

No. 17-1108

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

MASONIC TEMPLE ASSOC. OF DETROIT AND 450 TEMPLE, INC.

Respondents

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE B. BROIDO
Supervisory Attorney

VALERIE L. COLLINS
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-1978

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board (“the Board”) believes that this case involves the application of settled principles to well-supported fact findings, and therefore that argument would not materially aid the Court. However, if the Court desires argument, the Board requests participation, and suggests that 10 minutes per side would suffice for the parties to present their views.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the Board to enforce a Board Decision and Order issued against Masonic Temple Association of Detroit and 450 Temple, Inc. (collectively, “the Companies”) on November 29, 2016, and reported at 364 NLRB No. 150. (R. 273-281).¹ The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order is a final order with respect to all parties. The Board applied for enforcement on February 1, 2017, which was timely because the Act imposes no time limit on the initiation of enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), and venue is proper because the unfair labor practice occurred in Detroit, Michigan.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Companies violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

¹ “R.” references are to the administrative record. “Br.” references are to the Companies’ brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by Local 324, International Union of Operating Engineers, AFL-CIO (“the Union”), the Board’s General Counsel issued a complaint alleging the Companies violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Companies’ engineers and maintenance employees at its facility in Detroit, Michigan.

Following a hearing, an administrative law judge issued a decision finding that the Companies violated the Act as alleged. (R. 275-80.) After considering the decision and the record in light of the Companies’ exceptions, the Board affirmed the judge’s rulings, findings, and conclusions, and adopted the recommended Order, as modified.

II. THE BOARD’S FINDINGS OF FACT

A. The Companies’ Operations and Their Collective-Bargaining Agreement with the Union

The Companies operate the Masonic Temple (“the Temple”) in Detroit, Michigan, a 500,000 square-foot building that includes a 20-story tower and a 4,000-seat theater, as well as a ballroom and restaurants. (R. 275; 18.) In addition

to housing fraternal organizations, the Temple is used to host events, such as weddings, parties, and concerts. (R. 275.)

Since around 1968, the Union and its predecessor have served as the exclusive collective-bargaining representative of a unit of maintenance engineers, boiler operators, and operating engineers working at the Temple. (R. 276; 57.) During that time, the Union's predecessor and then the Union itself entered into a series of collective-bargaining agreements with various operators of the Temple, including an agreement between the Union and Masonic Temple Association ("the Association"), effective August 1, 2003, through July 31, 2006. (R. 276; 191-222.)

After the 2003-2006 agreement expired, the Companies continued to remit to the Union dues that they had received from employees who were union members. (R. 276; 73, 119, 127.) The Companies also continued to make payments to the Union's healthcare fund, which was available to all employees in the bargaining unit regardless of their union membership status. (R. 276; 73, 75.)

B. Olympia Entertainment Operates the Temple and Enters into a Successor Collective-Bargaining Agreement with the Union

In 2007, the Union entered into a successor collective-bargaining agreement with Olympia Entertainment, which was operating the Temple at the time. (R. 276; 20, 28, 191-222.) That agreement was effective from January 1, 2008, through December 31, 2009. (R. 276.) In December 2010, Olympia Entertainment ended its relationship with the Temple, and the unit employees became employed

by the Association, which resumed operations at the Temple after Olympia Entertainment's departure. (R. 276; 21.)

C. The Union Requests Bargaining and Files an Unfair-Labor-Practice Charge Against the Association, which Enters into a Settlement Agreement with the Union

In December 2010, the Temple's General Manager told a bargaining unit employee that the Association's President, Roger Sobran, planned to refuse to recognize the Union. (R. 276; 33-34.) The unit employee reported Sobran's plan to the Union, which informed Sobran that he was not allowed to unilaterally eliminate the Union, and that the Association was required by law to negotiate with the Union. (R. 276-77; 59.) On December 15, 2010, after receiving no response from the Association, the Union sent Sobran a written request to bargain. (R. 277; 59-60, 237-38.) When Sobran failed to respond to the letter, the Union filed an unfair-labor-practice charge with the Board. (R. 277; 60-61, 223.)

Following the Union's filing of the charge, the Association entered into a settlement agreement with the Union, agreeing to "recognize the Union and bargain in good faith as a successor employer." (R. 223.) From January through May 2011, the Association participated in negotiation sessions with the Union, although the parties were unable to reach an agreement. (R. 277; 61-63, 223.)

D. The Detroit Masonic Temple Theater Company Briefly Operates the Temple

During the May 2011 negotiations, Association President Sobran informed the Union that a new entity – the Detroit Masonic Temple Theater Company (“the Theater Company”) – would be managing the Temple and that the Union should bargain with it. (R. 277; 63-64.) In January 2012, following the change in operators, the Union held one negotiation session with the Theater Company. (R. 277; 38, 65, 118.)

Shortly after the Theater Company assumed the Temple’s operations, a dispute arose between it and the Association about lease payments. (R. 277; 26, 65-66.) The dispute continued for approximately 9 months, and in September, 2012, Sobran informed employees that the Theater Company would no longer be in charge of the Temple’s operations. (R. 277; 100.)

E. The Union Attempts To Engage in Collective Bargaining with the Companies, but They Fail To Respond

After the Theater Company left, the Association decided to put the Temple’s operation under its for-profit business arm, 450 Temple. (R. 277; 98-100.) The bargaining unit employees became employees of 450 Temple, and there were no changes in their terms and conditions of employment. (R. 277; 22-24.)

Association President Sobran continued to oversee the Companies’ operations, including collective bargaining. (R. 276; 23-24.)

From late 2012 to January 13, 2015, Union Business Representative James Arini made numerous requests to resume bargaining with the Companies. (R. 277; 66.) Arini regularly visited the Temple and frequently called the Companies' offices in an effort to schedule bargaining sessions. (R. 277; 66.) Arini left messages with the receptionist and the Temple's business manager, who both assured Arini that the messages were being given to Sobran. Nevertheless, Sobran did not return Arini's calls. (R. 277; 66-67, 69-10, 86.)

In October 2014, Arini intensified his efforts to schedule a bargaining session when he learned that Paul Buono, the Union's last dues-paying member in the unit, had quit his job, and that the Companies had requested refunds for insurance payments they had made on his behalf. (R. 277; 74-75.) Thus, from October 2014 through January 13, 2015, Arini repeatedly informed the Companies that they were delinquent in their contributions to the Union's health care fund, and that the Companies needed to begin bargaining with the Union. (R. 277; 76.) Arini also informed the Companies that if they refused to negotiate, the Union's trustees would discontinue its voluntary practice of extending healthcare coverage to employees in the unit who were not members of the Union. (R. 277-78; 76.)

F. The Companies Tell the Union They Will Not Bargain

On January 13, 2015, Arini was finally able to reach Sobran about scheduling a negotiation session. (R. 278; 77.) Arini informed Sobran that the Union's trustees would discontinue its practice of extending healthcare coverage to unit employees who were not members of the Union, and that the Union would file an unfair-labor-practice charge if the Companies refused to negotiate. (R. 278; 77-78.) In response, Sobran refused to negotiate, told Arini that the Companies would never again be a union employer, and hung up the phone. (R. 278; 78.) Three days later, the Union filed the unfair-labor-practice charge at issue here. (R. 278; 79, 167).

III. THE BOARD'S CONCLUSIONS AND ORDER

On November 29, 2016, the Board (then-Chairman Pearce and Members Miscimarra and McFerran) found, in agreement with the administrative law judge, that the Companies violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(5) and (1)) by refusing to bargain with the Union beginning on January 13, 2015.

The Board's Order requires the Companies 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 their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the

Companies to bargain with the Union as the exclusive collective-bargaining representative of the unit employees, and to post a remedial notice.

STANDARD OF REVIEW

The Court defers to the Board's factual determinations as long as they are 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, 488 (1951); *Peters v. NLRB*, 153 F.3d 289, 294 (6th Cir. 1998). As the Court has explained: "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). The Court will uphold the Board's findings even if it might "justifiably have made a different choice had the matter been before the court de novo." *Universal Camera*, 340 U.S. at 488; *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987). Moreover, credibility determinations of an administrative law judge that are adopted by the Board are only overturned in those rare instances where they "overstep the bounds of reason," and are "inherently unreasonable or self-contradictory." *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984); *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996).

The Board's application of law to facts is also reviewed under the substantial evidence standard. *Holly Farms Corp. v. NLRB*, 517 U.S. 391, 398-99 (1996);

NLRB v. Mead Corp., 73 F.3d 74, 78 (6th Cir. 1996). Further, as the Supreme Court has explained: “For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board’s judgment so long as its reading is a reasonable one.” *Holly Farms*, 517 U.S. at 409. *Accord Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“if the [Act] is silent or ambiguous with respect to the specific issue,” then “a court may not substitute its own construction . . . for a reasonable interpretation made” by the Board); *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003) (same). Finally, if substantial evidence supports the Board’s conclusion that a party failed to establish its affirmative defenses, the Court should enforce the Board’s order. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s finding that starting on January 13, 2015, the Companies violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. As the Board explained, the Companies failed to establish by a preponderance of the evidence, as required by *Levitz Furniture Company*, 333 NLRB 717 (2001), that a majority of bargaining unit employees in fact no longer wanted to be represented by the Union. The Companies miss the mark in claiming that they were privileged to withdraw

recognition from the Union, and refuse to recognize and bargain with it, because they purportedly harbored a good-faith doubt that the Union enjoyed the support of a majority of unit employees, and because they did not know if the Union had any dues-paying members. Under *Levitz* – a case that squarely overruled the good-faith doubt standard, and that this Court and its sister circuits have long applied – the Companies had the burden of showing that the Union actually lost the support of a majority of unit employees. Thus, their asserted good-faith doubts are irrelevant. Moreover, other precedent establishes that the Board does not consider whether employees are union members. Instead, the relevant inquiry is whether a majority of unit employees wish to be represented by the Union for purposes of collective bargaining. Accordingly, the Board reasonably found that the Companies failed to meet their burden of justifying their withdrawal of recognition, and therefore that their refusal to recognize and bargain with the Union was unlawful.

The Companies also failed to meet their burden of proving their other affirmative defense – that the Union’s unfair-labor-practice charge was time-barred under the six-month limitation period established in Section 10(b) of the Act. The Union’s charge – filed just three days after the Companies clearly and unequivocally notified Union Business Representative Arini of their refusal to bargain – could not have been more timely. The Board reasonably rejected the

Companies' various claims that they instead refused to bargain more than six months before the Union filed its charge, first by entering into a settlement agreement with the Union, and later by taking their time in responding to the Union's repeated requests to negotiate a new collective-bargaining agreement. Rather, as the Board found, it was not until January 13, 2015, that the Companies clearly and unequivocally informed the Union of their refusal to recognize and bargain. Having rejected both of the Companies' affirmative defenses, the Board correctly found that the Companies' refusal was unlawful.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(5) and (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

A. Principles Governing the Refusal To Bargain

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. Once employees have chosen to be represented by a labor organization, an employer violates Sections 8(a)(5) and 8(a)(1) of the Act "by 'refusing to bargain collectively with the representative of its employees,' . . . which includes unilaterally withdrawing recognition from a union supported by a

majority of the bargaining unit’s members.” *NLRB v. Galicks, Inc.*, 671 F.3d 602, 610 (6th Cir. 2012) (quoting *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 960 (6th Cir. 2006)).²

Moreover, to promote the Act’s policies of industrial stability and employee free choice, the Board presumes that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement lasting up to three years; upon contract expiration the presumption becomes rebuttable. *Id.* at 785-87. Moreover, the burden of rebutting the presumption rests with the party asserting loss of majority status. *Id.* at 786-87. *Accord Henry Bierce Co.*, 328 NLRB 646, 648 (1999), *enf’d in relevant part*, 234 F.3d 1268 (6th Cir. 2000).

Consistent with these principles, the Board held in *Levitz Furniture Company*, 333 NLRB 717, 720 (2001), that an employer may lawfully withdraw recognition from an incumbent union, and defeat the rebuttable presumption of

² Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees.” 29 U.S.C. §158(a)(5). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” which includes employees’ “right . . . to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157. A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1) of the Act. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

majority support, only by showing by a preponderance of the evidence that the union actually lost the support of a majority of the bargaining unit employees at the time of the withdrawal. In so holding, the Board overruled *Celanese Corporation*, 95 NLRB 664 (1951), and its progeny, which had applied a “good-faith doubt” standard for withdrawal of recognition. *Levitz*, 333 NLRB at 723-24. Applying *Levitz*, this Court recognized over a decade ago that “[i]n order to comply with Section 8(a)(5) of the Act, an employer may only withdraw recognition ‘where the union has actually lost the support of the majority of the bargaining unit employees.’” *Vanguard Fire*, 468 F.3d at 959 (quoting *Levitz*, 333 NLRB at 717). In addition to this Court, every other circuit presented with cases involving the *Levitz* standard has approved or applied it.³

Thus, as the reviewing courts have uniformly recognized, an employer withdraws recognition from its employees’ representative at its peril, and its “honest but mistaken belief” that the union has lost majority support will not insulate it from a Section 8(a)(5) violation. *See, e.g., Pac. Coast Supply*, 801 F.3d at 326 (holding, post-*Levitz*, that an employer’s “genuine, reasonable uncertainty

³ *See, e.g., Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 329 (D.C. Cir. 2015); *Heartland Human Servs. v. NLRB*, 746 F.3d 802, 807 (7th Cir. 2014); *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1060 (9th Cir. 2012); *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 260 (4th Cir. 2008). *See also Grane Health Care v. NLRB*, 712 F.3d 145, 151 n.5 (3d Cir. 2013) (acknowledging *Levitz* as Board law).

. . . is no longer enough” to justify its withdrawal of recognition); *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051 at 1060 (citing *Levitz*, 333 NLRB at 723, and holding that “[a]n employer cannot refuse to recognize a union as the elected representative of its employees on the basis of a subjective belief the union has lost support.”). In short, unless an employer has objective proof that the union actually lost majority support, it will not have rebutted the presumption of majority status, and its withdrawal of recognition from the Union will violate the Act. *Levitz*, 333 NLRB at 725.

B. Given Their Failure To Show that the Union Actually Lost Majority Support, the Companies Violated the Act by Admittedly Withdrawing Recognition from and Refusing To Bargain with the Union

It is undisputed that on January 13, 2015, when the Companies admittedly (Br. 23) withdrew recognition from and refused to bargain with the Union, the Union enjoyed a rebuttable presumption of majority support. Accordingly, under the applicable *Levitz* standard, the Companies’ actions were unlawful unless they could prove by the presentation of objective evidence that the Union actually lost the support of a majority of the bargaining unit employees. *See Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 960 (6th Cir. 2006) (recognizing the *Levitz* standard), and cases cited at pp. 12-15. The Board reasonably found that the Companies failed to make the required showing.

Before the administrative law judge, the only evidence that the Companies presented to support its defense was President Sobran's testimony that, after Buono resigned from his job in June 2014, none of the remaining employees told him that they wanted to remain union members. On that basis alone, the Companies asserted that they had a good-faith doubt of the Union's majority status, which permitted them to withdraw recognition and refuse to bargain. (R. 276, 276 n.4, 279; 122-24.) The judge found that assertion insufficient to carry the Companies' burden of proof because it was "contrary to current Board law" (R. 279), and the Board adopted that finding on review (R. 273).

Before the Court, the Companies continue to press their legally incorrect argument (Br. 23-25) and implore the Court to excuse their failure to bargain based on their purported "good faith doubt as to the union's continuing majority status." (Br. 23.) As authority for that mistaken position, the Companies rely on *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815 (6th Cir. 1983), a case that predates *Levitz* by nearly two decades and applied Board precedent that *Levitz* overruled. Thus, it is of no moment here that in *Landmark* this Court previously upheld a Board decision that had applied the now-discarded "good-faith doubt" standard.

Further, the Court lacks jurisdiction to entertain a direct challenge to the applicable *Levitz* standard because the Companies did not contest it before the

Board and they present no extraordinary circumstances to excuse their failure. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 (6th Cir. 2006) (citing Section 160(e)); *S. Moldings, Inc. v. NLRB*, 728 F.2d 805, 806 (6th Cir. 1984) (court lacks jurisdiction to consider issue not raised before Board prior to its decision, or afterward upon reconsideration) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)).

Contrary to the Companies’ other legally mistaken claim (Br. 23-24), the Board’s determination of whether the Union enjoys majority support “turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of a particular union.” *Trans-Lux Midwest Corp.*, 335 NLRB 230, 232 (2001). *Accord Henry Bierce Companies*, 328 NLRB 646, 648 (1999), *enf’d in relevant part*, 234 F.3d 1268 (6th Cir. 2000) (“it is well settled that unit employees’ nonmembership in the union does not establish that those employees do not want the Union to be their collective bargaining representative.”). As the Board succinctly explained here, “evidence of a desire to withdraw from membership in the union is insufficient proof that the Union has in fact lost the support of a majority of the unit.” (R. 279.) As the Board also noted, the record in this case “is devoid of evidence” showing that any action was taken

by the remaining bargaining unit employees to express a lack of support for the Union. (R. 279.) Before the Board, and again in this Court, the Companies simply “fail to grasp this distinction.” (R. 279.)

Finally, the Companies gain no more ground by distorting the record to claim that Union Business Representative Arini’s testimony at the unfair-labor-practice hearing “served as the basis of [President] Sobran’s good faith belief . . . that he could withdraw recognition lawfully.” (Br. 24.) The Company’s claim is wrong-headed for a number of reasons. To begin, it fails to acknowledge the *Levitz* standard, which makes Sobran’s purported beliefs irrelevant. Moreover, contrary to the Companies’ claim, what Arini actually told Sobran was that if he withdrew recognition based on his belief that “there were no more union members working at the site,” it would prompt the Union to file an unfair-labor-practice charge. (R. 78.) Sobran also testified that he refused to bargain with the Union because he personally did not think employees were benefiting from the Union’s representation (R. 78), but again his personal belief falls woefully short of the objective evidence required under *Levitz* that the Union actually lost the support of a majority of unit employees. *See Levitz*, 333 NLRB at 725 (employer must prove union actually lost majority support “at the time the employer withdrew recognition”).

C. The Board Reasonably Rejected the Companies' Defense that the Unfair-Labor-Practice Charge Was Time-Barred

The Companies spill much ink (Br. 18-22) arguing that the Union's unfair-labor-practice charge was barred by the six-month limitations period set forth in Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." 29 U.S.C. § 160(b). The party asserting that a charge is time-barred bears the burden of affirmatively proving that defense. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996); *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1004 (8th Cir. 1992). As shown below, the Board reasonably found that the Companies failed to meet their burden of showing that the charge was untimely.

The Board's long-settled rule, accepted by the courts, is that "the 6-month 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act." *United Kiser Servs., LLC*, 355 NLRB 319, 319 (2010) (internal quotation omitted); accord *Taylor Warehouse*, 98 F.3d at 899 (Section 10(b)'s limitations period does not begin to run until "unequivocal notice" is received); see also, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993), *enforced*, 54 F.3d 802 (D.C. Cir. 1995); *NLRB v. Pub. Serv. Elec. & Gas Co.*, 157 F.3d 222, 227 (3d Cir. 1998); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir.1989). Clear and unequivocal notice can be established by showing that the party filing the charge had actual or constructive knowledge of the violation. *Broadway Volkswagen*, 342

NLRB 1244, 1246 (2004), *enforced sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). The Board may impute knowledge where the conduct was “sufficiently open and obvious to provide clear notice,” or where “the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.” *Broadway Volkswagen*, 342 NLRB at 1246 (internal quotations omitted). However, Section 10(b) will not bar a complaint where the employer has sent conflicting signals or engaged in ambiguous conduct. *CAB Assoc.*, 340 NLRB 1391, 1392 (2003); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999) (citing *A & L Underground*, 302 NLRB 467, 469 (1991)); *see also Pub. Serv. Elec. & Gas Co.*, 157 F.3d at 228.

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

Here, substantial evidence supports the Board’s finding (R. 273 n.1, 278) that the Companies did not give the Union clear and unequivocal notice that they

were refusing to bargain until January 13, 2015, just three days before the Union filed its charge. Notably, the Companies admit (Br. 23) they informed the Union of their intention to withdraw recognition on January 13, 2015. And for good reason, as the record clearly establishes that January 13 is the date on which President Sobran told Union Business Representative Arini that the Companies refused to negotiate and “would never again be a union employer.” (R. 278; 78.)

In a last-ditch attempt to escape liability for this blatant refusal to bargain, the Companies make the counter-intuitive argument that they notified the Union of their refusal in January 2011, by entering into a settlement agreement agreeing to recognize the Union and bargain in good faith. (R. 60-61; 223.) An agreement to bargain in good faith hardly constitutes notice of a refusal to bargain. As the Board found, “it was not unreasonable for the Union to assume after the January 2011 settlement agreement that [the Companies] would continue to recognize it.” (R. 278.) Thus, the Companies err in asserting that the settlement agreement put the Union on notice of their refusal to recognize and bargain.

Moreover, after executing the settlement agreement, the Companies did recognize the Union and participated in several negotiations sessions as the agreement required them to do. In addition, as the Board noted, the Companies continued to “remit union dues and make healthcare contributions to the Union’s healthcare trust fund,” and they made health insurance payments for two

employees until they resigned in June 2013 and May 2014. (R. 273 n.1, 278.)

Finally, as the Board pointed out, the Companies failed to present any evidence that between May 2014 and January 2015, they informed the Union that they would no longer recognize it. (R. 278-79.) On these facts, the Board reasonably concluded that the Companies failed to notify the Union of their refusal to recognize and bargain before January 13, 2015, when President Sobran told Union Business Representative Arini that they would never again be a union employer. As the Union filed its unfair-labor-practice charge just three days later, the charge was well within the 6-month window provided by Section 10(b) of the Act. Accordingly, the Board reasonably rejected the Companies' defense that the charge was time-barred.

Local Lodge No. 1424 v. NLRB, 362 U.S. 411 (1960), the only case cited by the Companies (Br. 19-20), supports rather than undermines the Board's finding here. There, the Supreme Court distinguished between "two different kinds of situations," the first one being "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices." *Id.* at 416. The instant case involves this situation: the Companies' unlawful refusal to bargain and withdrawal of recognition from the Union, which occurred well within the six-month period preceding the charge-filing, constituted an independent unfair labor practice. As the Court also explained, in that situation,

events that precede the limitations period “may be utilized to shed light on the true character of matters occurring within the limitations period.” *Id.*

The second type of situation identified by the Court in *Local Lodge No. 1424* is not at issue here. It arises “where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice.” *Id.* at 416-17. The situation before the Court involved that second circumstance, specifically, where “the entire foundation of the unfair labor practice charged was the Union’s time-barred lack of majority status when the original collective bargaining agreement was signed.” *Id.* at 417. In those very different circumstances, the Court held that the validity of the agreement’s execution could not be challenged outside the 10(b) period. *Id.* at 417-19. However, that aspect of the Court’s decision has no bearing on the instant case.

CONCLUSION

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

Respectfully submitted,

/s/ Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

/s/ Valerie L. Collins

VALERIE L. COLLINS

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2996

(202) 273-1978

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

July 2017

**ADDENDUM: DESIGNATION OF RELEVANT
ADMINISTRATIVE DOCUMENTS**

NLRB v. Masonic Temple Association of Detroit and 450 Temple, Inc.
6th Cir. No. 17-1108
Board Case No. 07-CA-144521

VOLUME I – TRANSCRIPT

pp. 1-139 Transcript of Unfair Labor Practice Hearing before Administrative Law Judge Christine E. Dibble, dated 11/10/2015

VOLUME II – EXHIBITS

General Counsel’s Exhibits

pp. 167 GCX 1(a) Charge, dated 1/16/2015

pp. 162 GCX 1(d) Amended Charge, dated 8/17/2015

pp. 158 GCX 1(g) Second Amended Charge, dated 9/9/2015

pp. 149-154 GCX 1(j) Original Complaint and Notice of Hearing, dated 9/14/2015

pp. 142-145 GCX 1(l) Respondents’ Answer to Complaint and Notice of Hearing, dated 9/25/2015

pp. 168- 190 GCX 2 Agreement between Olympia Entertainment, Inc. (Masonic Temple) and the International Union of Operating Engineers Local 547 January 1, 2008 – December 31, 2009

pp. 191-222 GCX 3 Agreement between Masonic Temple Association of Detroit and the International Union of Operating Engineers Local 547 August 1, 2003 – July 31, 2006

pp. 223 GCX 4 Settlement Agreement between Masonic Temple Association and International Union of Operating Engineers Local 547, dated 1/12/2011 and 1/16/2011

pp. 224-226 GCX 5 Union dues from 450 Temple to International Union of Operating Engineers Local 547 on behalf of Paul Buono, dated 5/1/2014, 4/2/2014, and 3/5/2014

pp. 227-229 GCX 6 Masonic Temple Report of Health and Welfare Contributions

Charging Party Exhibit

pp. 237-238 CPX 1: Bargain request, dated 12/10/2010

VOLUME III – PLEADINGS

pp. 273-281 Decision and Order, dated 11/29/2016

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT (“THE ACT”)

Section 7 of the Act (29 U.S.C. § 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 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 157 of this title;

* * *

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

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

* * *

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

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

thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) 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. . . .

* * *

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 17-1108
v.)	
)	Board Case No.
MASONIC TEMPLE ASSOC. OF DETROIT)	07-CA-144521
AND 450 TEMPLE, INC.)	
)	
Respondents)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its corrected brief contains 5,253 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

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

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
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)
Respondents)

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth 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:

Eric I. Frankie
Law Offices
535 Griswold Street, Suite 1650
Detroit, MI 48226

/s/Linda Dreeben

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

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