

**Nos. 16-1311 & 16-1363**

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

**STAFFCO OF BROOKLYN, LLC,**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**NEW YORK STATE NURSES ASSOCIATION**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

### **A. Parties and Amici**

Staffco of Brooklyn, LLC (“the Company”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The New York State Nurses Association (“the Union”), was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *Staffco of Brooklyn, LLC*, 364 NLRB No. 102 (Aug. 26, 2016).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## **GLOSSARY**

A.	The Deferred Joint Appendix
Br.	The Company's opening brief
ERISA	Employee Retirement and Income Security Act, 29 U.S.C. § 1001, et seq.
LICH	Long Island College Hospital
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Company	Staffco of Brooklyn, LLC
The Continuation Policy	Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement
The Order	<i>Staffco of Brooklyn, LLC</i> , 364 NLRB No. 102 (Aug. 26, 2016)
The Pension Plan	New York State Nurses Association Pension Plan
The Union	New York State Nurses Association

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Staffco of Brooklyn, LLC (“the Company”) for review, and the cross-application of the National Labor

Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on August 26, 2016, and reported at 364 NLRB No. 102. (A. 504.)<sup>1</sup> The New York State Nurses Association (“the Union”), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. The Company’s petition and the Board’s cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUE**

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing pension contributions upon the expiration of the parties’ collective-bargaining agreement.

### **RELEVANT STATUTORY PROVISIONS**

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

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<sup>1</sup> “A.” references are to the deferred joint appendix. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

Following the investigation of a charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing pension contributions upon the expiration of the parties' collective-bargaining agreement. (A. 512; A. 108-18.) After a hearing, an administrative law judge found that the Company had violated the Act as alleged. (A. 522.) On review, the Board affirmed the judge's rulings, findings, and conclusions, amended the remedy, and adopted the recommended Order, with modifications. (A. 504, 508.)

### **II. THE BOARD'S FINDINGS OF FACT**

#### **A. Background**

Pursuant to a contract with the State University of New York Downstate Medical Center, the Company, a registered New York State Professional Employer Organization, hired and employed the non-physician staff at the Long Island College Hospital ("LICH"). (A. 504; A. 449.) The Company subsequently recognized the Union as the collective-bargaining representative for a bargaining unit of registered nurses and nurse practitioners who worked at LICH and in LICH-run clinics at nearby schools. (A. 504; A. 450.)

The Company and the Union negotiated an initial collective-bargaining agreement, effective May 29, 2011 to May 28, 2012, in which the Company agreed to participate in, and make contributions to, the New York State Nurses Association Pension Plan (“the Pension Plan”). (A. 504; A. 159-60.) Section 9.02 of the bargaining agreement specifically required the Company to complete an acknowledgment form and to become bound by the terms and provisions of the Pension Plan’s Agreement and Declaration of Trust, which includes the Pension Plan’s Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement (“the Continuation Policy”). (A. 504; A. 159, 179-80, 361-67, 376-82.) As relevant here, the Continuation Policy states:

*Upon expiration or termination of a collective bargaining agreement, if (i) the employer has not submitted to the Plan Office a new collective bargaining agreement which satisfies the requirements of (A) above and has not complied with the provisions of (B)(1) above, or (ii) the employer owes contributions to the Fund for more than two months (without regard to when such contributions are payable), the employer’s participation in and status as an Employer under the Fund shall forthwith terminate, the service of such employer’s employees shall no longer be credited under the Plan, the employer and the Associations, shall be notified in writing, and the employees of the employer shall be notified in writing five business days thereafter, that the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated on the expiration/termination date of the collective bargaining agreement.*

(A. 504; A. 381 (emphasis added).)<sup>2</sup>

**B. As the Parties' Final Bargaining-Agreement Extension Nears Expiration, the Company Ignores the Union's Proposal To Sign Another and Continue Pension Contributions**

Following the expiration of their initial collective-bargaining agreement on May 28, 2012, the parties agreed to three contract extensions and two interim agreements to continue pension coverage. (A. 504-05; A. 383, 386-89, 403-05, 415-20.) In March 2014, they signed their final contract extension, which was set to expire May 22, 2014. (A. 505 & n.5; A. 13, 418-20, 454.) The parties selected May 22 based on their mutual contemporaneous understanding that LICH would close after that date due to budget deficits and, therefore, that the Company would no longer employ any bargaining unit employees. (A. 505; A. 13, 418-20, 454.) The Company was also concerned about the potential liability it would face for withdrawing from the Pension Plan. (A. 517; A. 60-66, 86-89, 95-98.) Specifically, under the Pension Plan's rules, an employer is subject to a withdrawal penalty after three years of participation, as determined by its pro rata share of the Pension Plan's total unfunded vested benefits; an employer that has fully funded its employees' pensions faces no penalty if it withdraws from the plan within the first three years. (A. 513; A. 279, 450-51.) According to the Company's calculations,

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<sup>2</sup> Section (A) sets forth the provisions that a new collective-bargaining agreement must contain in order to serve as a basis for continued participation. Section (B)(1) provides for continued participation based on an interim agreement.

its withdrawal liability if it remained in the Pension Plan for more than three years would be approximately two million dollars. (A. 517; A. 86-89, 440-45.)

Due to outside factors, LICH continued to operate in a limited manner for several months longer than anticipated. (A. 513-14; A. 13, 452-56.) On May 20, the parties held a meeting regarding the upcoming layoff of many (but not all) remaining unit employees. (A. 505; A. 9-10.) During the meeting, the Union asked the Company to execute another contract extension, and to remain current on pension contributions for unit employees who would not be laid off on May 22. (A. 505, 515; A. 10-11.) The Company neither accepted nor rejected the request; it declined to discuss the issue and referred the Union to its counsel. (A. 505, 515; A. 9-11.) The Company ultimately declined to sign another extension.

On May 22, the final contract extension expired without another agreement between the parties. (A. 505; A. 455.) That same day, the Pension Plan sent a letter to the parties notifying them that, because no new agreement had been submitted, the Company's status as a participant in the plan was terminated. (A. 514; A. 423-30.) The letter further reminded them that the Continuation Policy provides for a 60-day "cure" period, during which an employer can remedy its termination by executing an extension agreement and making any overdue pension contributions. (A. 505 n.7; A. 376-82, 423-30, 455.) The Company had until July 21, 2014, to cure its termination. (A. 514; A. 423.)

After May 22, the Company continued to employ approximately 39 unit employees. (A. 505; A. 13-14, 125, 434-39, 457.) The Company ceased its pension contributions for those employees, but otherwise maintained all of the other terms and conditions of employment under the expired collective-bargaining agreement. (A. 505; A. 13-14, 38.) On July 9, the parties held a labor-management meeting. (A. 505 n.7; A. 14.) At the meeting, the Union again asked the Company to sign a new extension agreement and make pension contributions, and the Company declined to do so, citing its concern over withdrawal liability. (A. 505 n.7, 12; A. 15-16.) Over the following months, the Union continued to request that the Company resume its contributions to the Pension Plan, and the Company refused to do so. (A. 505 n.7; A. 124-25, 432-39.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board (Chairman Pearce and Member Hirozawa; Member McFerran, dissenting) found that the Company had violated Section (a)(5) and (1) of the Act by unilaterally ceasing contributions to the Pension Plan on behalf of unit employees upon the expiration of the parties' collective-bargaining agreement. (A. 504.) The Board's Order requires the Company to cease and desist from the unfair labor practice 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. (A. 508.)

Affirmatively, the Order requires the Company to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. The Order further requires the Company, upon the Union's request, to make all required contributions to the Pension Plan, including any additional amounts owed, in the manner set forth in the amended remedy section of the decision, and to continue such payments until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. If the Pension Plan will not accept such contributions, the Order requires the Company to deposit an amount equal to the required contributions in an escrow account and to negotiate with the Union over how the monies will be distributed to make the unit employees whole. In addition, the Company must make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest. (A. 508.)

Finally, the Company must post a remedial notice. (A. 509.)

## SUMMARY OF ARGUMENT

It is well-established that after the expiration of a collective-bargaining agreement, an employer is under a statutory obligation to maintain the status quo ante and bargain with the union before implementing any changes to the terms and conditions set forth in the expired agreement. Undisputedly, the Company ceased pension contributions after the parties' final contract extension expired, without bargaining with the Union. The Board reasonably found that unilateral cessation of a term of employment set forth in the parties' contract to violate Section 8(a)(5) and (1) of the Act.

In finding that unfair labor practice, the Board reasonably rejected the Company's three affirmative defenses. First, contrary to the Company's assertion, the Board reasonably found that the Pension Plan's Continuation Policy did not clearly and unmistakably waive the Union's right to bargain over cessation of the contributions. Rather, the policy addresses a separate—but distinct—point, namely, the Company's status as a plan participant. That determination is fully consistent with established law requiring that, in the specific context of fringe benefits provided through benefit funds, the Board will find waiver of an employer's statutory obligation to maintain contributions only when the cited language explicitly speaks to that obligation. For similar reasons, substantial evidence supports the Board's related finding that the Union did not waive its right

to bargain over changes to the statutory status quo by seeking contract extensions to facilitate continued pension contributions.

Second, substantial evidence supports the Board's finding that the Union timely requested bargaining. The facts establish that the Union proposed to high-level company agents that the Company sign another extension agreement and maintain pension contributions. It thus effectively conveyed not only disagreement with the Company's intent to stop contributions but proffered a proposed contrary course of action to initiate discussions. The Company's assertions that the Union's request was inadequate—e.g., because the Union failed to demand a “bargaining session,” or present its demand directly to company counsel or in writing—are unavailing. The law is clear that no particular requirements constrain a union in making a qualifying bargaining request, so long as it conveys, as the Union did here, a desire to discuss the proposed change.

Finally, substantial evidence supports the Board's finding that the Company failed to establish an impossibility defense. Factually, the Company failed to prove the predicate for its defense—that the Pension Plan would reject post-expiration contributions under any circumstance. As the Board found, there was evidence that the plan may have flexibility in that regard. Legally, the Company cited no authority for the proposition that impossibility excuses a failure to bargain over whether or how to alter the statutory status quo. Moreover, the Board

reasonably exercised its broad remedial authority to create an alternative remedy aimed at restoring the status quo ante even if the Pension Plan refuses contributions.

### STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court gives great deference to the Board's factual findings, and such findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). "[A] decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008).

To the extent that the Board's decision involves contract interpretation, the Court affords that interpretation "no particular deference." *Retail Clerks Int'l Ass'n Local No. 455 v. NLRB*, 510 F.2d 802, 805 (D.C. Cir. 1975). However, the Board's factual findings on related matters, such as the intent of the parties to the contract, are entitled to the same deference as any other factual findings. *IBEW Local 47 v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991); *IBEW Local 1395 v. NLRB*,

797 F.2d 1027, 1030 (D.C. Cir. 1986). Finally, the Board’s assessment of witness credibility is given great deference and must be upheld unless it is “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)).

## ARGUMENT

### **THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CEASING CONTRIBUTIONS TO THE PENSION PLAN**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.”<sup>3</sup> 29 U.S.C. § 158(a)(5). As defined by the Act, collective bargaining “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.” 29 U.S.C. § 158(d). An employer violates Section 8(a)(5) by unilaterally changing any term or condition of employment that is a mandatory subject of bargaining. That “is a circumvention of the duty to negotiate which frustrates the objectives of Section

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<sup>3</sup> A violation of Section 8(a)(5) creates a “derivative” violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer to “interfere with, restrain, or coerce employees” in the exercise of rights guaranteed in Section 7 of [the Act].” See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

8(a)(5) much as does a flat refusal” to bargain, and “must of necessity obstruct bargaining, contrary to the congressional policy.” *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); accord *Daily News of L.A. v. NLRB*, 73 F.3d 406, 410-11 (D.C. Cir. 1996).

The rule against unilateral changes to mandatory subjects of bargaining applies after the expiration of a collective-bargaining agreement. *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 198 (1991); *St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 145 (D.C. Cir. 1989); *Cauthorne Trucking*, 256 NLRB 721, 721 (1981), enforced in relevant part, 691 F.2d 1023 (D.C. Cir. 1982). Even after expiration, the agreement “continues to define the status quo as to wages and working conditions . . . .” *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). At that time, the terms and conditions described in the agreement—specifically including required pension-plan contributions—remain in effect, not as contractual terms but by operation of law. *Litton*, 501 U.S. at 198, 206-07; *St. Agnes*, 871 F.2d at 145; *Cauthorne Trucking*, 256 NLRB at 721. To satisfy its statutory duty to bargain, an employer must thus maintain the status quo until the parties either agree on a new contract or reach a good-faith impasse in negotiations, unless the union has waived its right to bargain. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), enforced, 136 F.3d 727 (11th Cir. 1998). An employer may not

otherwise alter or discontinue terms and conditions of employment (such as benefits) unilaterally; doing so is a violation of Section 8(a)(5) and (1).

In the present case, substantial evidence supports the Board's relevant findings. Specifically, the following key facts are stipulated or undisputed. The parties' collective-bargaining agreement required the Company to make pension contributions. (A. 513; A. 159-60, 450.) The bargaining agreement expired on May 22, 2012, and the parties' final contract-extension agreement expired May 22, 2014. (A. 513-14; A. 418-20, 454.) Finally, upon the expiration of the final bargaining agreement extension, the Pension Plan terminated the Company's participation and the Company ceased making any pension contributions for the remaining unit employees. (A. 514; A. 10-14, 36, 38, 65-66, 86-88, 95.) Those facts establish that the Company unilaterally discontinued pension contributions, a term and condition of employment that it was statutorily mandated to maintain post-contract expiration, in contravention of Section 8(a)(5) and (1).

To justify that unilateral change, the Company raises three affirmative defenses. It asserts that: the Union clearly and unmistakably waived the right to bargain over cessation of the contributions; the Union failed timely to request bargaining; and maintenance of the contributions was impossible. Because, the Company failed to carry its burden of establishing any of those defenses, the Board

reasonably rejected them and it is entitled to enforcement of its unfair-labor-practice finding.

**A. The Board Reasonably Rejected the Company’s Claim that the Union Clearly and Unmistakably Waived the Right To Bargain Over Cessation of Pension Contributions**

**1. Waiver of an employer’s obligation to continue pension-plan contributions requires unambiguous termination of the obligation, or authorization to cancel it unilaterally**

Although “a union may waive its statutory protection against unilateral changes in mandatory subjects of bargaining,” such waiver is subject to a stringent standard. *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001) (citing *Cauthorne Trucking*, 256 NLRB at 721). Specifically, because “the employer’s authority to act unilaterally is predicated on the union’s *waiver* of its right to insist on bargaining,” the Board, with Supreme Court approval, has long required that such a contractual waiver be “clear and unmistakable.” *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.”); *Honeywell*, 253 F.3d at 133-34 (applying clear-and-unmistakable-waiver standard). As the Board has explained, the clear-and-unmistakable-waiver standard “requires bargaining partners to unequivocally and specifically express

their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena*, 350 NLRB at 811. That well-established, stringent standard “reflects the Board’s policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.” *Id.*

In the specific context of fringe benefits provided through benefit funds, the Board will not find clear and unmistakable waiver of the statutory obligation to maintain contributions unless the operative language in a collective-bargaining agreement or fund document explicitly authorizes the employer to terminate that obligation. The Board has, for example, found such waiver based on a provision stating that “any Company’s [sic] *obligation* under this Pension Trust Agreement shall terminate [upon the expiration of the parties’ contract] unless, in a new collective bargaining agreement, such obligation shall be continued.” *Cauthorne Trucking*, 256 NLRB at 722 (emphasis added). It also has found waiver based on language providing that the employer would continue contributions after contract expiration, “until such time” as it provided written notice “of its intent to cancel such *obligation*.” *Oak Harbor Freight Lines, Inc.*, 358 NLRB 328, 333 (2012) (emphasis added), *affirmed*, 361 NLRB No. 82 (Oct. 31, 2014), 2014 WL 5524367

(Oct. 31, 2014), *petitions & cross-application filed*, Nos. 14-1226, 14-1273, 15-1002 (D.C. Cir., argument held Jan. 23, 2017).

Conversely, the Board has declined to find waiver based on language that does not unambiguously privilege an employer to cease contributions or expressly terminate the employer's obligation to maintain them. *See, e.g., Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 n.7, 365-66 (1987) (although pension-fund certification stated "a written labor agreement is in effect," and it and declaration of trust required that contributions to the fund be "in accordance with a Pension Agreement," neither contained language stating that employer's obligation to make pension contributions ceased upon the contract's expiration); *Gen. Tire & Rubber Co.*, 274 NLRB 591, 593 (1985) (although supplemental agreement provided for 90 days of pension and other benefits post-contract expiration, it did not address employer's statutory obligation to continue the benefits after the contractually agreed to 90 days lapsed), *enforced*, 795 F.2d 585 (6th Cir. 1986). That is true even when the governing documents link contributions to the existence of a collective-bargaining agreement. *See, e.g., Schmidt-Tiago Construction, supra; KBMS, Inc.*, 278 NLRB 826, 849-50 (1986) (although declaration of trust stated that contributions would continue as long as employer was obligated pursuant to the contract, provision did not address termination of the employer's obligation to contribute, and declaration said it should not be construed as changing contract).

**2. The Continuation Policy does not waive the Union's right to bargain over cessation of pension contributions by terminating the Company's obligation to maintain them**

The Board reasonably rejected (A. 507) the Company's assertion (Br. 36-40) that the Pension Plan's Continuation Policy constitutes a clear and unmistakable waiver of the duty to bargain over cessation of pension contributions after expiration of the parties' final contract extension on May 22. Rather, as the Board found, the Continuation Policy "simply sets forth the [Pension Plan's] rules with respect to the [Company's] status as an Employer within the definition of the Pension Plan." (A. 506.) It does not speak to the Company's statutory obligation to maintain the pension-contribution status quo, or to bargain before altering that status quo for whatever reason.

The Continuation Policy specifies that, upon expiration of a collective-bargaining agreement, an employer may remain a participant in the Pension Plan if it both continues to make contributions and submits a new bargaining agreement, contract extension, or interim agreement. (A. 504 & n.4; A. 376-82.) If an employer fails to abide by those terms, the Continuation Policy provides, as the Company highlights (Br. 38), that "the employer's participation in and status as an Employer under the Fund shall forthwith terminate," and employees will be notified "that the employer is no longer maintaining the [Pension] Plan." (A. 381.) As the Board found (A. 506), however, that "language does not explicitly address

the [Company's] contribution obligation as required by the Board's precedents" to establish waiver. *See Oak Harbor Freight Lines*, 358 NLRB at 336 (waiver when employer permitted "to cancel [pension] obligation" after contract expiration); *Cauthorne Trucking*, 256 NLRB at 722 (waiver when employer's pension obligation "shall terminate" at contract expiration, absent new agreement continuing it); *see also Metro. Edison*, 460 U.S. at 708 (declining to infer waiver from general provision; waiver instead must be "explicitly stated"); *Provena*, 350 NLRB at 811 (putative language must "unequivocally and specifically express" parties' intent to waive employer's obligation).<sup>4</sup>

Contrasting the Continuation Policy's language with the waiver language in *Cauthorne* and *Oak Harbor*, the Board observed (A. 506) that the Continuation Policy does not either expressly terminate the Company's statutory obligation to maintain the pension-contribution status quo or explicitly authorize the Company to cancel that obligation unilaterally. Indeed, as the Board found, the policy simply "does not address the [Company's] postexpiration pension contribution

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<sup>4</sup> There is no merit to the Company's contention (Br. 40) that the language in *Cauthorne* is "far from the epitome of clarity" and does not unambiguously provide for termination of the employer's obligation. As shown, the *Cauthorne* agreement provided that the employer's "obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued." 256 NLRB at 722. In any event, a finding of no waiver from that language would in no way advance the argument for finding waiver in the Continuation Policy, which does not even refer to the employer's "obligation."

obligations in any way.” (A. 506.) In other words, the Board’s interpretation of the Continuation Policy is not, contrary to the Company’s arguments (Br. 36-39), “illogical,” nor did the Board “twist words and split hairs” or “strain[]” to reach it. Rather, as just demonstrated, the Board applied settled precedent recognizing a material distinction between benefit-fund language that explicitly terminates an employer’s statutory obligation to maintain benefits after contract expiration and language that does not. Notably, the Company does not challenge the governing clear-and-unmistakable-waiver standard or the Board’s longstanding application of that standard in the context of pension contributions. And it fails to acknowledge, much less grapple with, any of the cases the Board cited as illustrations of contract or benefit-plan language insufficient to establish waiver for failure to discuss employers’ benefit obligations.

The Company’s interpretation of the Continuation Policy apparently relies (Br. 38-39) on an inferential leap—that the parties necessarily intended the Company’s termination as a participant from the Pension Plan to end its statutory obligation to make pension contributions. That inference is at odds with the governing law requiring clear and unmistakable waiver of a union’s statutory right to bargain over changes to pension benefits. It also disregards, as the Board found (A. 506-07), other plausible explanations for the plan-termination provision, such

as limiting the Pension Plan’s liability under the Employee Retirement and Income Security Act (“ERISA”).

Although the Company now challenges (Br. 39) the Board’s ERISA-based rationale, the Court lacks jurisdiction to consider that argument. The Company did not mention ERISA to the Board, either in its exceptions to the judge’s decision (*see* A. 483-503) or through a motion for reconsideration after the issuance of the Board’s decision. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent extraordinary circumstances); *Spectrum Health–Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349-50 (D.C. Cir. 2011) (objection to sua sponte finding preserved through reconsideration motion; that Board itself discussed an issue fails to preserve it under §160(e)).<sup>5</sup>

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<sup>5</sup> In any event, the Company misses the mark when it argues (Br. 39) that, because neither party raised the issue, the Board majority improperly sua sponte “forced a baseless argument” regarding the role of ERISA. As the Board’s decision makes clear, the majority’s discussion (A. 506-07 & n.11) of a probable logical nexus between ERISA and the Pension Plan’s termination language responded to a point made by the dissenting Board member (A. 510). And the Company provides no support for its suggestion that the Pension Plan would accept company contributions, and then refuse to credit them or distribute them to company employees, garnering “an untenable windfall,” much less that the Pension Plan could lawfully do so. Nor is the Company well placed to make arguments about undue windfalls at employee expense while it withholds pension contributions on behalf of employees performing qualifying work.

To be sure, as the Board acknowledged (A. 506), a union’s waiver need not be stated with “lawyerly perfection.” Nonetheless, consistent with established case law, waiver cannot be established by a document like the Continuation Policy, which lacks any reference to the Company’s pension-contribution obligation—let alone a statement that the Company had a right unilaterally to alter that obligation. *See, e.g., Schmidt-Tiago Construction*, 286 NLRB at 365-66 (provisions did not address termination of employer’s pension-contribution obligation); *KBMS*, 278 NLRB at 849-50 (same); *Gen. Tire & Rubber*, 274 NLRB at 593 (same).

In sum, the Continuation Policy “does not show that the Union agreed that the [Company] has no postexpiration obligations” to make pension contributions. (A. 506.) Simply stated, although the policy speaks plainly, it does not do so in regard to the statutory status quo but as to a different question—the Pension Plan’s own internal rules governing employers’ plan *status* (i.e., participating or terminated). And, as the Board reasonably concluded, “[t]hat the [Company] was no longer a participating employer under the Pension Plan after May 22, did not relieve it of its statutory obligation as a party to an expired collective-bargaining agreement to maintain the status quo.” (A. 506.) To the contrary, the Company’s decision not to maintain its status as a participating plan employer triggered its obligation to bargain over how to maintain (or alter) that status quo.

**3. The parties' conduct likewise does not clearly and unmistakably establish waiver**

There is also no merit to the Company's contention (Br. 41-43) that the conduct of the parties—especially that of the Union—establishes waiver. The Board reasonably and explicitly rejected that claim (A. 507, 519), contrary to the Company's incorrect assertion (Br. 41; *see also* 43) that the Board “completely ignored” it. Broadly speaking, the Company's conduct-based argument fails to demonstrate waiver for the same reason the Company cannot show waiver based on the language of the Continuation Policy: it ignores the distinction between the statutory obligation to bargain before changing the pension-contribution status quo and the requirements for maintaining participation in the Pension Plan.

Factually, the Company's conduct evidence simply illustrates the Board's finding that “the parties understood and agreed that the language in the [Continuation Policy] required them to have a current bargaining agreement or an extension of the agreement in order to continue the pension coverage.” (A. 507; A. 10-12, 15, 23, 35-36, 38, 43, 46-48.) The specific testimony and exhibits cited by the Company (Br. 42-43) consist of multiple statements by union representatives acknowledging that the Pension Plan requires a current agreement, and that the Union sought interim or extension agreements to ensure continued pension benefits according to the plan rules. Those statements, and the Union's consistent proffering of new agreements as the old ones expired, show that the Union strove

to ensure that the Company remained in compliance with the Pension Plan's internal rules. Doing so guaranteed that the Pension Plan would accept the Company's (required) pension contributions, and pension coverage would continue seamlessly. *See, e.g.*, A. 35 ("we wanted to make sure that the Pension Fund contributions would continue from – that the Pension Fund would accept contributions from the [the Company]."). As the Board found, the evidence does not establish "that the parties understood that the expiration of the parties' collective-bargaining agreement would trigger the end of the [Company's] pension obligations." (A. 507.)

In other words, the Union took the path of least resistance, preferring to follow plan rules rather than see the requirements violated and the Company's plan participation lapse, forcing the parties to confront a situation requiring work-arounds to maintain unit employees' status-quo pension coverage. Nothing in that course of conduct suggests that the Union understood—much less affirmatively agreed—that the Company could, by declining to comply with plan requirements, obviate its statutory duty to bargain before ceasing pension contributions. To the contrary, as the Board observed (A. 519), the parties' serial agreements only served to "reinforce the obligations of the parties to extend all [of] the terms [or] conditions," which they extended for two years after the expiration of the bargaining agreement that defined those terms. Notwithstanding the Company's

claim (Br. 43) that the evidence can only be understood as demonstrating waiver, the Board's finding that the Union did not intend to waive its right to bargain is a reasonable one, entitled to deference. *See IBEW Local 47*, 927 F.2d at 640 (Board's findings on matters related to contracts, such as parties' intent, entitled to deference); *IBEW Local 1395*, 797 F.2d at 1030 (same).

**B. Substantial Evidence Supports the Board's Finding That the Union Diligently Requested Bargaining**

The Company next asserts (Br. 44-51) that the Union waived its right to bargain over changes to the pension-contribution status quo by failing timely to request bargaining. There is no basis—factual or legal—for that assertion. Nor is there any merit to the Company's contention (Br. 44; *see also* Br. 51) that the “Board majority” “ignored” that “alternative waiver argument.” To the contrary, the judge specifically rejected it (A. 521), and the Board expressly (A. 504) “affirm[ed] the judge's rulings, findings and conclusions” without excluding that portion of the judge's analysis. As will be shown, substantial evidence supports the Board's finding that the Union requested bargaining when it asked that the Company sign another extension agreement and stay current on pension contributions before the final agreement expired, and repeated those requests during the Pension Plan's cure period and thereafter.

“The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly

request that the employer bargain over the matter.” *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982) (footnote omitted). Under established Board law, approved by this Court, a union need not specifically demand “bargaining” or present its request in any particular form to trigger an employer’s duty to bargain, provided it is clear that the union wants to discuss an issue with the employer. *See Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001) (“union need utter no particular words to convey its demand for bargaining”); *Sunoco, Inc.*, 349 NLRB 240, 245 (2007) (bargaining request need not contain statement such as “I want you to bargain with me about this”); *Indian River Mem’l Hosp., Inc.*, 340 NLRB 467, 69 (2003) (bargaining request “need take no special form, so long as there is a clear communication of meaning”) (citation omitted).

A union fails to demand bargaining if it merely objects to or protests an employer’s action, *see Citizens Nat’l Bank of Willmar*, 245 NLRB 389, 389-90 (1979) (no bargaining request where union objected to employer’s plan to change term of employment but did not ask that change be rescinded, or to bargain over change), *enforced mem.*, 644 F.2d 39, 644 F.2d 40 (D.C. Cir. 1981), and/or files an unfair-labor-practice charge, *see Finch, Pruyn & Co. v. NLRB*, 296 F. App’x 83, 85 (D.C. Cir. 2008) (union never requested bargaining over employer’s explicitly announced decision to change term of employment before filing charge alleging unlawful unilateral change).

The Board will review a union's "statements in the context that they were made" to determine if the union communicated, even implicitly, its desire to bargain. *Sunoco*, 349 NLRB at 245; *see also Indian River*, 340 NLRB at 469 (bargaining demand may be inferred if not explicit); *accord Prime Serv.*, 266 F.3d at 1238 (if bargaining demand not explicit, court looks to "some indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply") (citation omitted). In doing so, the Board also considers whether the employer understood the union to be making such a request. *See Indian River*, 340 NLRB at 469 (noting employer's "response indicated he understood [the union] was requesting bargaining."); *see also NLRB v. Barney's Supercenter, Inc.*, 296 F.2d 91, 94 (3d Cir. 1961) (noting "[employer's] conduct . . . shows that it understood that the union had made a valid bargaining demand").

As the Board found (A. 521), the Union requested bargaining on May 20, when Eric Smith, its program representative, specifically asked that the Company "stay current" with respect to the pension and, moreover, proposed that it execute a new extension agreement to replace the one expiring on May 22. (A. 10-11.) Significantly, Smith made that request (and proposal) in a formal labor-management meeting attended by Francesca Tinti, the Company's assistant vice president for human relations, and David Pappalardo, its chief executive officer. (A. 10, 23, 56.) And he did so on the heels of repeated union requests for another

extension agreement, presented by Associate Director of Special Projects Michelle Green to company counsel Brian Clark. (A. 36.)

The import of the Union's request was not lost on Pappalardo. In response, he declined to address pension-related issues and referred Smith to Clark. (A. 10-11.) Given that Clark typically handled the Company's collective bargaining (A. 78-79), that referral indicates Pappalardo's awareness that the Union desired bargaining. *See Indian River*, 340 NLRB at 469 (employer's response indicated understanding union had requested bargaining).

The Company's suggestion (Br. 49-50) that the Union negated the May 20 bargaining request by failing promptly to contact Clark after Pappalardo's referral depends on a mistaken premise. It implicitly presumes that the Company can undo a bargaining request by figuratively sticking its fingers in its ears, ignoring an overture made to two high-level company agents, and directing the Union to approach a different designated agent.<sup>6</sup> But the Company cites no authority suggesting that an employer may evade its duty to bargain by deliberately disregarding a union request. *Cf. Stevens Pontiac-GMC*, 295 NLRB 599, 601 & nn.5-6 (1989) (where employer purposely avoids mail from union that it believes contains bargaining demand, union's obligation to demand satisfied and employer

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<sup>6</sup> Understandably, the Company does not attempt to argue that merely referring the Union to the company attorney would suffice to satisfy the Company's duty to bargain in response to the Union's request.

commits refusal to bargain); *see also id.* at n.10 (citing *NLRB v. Regal Aluminum, Inc.*, 436 F.2d 525 (8th Cir. 1971)).<sup>7</sup>

Nor does the Company provide any support for its related implication that a request is inadequate if not made to a designated individual (Clark). The Company cites *Pan American Grain Co.* (Br. 49), but that case stands for the uncontested and irrelevant proposition that *during actual bargaining*, each party may designate its negotiator. 343 NLRB 205, 206-08 (2005) (party must bargain with negotiator for other side absent special circumstances, such as where the designee would make good-faith bargaining impossible). Addressing the bargaining demand to Clark, company counsel charged with bargaining, presumably would have been sufficient, *Hardesty Co.*, 336 NLRB 258, 259 (2001) (imputing to employer knowledge of request for information union had faxed to employer's counsel), but it was not a necessary component of a valid bargaining request. In other words, the Union's request for bargaining properly was made to the Company (as embodied by its chief executive officer), the party with which the Union has a statutorily

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<sup>7</sup> The Eighth Circuit made a similar observation in the context of assessing the adequacy of a union demand for recognition as collective-bargaining representative. The Court found that “the company cannot hide behind its own self-constructed wall of obstinance and thereby use its ignorance as a shield,” clarifying further that “[u]nder a statute requiring cooperative attitudes to achieve industrial peace, common sense dictates that artificial devices created by the company to avoid knowledge of [a union] demand cannot succeed.” *Regal Aluminum*, 436 F.2d at 527.

recognized bargaining relationship.<sup>8</sup> *Cf. Vill. Rambler Sales, Inc.*, 174 NLRB 247, 249 (1969) (employer could not divest itself of its statutory duty to bargain by shifting responsibility to counsel, who was too busy to meet with union).

The Company's further challenges to the adequacy of the Union's request to bargain all fail for similar reasons. The overriding theme of the Company's argument is a refusal to accept the settled law that a request need not satisfy particular formal requirements to trigger the duty to bargain. Accordingly, to the extent the Company faults (Br. 48) the Union for making an oral request, there is no basis for doing so because a request for bargaining "may be in writing or it may be oral." *Prime Serv.*, 266 F.3d at 1238. Nor did the forum for the Union's May 20 request—in a labor-management meeting rather than a collective-bargaining session—obscure its message, as the Company argues (Br. 48-49) without any legal support. To the contrary, the forum supports the Board's finding of a request, as discussed above; the labor-management meeting, attended by both the Company's assistant vice president for human relations and its chief executive officer, was relatively formal and linked to labor relations.

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<sup>8</sup> The Union's direct communication of its proposal to high-level company agents contrasts with the situation in *Columbian Enameling*, cited by the Company (Br. 45), where the court found waiver based on its factual determination that the union did not communicate its request to bargain directly to any agent of the employer. *See NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 296-300 (1939).

And, finally, the Company's contention (Br. 49) that the Union's request was lacking because there was no demand for an "actual bargaining session" contravenes precedent clarifying that no magic words are required. *See, e.g., Armour & Co.*, 280 NLRB 824, 828 (1986) (valid bargaining request where union stated it "would like the opportunity to *discuss* with your company your position" but did not use word "bargain"). As described, the Union proposed that the Company sign a new extension agreement. Such a proposal implies, at a minimum, a desire to discuss, hear counter-proposals, or otherwise bargain. It cannot be reduced, as the Company suggests (Br. 49), to a mere protest insufficient to trigger the Company's duty to bargain, like the unions' statements in *Citizens National Bank* (cited at Br. 49; *see also* 44, 48) and *AT&T* (cited at Br. 45). *See Citizens Nat'l Bank*, 245 NLRB at 389-90; *AT&T Corp.*, 337 NLRB 689, 691-93 (2002) (prior to filing charge, union only expressed disagreement with employer's plan to close facility and did not discuss plan with employer's higher-ranking officials, as said would do).

As just demonstrated, substantial evidence supports the Board's finding that the Union made efforts to bargain about the Company's potential alteration of the pension-contribution status quo during the period of time leading up to May 20, and a qualifying bargaining request on May 20. And, to the extent the Company harbored any doubts, they should have been resolved when the Union renewed its

request at a July 9 labor-management meeting. The Company's only challenge to the validity of that renewed request is the patently incorrect argument (Br. 50-51, *see also* Br. 27) that, after May 20, the Union failed to request bargaining at any time during the Pension Plan's 60-day "cure period," which expired July 21, 2014. As the Board (A. 521) specifically found, "since May 20" the Union repeated its request that the Company sign an extension agreement. In making that finding, the Board relied on the credited testimony of Green (A. 38) and Smith (A. 14-16). Smith, in turn, specifically testified to making such a request at a July 9 labor-management meeting. The Company cannot show (Br. 50) that the decision to credit those witnesses was "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media*, 677 F.3d at 1250.

Additionally, there is no merit to the Company's claim (Br. 48-49) that the Union's bargaining request was untimely. As just shown, on May 20 the Union requested that the Company sign a new extension agreement to replace the one set to expire on May 22, reiterating similar requests it previously had made. Although the Company faults (Br. 48) the Union for waiting until May 20, that date was a fitting moment for the Union to reiterate its ongoing request for several reasons. Significantly, by May 20 it was evident to all parties that LICH would not close as planned, and thus the Company would continue to employ unit employees after May 22. (A. 13, 24, 452.) Moreover, the purpose of the May 20 labor-

management meeting was to discuss the May 22 layoffs, thus addressing how many unit members would remain working and, therefore, entitled to status-quo pension benefits. (A. 10.)

Finally, the parties had ample time to bargain over, or act on, the Union's narrow proposal, namely, that the Company sign another extension agreement. At that point in time, the parties had simply been executing three-page, formulaic contract-extension agreements (A. 415-20) and had previously signed such agreements within days of a prior contract's expiration. (A. 417 (signed by Company 8, and Union 4, days before expiration of prior agreement).) It was therefore not unreasonable or infeasible for parties to have done so between May 20 and 22. Moreover, the parties' bargaining window was not limited to just those two days. They also had the 60-day cure period during which to bargain before they would no longer have the option of submitting another extension agreement, making overdue pension contributions, and seamlessly continuing the status quo.<sup>9</sup>

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<sup>9</sup> *YHA, Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993), cited by the Company (Br. 45, 48), is distinguishable and does not compel a contrary result. Rejecting the Board's finding of no waiver, the Court determined that a union's bargaining demand was untimely where the union knew about the employer's plan to initiate a system-wide policy since late December, "but did not demand bargaining on the issue until the afternoon of March 30, the last business day before the policy was to take effect." *Id.* at 174.

### **C. The Company Failed to Establish Its Impossibility Defense**

Substantial evidence supports the Board's finding (A. 521) that the Company failed to carry its burden of proving an impossibility defense (Br. 52-56). The Company did not establish the factual predicate for its argument nor did it provide a rationale for why its claimed impossibility would excuse its failure to bargain before changing the status quo regarding pension contributions, much less any legal authority supporting its theory.

Factually, as the Board reasonably found (A. 521; *see also* A. 507 n.11), the Company "did not actually establish that the contributions [to the Pension Plan] would not be possible . . . ." More specifically, the Board observed (A. 507 n.11) that "the record is devoid of evidence that the [Pension Plan] had ever rejected a tendered contribution" and it found that "the [Company] has [not] identified a provision of the [Continuation] Policy or other relevant documents that would prohibit the [Pension Plan] from receiving postexpiration contributions." In reaching its conclusion, the Board did not "overlook[]" or "ignor[e]" the record evidence, contrary to the Company's assertions (Br. 52). Nor does the record as a whole demonstrate, as the Company asserts (Br. 52-54), that the Pension Plan would necessarily refuse any post-expiration contributions.

As the Board pointed out (A. 507 n.11), a terminated "contributing employer" may rejoin the Pension Plan under some circumstances. (*See* A. 507

n.11 (citing A. 336-38).) For that same reason, testimony that the Pension Plan required valid extension agreements does not preclude the Board's finding that the plan could potentially accept post-expiration contributions.<sup>10</sup> And the Board reasonably viewed (A. 521) the 60-day cure period as indicating that the Pension Plan has some flexibility in responding to situations resulting in the termination of an employer. The Board thus did not disregard the record evidence generally, or "render[] . . . meaningless" (Br. 52) the Pension Plan's cure-period procedure for rectifying an employer's termination, by observing that other methods for effectuating post-expiration contributions may exist, and that the Company had not established that they do not. *See, e.g., Oak Harbor Freight Lines*, 358 NLRB at 336 (although nominally requiring valid bargaining agreement, or extension, and signed certificate, pension trust agreed to accept contributions based solely on expired bargaining agreement and Board order remedying employer's unlawful cessation of contributions).

Legally, the Company has not cited any authority for the proposition that impossibility excuses an employer's failure to bargain before unilaterally changing the status quo. In the event the Pension Plan would not accept the Company's post-expiration pension contributions, the Company still had the duty to bargain

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<sup>10</sup> While the Company makes much (Br. 53-54) of Green's and Smith's "blatant guesswork," the Board did not rely on their testimony in reaching its finding. (*See* A. 507 n.11, 508 n.14, 521.)

with the Union to agreement or impasse over how to maintain or alter the status quo regarding pensions in light of plan requirements.<sup>11</sup> As established, the Company knew when its contract (and extensions) would expire, the Union requested bargaining, and there was time to devise a solution; alternatively, as the Board noted (A. 521), the Company could have maintained pension contributions (in escrow) while bargaining.

Through its arguments, the Company may be implicitly invoking precedent allowing parties to avoid strict compliance with Board remedial orders (as opposed to unfair-labor-practice liability) by proving impossibility. *See, e.g., NLRB v. Castaways Mgmt., Inc.*, 870 F.2d 1539, 1544 (11th Cir. 1989) (where facility demolished, impossibility raised as defense to order requiring notice posting and new election). But the Board's Order provides (A. 508 n.14) an "alternative means . . . for making employees whole in the event the Pension Plan refuses to accept contributions" from the Company. Specifically, it states that, if the Pension Plan "will not accept such contributions, the [Company] shall deposit an amount equal to the required contributions in an escrow account and negotiate with the Union over how the moneys will be distributed to make the unit employees whole." (A. 508.) That make-whole remedy, tailored to moderate the effects on employees of

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<sup>11</sup> Indeed, even when an employer has no duty to bargain over a decision, it still has the duty to bargain over the effects of its decision. *See United Food & Commercial Workers, Local 540 v. NLRB*, 519 F.3d 490, 495-97 (D.C. Cir. 2008).

the Company's unlawful conduct, is well within the Board's broad remedial discretion. *See United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2004) ("the Board's remedial authority is a broad discretionary one, subject to limited judicial review, and a remedy will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act") (internal quotation marks omitted). The Company, moreover, has not argued (Br. 52-56) that the remedial Order is not meant to make the Union whole, or is otherwise intended to be punitive or contrary to the policies of the Act.

The Company does argue (Br. 55) that the alternative remedy improperly runs afoul of the parties' collective-bargaining agreement. It cites the agreement's provisions stating that pension "payments shall be used by the [Pension Plan] for the purpose of providing pension benefits for employees as the Trustees may from time to time determine," and that nothing in the agreement can conflict with the Pension Plan's rules. (A. 159.) That claim is perplexing, given that the bargaining agreement has expired and no party is claiming that, as a matter of contract, it is still in effect. As discussed, the Company's pension obligation, although originating in contract, is now statutory. In any event, the claim appears to be another incarnation of the Company's rejected assertion that it was privileged to unilaterally cease its pension obligation because of the Continuation Policy's

termination language. As shown, the Board possesses broad remedial authority and the alternative remedy properly is aimed at restoring the status quo ante and making whole, to the extent practicable, the employees affected by the Company's unlawful unilateral action. The Company's objections to the alternative solution the Board has devised to address potential difficulties distributing pension contributions through the Pension Plan fall flat given the Company's unlawful refusal to bargain over how to handle that very eventuality.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

May 2017

## STATUTORY ADDENDUM

### Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69:

**Sec. 7 [Sec. 157]** 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 8(a)(3) [section 158(a)(3) of this title].

\*\*\*

**Sec. 8(a) [Sec. 158(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 7 [section 157 of this title];

\*\*\*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

\*\*\*

### **Sec. 10 [Sec. 160]**

(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. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

\*\*\*

(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 proceeding, as provided in section 2112 of title 28, United States Code [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 question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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 court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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

STAFFCO OF BROOKLYN, LLC,	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1311 & 16-1363
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	29-CA-134148
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
NEW YORK STATE NURSES ASSOCIATION	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,788 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 30th day of May, 2017

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NEW YORK STATE NURSES ASSOCIATION	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 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 30th day of May, 2017