONAL LABOR RELATIONS BOARD	)	ORAL ARGUMENT
	)	NOT YET
Respondent/Cross-Petitioner	)	SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: Advanced Life Systems, Inc. (“the Company”), was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board’s General Counsel was also a party before the Board, and the Board is the respondent/cross-petitioner before the Court. The International Association of EMT’s and Paramedics was the charging party before the Board. There are no intervenors or amici.

(B) Ruling Under Review: This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of the Board’s Decision and Order in Case Nos. 19-CA-096464 and 19-CA-096899, issued on August 27, 2016, and reported at 364 NLRB No. 117.

(C) Related Cases: This case has not previously been before this Court or any other court. The Board is unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 11th day of May, 2017

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GLOSSARY

“Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to the Court
“Company”	Advanced Life Systems, Inc.
“FVRA”	Federal Vacancies Reform Act
“Union”	International Association of EMT’s and Paramedics
“JA”	Joint Appendix
“SA”	Supplemental Appendix

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Advanced Life Systems, Inc. (“the Company”) to review and set aside, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a final Board Decision and Order issued against the Company regarding unfair labor practices it committed in connection with its employees choosing representation by the International Association of EMT’s and Paramedics (“the Union”). The Board’s Decision and

Order issued on August 27, 2016, and is reported at 364 NLRB No. 117 (A. 12-31.)¹ The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company’s petition and the Board’s cross-application are timely because the Act imposes no time limits on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by telling employees prior to the election that they would not get raises if they voted in favor of the union.
2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally stopping annual Christmas bonuses.
3. Whether the Board is entitled to summary enforcement of its finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily

¹ “A” references are to the Joint Appendix. “SA” references are to the Supplemental Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

stopping periodic wage increases and annual Christmas payments after employees chose union representation.

4. Whether the Board properly rejected the Company's challenges to the complaint's validity.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In July 2012, the Union began organizing the Company's employees, and in August, employees voted for union representation. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company, as relevant here, unlawfully told unit employees prior to the election that they would not receive raises if they chose union representation, and, after they voted for representation, that doing so was the reason they would not receive wage increases. The complaint further alleged that after the election, the Company discontinued periodic wage increases and annual Christmas payments because the employees chose union representation. Following a hearing, an administrative law judge found that the Company had committed the alleged unfair labor practices.

(A. 24-31.) On review, the Board modified the judge's rulings, findings, conclusions, and recommended order. (A. 12-16.)

II. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Informs New Employees To Expect Periodic Wage Increases and an Annual Christmas Bonus and Thereafter Provides These Payments to Employees

The Company is a Washington State corporation that has provided emergency medical transportation services since 1996. (A. 24; 55-56, SA 3-4.) William Woodcock, who oversees the day-to-day operations, serves as the Company's president, chief executive officer, and majority shareholder. Woodcock's spouse is the other majority shareholder, but has no active role in the Company's operations. (A. 24; 34, 55-56.) The Company has approximately 55 employees including Emergency Medical Technicians ("EMT's"), paramedics, and dispatchers. The employees work out of six stations throughout Yakima, Washington. (A. 24 and n.4; 56-57, SA 4, 19-20, 25-26.)

The Company starts new employees at relatively low hourly wage rates because they initially require significant training. Thereafter, it then increases employees' wages based, in part, on their completing training, as well as their tenure, and performance. (A. 12, 24-25 and nn.8, 13; 61-63, SA 21, 25-26.)

During the hiring process, Woodcock, Operations Manager Peter South, or other managers informed new employees to expect periodic hourly wage increases

approximately every 6 months. (A. 12-13, 24 and n.9; 34, 44-45, 51, 54.)

Additionally, the Company consistently gave Christmas payments in different forms and amounts; the practice evolved to the point that employees were informed, upon being hired to expect such bonuses. The Company, through then-General Manager Ann McCarter, told new hires that they would receive bonuses, with EMTs receiving \$50 for each year of seniority up to \$500, and paramedics receiving \$100 for every year up to \$500. (A. 12-13, 25 and n.20; 38, 47-48, 64-65.)

Between August 2009 and January 2012 the Company provided wage increases of at least 25 cents per-hour at least twice a year to a majority of employees. (A. 12, 25; 69-77.) For example, employee Cole Gravel was hired on July 10, 2008 at \$10 per-hour. He received two raises prior to August 2009, and then six additional raises through January 28, 2012, which increased his pay to \$15.25 per-hour. (A. 25 and n.11; 71.) Employee Matthew Schauer was hired on March 16, 2009, at \$10 per-hour. He received one wage increase prior to August 2009, and then six additional raises through January 28, 2012, which increased his pay to \$13 per-hour. (A. 25 and n.11; 76.) Employee Lenny Ugaitafa was hired on November 2, 2011, at \$10.50 per-hour and received three raises between December 31, 2011 and June 2, 2012, which increased his pay to \$12.50 per-hour. (A. 25 and n.11; 76.)

Prior to 2012, employees consistently received a bonus around Christmas in the form of cash, check, raffles, gifts, or trips. The payments were usually distributed at the annual Christmas party. (A. 12, 25 and nn.21-22, 26 and n.26, 27; 38-40, 47-49, 53, 63-66, SA 9-10, 15-17, 27-29.) Between 2008 and 2011, Woodcock spent between \$10,000 and \$15,000 per year on Christmas bonuses. The money came from Woodcock's personal checking and bank accounts. (A. 25, 27 and nn.26-27; SA 28-29, 31.) During that time period, for example, Gravel's bonus increased from \$100 to \$300. (A. 49.) The one exception occurred in 2010, when President Woodcock asked employees if they would agree to forego their Christmas bonuses in return for a \$10,000 contribution by Woodcock to an employee whose home was destroyed by a mudslide. The employees agreed and the affected employee received a \$10,000 check. (A. 25-26 and n. 23; 49, 66.) That year, some employees randomly received gifts through a raffle. (A. 25-26 and n.23; 49, 66, 67.) The following year, most employees received checks at Christmas time. However, Woodcock informed employee Ugaitafa that, because he was a new employee who had just started working for the Company, it would be unfair to give him a bonus. Instead, Ugaitafa participated with other employees in a raffle and received a \$50 gift card. (A. 26 and n.24; 49, 53.)

B. In July 2012, the Company Tells Employees that They Will Not Receive Raises if They Vote for the Union; In December 2012, After Employees Vote For Union Representation, the Company Tells Employees That They Cannot Receive Raises Because of the Union

In July 2012, the Union began organizing the Company's employees. An election was scheduled for August 15 and 16. (A. 12, 24 and n.5; 5-6.) Prior to the election, President Woodcock told employee Matthew Schauer that "he wasn't for [employees] going with the Union," and that the Company "would not be able to give [employees] raises if [they] brought a union in." (A. 13, 25 and n.14; 35-36, 43, SA 6.)

The Union won the election, and on August 24, 2012, the Board certified the Union as the exclusive collective-bargaining representative of the Company's EMTs, paramedics, and dispatchers. (A. 13, 24 and n.5; 3.) In December, employee Lenny Ugaitafa asked Woodcock about a raise he had been expecting based on his length of service. Woodcock replied that he could not give a pay raise "because of the whole [u]nion deal," and that "everything was frozen" on the advice of his attorney. (A. 25 and n.15; 36-37, 51-52, SA 7-8.)

C. Since the Union Election, Few Employees Have Received a Wage Increase and None Have Received the Annual Christmas Payment

Since the 2012 election, few employees have received their periodic wage increase, and none have received a Christmas bonus. (A. 13, 25 and n.17, 26 and n.25; 40, 45, 69-77, SA 5, 15, 22.) On December 19, 2013, the Company notified

the Union by letter that it “believes that it is appropriate to increase the wages of [12 named] employees” effective January 1, 2014, unless the Union objects. (A. 14 n.7, 25; SA 32.) On December 30, the Union replied that it would not “oppose the raises,” but wanted to discuss them. (A. 14 n.7; SA 33.) In January 2014, the Company granted the wage increases.² (A. 25 and n.18; 45, SA 15-16, 18, 24.)

III. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (A. 12-13) (Chairman Pearce and Members Miscimarra and Hirozowa)³ found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling employees prior to the election that they would not get raises if they voted for union representation, and by telling employees in December 2012, after the election, that they would not get raises because of the Union.⁴ Also, the Board (Member Miscimarra dissenting) found, in agreement with the judge (A. 13-14, 22), that the Company violated 8(a)(3) and (1) of the Act (29 U.S.C. §

² As of the hearing on February 25, 2014, the parties had not met for any negotiations. (A. 24; 60.)

³ On April 24, 2017, Member Miscimarra was named Chairman of the Board.

⁴ The Board found it unnecessary to pass on the administrative law judge’s finding that the Company violated Section 8(a)(1) of the Act in January 2013 by telling employees that it did not need to give wage increases during contract negotiations because it would not affect the remedy. (A. 13 n.5.) Member Miscimarra would have found that this statement did not violate the Act. (A. 21.)

158(a)(3) and (1)) by discontinuing periodic wage increases and annual Christmas bonuses because of the employees' union activity, specifically by voting for union representation. The Board further found, in agreement with the judge (A. 13, 22), that the Company's refusal to provide Christmas payments also violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). Because it would not materially affect the remedy, the Board found it unnecessary to pass on the judge's additional finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing an established practice of granting periodic wage increases to employees. (A. 14 n.8.) Accordingly, the Board did not address the dissent's interpretation or application here of *NLRB v. Katz*, 369 U.S. 736 (1962). (A. 14 n.8.)

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 the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A. 15.) Affirmatively, the Order requires the Company to notify and bargain with the Union before implementing any changes in wages or other terms and conditions of employment, and on request of the Union to rescind the unilateral changes in terms and conditions of employment, and to restore the status quo ante regarding the granting of Christmas payment until the parties either reach an agreement for a collective-bargaining agreement or a

lawful impasse. (A. 15.) The Order also requires the Company to make employees whole for any loss of earnings or benefits suffered from the Company's unlawful unfair labor practices, and to post a remedial notice. (A. 15.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by telling employees prior to the election that they will not get raises if they choose union representation. The statement had a reasonable tendency to coerce employees because it was made by President Woodcock, and suggested to employees that if they voted for union representation, they would be placing their pay raises in jeopardy. The Company's arguments ignore the credited evidence and the objective standard that a reasonable person would conclude that the statement constituted a threat of reprisal for voting for the union. Its other violation of Section 8(a)(1), committed in December 2012 when Woodcock told employees that he was freezing pay raises because they voted for the Union, is uncontested and thus subject to summary enforcement.

2. Substantial evidence supports the Board's finding that by unilaterally discontinuing annual Christmas payments the Company violated Section 8(a)(5) and (1) of the Act. The Act requires employers to bargain with their employees' representative over terms and conditions of employment. Under settled principles a regular payment program becomes a term and condition of employment that

requires bargaining for altering when employees reasonably expect the payment, it is not a mere token, it is paid over several years at a predictable time, and/or its amount is based in part on the length of an employee's service. The annual Christmas bonus amply meets those requirements. Thus, the Board reasonably found that the Christmas payments were a mandatory subject of bargaining and that the Company acted unlawfully when it unilaterally ceased paying them after its employees voted for union representation.

3. Before the Court, the Company's opening brief fails to pursue in its argument the fifth issue listed in its Statement of Issues, which relates to the Board's finding that it violated Section 8(a)(3) and (1) of the Act by discriminatorily stopping periodic wage increases and annual Christmas payments after employees voted for union representation. This failure amounts to a forfeiture of the issue and entitles the Board to summary enforcement of the portions of its Order relating to that violation.

4. The Court lacks jurisdiction to consider the Company's challenge to the initial complaint, which was issued by an acting general counsel not properly serving at the time in that acting capacity. The Company failed to timely raise their argument before the Board and offers no extraordinary circumstances to excuse its failure to do so. In any event, the issue of the initial complaint's validity

is moot because General Counsel Griffin ratified the complaint's issuance and continued prosecution, correcting any alleged defect.

STANDARD OF REVIEW

The Court will uphold a decision of the Board “unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so.” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (internal quotation marks omitted). 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). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). 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). Additionally, the Court will accept all credibility determinations made by an administrative law judge and adopted by the Board, unless those determinations are shown by the challenging party to be “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation marks omitted).

The Board's legal determinations under the Act are entitled to deference, and the Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int'l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

Furthermore, the Court will "abide [by the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

ARGUMENT

The case before this Court involves challenges to only two of the five unfair labor practices found by the Board. Thus, the Company challenges the Board's finding that President Woodcock coercively told employees before the election that he would not be able to give them raises if they voted for the Union, and the Board's finding that the Company's unilateral discontinuation of the employees' annual Christmas bonus was unlawful. As shown below, the Company has waived any challenge to the Board's remaining unfair labor practices because they are not challenged in its opening brief. Specifically, the Company's opening brief fails to contest the Board's finding that Woodcock coercively told employees in December 2012 that he would freeze their wages because of the Union, and the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to provide periodic wage increases and annual Christmas bonuses because they chose union representation. Last, although the Company

extensively briefs whether its failure to provide periodic wage increases violated Section 8(a)(5) of the Act, the Board expressly declined to address those arguments because it would not alter the remedy. Accordingly that issue is not before the Court.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING EMPLOYEES PRIOR TO THE ELECTION THAT THEY WILL NOT GET RAISES IF THEY CHOOSE UNION REPRESENTATION

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157). Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking*, 254 F.3d at 124; *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). The test is an objective one and proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *See United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004); *Avecor*, 931 F.2d at 931.

Substantial credited evidence supports the Board's finding (A. 13 n.5, 25 and n.14; 35-36, SA 6) that the Company violated Section 8(a)(1) of the Act by telling employees prior to the election that it "would not be able to give [employees] raises if [they] brought a union in." The statement would have a reasonable tendency to coerce employees because it was made by Woodcock, the Company's majority shareholder and president, and suggested to employees that if they chose union representation, they were placing their wages at risk. As this Court has explained, "[a]n employer may not use benefit eligibility as a means of discouraging employees from participating in a representation election." *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016); *accord Avecor*, 931 F.2d at 931 (an employer violates Section 8(a)(1) "by threatening to penalize employees if they chose union representation"). Accordingly, the Board was fully warranted in finding that Woodcock's statement reasonably would tend to coerce employees in the exercise of their rights in violation of Section 8(a)(1) of the Act. *See Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C. Cir. 1987) (employer unlawfully threatened employees with lower wages and loss of benefits if they voted for the union); *United Steelworkers of America, AFL-CIO v. NLRB*, 405 F.2d 1373, 1375 (D.C. Cir. 1968) (employer unlawfully threatened employees with the loss of a bonus if they voted for union representation); *Twin City*

Concrete, Inc., 317 NLRB 1313, 1318 (1995) (implied threat to withhold expected wage increases if the union won the election).

The Company (Br. 33-34) asks the Court to “look at the actual facts” but ignores the credited evidence. The administrative law judge, upheld by the Board, credited employee Schauer who “specifically remember[ed]” Woodcock stating that employees would not receive raises if they voted for union representation (A. 25 and n.14; 35-37), over Woodcock’s denial (A. 25 and n.14; 58-59). The Company has shown no basis, let alone an extraordinary one, to reverse the judge’s demeanor-based credibility determination adopted by the Board. *See Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012).

Likewise, the Company’s claim (Br. 34) that this statement was protected by Section 8(c) of the Act has no merit. Section 8(c) authorizes “the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Section 8(c) therefore does not protect coercive speech. *See generally Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 360-61 (D.C. Cir. 2016). Here, as shown, the Company’s statement was unprotected coercive speech because it indicated to employees that the Company intended to retaliate against them if they voted for union representation.

Finally, the Company's additional violation of Section 8(a)(1) stands uncontested before the Court and thus is subject to summary enforcement. As shown by the credited evidence, after an employee asked Woodcock in December 2012 why he had not received his expected pay raise, Woodcock replied that his lawyer told him that to freeze employees' pay raises "because of the whole [u]nion deal." (A. 13 n.5, 28.) As the Board found (A. 13-14, 21, 28), the Company's post-election statement would have a reasonable tendency to coerce employees because it reasonably suggests to employees that the failure to grant the wage increase was in retaliation for selecting the union.⁵ Before the Court, the Argument section of the Company's opening brief (Br. 32-33) fails to address the Board's finding regarding the December 2012 unlawful statement.⁶ Under settled principles any issue not raised in an opening brief is waived. *See New York Rehab. Care Mgmt. LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *National Steel*

⁵ *See Enterprise Leasing Co. of Florida v. NLRB*, 831 F.3d 534, 543 (D.C. Cir. 2016) (employer unlawfully told employees that it was eliminating short-term disability benefits because of their union representation); *NLRB v. Elec. Steam Radiator Corp.*, 321 F.2d 733, 734 (6th Cir. 1963) (employer unlawfully told employees that they would not receive a holiday bonus because a union had organized the plant); *Teksid Aluminum Foundry*, 311 NLRB 711, 713, 717 (1993) (employer's explicit threat of wage freeze was unlawful).

⁶ The Company (Br. 33) also addresses its January 2013 statement that raises needed to be negotiated. However, although the judge found the statement unlawful (A. 25 and n.16, 28), the Board expressly found it unnecessary to pass on this finding (A. 13 n.5) and therefore it is not before this Court.

and Shipbuilding, Co. v. NLRB, 156 F.3d 1268, 1273 (D.C. Cir. 1998); *see also* Fed. R. App. P. 28(a)(8)(A) (argument in brief before court must contain party's contention with citations to authorities and record). Accordingly, the Board's finding that the Company violated Section 8(a)(1) in December 2012 by telling employees they would not get raises because of the Union is uncontested before the Court, and the Board is entitled to summary enforcement of its Order with respect to that finding. *Nat'l Steel & Shipbuilding*, 156 F.3d at 1273; *DIRECTV v. NLRB*, 837 F.3d 25, 32 (D.C. Cir. 2016).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BY UNILATERALLY STOPPING ANNUAL CHRISTMAS PAYMENTS THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. Applicable Principles

Section 8(a)(5) of the Act requires employers to bargain with the collective-bargaining representative of their employees' unions over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964).⁷ Section 8(d), in turn, defines those mandatory subjects, establishing employers' and unions' mutual obligation to meet and confer "with respect to wages, hours, and other terms and conditions of employment."

⁷ An employer who violates Section 8(a)(5) commits a derivative violation of Section 8(a)(1). *NLRB v. Galicks, Inc.*, 671 F.3d 602, 608 n.2 (D.C. Cir. 2012).

29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. An employer thus violates its bargaining obligation if it unilaterally changes its employees' terms or conditions of employment without bargaining to impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)).

In defining the contours of “terms and conditions of employment” under the Act, the Board will regard bonuses as part of remuneration requiring bargaining “if they are of such a fixed nature and have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration.” *Phelps Dodge Mining Co v. NLRB*, 22 F.3d 1493, 1496 (10th Cir. 1994) (quoting *NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399, 400 (9th Cir. 1974)); *accord Unite Here v. NLRB*, 546 F.3d 239, 243 (2d Cir. 2008); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enforced*, 112 App'x 65 (D.C. Cir. 2004) (per curiam).

The Board and this Court have examined the circumstances of bonuses and determined such awards are terms and conditions of employment when the bonus has been promised to employees, been given over several years at a predictable time, and/or the amount was based in part on the length of an employee's service. *See NLRB v. Pepsi-Cola Distrib.*, 646 F.2d 1173, 1174-75 (6th Cir. 1981) (“year-end bonus” was term of employment when paid regularly “[f]or a considerable

number of years”); *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342-43 (5th Cir. 1980) (Section 8(a)(5) applies to employer’s Christmas bonuses because of the employer’s promises and conduct of having given the bonuses for at least three years); *United Steelworkers*, 405 F.2d at 1375 (“[r]egular Christmas bonus” that “had been paid for at least seven years” was bonus that was part of wage structure); *Elec. Steam Radiator*, 321 F.2d at 735 (annual Christmas bonus was “not a gift but was in fact a term or condition of employment” because it was given regularly over a period of years and “[i]n most cases the bonus was based on length of service”). Here, as discussed below, the Christmas bonus was promised to employees at the time they were hired, and thereafter given each Christmas (with the one agreed-upon exception) in amounts that seemingly increased with an employee’s tenure, falls squarely within the employee’s terms and conditions of employment.

B. The Company Had a Duty to Bargain Over the Cessation of the Christmas Payments Because They Were a Term and Condition of Employment That Could Not Be Discontinued Unilaterally

Here, the Company does not dispute that it unilaterally ceased making Christmas payments to employees after they voted for union representation. Substantial evidence and controlling precedent support the Board’s finding that the Christmas payments are a mandatory subject of bargaining because the payments were a term and condition of employment that constituted wages. As such, the

Company was not privileged to unilaterally discontinue those payments. By doing so, it unlawfully instituted a change in the employees' terms and conditions of employment without first bargaining with the employees' representative.

As the Board found (A. 27), the Company's early pot-luck Christmas parties gradually evolved into employees receiving recurring Christmas payments that were promised to employees at the time they were hired and delivered at a set time each year. From 2008 to 2011, those payments, were not only regular, but substantial. Thus, employees received checks, gift cards, televisions, and raffle prizes with a total value of \$10,000 to \$15,000, with the potential monetary value of each bonus ranging in value from \$50 to \$500. Moreover, as Woodcock admitted (A. 66), the amount of the bonus reflected, among other things, the length of employee's tenure at the Company. Thus, employee Gravel's payment increased from \$100 to \$300 between 2008 and 2011; new employee Ugaitafa did not receive a monetary bonus but received a gift card through a raffle because he had only worked at the Company for one month at the time.

Significantly, the Company's own statements and actions support the Board's finding that the payments were given in the context of the employment relationship. The Company promised them to employees when they were hired, made the payments annually, and the employees' reasonably expected them. As the Board found (A. 28), Woodcock sought the employees' approval to forego a

Christmas payment one year to assist an employee, which amply demonstrated that “the Company knew that unit employees expected to receive Christmas payments in some form or another.” Further, Woodcock acknowledged that the annual Christmas bonus to employees were not mere tokens, as they totaled at least \$10,000 to \$15,000 per-year. (A. 65-66, 67.) Last, as the Board reasonably found (A. 14, 28; 67, SA 23-24, 29-30), the Company’s reliance before the Board on a variety of economic arguments (for example, increased business competition, decreased margins in the Company’s reimbursement system from Medicare and Medicaid) to justify the elimination of the Christmas payments essentially conceded that the Christmas payments were a bonus to employee’s wages that constituted a term and condition of employment because they were tied to production and the financial health of the Company.

In these circumstances, the Board reasonably rejected the Company’s argument that the annual payments were gifts and concluded (A. 14, 22, 28) that “[c]onsidering that most unit employees received payments, the significance of the amount, and the consistency of the payments, Woodcock’s practice created a reasonable expectations among unit employees that the Christmas . . . payment would be received as part of their remuneration from employment,” and that the Company therefore violated Section 8(a)(5) by unilaterally ceasing those payments. *See Pepsi-Cola Distrib.*, 646 F.2d at 1174-75 (“year-end bonus” was

term of employment when paid regularly “[f]or a considerable number of years”); *Laredo Coca Cola Bottling*, 613 F.2d at 1341 (Section 8(a)(5) applies to employer’s Christmas bonuses because they were given for at least three years and “accompanied by promises that they would continue to be given”); *United Steelworkers*, 405 F.2d at 1375 (“[r]egular Christmas bonus” that “had been paid for at least seven years” was bonus that was part of wage structure).⁸

C. The Company’s Arguments Are Without Merit

The Company first suggests (Br. 26-28) that the evidence is insufficient to establish that it provided annual Christmas payments between 2008 and 2011 because the Board only provided testimony from three employees. That argument is unavailing given that the Company has not refuted the credited testimony of

⁸ Woodcock’s acknowledgement (A. 66) that that the monetary amount of cash and gift cards provided to each employee depended on the employee’s length of service, which corroborated credited employee testimony that when hired they were told that bonuses increased based on length of service and in fact, did increase, provides additional support for the Board’s finding that the payments were a term and condition of employment. *See NLRB v. Elec. Steam Radiator Corp*, 321 F.2d 733 735 (6th Cir. 1963) (annual Christmas bonus was “not a gift but was in fact a term or condition of employment” because it was given regularly over a period of years and “[i]n most cases the bonus was based on length of service”).

those three employees, which was corroborated by President Woodcock, that employees received annual Christmas bonuses.⁹

The Company's regular, significant, Christmas bonuses paid over a period of time, and consistent with what employees were told at the time of hire to expect, and reasonably expected after being hired, clearly distinguishes this case from those relied on by the Company where an employer's single, or token, payment was considered a gift and not a term and condition of employment. *See Excel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 976-77 (D.C. Cir. 1996) (Br. 24) (one-time Christmas bonus); *North American Pipe Corporation*, 347 NLRB 836, 838 (2006) (Br. 28, 30), *affirmed*, 546 F.3d 239 (2d Cir. 2008) (one-time stock award); *Benchmark Indus., Inc.*, 270 NLRB 22, 22 & n.5 (1984) (Br. 29) ("token items" of Christmas dinners and hams given for "relatively short" period of time), *affirmed*, 760 F.2d 267 (5th Cir. 1985).

To the extent the Company (Br. 26) argues that the payments were gifts and not wages because the Company did not report the payments as a business expense, the Board (A. 28) reasonably rejected that argument. The Board has

⁹ Employee Schauer's inability to remember which year he did not receive a bonus because the employees agreed to Woodcock's donation of the bonus to a needy employee does not undermine the Board's finding about the yearly payments. (A. 38-41, SA 9-13.)

previously held that an “employer[’s] decision[] to withhold taxes . . . is not dispositive” to its analysis, and has even found that certain awards that *are* taxable as income are not terms of employment absent other relevant attributes. *N. Am. Pipe Corp.*, 347 NLRB at 840. More fundamentally, the Board has long made clear, with this Court’s approval, that IRS determinations are based on a different statutory scheme and are not controlling in the context of federal labor law. *See Seattle Opera v. NLRB* 292 F.3d 757, 763 n.8 (D.C. Cir. 2002) (tax treatment is “of little analytical significance” in determining employee status under the Act); *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 266 n.10 (D.C. Cir. 1980) (IRS determinations are not controlling “in light of statutory policies different from those of the” Act); *see also N. Am. Pipe Corp.*, 347 NLRB at 840 n.12 (noting that, conversely, the Board’s determination as to whether a payment is bargainable would not bind the IRS in deciding whether to tax the payment).

Nor does the Company advance its position by suggesting (Br. 31-32) that because the Christmas bonuses may have a discretionary element, it is therefore barred from unilaterally continuing the bonuses. The payment is fixed with respect to timing, given at Christmas each year, and any discretion as to the actual amount of the payment based on length of service and affordability does not detract from the Company’s obligation to keep the program in place. *See Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 416 (D.C. 1996) (employer required to maintain

established merit-increase program that was fixed on timing and criteria, but discretionary regarding amount).

Moreover, the Company's reliance (Br. 31) on *Alan Richey, Inc.*, 359 NLRB 396 (2012) is misplaced. In the first place, that case has no precedential value as a result of the Supreme Court's decision in *Noel Canning v. NLRB*, 134 S. Ct. 2550 (2014), which concluded that the Board that issued the decision lacked a quorum. Arguably, the Company may be referencing a principle mentioned in *Alan Richey* and set forth in *Stone Container Corporation*, 313 NLRB 336 (1993), that provides an exception to the rule that requires an employer to maintain the status quo of all mandatory bargaining subjects absent overall impasse and permits an employer to lawfully implement a change in a term or condition *if* it provides the union with reasonable advance notice and an opportunity to bargain about the intended change. *Id.* at 336; *see generally, Neighborhood House, Ass'n.*, 347 NLRB 553, 554 (2006). Here, however, the Company never argued that the *Stone Container* exception applied, nor did it notify or bargain with the Union prior to discontinuing the annual Christmas payments.

Finally, the Company claims (Br. 30-31) that the Woodcocks' cannot be held liable as officers of the Company because they were not named in the complaint. The Court has no jurisdiction to consider that argument because it was never raised to the Board. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e) ("No

objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes a court of appeals from reviewing an issue not raised to the Board).

In any event, it is unclear exactly what the Company seeks by asserting that the funds came from a personal account rather than the corporate entity. Wherever the funds came from, Company President Woodcock established a practice of distributing payments to employees each year at a set time. Those bonuses, promised to employees upon hiring, and delivered each year (except for one when Woodcock sought the employees’ agreement to forego them) became part of the employees’ terms and conditions of employment. Moreover, the Board’s Order that requires the Company, its officers, and assigns to comply with the Board’s Order, simply sets forth an obligation to comply with the Board’s Order – an obligation that includes managing and preserving corporate assets so that those assets will be available to satisfy a Board-ordered, court-enforced judgment. *See Bolivar-Tees, Inc.*, 349 NLRB 720,728 (2007), *enforced*, 551 F.3d 722 (5th Cir. 2008).

III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER RELATED TO SECTION 8(a)(3) AND (1) VIOLATIONS OF THE ACT THAT THE COMPANY FORFEITED BEFORE THIS COURT

The Board found (A. 13-15, 28-29), in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily denying employees periodic wage increases and annual Christmas bonuses in retaliation for choosing union representation.¹⁰ The Argument section of the Company's opening brief does not address the Section 8(a)(3) violations found by the Board, or discuss any of the Board's specific reasoning underlying those findings. Indeed, apart from the Company's reference in its Issue Statement Five (Br. 2), the brief fails to even cite Section 8(a)(3). Instead, the Company's brief (Br. 17-31) addresses wage increases and the Christmas payments solely in the context of Section 8(a)(5) of the Act.¹¹

Under Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure, the Company's brief must contain its contentions "with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the

¹⁰ Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

¹¹ As noted above at p. 9, the Board expressly did not pass on the judge's finding that the Company's withholding of raises without bargaining violated Section 8(a)(5) of the Act, and therefore that finding is not before the Court.

record relied on.” As this Court has observed, “appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, failure to enforce [Rule 28(a)(8)(A)] will ultimately deprive [the Court] in substantial measure of that assistance of counsel which the system assumes – a deficiency that [the Court] can perhaps supply by other means, but not without altering the character of [the] institution.” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (“An issue is waived if it is not both raised in the statement of issues and pursued in the brief.”); 16AA Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974.1 (“to assure consideration of an issue by the court, the appellant must both raise it in the ‘Statement of the Issues’ and . . . pursue it in the ‘Argument’ portion of the brief”).

Here, counsel has failed to address the violations of Section 8(a)(3) and (1) of the Act, and it is not the role of the Court to remedy the defect. The Company’s waiver of these issues entitles the Board to summary enforcement of those portions of its Order. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

To the extent the Company may suggest that its discussion of Section 8(a)(5) with respect to both periodic wage increases and Christmas bonuses, somehow

preserves a challenge to the Section 8(a)(3) findings, such argument is without merit. The legal analysis for a Section 8(a)(3) violation differs from the analysis for a Section 8(a)(5) violation: an employer violates Section 8(a)(3) by taking an adverse employment action for discriminatory reasons against employees for engaging in union activity (*NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001)), while an employer violates Section 8(a)(5) by unilaterally changing terms and conditions of employment without bargaining (see p. 19).

As this Court has recognized, “[i]rrespective of whether the failure to increase wages constituted a § 8(a)(5) violation, it constituted a § 8(a)(3) violation if [the employer’s] decision was motivated by anti-union animus, a discriminatory desire to discourage union membership.” *Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C. Cir. 1994) (emphasis in original). Likewise, *Acme Die Casting* rejected the argument posed by the employer that “no § 8(a)(3) violation may arise from failure to implement a discretionary wage increase,” holding that where the denial arises from anti-union animus, the employer has violated §§ 8(a)(3) and (1). *Acme Die Casting v. NLRB*, 26 F.3d at 166; accord *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 3 & n. 10 (2015), 2015 WL 3761407, at * 2-3 (employer who did not have a past practice of wage increases violated Section 8(a)(3) by withholding a wage increase from newly unionized employees); *Arc Bridges, Inc.*, 362 NLRB

No. 56, slip op. at 5 (2015), 2015 WL 1457683, at *4-5 (employer violated Section 8(a)(3) by withholding wage increase from unionized employees). Similarly, employers violate Section 8(a)(3) by stopping Christmas bonuses for unlawfully motivated reasons. *See, e.g., Steelworkers of Am.*, 405 F.2d at 1375; *Laredo Coca-Cola Bottling Co.*, 241 NLRB 167, 173-74 (1979), *enforced*, 613 F.2d 1338 (5th Cir. 1980).

In these circumstances, the Company's Section 8(a)(5) arguments (Br. 17-24) have no bearing on the Board's motive-based analysis under which the Board found that the Company violated Section 8(a)(3) by discontinuing periodic wage increases and annual Christmas payments because the employees had selected union representation. The Company's failure to address the Section 8(a)(3) and (1) violations thus constitutes a waiver and entitles the Board to summary enforcement of those portions of its Order remedying the violations. *See Allied Mech. Servs.*, 668 F.3d at 765.¹²

¹² The Company asserts that it should be awarded attorney's fees because the Board has acted in bad faith by finding that the Company violated the Act. To begin, the Company is in no position to claim (Br. 37-38) that the Board acted in bad faith where the Company has waived challenges to three significant Board findings: that the Company violated Section 8(a)(1) of the Act by coercively telling employees in December 2012 that it would freeze pay raises because of the Union, and that the Company violated Section 8(a)(3) by discriminatorily withholding periodic wage increases and an annual Christmas bonus. Moreover, the Company's dispute with the judge's determination that the Company also violated Section 8(a)(5) by unilaterally withholding periodic wage increases without

IV. THE BOARD PROPERLY REJECTED THE COMPANY'S CHALLENGES TO THE COMPLAINT'S VALIDITY

In *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015), the Supreme Court held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq. (“the FVRA”) after January 5, 2011, when President Obama nominated him to be General Counsel. The initial complaint here issued during the period Acting General Counsel Solomon served in violation of the FVRA. Nevertheless, the Supreme Court’s decision in *SW General* does not invalidate the complaint at issue.

First, the Court does not have jurisdiction to consider the Company’s challenge (Br. 34-37) to Solomon’s service under the FVRA. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge

bargaining fails to establish that the Board acted in bad faith because the Board simply did not pass on that finding. Finally, the Company’s dispute with the Board regarding whether discontinuation of the Christmas bonus violated Section 8(a)(5) of the Act amounts to a disagreement with the Board’s underlying factual findings as applied to settled law. Such a dispute falls far short of establishing that the Board has acted in bad faith. More significantly, in the absence of any determination by the Court about the merits of the Board’s finding, the Company’s request is premature at best. Indeed, the Company’s reliance on *Heartland Plymouth MI, LLC v. NLRB*, 838 F.3d 16, 19, 28-29 (D.C. Cir. 2016) is misplaced because in that case the Court awarded attorney fees only after the employer had successfully petitioned the Court to review a Board order and thereafter, the employer sought attorney fees.

such objection shall be excused because of extraordinary circumstances.” *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes court of appeals from reviewing claim not raised to the Board); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice”).

Here, before the Board, the Company did not mention the FVRA as a basis for challenging the issuance of the complaint. Rather, the Company argued that Acting General Counsel Solomon, who became Acting General Counsel on June 18, 2010, was “improperly appointed,” and that his “authority had expired on July 31, 2010.” (A. 12 n.2; Brief in Support of Exceptions p. 8.) The Board rejected that argument, and before the Court, the Company does not dispute the Board’s finding (A. 12 n.2) that Acting General Counsel Solomon properly assumed his duties. Instead, before the Court, the Company now argues that Solomon lost his authority to act under FVRA when he was nominated as the General Counsel. (A.

12 n.2).¹³ The Company has waived this argument by failing to timely raise it to the Board in its exceptions. *See SW General*, 796 F.3d at 83 (“[w]e address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision,” and “[w]e doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success,” citing 29 U.S.C. § 160(e); *Marquez Bros. Enter., Inc. v. NLRB*, 650 F. App’x 25 (D.C. Cir. 2016) (holding that “the typical NLRA exhaustion doctrine applies” to FVRA-based challenges to Solomon’s service as Acting General Counsel).

Second, unlike in *SW General*, a Senate-confirmed General Counsel ratified the unfair-labor-practice complaint in this case. Accordingly, as explained below, even if the Court does not hold the Company’s challenge to Solomon waived, General Counsel Griffin’s ratification of the complaint moots the challenge.

Section 3348(d) of the FVRA provides that “[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect” and “may not be ratified.” 5 U.S.C. § 3348(d)(1)-(2). Significantly, however, Section 3348(e) exempts “the General Counsel of the National Labor Relations Board” from the provisions of “this section.” 5 U.S.C. § 3348(e). Thus, as this Court

¹³ The Company’s brief incorrectly states that Solomon was nominated on July 31, 2010 to serve as General Counsel. As the Board stated, Solomon was nominated on January 5, 2011. (A. 12 n.2)

recognized in *SW General*, the Board’s General Counsel is one of only several officers expressly exempted from the FVRA’s “void-ab-initio” and “no-ratification” provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e) and assuming that Sec. 3348(e) “renders the actions of an improperly serving Acting General Counsel *voidable*, not void”) (emphasis in original).¹⁴ The Board’s General Counsel therefore retains the authority to ratify a previous officer’s actions. Exercising that prerogative, General Counsel Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice of ratification stating that, “[a]fter appropriate review and consultation with [] staff,” he had “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.” (A. 12 n.2.)

This Court’s precedent confirms that a properly appointed official can subsequently validate decisions made by those whose appointments were improper. In *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d

¹⁴ The Supreme Court acknowledged but did not address this Court’s statement that the FVRA renders actions of an improperly serving Acting General Counsel voidable, because the issue was not presented in the petition for certiorari. 2017 WL 1050977, at *7 n.2.

203, 213-14 (D.C. Cir. 1998), for example, the Court upheld a cease-and-desist order issued by a validly appointed official, which implicitly ratified the prior action of a possibly improperly appointed “acting” official. 139 F.3d at 213.¹⁵ *Accord FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding that reconstituted FEC could properly ratify prior decisions made when unconstitutionally constituted). *See also Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (upholding ratification of prior decisions made by director who served in violation of the FVRA but was subsequently properly appointed).

Because General Counsel Griffin ratified the prior actions of Acting General Counsel Solomon in this case, the Company cannot show that the case is based on an unauthorized complaint. Indeed, by ratifying the issuance and continued prosecution of the complaint against the Company, General Counsel Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue the complaint. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118-19 (D.C. Cir. 2015) (“de novo review” by properly appointed members sufficiently cured taint caused by invalid members’ prior actions).

¹⁵ In *SW General*, this Court contrasted *Doolin* with the case before it, noting that “no properly appointed General Counsel ratified the ULP complaint against Southwest.” 796 F.3d at 79.

There is no merit to the Company's contention (Br. 36-37) that the ratification was invalid because it did not expressly discuss specific facts from this case. That contention fails to recognize that courts apply a "presumption of regularity" under which they presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). The Company's arguments disregard the Supreme Court's instruction that federal courts should not probe the mental processes of agency decisionmakers; "[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (error to permit Secretary of Agriculture to be deposed regarding process by which he reached decision, including extent to which he studied record and consulted with subordinates). The Company has offered no facts, much less the sort of "clear evidence to the contrary," *Chem. Found.*, 272 U.S. at 14-15, that would warrant disregarding General Counsel Griffin's ratification or delving into the process underlying it. Nor has the Company attempted to distinguish *Intercollegiate Broadcasting* or *Doolin*, wherein this Court has validated ratifications that are far less detailed, including implicit ratifications.

In sum, General Counsel Griffin's ratification is sufficient to cure the unauthorized complaint issued under Acting General Counsel's Solomon.

Therefore, the Company's challenge, even if it were properly before the Court, is moot.

CONCLUSION

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

Respectfully submitted,

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May 2017

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

ADVANCED LIFE SYSTEMS, INC.)	
)	
Petitioner/Cross-Respondent)	
	)	Nos. 16-1405 & 16-1450
v.)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-096464
	)	19-CA-096899
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 8,842 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of May, 2017

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1. NATIONAL LABOR RELATIONS ACT

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

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all 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 8(a)(3)

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

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

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

[Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

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

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

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

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

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order 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. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

2. Federal Rule of Appellate Procedure 28(a)(8)(A):

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

(8) the argument, which must contain:

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

3. FEDERAL VACANCIES REFORM ACT OF 1998, P.L. 105-277

5 U.S.C.A. § 3345 § 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if--

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

5 U.S.C.A. § 3346 **§ 3346. Time limitation**

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve--

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

5 U.S.C.A. § 3347
§ 3347. Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless--

(1) a statutory provision expressly--

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

5 U.S.C.A. § 3348
§ 3348. Vacant office

(a) In this section--

(1) the term “action” includes any agency action as defined under section 551(13); and

(2) the term “function or duty” means any function or duty of the applicable office that--

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and
(II) is required by such regulation to be performed by the applicable officer (and only that officer); and
(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to--

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory

provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

5 U.S.C.A. § 3349
§ 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to the Comptroller General of the United States and to each House of Congress--

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to--

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

5 U.S.C.A. § 3349a
§ 3349a. Presidential inaugural transitions

(a) In this section, the term “transitional inauguration day” means the date on which any person swears or affirms the oath of office as President, if such person

is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring--

- (1) 90 days after such transitional inauguration day; or
- (2) 90 days after the date on which the vacancy occurs.

5 U.S.C.A. § 3349b
§ 3349b. Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office--

- (1) after the expiration of the term for which such person is appointed; and
- (2) until a successor is appointed or a specified period of time has expired.

5 U.S.C.A. § 3349c
§ 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to--

- (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that--
 - (A) is composed of multiple members; and
 - (B) governs an independent establishment or Government corporation;
- (2) any commissioner of the Federal Energy Regulatory Commission;
- (3) any member of the Surface Transportation Board; or
- (4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

5 U.S.C.A. § 3349d
§ 3349d. Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

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Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 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 further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 11th day of May, 2017