

**Nos. 16-1289, 16-1343**

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

**HOSPITAL OF BARSTOW, INC.,  
D/B/A BARSTOW COMMUNITY HOSPITAL**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

and

**CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES  
ORGANIZING COMMITTEE**

**Intervenor for Respondent**

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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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**JILL A. GRIFFIN**  
*Supervisory Attorney*

**BARBARA A. SHEEHY**  
*Attorney*

*National Labor Relations Board*  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2949  
(202) 273-0094

**RICHARD F. GRIFFIN, JR.**  
*General Counsel*

**JENNIFER ABRUZZO**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

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

HOSPITAL OF BARSTOW, INC. d/b/a )  
 BARSTOW COMMUNITY HOSPITAL )  
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 Petitioner/Cross-Respondent )  
 )  
 v. )  
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 NATIONAL LABOR RELATIONS BOARD )  
 )  
 Respondent/Cross-Petitioner )  
 )  
 and )  
 )  
 CALIFORNIA NURSES UNION/NATIONAL )  
 NURSES ORGANIZING COMMITTEE )  
 )  
 Intervenor )  
 \_\_\_\_\_)

Nos. 16-1289, 16-1343

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

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

**A. Parties, Intervenor, Amicus.** Hospital of Barstow, Inc., d/b/a Barstow Community Hospital (“Barstow”) is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The California Nurses Association/National Nurses Organizing Committee (“the Union”) is the intervenor before the Court. Barstow, the Board’s General Counsel,

and the Union appeared before the Board in Cases 31-CA-090049 and 31-CA-096140.

**B. Ruling Under Review.** The case involves Barstow's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on July 15, 2016, reported at 364 NLRB No. 52.

**C. Related cases.** The ruling under review has not previously been before the Court or any other court. A related case, *Hospital of Barstow*, 361 NLRB No. 34 (2014), was previously before the Court, and the Court vacated the Board's Decision and Order and remanded to the Board for further consideration. *See Hosp. of Barstow v. NLRB*, 820 F.3d 440 (D.C. Cir. 2016).

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half St., S.E.  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 31st of August, 2017

**TABLE OF CONTENTS**

| <b>Headings</b>  | <b>Page(s)</b> |
|--|----------------|
| Statement of jurisdiction .....  | 1              |
| Statement of the issues .....  | 2              |
| Relevant statutory provisions.....   | 3              |
| Statement of the case.....   | 3              |
| I. The Board’s findings of fact .....  | 6              |
| A. Background; Barstow and the Union agree to a consent election;<br>nurses vote in favor of the Union; and the Regional Director certifies<br>the Union .....                       | 6              |
| B. Barstow maintains reporting policies involving patients, visitors, and<br>staff to improve patient safety .....   | 7              |
| C. The Union develops a form to assist the nurses with patient care and<br>safety and with protection of their licenses .....  | 7              |
| D. The Parties discuss preliminary bargaining details; Barstow objects to the<br>ADO form; and Barstow refuses to bargain until the Union submits its<br>full contract proposal..... | 8              |
| E. Barstow continues its refusal to submit proposals and its objection to the<br>ADO form and unilaterally changes its policy for certification trainings<br>and reimbursement ..... | 10             |
| F. The Union submits its wage proposal; Barstow finally submits proposals;<br>and Barstow declares impasse.....  | 11             |
| II. The Board’s 2014 Decision and Order .....  | 13             |
| III. The Court’s Opinion .....   | 14             |
| IV. The Board’s 2016 Supplemental Decision and Order.....  | 16             |

## TABLE OF CONTENTS

| <b>Headings-Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| Summary of argument.....  | 19             |
| Argument.....   | 22             |
| I. The Board reasonably determined that a Regional Director retains authority to process a representation proceeding and to issue a certification pursuant to a consent-election agreement, notwithstanding the absence of a Board quorum ..... | 22             |
| A. Introduction .....   | 22             |
| B. The Board has reasonably determined that construing the Act to permit Regional Directors to conduct representation proceedings in the absence of a Board quorum is consistent with the Act and Board regulation .....                        | 24             |
| C. Parties' voluntary execution of consent-election agreements vest Regional Directors with final authority to decide post-election disputes .....  | 27             |
| 1. Consent-election agreements provide parties with an expeditious procedure for resolving election disputes .....  | 27             |
| 2. Party choice manifested in a consent-election agreement gives Regional Directors final authority in representation cases, analogous to a party's choice to forego Board review of a stipulated election.....                                 | 28             |
| D. The Board retains final, plenary authority to consider challenges to a certification issued pursuant to a consent-election agreement.....  | 32             |
| II. The Board is entitled to summary enforcement of the unchallenged portions of its Order .....  | 38             |
| III. Substantial evidence supports the Board's finding that Barstow violated the Act by refusing to submit any proposals or counterproposals until the Union submitted its entire contract proposal .....                                       | 40             |

## TABLE OF CONTENTS

| <b>Headings-Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| A. Applicable principles and standard of review .....   | 40             |
| B. Substantial evidence supports the Board’s finding that Barstow refused to bargain in good faith.....   | 41             |
| C. Barstow’s claims of good-faith bargaining are meritless.....   | 43             |
| IV. Substantial evidence supports the Board’s finding that Barstow violated the Act by declaring impasse and refusing to bargain unless the Union directed unit employees to stop using the ADO form..... | 45             |
| A. Standard of review and applicable principles .....   | 45             |
| B. Substantial evidence supports the Board’s finding that Barstow engaged in bad-faith bargaining by declaring impasse and refusing to bargain until the Union took certain actions.....                  | 47             |
| C. Barstow’s claims that it declared impasse in good faith are meritless.....   | 48             |
| V. The Board properly exercised its broad remedial discretion in ordering Barstow to reimburse the Union’s negotiating expenses.....  | 49             |
| A. Standard of review and applicable principles .....   | 49             |
| B. The Board reasonably determined that Barstow’s deliberate bad-faith bargaining warranted reimbursement of the Union’s negotiating expenses.....  | 50             |
| C. Barstow’s challenges to the Board’s remedy are meritless.....  | 53             |
| VI. The Board reasonably declined to defer the case to arbitration .....  | 54             |
| Conclusion .....  | 56             |

## TABLE OF AUTHORITIES

| <b>Cases</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>Affinity Medical Center</i> ,<br>2013 WL 143371 (2013) .....  | 35             |
| <i>Allied Mech. Services., Inc. v. NLRB</i> ,<br>668 F.3d 758 (D.C. Cir. 2012).....  | 40             |
| <i>American Federation of Telephone &amp; Radio Artists v. NLRB</i> ,<br>395 F.2d 622 (D.C. Cir. 1968).....                            | 46             |
| <i>Amalgamated Clothing Workers of America, AFL-CIO v. NLRB</i> ,<br>365 F.2d 898 (D.C. Cir. 1966).....                                | 25             |
| <i>AMF Bowling Co. v. NLRB</i> ,<br>977 F.2d 141 (1st Cir. 1992).....  | 53             |
| <i>Ardsley Bus Corp.</i> ,<br>357 NLRB 1009 (2011).....  | 42             |
| <i>Area E-7 Hospital Association</i> ,<br>233 NLRB 798 (1977).....   | 32             |
| <i>Arizona Portland Cement Co.</i> ,<br>281 NLRB 304 (1986).....   | 54             |
| <i>Atlanta Hilton &amp; Tower</i> ,<br>271 NLRB 1600 (1984).....   | 44             |
| * <i>Bluefield Hospital Co.</i> ,<br>361 NLRB No. 154, 2014 WL 7246760 (2014), <i>enforced</i> ,<br>821 F.3d 534 (4th Cir. 2016) ..... | 26, 36         |
| <i>Bluefield Regional Medical Center</i> ,<br>359 NLRB 1181 (2013).....  | 36             |

---

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

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| <i>Boire v. Greyhound</i> ,<br>376 U.S. 473 (1964).....   | 33             |
| <i>Bryant &amp; Stratton Business Institute</i> ,<br>321 NLRB 1007 (1996), <i>enforced</i> ,<br>140 F.3d 169 (2d Cir. 1998) ..... | 42, 53         |
| <i>Carducci v. Regan</i> ,<br>714 F.2d 171 (D.C. Cir. 1983).....  | 39             |
| <i>Chelsea Clock</i> ,<br>170 NLRB 69 (1968).....   | 36             |
| * <i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> ,<br>467 U.S. 837 (1984).....                           | 22             |
| * <i>City of Arlington v. FCC</i> ,<br>133 S. Ct. 1863 (2013).....  | 22             |
| <i>Cobb Mechanical Contractors, Inc. v. NLRB</i> ,<br>295 F.3d 1370 (D.C. Cir. 2002).....   | 49             |
| <i>Exxon Chemical Co. v. NLRB</i> ,<br>386 F.3d 1160 (D.C. Cir. 2004).....  | 40             |
| * <i>Fallbrook Hospital</i> ,<br>360 NLRB 644 (2014), <i>enforced</i> ,<br>785 F.3d 729 (D.C. Cir. 2015).....                     | 9, 42, 51      |
| <i>Federal Mogul Corp.</i> ,<br>212 NLRB 950 (1974), <i>enforced</i> ,<br>524 F.2d 37 (6th Cir. 1975) .....                       | 41, 42         |

---

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

## TABLE OF AUTHORITIES

| <b>Cases -Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>Fibreboard Paper Products Corp. v. NLRB</i> ,<br>379 U.S. 203 (1964).....   | 49             |
| <i>Fieldcrest Cannon, Inc.</i> ,<br>318 NLRB 470 (1995), <i>enforced in relevant part</i> ,<br>97 F.3d 65 (4th Cir. 1996) .....  | 50             |
| <i>Franks v. Bowman Transportation Co.</i> ,<br>424 U.S. 747 (1975).....   | 50             |
| * <i>Frontier Hotel &amp; Casino</i> ,<br>318 NLRB 857 (1995), <i>enforced in pertinent part sub nom.</i> ,<br><i>Unbelievable, Inc. v. NLRB</i> , 118 F.3d 795 (D.C. Cir. 1997) ..... | 50, 51         |
| <i>Garner v. Teamsters Chauffeurs &amp; Helpers Local 776</i> ,<br>346 U.S. 485 (1953).....  | 22             |
| <i>General Tube Co.</i> ,<br>141 NLRB 441 (1963), <i>enforced</i> ,<br>331 F.2d 751 (6th Cir. 1964) .....  | 33             |
| <i>Grinnell Fire Protection Systems, Co.</i> ,<br>328 NLRB 585 (1999), <i>enforced</i> ,<br>236 F.3d 187 (4th Cir. 2000) .....   | 46             |
| <i>Harowe Servo Controls, Inc.</i> ,<br>250 NLRB 958 (1980) .....  | 52             |
| <i>Health Care Serv. Group</i> ,<br>331 NLRB 333 (2008) .....  | 42             |
| <i>Hospital of Barstow v. NLRB</i> ,<br>820 F.3d 440 (D.C. Cir. 2016).....   | 5, 14, 15      |

---

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

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| <i>Hydrotherm, Inc.</i> ,<br>302 NLRB 990 (1991) .....  | 43             |
| <i>Kost v. Kozakiewicz</i> ,<br>1 F.3d 176 (3d Cir. 1993) .....   | 39             |
| <i>Lapham-Hickey Steel Corp. v. NLRB</i> ,<br>904 F.2d 1180 (7th Cir. 1990) .....                               | 45             |
| * <i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> ,<br>564 F.3d 469 (D.C. Cir. 2009).....            | 16             |
| <i>Litton Systems</i> ,<br>300 NLRB 324 (1990), <i>enforced</i> ,<br>949 F.2d 249 (8th Cir. 1991) .....         | 44-45          |
| <i>Local 13, Detroit Newspaper Printing &amp; Graphic Union v. NLRB</i> ,<br>598 F.2d 267 (D.C. Cir. 1979)..... | 41             |
| <i>Magnesium Casting Co. v. NLRB</i> ,<br>401 U.S. 137 (1971).....  | 24, 25         |
| <i>MRA Associates, Inc.</i> ,<br>245 NLRB 676 (1979) .....  | 42             |
| <i>Myers v. Bethlehem Shipbuilding Corp.</i> ,<br>303 U.S. 41 (1938).....                                       | 33             |
| <i>N.D. Peters &amp; Co.</i> ,<br>327 NLRB 922 (1999) .....   | 54             |
| * <i>NLRB v. Bluefield Hospital Co.</i> ,<br>821 F.3d 534 (4th Cir. 2016) .....                                 | 29, 31         |

---

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

**TABLE OF AUTHORITIES**

| <b>Cases -Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>NLRB v. Cauthorne</i> ,<br>691 F.2d 1023 (D.C. Cir. 1982).....                      | 41             |
| <i>NLRB v. Chelsea Clock Co.</i> ,<br>411 F.2d 189 (1st Cir. 1969).....                | 27, 33, 36     |
| <i>NLRB v. Economics Laboratory, Inc.</i> ,<br>857 F.2d 931 (3d Cir. 1988) .....       | 33             |
| <i>NLRB v. Hood Corp.</i> ,<br>346 F.2d 1020 (9th Cir. 1965) .....                     | 33             |
| <i>NLRB v. HTH Corp.</i> ,<br>693 F.3d 1051 (9th Cir. 2012) .....                      | 52             |
| <i>NLRB v. Jas. H. Matthews &amp; Co.</i> ,<br>342 F.2d 129 (3d Cir. 1965) .....       | 33             |
| <i>NLRB v. MEMC Electronic Materials, Inc.</i> ,<br>363 F.3d 705 (8th Cir. 2004) ..... | 31             |
| <i>NLRB v. Montgomery Ward &amp; Co.</i> ,<br>133 F.2d 676 (9th Cir. 1943) .....       | 40             |
| <i>NLRB v. Noel Canning</i> ,<br>134 S. Ct. 2550 (2014).....                           | 5, 36          |
| <i>NLRB v. Parkhurst Manufacturing Co.</i> ,<br>317 F.2d 513 (8th Cir. 1963) .....     | 34             |
| <i>NLRB v. United Dairies</i> ,<br>337 F.2d 283 (10th Cir. 1964).....                  | 33-34          |

---

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

## TABLE OF AUTHORITIES

| <b>Cases -Cont'd</b>   | <b>Page(s)</b> |
|--|----------------|
| <i>NLRB v. United Ins. Co.</i> ,<br>390 U.S. 254 (1968) .....  | 41             |
| <i>O'Neill, Ltd.</i> ,<br>288 NLRB 1354 (1988), <i>enforced</i> ,<br>965 F.2d 1522 (9th Cir. 1992) .....                                       | 52             |
| <i>Pierre Apartments</i> ,<br>217 NLRB 445 (1975) .....  | 33             |
| <i>Powell Electrical Manufacturing Co.</i> ,<br>287 NLRB 969 (1987), <i>enforced in relevant part</i> ,<br>906 F.2d 1007 (5th Cir. 1990) ..... | 47             |
| <i>PRC Recording Co.</i> ,<br>280 NLRB 615 (1986), <i>enforced</i> ,<br>836 F.2d 289 (7th Cir. 1987) .....                                     | 46-47          |
| <i>Rubin v. Hosp. of Barstow, Inc.</i> ,<br>No. ED-CV 13-933, 2013 WL 3946543 (C.D. Cal. July 29, 2013) .....                                  | 4              |
| <i>Rubin v. Hosp. of Barstow, Inc.</i> ,<br>No. ED CV 13-933, 2013 WL 4536849 (C.D. Cal. Aug. 26, 2013) .....                                  | 54             |
| <i>San Juan Bautista Medical Center</i> ,<br>356 NLRB 736 (2011) .....   | 55             |
| <i>Semi-Steel Casting Co. v. NLRB</i> ,<br>160 F.2d 388 (8th Cir. 1947) .....  | 28             |
| <i>Silver Brothers Co.</i> ,<br>312 NLRB 1060 (1993) .....   | 45             |

---

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

## TABLE OF AUTHORITIES

| <b>Cases -Cont'd</b>  | <b>Page(s)</b> |
|---|----------------|
| <i>SSC Mystic Operating Co.</i> ,<br>360 NLRB 605 (2014), <i>enforced</i> ,<br>801 F.3d 302 (D.C. Cir. 2015).....   | 26             |
| * <i>SSC Mystic Operating Co. v. NLRB</i> ,<br>801 F.3d 302 (D.C. Cir. 2015).....                                   | 5, 15, 22      |
| <i>Success Village Apartments, Inc.</i> ,<br>347 NLRB 1065 (2006) .....   | 49             |
| <i>Sure-Tan, Inc. v. NLRB</i> ,<br>467 U.S. 883 (1984).....   | 46             |
| <i>Taft Broadcasting Co.</i> ,<br>163 NLRB 475 (1967), <i>enforced</i> ,<br>395 F.2d 622, 628 (D.C. Cir. 1968)..... | 46             |
| <i>Teamsters Local 115 v. NLRB</i> ,<br>640 F.2d 392 (D.C. Cir. 1981).....  | 49             |
| <i>Teamsters Local 175 v. NLRB</i> ,<br>788 F.2d 27 (D.C. Cir. 1986).....   | 45, 46         |
| <i>Teamsters Local 639 v. NLRB</i> ,<br>924 F.2d 1078 (D.C. Cir. 1991).....   | 46             |
| <i>Traders Oil Co.</i> ,<br>119 NLRB 746 (1957), <i>enforced</i> ,<br>263 F.2d 835 (5th Cir. 1959) .....            | 27             |
| <i>UC Health</i> ,<br>360 NLRB 608 (2014), <i>enforced</i> ,<br>803 F.3d 669 (D.C. Cir. 2015).....                  | 26             |

---

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

## TABLE OF AUTHORITIES

| <b>Cases -Cont'd</b>   | <b>Page(s)</b>               |
|--|------------------------------|
| * <i>UC Health v. NLRB</i> ,<br>803 F.3d 669 (D.C. Cir. 2015).....   | 5, 15, 17, 22, 23, 29-31, 34 |
| <i>United Dairies, Inc.</i> ,<br>144 NLRB 153 (1963), <i>enforced</i> ,<br>337 F.2d 283 (10th Cir. 1964) .....       | 27-28                        |
| <i>United Food &amp; Commercial Workers International Union v. NLRB</i> ,<br>852 F.2d 1344 (D.C. Cir. 1988).....     | 49                           |
| <i>United Food &amp; Commercial Workers Union v. NLRB</i> ,<br>447 F.3d 821 (D.C. Cir. 2006).....                    | 30                           |
| <i>United Technologies Corp.</i> ,<br>268 NLRB 557 (1984) .....  | 55                           |
| <i>United Technologies Corp.</i> ,<br>296 NLRB 571 (1989) .....  | 42                           |
| <i>Universal Camera Corp. v. NLRB</i> ,<br>340 U.S. 474 (1951).....  | 41                           |
| <i>Vanguard Fire &amp; Supply</i> ,<br>345 NLRB 1016 (2005), <i>enforced</i> ,<br>468 F.3d 952 (6th Cir. 2006) ..... | 42                           |
| <i>Virginia Electric &amp; Power Co. v. NLRB</i> ,<br>319 U.S. 533 (1943).....                                       | 49-50                        |
| <i>W&amp;M Properties of Connecticut, Inc. v. NLRB</i> ,<br>514 F.3d 1341 (D.C. Cir. 2008).....                      | 45                           |
| <i>Wayneview Care Center v. NLRB</i> ,<br>664 F.3d 341 (D.C. Cir. 2011).....   | 46, 47, 53                   |

---

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

## TABLE OF AUTHORITIES

| <b>Statutes:</b>  | <b>Page(s)</b>           |
|---|--------------------------|
| National Labor Relations Act, as amended<br>(29 U.S.C. § 151 et seq.)                                       |                          |
| *Section 3(b) (29 U.S.C. § 153(b)).....   | 4, 16, 24, 25, 26        |
| Section 7 (29 U.S.C. § 157) .....   | 40                       |
| Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....  | 4, 6, 12, 14, 22, 41, 42 |
| Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....  | 4, 6, 12, 14, 22, 41, 42 |
| Section 8(d) (29 U.S.C. § 158(d)).....  | 42                       |
| Section 10(a) (29 U.S.C. § 160(a)) .....  | 2                        |
| Section 10(c) (29 U.S.C. § 160(c)) .....  | 51, 52                   |
| Section 10(e) (29 U.S.C. § 160(e)) .....  | 2, 43                    |
| Section 10(f) (29 U.S.C. § 160(f)) .....  | 2                        |
| Section 10(j) (29 U.S.C. § 160(j)).....   | 4                        |
| <br><b>Regulations:</b>   |                          |
| 29 C.F.R. § 102.178 .....   | 26                       |
| 29 C.F.R. § 102.182 .....   | 26                       |
| 29 C.F.R. § 102.62(a).....  | 3, 27                    |
| 29 C.F.R. § 102.62(a)-(c).....  | 27                       |
| 29 C.F.R. § 102.67 .....  | 25                       |
| 29 C.F.R. § 102.67(g) .....   | 17                       |
| 29 C.F.R. § 102.69 .....  | 27                       |
| 29 C.F.R. § 102.70 .....  | 27                       |
| <br><b>Rules:</b>   |                          |
| Fed.R.App.P. 28(a)(8)(A) .....  | 38-39                    |
| <br><b>Other Authorities:</b>   |                          |
| 105 Cong. Rec. 19,770 (1959) .....  | 25                       |
| 29 Fed. Reg. 3911 (May 4, 1961) .....   | 25                       |
| 16AA Wright, A. Miller, E. Cooper & E. Gressman, <i>Federal Practice and<br/>Procedure</i> , § 3974.1 ..... | 39                       |

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Hospital of Barstow, Inc., d/b/a Barstow Community Hospital (“Barstow”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a

Board Order issued against Barstow. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on July 15, 2016, and is reported at 364 NLRB No. 52.

The Court has jurisdiction over these consolidated proceedings under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties. Barstow originally filed a petition for review on July 18, 2016, which it later withdrew, and on September 28 filed a new petition for review, and the Board filed a cross-application for enforcement on August 16. Both were timely; the Act places no time limit on such filings.

### **STATEMENT OF THE ISSUES**

1. Whether the Board reasonably determined that a Regional Director retains authority to process a representation proceeding and to issue a certification pursuant to consent-election agreement, notwithstanding the absence of a Board quorum.
2. Whether the Board is entitled to summary enforcement of the unchallenged portions of its Order.
3. Whether substantial evidence supports the Board’s finding that Barstow violated the Act by refusing to submit any proposals or counterproposals until the Union submitted its entire contract proposal.

4. Whether substantial evidence supports the Board's finding that Barstow violated the Act by declaring impasse and refusing to bargain unless the Union directed unit employees to stop using the "assignment despite objection" form.

5. Whether the Board properly exercised its broad remedial discretion in ordering Barstow to reimburse the Union's negotiating expenses.

6. Whether the Board reasonably declined to defer the case to arbitration.

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are in the Addendum.

### **STATEMENT OF THE CASE**

The Regional Director certified the California Nurses Association/National Nurses Organizing Committee ("the Union") as the collective-bargaining representative of Barstow's registered nurses on June 29, 2012, following an election pursuant to a consent-election agreement. The parties to the consent-election agreement, consistent with Board regulation, "agree[d] to waive their right to a pre-election hearing, agree[d] to an election among a defined unit of employees, and agree[d] that the regional director's determination of post-election disputes will be final." (A.871 (citing 29 C.F.R. § 102.62(a)).) The parties began

negotiations for a first contract, but bargaining broke down, and the Union filed charges against Barstow for various violations of the duty to bargain in good faith.

Based on the charges filed by the Union, the Board's Acting General Counsel issued a consolidated complaint alleging that Barstow violated Sections 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain in good faith and by unilaterally implementing changes to the terms and conditions of employment. Following a hearing, an administrative law judge found merit to the allegations and issued a decision and recommended order.<sup>1</sup> (A.727.)<sup>2</sup> On review, the Board affirmed the judge's findings, but modified the recommended decision and remedy to include an additional violation and an additional special remedy. (A.719-22.) The Board also rejected Barstow's claim, raised for the first time in the unfair-labor-practice case, that the Regional Director's certification of the Union as the employees' collective-bargaining representative was invalid because it was issued when the Board lacked the statutorily mandated quorum. *See* 29

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<sup>1</sup> In May 2013, around the same time as the hearing, the Board sought and later obtained a temporary injunction under Section 10(j) of the Act (29 U.S.C. § 160(j)) directing Barstow to bargain in good faith with the Union and rescind its unilateral changes. *Rubin v. Hosp. of Barstow, Inc.*, No. ED-CV 13-933, 2013 WL 3946543 (C.D. Cal. July 29, 2013).

<sup>2</sup> "A." references the parties' deferred appendix filed on August 17, 2017. "Br." refers to Barstow's opening brief. References before a semicolon are to the Board's findings; those following are to the supporting evidence.

U.S.C. 153(b); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).<sup>3</sup> The Board concluded that because Barstow had entered into negotiations with the Union, it had waived any challenge to the certification. (A.718 n.5.)

On appeal, the Court granted Barstow's petition for review without considering the merits of the Board's unfair-labor-practice findings, concluding instead that Barstow had not waived its challenge to the certification. *Hosp. of Barstow v. NLRB*, 820 F.3d 440, 442-43 (D.C. Cir. 2016). The Court determined that *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015), and *SSC Mystic Operating Co. v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015), which held that Regional Directors, during the period the Board had no quorum, retained their delegated power to conduct representation proceedings, were not dispositive. Those cases involved stipulated-election agreements, which provide for Board review during the representation proceeding. *Barstow*, by contrast, involved a consent-election agreement, which provides for no such Board review during the representation proceeding. The Court therefore vacated the Board's decision and remanded the case "to enable the Board to render an interpretation as to whether . . . Regional Directors retained power over representation elections notwithstanding the lapse of a Board quorum . . . ." *Barstow*, 820 F.3d at 441.

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<sup>3</sup> The Board regained a quorum in August 2013. See *The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members> (last viewed June 27, 2017).

On remand, the Board concluded that Regional Directors retain that authority under consent-election agreements, despite the lack of a Board quorum. The Board reaffirmed its prior findings that Barstow violated Section 8(a)(5) and (1) of the Act by refusing to submit any proposals or counterproposals until the Union submitted its entire contract proposal, by declaring impasse and refusing to bargain unless the Union directed unit employees to stop using certain forms, and by unilaterally changing the terms and conditions of employment.

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

### **A. Background; the Parties Enter a Consent-Election Agreement; Nurses Vote in Favor of the Union; and the Regional Director Certifies the Union**

Barstow is an acute-care facility in Barstow, California, owned by a parent company, Community Health Systems ("Community Health"). The Union sought to represent Barstow's registered nurses. On May 1, 2012, Barstow and the Union executed a consent-election agreement, agreeing that the Regional Director would resolve all representation matters and that her determination would be final. In agreeing to forego Board review of the representation case, the parties received a prompt election and expeditious resolution of post-election issues. Before the election, the Union and Community Health tentatively agreed on certain collective-bargaining issues including retirement benefits, union security, and recognition, as well as arbitration of disputes. The Union and Community Health never executed

the pre-election agreement. (A.718,724-25; A.44,67-69,286-90,312-19,333-39,351-432.)

On May 10, the nurses voted 38-19 in favor of the Union. On May 17, Barstow filed timely objections to conduct affecting the election. The Regional Director investigated and overruled the objections and, on June 29, certified the Union, at a time when the Board lacked a quorum. (A.718,724-25; A.333-48.)

**B. Barstow Maintains Reporting Policies Involving Patients, Visitors, and Staff To Improve Patient Safety**

Barstow has reporting processes to improve patient care and safety, including an on-line event report form. Employees use the report to document incidents that occur during their shift such as injuries or falls of patients, visitors, and staff, medication errors, and patients leaving against medical advice. Nurses receive training on the policy, the reporting system, and completion of the forms during new employee orientation. Barstow's event report form is not discoverable in a medical malpractice suit or by the public. (A.718,724-25; A.182-92,595-604.)

**C. The Union Develops a Form To Assist the Nurses with Patient Care and Safety and with Protection of Their Licenses**

The Union created an "assignment despite objection" ("ADO") form for nurses to document assignments or situations they feel may compromise patient safety or care or their nursing license. The Union distributed these forms to

Barstow's nurses after the election, conducted training, and made them available for the nurses' use. (A.718,725; A.50-51,104-05,116,129-30,349-50.)

Under the ADO process, a nurse verbally notifies her supervisor about the issue and allows the supervisor to address it. If the matter remains unresolved, the nurse completes the ADO form, which documents the reason for the objection, its potential effect, and the supervisor's response. The nurse gives a copy to her manager and the Union. Nurses continued to perform the work assignment.

Further, the Union instructed the nurses to continue following Barstow's reporting procedures. The Union's form is not protected from discovery. (A.718,725; A.50-51,104-05,116,129-30,349-50.)

**D. The Parties Discuss Preliminary Bargaining Details; Barstow Objects to the ADO Form; and Barstow Refuses To Bargain Until the Union Submits Its Full Contract Proposal**

On July 16, Barstow and the Union held a meeting to discuss bargaining logistics. Stephen Matthews was the Union's lead negotiator, and attorney Don Carmody was Barstow's lead negotiator. A bargaining team comprised of three nurses assisted Matthews, while Human Resources Director Jan Ellis assisted Carmody. The Union submitted an information request, and the parties discussed future dates. During this meeting, Carmody insisted that the Union stop using the ADO form. Matthews responded that the nurses would follow Barstow's internal procedure as well as complete the ADO form. (A.718,725-26; A.52-56.)

On July 26, at the first bargaining session, the Union presented an extensive 82-page contract proposal containing all articles except wages. Carmody responded that Barstow would not offer *any* proposals until the Union provided *all* of its proposals.<sup>4</sup> Union representative Matthews insisted that Barstow was bargaining in bad faith, but Carmody refused to yield. Barstow did not offer any proposals or counterproposals. (A.718,725-26; A.59-66,351-342.)

At the second bargaining session on August 1, pursuant to the unsigned pre-election agreement between the Union and Community Health, Barstow and the Union tentatively agreed to three articles that the Union submitted on July 26: recognition, union security and retirement benefits. Carmody again stated that Barstow would make no proposals or counterproposals until the Union submitted all its proposals. Matthews again responded that Barstow was not bargaining in good faith. Carmody ended the meeting by reiterating that there would be no counterproposals until Barstow received all of the Union's proposals. (A.718,725; A.67-71,351-432.)

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<sup>4</sup> In parallel negotiations between the Union and another hospital owned by Community Health, Carmody was chief negotiator and behaved in an identical manner – opposing the ADO form, refusing to bargain unless the Union submitted all of its proposals, and declaring impasse over the form. *See Fallbrook Hosp.*, 360 NLRB 644 (2014), *enforced*, 785 F.3d 729 (D.C. Cir. 2015).

**E. Barstow Continues Its Refusal To Submit Proposals and Its Objection to the ADO Form and Unilaterally Changes Its Policy for Certification Trainings and Reimbursement**

At the third session on August 15, the parties discussed the Union's information requests, and Matthews presented a document showing that another Community Health hospital allowed the ADO form. Carmody responded that other hospitals did not matter; Barstow would not accept the form. The meeting ended with Carmody refusing to make proposals or counterproposals until he received the Union's wage proposal. (A.718,725; A.71-75,351-432.)

During the last week of August, the Union learned that Barstow had changed its policy on certification trainings; nurses must renew their certifications every two years. Barstow mandated a self-directed online program called HeartCode and capped the number of paid hours for completing trainings. (A.719; A.75-76,138-39,515-17.)

At the September 13 bargaining session, the Union submitted a proposal to allow nurses to obtain their certification trainings at any American Heart Association approved facility. Carmody did not respond to the proposal because he claimed he could not reach any Barstow officials for an answer. Matthews asked Carmody for proposals or counterproposals. Carmody refused because the Union had not yet submitted its full contract proposal, and the meeting ended. (A.718,725; A.77-82,481.)

**F. The Union Submits Its Wage Proposal; Barstow Finally Submits Proposals; and Barstow Declares Impasse**

On September 26, the Union submitted its wage proposal to Ellis because Carmody was absent. Ellis stated that she could accept the Union's proposal but had no bargaining authority. Matthews responded that the Union expected proposals, but Ellis reiterated that she could only receive the wage proposal. The session ended. Later that day, the Union filed a charge alleging that Barstow had violated the Act by, among other actions, refusing to submit any proposals or discuss any of the Union's proposals until the Union submitted an entire set of contract proposals and unilaterally changing the certification process for nurses. (A.718,724-26; A.82-85,296-98,433-50,490-514,518-73.)

On October 17, the Union again requested proposals and counterproposals; Carmody offered none. After a two-hour discussion of the Union's proposals, the session ended with Carmody stating that he would provide written counterproposals on a number of articles "at some point." Later that day, Carmody sent Matthews a grievance and arbitration proposal and a no-strike/no-lockout proposal. (A.718,725; A.88-90.)

On October 19, the Union amended its charge to include an additional violation related to unilateral changes in rates of pay. The parties held bargaining sessions on November 8, 14, and 29, during which Barstow submitted contract proposals. At the end of the November 29 meeting, Carmody proposed that the

parties meet in January. The Union objected to the late scheduling, and the parties agreed to meet on December 28. (A.718,725; A.90-96,451-80.)

On December 27, the Regional Director issued a complaint and notice of hearing alleging that Barstow failed to bargain in good faith with the Union in violation Section 8(a)(5) and (1) of the Act. (A.302)

At the December 28 session, the Union requested information about and the parties discussed Barstow's pension plan. Carmody then declared the parties at impasse over the use of the ADO form. Matthews responded that the Union would continue using the form, but that it was willing to bargain over its use and any other issue. Carmody insisted the parties were at impasse over the form and therefore were at impasse over every issue, and stated that the parties needed a mediator. Matthews denied the parties were at impasse, but did not oppose mediation. Barstow never submitted any proposals concerning the ADO form. (A.718,725; A.96-100.) Later that day, Matthews sent Carmody an email reiterating the Union's willingness to negotiate over any issue, with or without mediator assistance. He resent the email on December 31. Carmody never replied. (A.718,725; A.79,351-432,482-88.)

On January 10, 2013, the Union filed a second charge alleging that Barstow violated the Act by refusing to bargain unless the Union waived the nurses' right to complete ADO forms. On January 11, the parties met with a federal mediator.

The mediator informed the Union that Carmody insisted that the parties were at impasse over the use of the form and, therefore, were at impasse over everything. The Union maintained that the parties were not an impasse. The parties did not hold additional bargaining sessions, despite Matthews' repeated attempts to do so. (A.718,725; A.100-02.)

On May 13, the Acting General Counsel issued an amended consolidated complaint against Barstow.<sup>5</sup> An administrative law judge held a hearing on the complaint allegations and found Barstow violated the Act. (A.718,725; A.9-16.)

## **II. THE BOARD'S 2014 DECISION AND ORDER**

On those facts, the Board (then-Chairman Pearce and Members Hirozawa and Johnson) determined, in agreement with the administrative law judge, that Barstow violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain with the Union over the terms of a collective-bargaining agreement. (A.718.) The Board also found that Barstow violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of unit employees. (A.718.) The Board adopted the judge's finding that deferral to arbitration was inappropriate and rejected Barstow's contention that it had no bargaining obligation because the underlying certification of

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<sup>5</sup> On June 29, 2016, after the Court vacated and remanded the prior case to the Board, General Counsel Richard F. Griffin, Jr. ratified the consolidated complaint. (A.873 n.10.)

representative issued when the Board lacked a quorum. (A.718 nn.3, 5.) The Board determined that Barstow had waived its right to challenge the certification's validity because it had begun negotiations with the Union. (A.718 n.5.)

### III. THE COURT'S OPINION

On review, without addressing the merits of the Board's unfair-labor-practice findings, the Court granted Barstow's petition for review, vacated the Board's decision, and remanded the case "to enable the Board to render an interpretation as to whether . . . Regional Directors retained power over representation elections notwithstanding the lapse of a Board quorum." *Barstow*, 820 F.3d at 441.

First, the Court held that Barstow's challenge to the Regional Director's exercise of delegated authority during the time the Board lacked a quorum was not subject to waiver for failure to preserve the claim before the Board. *Id.* The Court then addressed the merits of Barstow's challenge, noting that *UC Health* and *SSC Mystic* provide the "backdrop" because those cases also presented the issue of the Regional Director's exercise of delegated authority to certify the results of a representation election during the time the Board lacked a quorum. *Id.* at 443. The Court explained that, in *UC Health* and *SSC Mystic*, it held that the Act was silent on the issue and thus deferred to the Board's "reasonable interpretation that the lack of a Board quorum does not prevent Regional Directors from continuing to

exercise delegated authority that is not final because it is subject to eventual review by the Board.” *Barstow*, 820 F.3d at 444 (citing *SSC Mystic*, 801 F.3d at 308).

That is to say, “once a quorum is restored,” the Board could “exercise the power the [Act] preserves for it to review the Regional Director’s decisions.” *UC Health*, 803 F.3d at 675.

The Court explained, however, that both *UC Health* and *SSC Mystic* involved *stipulated*-election agreements, which reserve the parties’ right to Board review, so the delegation at issue was of “‘*nonfinal* authority’ to Regional Directors ‘to supervise elections, subject to review and approval by the Board itself.’” *Barstow*, 820 F.3d at 444 (quoting *UC Health*, 803 F.3d at 678) (emphasis in original). This case, the Court observed, involves a *consent*-election agreement, and “the Board has not rendered any interpretation of the [Act] in the context of a consent election as to which the employer and the union agree that the Regional Director’s decisions are final.” *Barstow*, 820 F.3d at 444. The Court also noted *Barstow*’s argument that this case is controlled by *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) – which held that the Board’s delegation of final Board authority to a three-member group lapsed with the loss of a Board quorum – but “decline[d] to resolve that issue in the first instance.” *Barstow*, 820 F.3d at 444. Accordingly, the Court remanded the case for the Board to address whether the Act “enables a Regional Director to conduct elections under

a consent-election agreement when there is no Board quorum” and to “tak[e] into account [the Court’s] decisions in *UC Health* and *SSC Mystic*.” *Id.*

#### **IV. THE BOARD’S 2016 SUPPLEMENTAL DECISION AND ORDER**

On remand, the Board invited the parties to file position statements. On July 15, 2016, the Board (then-Chairman Pearce and Members Hirozawa and McFerran) issued its Supplemental Decision and Order. The Board concluded that the Regional Director retained the authority to process the underlying representation proceeding and to issue a certification pursuant to the parties’ consent-election agreement, notwithstanding the lapse of a Board quorum.

The Board explained (A.871) that under the 1959 amendment to Section 3(b) of the Act, 29 U.S.C. § 153(b), which authorizes the Board to delegate certain powers to its Regional Directors in representation cases, and the 1961 Delegation based on that authorization, no final authority is delegated to Regional Directors. Rather, all authority delegated to Regional Directors to process representation cases and to certify the results of elections is subject to the Board’s authority to “review any action of a regional director” at the objection of an interested person. *See* 29 USC § 153(b). For that reason, the Board explained (A.871), it has not delegated its “final, plenary authority” to its Regional Directors. Nevertheless, Board review is not required in every case because the parties may, at any time,

waive their right to request review, and in the absence of a request for review, the Regional Director's actions become final. *See* 29 C.F.R. § 102.67(g).

The Board then pointed out (A.871) that in consent elections, parties agree in advance to forego direct Board review, and “it is the parties’ agreement, not the Board’s delegation, that gives the Regional Director’s [representation] decision finality.” (A.871.) The Board likened the parties’ actions in executing a consent-election agreement to the choice parties make in opting not to seek Board review in a stipulated-election agreement. In both instances, the Board explained, the Regional Director’s actions are only final by “acquiescence of the parties.” (A.871-72 & nn.4, 5 (citing *UC Health*, 803 F.3d at 671, 680).)

In addition, as the Board noted (A.872), the Board affords the parties to consent elections an opportunity for Board review in any unfair-labor-practice proceeding testing the validity of the Regional Director’s certification. Notwithstanding the parties’ agreement that the Regional Director’s representation case decisions would be final, the Board “may consider a challenge to the validity of the regional director’s certification in a subsequent related unfair-labor-practice proceeding if there is a showing of fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director’s rulings were arbitrary or capricious.” (A.872.)

Next, the Board – accepting as the law of the case the Court’s finding that Barstow’s challenges to the certification were not waived after it commenced bargaining – reviewed the underlying representation proceeding. The Board found no evidence or allegation of fraud, misconduct, or such gross mistakes as to imply bad faith, or that the Regional Director’s rulings were arbitrary or capricious. (A.872.) Accordingly, the Board upheld the validity of the certification and reviewed the merits of the unfair-labor-practice case. (A.872.) The Board agreed with the majority rationale in the prior decision, reported at 361 NLRB No. 34 (2014), and adopted and reissued that decision and order. (A.872-73.)

The Board’s Order requires Barstow to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (A.722.) Affirmatively, the Order requires Barstow to bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement; to notify, and on request, bargain with the Union before implementing changes to the terms and conditions of employment; and to rescind, at the Union’s request, the HeartCode policy and make employees whole. (A.722.) The Board also, in agreement with the judge, extended the certification by one year and directed Barstow to post a remedial notice. (A.721-22.) Further,

the Board ordered Barstow to reimburse the Union for expenses it incurred for the negotiations held from July 26, 2012, through January 11, 2013. (A.721-22.)

The Board denied Barstow's Motion for Reconsideration on September 14, 2016. (A.947-48.)

### SUMMARY OF ARGUMENT

1. The Board reasonably interpreted Section 3(b) of the Act, its longstanding 1961 delegation of authority to Regional Directors to process representation petitions, and its Rules and Regulations to determine that lack of a Board quorum does not abrogate the authority of a Regional Director to conduct a consent election pursuant to the parties' agreement. Under a consent-election agreement, the parties agree in advance to vest the Regional Director with final authority over the representation case – authority that is subject to Board review for fraud, misconduct or abuse of discretion in a subsequent unfair-labor-practice proceeding. Therefore, in consent elections, the representation decision of the Regional Director is final as to representation and election disputes only through party acquiescence. Referencing this Court's rationale in *UC Health* and *SSC Mystic*, the Board reasonably analogized this scenario to that of parties to a stipulated-election agreement, wherein the parties' choice not to seek discretionary Board review allowed the Regional Director's representation decision to be final notwithstanding the lack of a Board quorum.

Furthermore, the Regional Directors' conduct of consent elections during a time when the Board lacks a quorum is subject to Board review in unfair-labor-practice proceedings aimed at testing the validity of the Regional Director's certification. As the Board explained, through the test-of-certification procedures, an employer who is party to a consent-election agreement can refuse to bargain once the Regional Director certifies the union. Notwithstanding the parties' agreement that the Regional Director's certification would be final, the employer can defend against an unfair-labor-practice complaint on the ground that the certification was issued as a result of fraud, abuse, or misconduct or that the Regional Director acted arbitrarily or capriciously.

For all these reasons, *Laurel Baye* is not controlling. Unlike there, this case does not involve any Board delegation of final Board authority, and therefore *Laurel Baye* does not preclude the Court from upholding the Board's reasonable determination that the temporary lack of Board quorum did not preclude the Regional Director from issuing a certification of the election pursuant to the final authority the parties delegated to the Regional Director in their consent-election agreement.

2. Before the Court, Barstow fails to pursue nine of the issues listed in its Statement of the Issues. This failure entitles the Board to summary enforcement of

the portions of its Order relating to those unchallenged violations and special remedy.

3. Substantial evidence supports the Board's findings that Barstow violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith. The credited evidence shows that Barstow refused to bargain unless the Union submitted all of its proposals, while refusing to submit any proposals or counterproposals or discuss the Union's proposals for at least five bargaining sessions over three months. Barstow's conduct evinced bad faith and a deliberate attempt to frustrate the bargaining process. Barstow principally contests the Board's finding by relying on an unsigned pre-election agreement that its parent company negotiated with the Union and with which Barstow itself had no involvement.

4. The Board's finding that Barstow violated Section 8(a)(5) and (1) of the Act by declaring impasse and conditioning bargaining on its demand that the Union direct nurses to stop using the ADO form is likewise supported by substantial evidence. The parties never bargained over the form, and Barstow's claim otherwise is contrary to the credited record evidence.

5. The Board acted within its broad remedial discretion in determining that Barstow's bad-faith bargaining and deliberate efforts to prevent meaningful progress in bargaining warranted reimbursement of the Union's negotiating

expenses. The remedy comports with precedent and is appropriate under the circumstances here.

6. The Board's determination not to defer the case to arbitration is supported by substantial evidence and consistent with law. The Board properly found that there was no agreement to arbitrate and that the parties' immature relationship militated against arbitration deferral.

## ARGUMENT

### **I. The Board Reasonably Determined that a Regional Director Retains Authority To Process a Representation Proceeding and To Issue a Certification Pursuant to a Consent-Election Agreement, Notwithstanding the Absence of a Board Quorum**

#### **A. Introduction**

In passing the Act, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the Act is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "the statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *UC Health*, 803 F.3d at 674; *SSC Mystic*, 801 F.3d at 307.

In *UC Health*, this Court applied *Chevron* deference to uphold the Board's

conclusion that, under Section 3(b) of the Act, the Board's delegation of authority to Regional Directors to conduct stipulated elections did not lapse when the Board lost a quorum. *UC Health*, 803 F.3d at 673-75. The Court recognized that the Act "says nothing about what effect the loss of a quorum has on pre-existing delegations of authority to the Regional Directors," and that the Board's interpretation of the Regional Directors' power to act in the absence of a Board quorum was "reasonable and consistent with the statute's purpose." *Id.* at 675. The Court noted the Board's explanation that the Act "expressly authorize[s] the delegation" of power in representation cases to the Regional Director, and that the Board had issued a standing delegation under that authority. *Id.* The Court further recognized that the Board's interpretation "avoids unnecessarily halting representation elections any time a quorum lapses." *Id.* It enabled representation elections to proceed and set up cases for Board review once a quorum is restored, while allowing "unions and companies that have no objections to the conduct or result of an election [to] agree to accept its outcome without any Board intervention at all." *Id.* at 675-76.

The Board's determination in this case that Regional Directors remain vested with authority to conduct election proceedings pursuant to consent-election agreements, regardless of the Board's composition, is similarly reasonable and consistent with the Act's language and purpose. It also fully takes account of this

Court's decisions in *UC Health* and *SSC Mystic*.

**B. The Board Has Reasonably Determined that Construing the Act To Permit Regional Directors To Conduct Representation Proceedings in the Absence of a Board Quorum Is Consistent with the Act and Board Regulation**

In addressing the issue remanded by the Court, the Board reviewed (D&O 2) the language, legislative history, and purpose of the delegation provision of Section 3(b) of the Act. In 1959, Congress amended Section 3(b) of the Act and authorized the Board “to delegate to its regional directors its powers under section 9[, 29 U.S.C. § 159,] . . . to direct an election or take a secret ballot . . .,” subject to discretionary review by the Board.<sup>6</sup> 29 U.S.C. § 153(b). Congress recognized that the Board had developed a vast backlog, including a large number of pending representation petitions, and designed the amendment “to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.” *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141

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<sup>6</sup> The relevant portion of Section 3(b) provides that the Board is authorized: to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. § 153(b).

(1971) (internal quotation marks omitted); *accord Amalgamated Clothing Workers of Am., AFL-CIO v. NLRB*, 365 F.2d 898, 903 & n.9 (D.C. Cir. 1966); 105 Cong. Rec. 19,770 (1959) (statement of Senator Goldwater that the new provision would enable the Board to give Regional Directors the power “to act in all respects as the Board would act,” subject to discretionary Board review).

The Board further recognized (A.870) that in 1961, the Board invoked that authority and delegated decisional authority in representation cases to Regional Directors.<sup>7</sup> *See* 29 Fed. Reg. 3911 (May 4, 1961). Thereafter, the Board promulgated rules implementing that standing delegation. *See* 29 C.F.R. § 102.67; *Magnesium Casting*, 401 U.S. at 138. As the Board observed (A.870), those rules have remained in effect without interruption for more than 50 years, and Regional Directors have routinely exercised the authority delegated by those rules throughout the intervening decades, including during those periods when the Board lacked a quorum.

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<sup>7</sup> The delegation provides in relevant part:

Pursuant to section 3(b) of the [Act] . . . the Board delegates to its Regional Directors “its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof.” Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

29 Fed. Reg. 3911 (May 4, 1961).

Such uninterrupted continuation of operations is consistent with Board policies and procedures in the absence of a quorum. For instance, under the Board's Rules and Regulations "during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law," and representation cases should be processed to certification "[t]o the extent practicable" when the Board lacks a quorum. (A.870 (quoting 29 C.F.R. §§ 102.178, 102.182)).

Based on its review of the statutory language and purpose and its own longstanding regulatory actions, the Board reaffirmed its conclusion that "consistent with Section 3(b) of the Act, the 1961 Delegation, and the Board's Rules and Regulations, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment." (A.870-71, citing *SSC Mystic Operating Co.*, 360 NLRB 605, 607 n.1 (2014), *enforced*, 801 F.3d 302 (D.C. Cir. 2015); *UC Health*, 360 NLRB 608, 610 n.2 (2014), *enforced*, 803 F.3d 669 (D.C. Cir. 2015); *Bluefield Hosp. Co.*, 361 NLRB No. 154, 2014 WL 7246760, at \*6 n.5 (2014), *enforced*, 821 F.3d 534 (4th Cir. 2016) (upholding Regional Director's certification of union pursuant to a consent-election agreement). As shown below, the Board reasonably concluded that that principle fully applies to Regional Director actions based on consent-election agreements.

**C. Parties' Voluntary Execution of Consent-Election Agreements Vest Regional Directors with Final Authority To Decide Post-Election Disputes**

**1. Consent-Election Agreements Provide Parties with an Expeditious Procedure for Resolving Election Disputes**

As the Board observed (A.871), there are several procedures that parties may voluntarily choose through which representation issues may be resolved without recourse to formal procedures. *See* 29 C.F.R. § 102.62(a)-(c). A consent-election agreement, in which the parties voluntarily agree that the Regional Director will have final authority to decide post-election disputes, is one such procedure. Consent-election agreements provide “prompt and final settlement of such controversies as may arise between the parties and thus minimize the delay in the administration of the Act.” *Traders Oil Co.*, 119 NLRB 746, 764-65 (1957), *enforced*, 263 F.2d 835 (5th Cir. 1959) (per curiam); *see* 29 C.F.R. § 102.62(a) (incorporating by reference the election procedures set forth in 29 C.F.R. §§ 102.69, 102.70).

For that reason, a consent election is “a valuable, and indeed necessary, device” that “is to be encouraged” because it “fairly expedites th[e] process” of determining “employee choice with respect to a bargaining representative.” *NLRB v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969); *see, e.g., United Dairies, Inc.*, 144 NLRB 153, 154 (1963) (“[T]he Board has recognized the value of such agreements not only in saving the expenditure of time and effort by the

Government, but also because of their tendency to stabilize labor-management relations and to expedite the settlement of labor disputes.”), *enforced*, 337 F.2d 283 (10th Cir. 1964). And the prompt and certain completion of representation proceedings intended by consent-election agreements would be thwarted if the parties are not held to their bargain. *See Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 391 (8th Cir. 1947) (ignoring an election agreement would “allow subterfuges for hampering and delaying a final determination of a bargaining representative” and “tend to defeat, rather than to effectuate, the policies of the Act”) (internal citations and quotation marks omitted)).

**2. Party Choice Manifested in a Consent-Election Agreement Gives Regional Directors Final Authority in Representation Cases, Analogous to a Party’s Choice To Forego Board Review of a Stipulated Election**

As shown above, consent-election agreements involve a conscious, knowing, and voluntary choice by both parties to forego Board review in the representation proceeding and allow Regional Directors’ representation decisions to be final. Given this framework, the Board reasonably concluded that “it is the parties’ agreement, and not the Board’s delegation, that gives the Regional Director’s decision finality.” (A.871.) The Board, therefore, found no “meaningful distinction between the ‘finality’ accorded to the Regional Director’s certification of representative based on the parties’ consent-election agreement and the ‘finality’ accorded to the Regional Director’s certification of representative in *UC Health*

based on the parties' choice not to seek Board review to which they otherwise were entitled under their stipulated-election agreement." (A.871 (footnote omitted)).

In analogizing the two types of election agreements, the Board reasonably observed that *UC Health* supports its view.<sup>8</sup> For instance, the Board found it to be "particularly instructive" (A.872) that in *UC Health* this Court attached significance to the fact that a Regional Director's actions pursuant to a stipulated-election agreement "only became final if the parties decide not to seek Board review . . . ." *UC Health*, 803 F.3d at 671. In consent-election agreements, parties likewise decide not to seek direct Board review of the Regional Director's actions. Further, the Board also considered (A.871 n. 4) the Court's observation in *UC Health* that "acquiescence of the parties . . . can give binding force to a Regional Director's determination." 803 F.3d at 680. Similarly, the Board reasoned, a consent-election agreement gives binding force to the Regional Director's determination through "acquiescence of the parties." (A.871 n.4); *accord NLRB v. Bluefield Hosp. Co.*, 821 F.3d 534, 544 (4th Cir. 2016) (agreement of the parties is binding).

For those reasons and contrary to Barstow's view (Br. 33-38), *UC Health* and *SSC Mystic* are in harmony with the Board's Supplemental Decision. The

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<sup>8</sup> To be clear, the Board *compared* stipulated-election and consent-election agreements; it did not state that the processes under both were identical, as Barstow maintains. (Br. 42.)

Board reasonably concluded (A.871) that it is not material that parties to a consent-election agreement make that choice before the representation proceeding, whereas parties to a stipulated-election agreement make that choice after the Regional Director issues a certification. Regardless of when the choice is exercised, “[i]t is the parties’ choice to leave the Regional Director’s decisions unchallenged that effectively makes the election final.” (A.871 n.5 (quoting *UC Health*, 803 F.3d at 680)). In any event, as discussed immediately below, the Board accounts for the fact that parties to a consent-election agreement agree in advance to the “finality” of the Regional Director’s decision, by affording the employer the opportunity to establish in an unfair-labor-practice proceeding that the certification was issued as a result of fraud, abuse, or misconduct or that the Regional Director acted arbitrarily or capriciously.

Barstow incorrectly argues (Br. 35-36) that the Board’s rationale in the Supplemental Decision amounts to the same waiver argument that the Court rejected in *UC Health* and *SSC Mystic*. In those cases, the Court rejected the Board’s position that the employer “*may not challenge* the Regional Director’s authority because [it] voluntarily entered into the Stipulated Election Agreement with the Union.” *UC Health*, 803 F.3d at 673 (emphasis added). On remand, the Board here accepted the Court’s holding that Barstow “did not waive its argument that the Regional Director lacked delegated authority to certify the Union during a

time when the Board lacked a quorum,” and addressed the merits of Barstow’s quorum-based challenge. (A.869.) In so doing, the Board did not rely solely on the parties’ agreement, but fully examined the purpose of consent elections and the significance of the parties’ mutual agreement that the Regional Director’s resolution of post-election disputes would be final in the representation proceeding. The Board observed, for example, that “it is the parties’ agreement, not the Board’s delegation, which gives a regional director’s decisions finality in the context of a consent election agreement,” citing this Court’s statement in *UC Health* that a regional director’s action can become final “if the parties decide not to seek Board review.” (A.872.)<sup>9</sup> The Board further explained that, given the parties’ conscious choice to enter into a consent-election agreement and forego direct review, it would be “anomalous to nullify the parties’ choice solely because, due to a lack of

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<sup>9</sup> *Accord Bluefield*, 821 F.3d at 543-44. In *Bluefield*, the Fourth Circuit agreed with this Court that the employer had not waived its no-quorum challenge by failing to raise it during the representation proceedings and by entering into consent-election agreements. Nevertheless, the Fourth Circuit rejected, on the merits, the employer’s argument that the Regional Director’s authority lapsed with a loss of the Board’s quorum. The court emphasized that, at bottom, “[t]his is a matter of contract law.” *Id.* at 544 (citing *NLRB v. MEMC Elec. Materials, Inc.*, 363 F.3d 705, 709 (8th Cir. 2004) (stating the Board was “on sound ground in emphasizing that parties are bound by an approved election agreement, just as they are bound by other contracts”)). A consent-election agreement was “among the ways to relinquish the right to plenary Board review and confer on the Regional Director final authority over representation proceedings.” *Bluefield*, 821 F.3d at 544 (citing *UC Health*, 803 F.3d at 680 (“Only the acquiescence of the parties or the Board’s ratification can give binding force to a Regional Director’s determination.”)).

quorum, there was no Board empowered to consider a request for review . . . .”

(A.871.)<sup>10</sup>

**D. The Board Retains Final, Plenary Authority To Consider Challenges to a Certification Issued Pursuant to a Consent-Election Agreement**

While the Act authorizes consent-election agreements in which the parties agree to be bound by a final decision by the Regional Director with respect to certification, it does not invest the Regional Director with absolute discretion or license arbitrary action. To the contrary, as the Board explained in its Supplemental Decision, notwithstanding the parties’ agreeing in advance that the Regional Director’s representation case decisions would be final, the Board “may consider a challenge to the validity of the regional director’s certification in a subsequent related unfair-labor-practice proceeding if there is a showing of fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director’s rulings were arbitrary or capricious.” (A.872.) Thus, a party can challenge a certification of representative, even one issued pursuant to a consent-election agreement, by refusing to recognize and bargain with the certified union and defending that refusal by reference to the foregoing Board standard. *Area E-7*

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<sup>10</sup> The Board’s rationale in the Supplemental Decision, particularly its discussion of *UC Health* and *SSC Mystic*, was not before the Court when oral argument was held in 2016. Therefore, Barstow’s references (Br. 35-36) to oral argument concerning a decision that has since been vacated and reconsidered are not relevant.

*Hosp. Ass'n*, 233 NLRB 798, 799 (1977); *Pierre Apartments*, 217 NLRB 445, 446 (1975); *General Tube Co.*, 141 NLRB 441, 445 (1963), *enforced*, 331 F.2d 751 (6th Cir. 1964); *see also Boire v. Greyhound*, 376 U.S. 473, 476-480 (1964) (explaining Congress's policy that the correctness of certification decisions should be reviewed by the courts after the Board issues an unfair-labor-practice order); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) (“[u]ntil the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it.”).<sup>11</sup>

Pursuant to this process, courts of appeals have, for decades, recognized that certifications issued by Regional Directors pursuant to consent-election agreements are subject to limited review by the Board and the courts of appeals in any related unfair-labor-practice proceeding. *See, e.g., NLRB v. Econ. Lab., Inc.*, 857 F.2d 931, 934 (3d Cir. 1988); *Chelsea Clock*, 411 F.2d at 193; *NLRB v. Hood Corp.*, 346 F.2d 1020, 1021-23 (9th Cir. 1965); *NLRB v. Jas. H. Matthews & Co.*, 342 F.2d 129, 131 (3d Cir. 1965) (collecting cases); *NLRB v. United Dairies*, 337 F.2d 283,

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<sup>11</sup> As the Board noted (A.872 & n.9), the Board's standard for its unfair-labor-practice review of consent elections is different from the standard the Board applies in unfair-labor-practice cases challenging directed or stipulated elections. In the latter kinds of cases, where Board review is available to the parties in the representation case, a party is generally precluded from litigating matters that could have been raised in the representation case in the absence of newly discovered or previously unavailable evidence or other special circumstances.

286 (10th Cir. 1964); *NLRB v. Parkhurst Mfg. Co.*, 317 F.2d 513, 519 (8th Cir. 1963).

Contrary to Barstow's claim (Br. 18, 30-31), the delegation here does not run afoul of *Laurel Baye*, which involved the Board's delegation of all of its powers under the Act, including its core adjudicatory function – the issuance of final orders resolving unfair-labor-practice allegations – to a delegee panel of three Board members who, with two sitting members, exercised the Board's authority once the Board lost a quorum. (A.872 n.7.) As *UC Health* teaches, a delegation of representation authority to Regional Directors, whose decisions are subject to Board review, fundamentally differs from the delegation of final Board authority in *Laurel Baye*. *UC Health*, 803 F.3d at 678-79. That fundamental difference applies here. As the Board explained, “it is the parties' agreement, not the Board's delegation, which gives a regional director's decisions finality in the context of a consent election agreement.” (A.872.) Furthermore, before the Board issues or a reviewing court enforces any final order requiring an employer to bargain based on the action of a Regional Director, the employer has the opportunity to demonstrate fraud, abuse, misconduct or arbitrary or capricious action. (A.872.)

Barstow repeatedly insists (Br. 30-37, 45-46) that the Board has vested “final, plenary authority” in Regional Directors when parties execute consent-election agreements. Repetition, however, does not render truth. Barstow refuses

to acknowledge that the parties themselves – not the Board – vest final authority in the Regional Director over the representation proceeding. Barstow also refuses to acknowledge that in consent-election cases, where the parties consent in advance to the finality of the Regional Director’s decision, the employer can avoid being required to bargain on the basis of the Regional Director’s certification if it can demonstrate “fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director’s rulings were arbitrary or capricious.” (A.872.) For these reasons, Barstow cannot show that Regional Directors possess the Board’s final, plenary authority.<sup>12</sup>

Contrary to Barstow’s claim that “the Board will refuse to undertake any further review of the case,” (Br. 32), the cases cited by Barstow establish the opposite. For instance, in *Affinity Medical Center*, 2013 WL 143371 (2013), the Board made eminently clear its review role in the remainder of the sentence that Barstow omits (Br. 43): “The Board has long refused to review the merits of a regional director’s determination under a consent election agreement *absent a*

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<sup>12</sup> This fundamental error pervades Barstow’s challenges to the Board’s Supplemental Decision. Thus the premise of Barstow’s multiple challenges is wrong: less powerful actors are not carrying out the Board’s full and final authority and rendering a “bizarre situation” (Br. 30); Regional Directors are not being permitted to circumvent the Board’s quorum requirement (Br. 31, 45); consent-election agreements do not bear “all the necessary hallmarks of the Board’s final, plenary authority” (Br. 31-32); and the Board is not allowing private parties to contract around statutory rights or to contravene the Act (Br. 37, 45-46).

*showing of fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director's rulings were arbitrary or capricious.*" *Affinity*, 2013 WL 143371, at \*1 n.1 (emphasis added). Further, the absence of a Regional Director's ability to exercise final, plenary authority is unequivocally shown in *Chelsea Clock*, 170 NLRB 69 (1968). In that case, the Board reviewed the action of a regional director pursuant to a consent-election agreement and refused to set aside the union's certification. *Id.* at 70-71. The First Circuit disagreed with the Board and concluded that the employer's refusal to bargain was justified because the Regional Director's actions in the representation case were arbitrary and capricious. *Chelsea Clock*, 411 F.2d at 192. That case plainly illustrates the Board's authority to review the Regional Director's decision for fraud, abuse, misconduct, and allegations of arbitrary or capricious conduct, and a reviewing court's ability to do so as well. Lastly, nothing in *Bluefield* establishes a lack of Board review; rather, the Board simply rejected the employer's request to revisit the Regional Director's representation determination without an allegation of fraud, abuse, misconduct, or arbitrary or capricious conduct.<sup>13</sup> 2014 WL 7246760, at \*6 n.6.

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<sup>13</sup> Barstow appears to rely on (Br. 32) *Bluefield Regional Medical Center*, 359 NLRB 1181,1181 n.2 (2013), but fails to acknowledge that the Board set it aside following the Supreme Court's decision in *Noel Canning*. See *Bluefield*, 2014 WL 7246760, at \*2.

Nor does Barstow advance its argument by relying (Br. 40-42) on language in the Board's Casehandling Manual and the Consent Election Agreement that regional director rulings in consent elections have the "same force and effect" as if issued by the Board. That language establishes only the finality of the Regional Director's actions *with regard to the representation case* where the parties have agreed that the Regional Director's actions should have that finality. That language does not address the longstanding precedent that the employer can argue to the Board in the related refusal-to-bargain proceeding that the Regional Director's action was tainted by fraud, abuse, misconduct or arbitrary or capricious action.

Barstow's attempt to show (Br. 42 n. 6) that Board review of consent-election certifications is an "illusory paper tiger" because there are so few examples ignores that consent elections providing for final decision by the Regional Director are comparatively rare. Most parties seeking expedited resolution of representation disputes enter into stipulated-election agreements, which afford the option of Board review in the representation case. In Fiscal Year 2010, the last year of available statistics, the Board issued 1786 certifications – 1516 after stipulated elections, 179 after directed elections, and 90 after consent elections. *See* Table 10-Analysis of Methods of Disposition of Representation and

Union Deauthorization Cases Closed, Fiscal Year 2010.<sup>14</sup> Therefore, consent elections represented 5% of all the certifications issued in 2010.<sup>15</sup> The lack of Board precedent relating to consent-election agreements, therefore, reflects the small sample size. Moreover, the limited number of cases reviewing consent elections underscores that the parties enter into those agreements to achieve expeditious resolution to the representation issue and to limit the grounds on which certifications may be challenged before the Board. Importantly, when one of those narrow grounds is asserted – challenges that go to fundamental questions of fair treatment by the government – review in the subsequent unfair-labor-practice case, as well as court review, is available.

## **II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTIONS OF ITS ORDER**

Barstow fails to pursue nine of its stated issues in its brief.<sup>16</sup> Under the Federal Rules of Appellate Procedure, Barstow's brief must contain its contentions "with respect to the issues presented, and the reasons therefor, with citations to the

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<sup>14</sup> Available at [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1696/table\\_10.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1696/table_10.pdf) (last viewed on June 27, 2017).

<sup>15</sup> Similar data exists for Fiscal Year 2009, when 41 certifications (out of 1586 total), or 2.6%, issued after a consent election. *See* Seventy-Fourth Annual Report of the National Labor Relations Board at 116 (Table 10) (G.P.O. 2009), available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1677/nlr2009.pdf> (last viewed June 27, 2017).

<sup>16</sup> Barstow does not pursue the following numbered issues from its Statement of the Issues (Br. 2-5): 4, 5, 6, 8, 13, 14, 15, 16, and 18.

authorities, statutes and parts of the record relied on.” Rule 28(a)(8)(A). As this Court has observed, “appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, failure to enforce [Rule 28(a)(8)(A)] will ultimately deprive [the Court] in substantial measure of that assistance of counsel which the system assumes – a deficiency that [the Court] can perhaps supply by other means, but not without altering the character of [the] institution.” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (“An issue is waived if it is not both raised in the statement of issues and pursued in the brief.”); 16AA Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974.1 (“to assure consideration of an issue by the court, the appellant must both raise it in the ‘Statement of the Issues’ and pursue it in the ‘Argument’ portion of the brief”). Here, counsel has made no attempt to address many of the issues stated, and the Court must decline to entertain Barstow’s unanalyzed claims.

By forfeiting Issues 13, 14, and 15, Barstow does not contest the Board’s unfair-labor-practice finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the HeartCode policy. Nor does it contest that portion of the Order requiring it to rescind the policy and make employees whole. Further, by forfeiting Issue 18, Barstow does not contest that its bad-faith bargaining

warrants imposition of an affirmative bargaining order and the special remedy of a one-year extension of the Union's certification period. Barstow's waiver of these issues entitles the Board to summary enforcement of those portions of its Order.

*See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BARSTOW VIOLATED THE ACT BY REFUSING TO SUBMIT ANY PROPOSALS OR COUNTERPROPOSALS UNTIL THE UNION SUBMITTED ITS ENTIRE CONTRACT PROPOSAL**

#### **A. Applicable Principles and Standard of Review**

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 his employees . . . ."<sup>17</sup>

29 U.S.C. §158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as the obligation "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). It is a long-recognized principle that sincere effort to reach common ground is the essence of good-faith bargaining. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943). The Board considers the totality

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<sup>17</sup> A violation of Section 8(a)(5) of the Act carries a "derivative" violation of Section 8(a)(1) of the Act, 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]." 29 U.S.C. § 158(a)(1); *see Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." 29 U.S.C. § 157.

of the circumstances in assessing whether a party has bargained in good faith. *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982). This Court recognizes that while the question of whether an employer has conferred in good faith “is not purely factual . . . its resolution is largely a matter for the Board’s expertise.” *Id.* (internal quotation marks omitted); accord *Local 13, Detroit Newspaper Printing & Graphic Union v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. (1979) (“The issues raised in this context are ‘delicate’ ones, particularly within the expertise of the Board.)).

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). The Board’s application of law to the facts is reviewed under the substantial evidence standard. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968).

**B. Substantial Evidence Supports the Board’s Finding that Barstow Refused To Bargain in Good Faith**

Under Board law, a party’s insistence on preconditions before discussing proposals is “antithetical to good-faith bargaining and exhibit[s] a cast of mind against reaching agreement.” *Fed. Mogul Corp.*, 212 NLRB 950, 951 (1974) (finding bad faith where employer refused to offer proposals and blocked

discussion of the union's proposals until the union agreed to the employer's noneconomic proposals), *enforced*, 524 F.2d 37 (6th Cir. 1975).<sup>18</sup> Examples of an employer's unlawful preconditions include refusing to bargain until the union provides all of its proposals, *Fallbrook*, 360 NLRB at 652; insisting on first obtaining the union's demands in writing, *Ardley Bus Corp.*, 357 NLRB 1009, 1011-12 (2011); conditioning bargaining on the union first furnishing an agenda, *Vanguard Fire & Supply*, 345 NLRB 1016 (2005), *enforced*, 468 F.3d 952 (6th Cir. 2006); and conditioning bargaining on economic contract issues, *United Techs. Corp.*, 296 NLRB 571, 572 (1989).

The failure to submit proposals or counterproposals also supports a finding of bad-faith bargaining. For instance, in *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979), the Board determined that the employer's failure to submit any proposals over the course of three bargaining sessions evinced a "basic intransigence" designed to undermine the union's negotiating efforts. *See also Health Care Serv. Group*, 331 NLRB 333, 336 (2008) (failure to make proposals for six months indicates bad faith); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007, 1042 (1996) (a party's failure to pursue or exchange proposals for five months is

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<sup>18</sup> In finding bad faith in *Federal Mogul*, the Board also relied on the employer's insistence that the union "concede exclusive control to [the employer] over matters that parties are obligated by law to bargain about and which are commonly contained in bargaining agreements." 212 NLRB at 951. The employer's position there is analogous to Barstow's insistence that the Union direct its members not to use the ADO form.

evidence of bad-faith bargaining), *enforced*, 140 F.3d 169 (2d Cir. 1998); *Hydrotherm, Inc.*, 302 NLRB 990, 1005 (1991) (bad faith evidenced by employer's failure over three months "to propose anything at all" concerning economics despite having received two wage proposals from the union).

Based on the foregoing, the Board determined (A.718) that Barstow engaged in bad-faith bargaining by refusing to bargain until it received all of the Union's proposals. Barstow flatly refused to offer any proposal until it received every union proposal for the entire contract and refused to engage in any substantive discussion of the Union's proposals.

### **C. Barstow's Claims of Good-Faith Bargaining Are Meritless**

Barstow's challenge (Br. 49-51) to the Board's finding of bad-faith bargaining asks the Court to reweigh the facts and second-guess the Board's exercise of its unique expertise in assessing collective bargaining. The Court must decline this invitation. In any event, the facts relied on by Barstow do not undermine the Board's finding. For instance, Barstow's reliance (Br. 49) on the parties' agreement on union recognition, union security, and pensions is misplaced. These articles were part of the pre-election agreement between Barstow's parent company, Community Health, and the Union, well before the Union was certified to represent Barstow's nurses. The agreement between Community Health and the Union has no bearing on whether *Barstow* bargained in bad faith *post*-election with

the Union as the certified representative. Moreover, the Union included the three pre-election articles in its opening set of proposals, and Barstow never bargained over them, only signing off on them on August 1 without discussion. (A.69-70.) Barstow thus cannot rely on them as evidence of good-faith bargaining because it was the Union, and not Barstow, that initiated the proposals.

Barstow's suggestion (Br. 50) that it did not engage in bad-faith bargaining because it did not also violate the Act by refusing to provide information is frivolous. The Board found that Barstow's misconduct at the table sufficiently supported a finding of bad-faith bargaining, without additional violations. Equally unavailing is Barstow's attempt to cast (Br. 50) its conduct as simply "hard bargaining." Contrary to its version of the facts, the Board found based on the credited evidence that Barstow refused to consider, discuss, and respond to the Union's proposals until the Union had submitted its entire contract proposal. (A. 718,721,726.) Barstow relies on cases that are readily distinguishable. *See, e.g., Atlanta Hilton & Tower*, 271 NLRB 1600, 1604 (1984) (no bad faith where employer attended 13 sessions, agreed to a sick leave proposal and wage increase, and had a prior successful bargaining relationship with the union); *Litton Sys.*, 300 NLRB 324, 327 (1990) (no bad faith where employer attended 53 meetings, examined and discussed the union's proposals, agreed on 23 topics, made concessions, and did not procedurally frustrate process), *enforced*, 949 F.2d 249

(8th Cir. 1991). And its citation to *Silver Brothers Co.*, 312 NLRB 1060 (1993), is beside the point given that case involved changing agreed-upon bargaining locations, not hard bargaining.

Barstow erroneously posits (Br. 50-51) that the Board treated its sequencing of proposals as a *per se* violation of the Act. The Board found, *based on these facts*, that Barstow engaged in bad-faith bargaining. A broader reading of the Board's decision is unfounded.

#### **IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BARSTOW VIOLATED THE ACT BY DECLARING IMPASSE AND REFUSING TO BARGAIN UNLESS THE UNION DIRECTED UNIT EMPLOYEES TO STOP USING THE ADO FORM**

##### **A. Standard of Review and Applicable Principles**

This Court gives great deference to the Board's factual findings. *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). The determination of whether an impasse exists is a question of fact and "is an inquiry particularly amenable to the experience of the Board as a factfinder." *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (internal quotation marks omitted). The Court will not disturb the Board's finding of impasse unless it is irrational or unsupported by substantial evidence. *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986). As this Court has recognized, "in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better

suites to the expert experience of [the Board,] which deals constantly with such problems.” *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (internal quotation marks omitted).

A stalemate in negotiations constitutes a good-faith impasse only when “there [is] no realistic prospect that continuation of discussion at that time would [be] fruitful,” *Am. Fed. of Tel. & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968), and “after good-faith negotiations have exhausted the prospects of concluding an agreement.” *Teamsters Local 175*, 788 F.2d at 30 (internal citations omitted). The burden of proving impasse rests with the party asserting it. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

The Board looks at the totality of the circumstances in determining whether impasse exists. *Grinnell Fire Prot. Sys., Co.*, 328 NLRB 585, 586 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). In doing so, the Board considers the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622, 628 (D.C. Cir. 1968). There can be no impasse unless “[b]oth parties in good faith believe that they are at the end of their [bargaining] rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir.

1987). Further, impasse must generally be reached as to the whole agreement, not as to one or more discrete contractual items. *Wayneview*, 664 F.3d at 349-50.

**B. Substantial Evidence Supports the Board’s Finding that Barstow Engaged in Bad-Faith Bargaining By Declaring Impasse and Refusing To Bargain Until the Union Took Certain Actions**

The credited evidence establishes that the parties were not at impasse at the time that Barstow unilaterally abandoned bargaining. As the Board observed, Barstow “adamantly and repeatedly refused to respond to the Union’s requests for future bargaining dates, despite the Union’s open invitation to discuss any matter, including the ADO forms.” (A.721.) According to the uncontroverted and credited testimony, once Carmody declared impasse, Matthews responded that, “we’re here to bargain over everything. We have movement on every issue and we are not at impasse over any issue. You need to sit down and bargain.” (A.97,568-71.) Carmody replied, “You heard me, I am done,” and then left the room six minutes after the session had begun. (A.97-98,134-35,332,568-71.) The Board determined that Barstow’s abrupt and repeated insistence on impasse was not a true deadlock. (A.718,726.) *See, e.g., Powell Elec. Mfg. Co.*, 287 NLRB 969, 973 (1987) (“It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem – getting a contract – together, not to quit the table and take a separate path.”), *enforced in relevant part*, 906 F.2d 1007 (5th Cir. 1990).

Further, the Board found that Barstow's premature declaration of impasse and subsequent refusal to bargain until the Union directed employees to cease using the form was equally unlawful because Barstow never sought to bargain over the form. As the Board found, "[i]n none of the bargaining sessions did either party make a proposal regarding the use of the [] forms, nor did they bargain over them." (A.726.)

**C. Barstow's Claims that It Declared Impasse In Good Faith Are Meritless**

Barstow proclaims (Br. 51-53) that the parties bargained over the ADO form, but the record lacks any such evidence. All Barstow manages to show is that the form, among other uses, assisted the Union in gathering information for bargaining on issues of concern to its members. Barstow relies (Br. 52-53) on the Union's proposal for a committee whose function it claims would be similar to that of the ADO form – patient care and protection of the nurses' licenses. Assuming for the sake of argument that the Union's proposal was "inextricably tied" to the form (Br. 51), evidence that Barstow responded in any way to the proposal is glaringly absent.<sup>19</sup>

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<sup>19</sup> Barstow notes (Br. 53) that the Board did not find that it would have lacked the right to declare an impasse over the ADO form. The Board had no reason to make such a finding, having determined that no impasse existed.

## V. THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ORDERING BARSTOW TO REIMBURSE THE UNION'S NEGOTIATING EXPENSES

### A. Standard of Review and Applicable Principles

The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review"); *accord United Food & Commercial Workers Int'l Union v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) ("UFCW"). Under Section 10(c) of the Act, the Board is directed to order remedies for unfair labor practices. 29 U.S.C. § 160(c). The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *accord Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002).

The Board's remedial order is "subject to limited judicial review," *UFCW*, 852 F.2d at 1347, and its "choice of remedies is entitled to a high degree of deference." *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). A reviewing court enforces the Board's choice of remedy unless a challenging party can show "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." *Virginia Elec. & Power*

*Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

The Act authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies of th[e] Act.” 29 U.S.C. § 160(c). The Board’s task under Section 10(c) is to restore the status quo ante and “to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1975).

**B. The Board Reasonably Determined that Barstow’s Deliberate Bad-Faith Bargaining Warranted Reimbursement of the Union’s Negotiating Expenses**

The Board’s statutory authority to fashion appropriate remedies includes the discretion to order special remedies when necessary “to dissipate fully the coercive effects of the unfair labor practices.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (citing cases), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996). The Board has determined that a special remedy is warranted when an employer engages in unusually aggravated misconduct “calculated to thwart the entire collective-bargaining process and forestall the possibility of . . . ever reaching agreement with the chosen representative of its employees.” *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) (“*Frontier*”), *enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)). Under such

circumstances, the appropriate remedy is reimbursement of the union's negotiating expenses because an employer has willfully defied its statutory obligation and has wasted the union's resources in a futile exercise. *Id.* at 859; *see also Fallbrook*, 360 NLRB at 646 (ordering negotiating expenses where employer refused to bargain until the union submitted its entire contract proposal and then prematurely declared impasse over a single issue). An order of negotiation expenses effectuates the Act's policies by making "the charging party whole for the resources that were wasted because of the unlawful conduct, and [restoring] the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Frontier*, 318 NLRB at 859 (internal citations omitted).

Here, the Board reasonably exercised its discretion and determined that traditional remedies alone would not eliminate the effects of Barstow's misconduct. The Board based its award of negotiating expenses on Barstow having "deliberately acted to prevent any meaningful progress during bargaining sessions," (A.721), and the "deliberate refusal to bargain in good faith [that] occurred in the critical postelection period." (A.721-22.) The Board observed (A.721) that Barstow refused to provide proposals or counterproposals during the first five bargaining sessions until the Union satisfied the unlawful demand for a full-contract proposal and it threatened to abandon bargaining if the Union persisted in encouraging use of the ADO form. The Board also considered (A.721)

Barstow's erroneous claim that the Union's use of the form prompted impasse and Barstow's refusal to bargain despite the Union's multiple bargaining requests and statements that it would negotiate over *any* matter. Lastly, the Board considered (A.458) that the misconduct occurred right after the Union won the initial election.

According to the Board, Barstow's deliberate misconduct "directly caused the Union to waste its resources in futile bargaining." (A.721.) Not only did Barstow eliminate the Union's strength of bargaining when union support was generally at its height, it also wasted the Union's time and resources in a "futile pursuit of a collective-bargaining agreement." *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964-65 (1980); *see, e.g., O'Neill, Ltd.*, 288 NLRB 1354, 1356-57, 1387 (1988) (ordering employer to reimburse union for resources that it wasted in useless bargaining where employer caused bargaining to be a "complete and utter sham"), *enforced*, 965 F.2d 1522 (9th Cir. 1992). The Union expended time and financial resources by arranging bargaining dates, developing and drafting proposals, and keeping union members apprised of negotiations. There is an "undeniable causation between [Barstow's] misconduct and the useless expenditure of the Union's resources in their attempts to bargain." *NLRB v. HTH*, 693 F.3d 1051, 1061 (9th Cir. 2012).

### C. Barstow's Challenges to the Board's Remedy Are Meritless

Barstow, not seriously contesting the Board's award of negotiating expenses, offers summary challenges that border on frivolous. For example, Barstow wrongly asserts (Br. 53-54) that the Board should not have relied on the declaration of impasse as evidence of "unusually aggravated" circumstances. The fact that a party may lawfully declare impasse over a single issue has no relevance to the Board's decision here inasmuch as Barstow failed to show that the ADO form was so critical as to create "a complete breakdown in the entire negotiations." *Wayneview*, 664 F.3d at 350.<sup>20</sup> Further, the Board relied on many factors, not simply Barstow's declaration of impasse.

Because the Board undertakes a case-by-case approach, the cases cited by Barstow (Br. 54) do not inform the appropriateness of the award here. In *Bryant & Stratton*, the parties were bargaining only over a wage change and had a 10-year relationship. 321 NLRB at 1136. In *Success Village Apartments, Inc.*, the employer and the union had an established 25-year relationship. 347 NLRB 1065, 1066 (2006). In *AMF Bowling Co. v. NLRB*, the employer did not engage in any bad-faith bargaining. 977 F.2d 141, 144 (1st Cir. 1992). Given the difference in

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<sup>20</sup> Barstow bears the burden of proving that the deadlocked issue is critical and "that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Wayneview*, 664 F.3d at 350 (internal quotation marks and citation omitted). It never showed that the parties could not make progress on any of the remaining issues.

the parties' relationships and the violations, these cases do not have any particular application here and provide no basis to disturb the Board's remedy.

## **VI. THE BOARD REASONABLY DECLINED TO DEFER THE CASE TO ARBITRATION**

In refusing to defer this case to arbitration, the Board properly found that there was no agreed-upon grievance-arbitration procedure and that the parties lacked a productive relationship. As the Board observed (A.718 n.3,728), and Barstow admits (Br. 47), the parties never signed the pre-election agreement containing an arbitration clause, and the clear intent was not to be bound by its terms: "Neither party to this Agreement shall be bound to any of its provisions solely by the presence of such provision in any draft hereof *unless and until this Agreement is signed by such party.*" (A.623) (emphasis added). The Board reasonably declined to infer a mutual agreement to mandate arbitration of all disputes between the two parties.<sup>21</sup> *See, e.g., N.D. Peters & Co.*, 327 NLRB 922, 925 (1999); *Arizona Portland Cement Co.*, 281 NLRB 304, 304 n.2 (1986).

The Board has also long considered the length of the parties' collective-bargaining relationship in determining the appropriateness of deferral. *See, e.g.,*

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<sup>21</sup> The district court reached the same conclusion in the 10(j) proceedings after Barstow moved the court to reconsider its decision to grant the temporary injunction based on testimony before the administrative law judge in this case that Barstow asserted – as it does here – showed that the parties had agreed to arbitrate all disputes. *See Rubin v. Hosp. of Barstow, Inc.*, No. ED CV 13-933, 2013 WL 4536849, at \*2 (C.D. Cal. Aug. 26, 2013) (noting that transcripts failed to show an oral collective-bargaining agreement).

*United Techs. Corp.*, 268 NLRB 557, 558 (1984) (listing relevant factors, including whether the dispute arose during a long, productive relationship); *San Juan Bautista Med. Ctr.*, 356 NLRB 736, 737 (2011) (refusing to find a long, productive relationship where union had been the exclusive-bargaining representative for one year and the collective-bargaining agreement had been in place for six months). Here, the parties had only bargained intermittently for a first contract for six months before Barstow declared impasse. This six-month period, during which the Union filed three charges and the Board found that Barstow bargained in bad faith and unlawfully declared impasse, hardly demonstrates that the parties' relationship had matured. As the Board noted (A.718 n.3) in *San Juan Bautista*, “[w]e are unaware of any decision finding that a relationship as new and contentious as the one at issue here can be considered ‘long and productive’ for the purposes of a [deferral].” 356 NLRB at 737.

Barstow erroneously claims that the agreement, though unsigned, “exist[ed] and expressly provided for arbitration of the parties’ disputes.” (Br. 47.) Not so. No valid agreement existed. The document itself establishes that it is non-binding without signatures evincing a desire to be bound by the terms.

Barstow asserts (Br. 48) that the Board failed to explain why the parties’ relationship “played such a key role.” The Board relied (A.718 n.3) on *San Juan Bautista* and the cases cited therein, which fully support the determination that a

six-month relationship of this type is insufficient to support deferral. The Board properly saw no reason to consider the other deferral factors because there was no enforceable agreement and no established bargaining relationship.

### CONCLUSION

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

Respectfully submitted,

/s/ Jill A. Griffin

JILL A. GRIFFIN

*Supervisory Attorney*

/s/ Barbara A. Sheehy

BARBARA A. SHEEHY

*Attorney*

National Labor Relations Board  
1015 Half St., SE  
Washington, D.C. 20570  
(202) 273-2949  
(202) 273-0094

RICHARD F. GRIFFIN, JR.

*General Counsel*

JENNIFER ABRUZZO

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

AUGUST 2017

# **ADDENDUM**

**Section 3(b) (29 U.S.C. § 153(b))**

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed

**Section 7 (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 of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

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

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

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

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 8(d) (29 U.S.C. § 158(d))**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any

employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

**Section 10(a) (29 U.S.C. § 160(a))**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in 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 predominantly 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 subchapter or has received a construction inconsistent therewith.

**Section 10(c) (29 U.S.C. § 160(c))**

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

**Section 10(e) (29 U.S.C. § 160(e))**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall file in the court the record in the 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.

**Section 10(f) (29 U.S.C. § 160(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 any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. 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. 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.

**Section 10(j) (29 U.S.C. § 160(j))**

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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

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| HOSPITAL OF BARSTOW, INC., D/B/A | ) |                       |
| BARSTOW COMMUNITY HOSPITAL       | ) |                       |
|                                  | ) |                       |
| Petitioner/Cross-Respondent      | ) |                       |
|                                  | ) | Nos. 16-1289, 16-1343 |
| v.                               | ) |                       |
|                                  | ) | Board Case Nos.       |
| NATIONAL LABOR RELATIONS BOARD   | ) | 31-CA-090049          |
|                                  | ) | 31-CA-096140          |
| Respondent/Cross-Petitioner      | ) |                       |
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| CALIFORNIA NURSES ASSOCIATION/   | ) |                       |
| NATIONAL NURSES ORGANIZING       | ) |                       |
| COMMITTEE                        | ) |                       |
|                                  | ) |                       |
| Intervenor                       | ) |                       |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,958 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 31st of August, 2017

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

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| HOSPITAL OF BARSTOW, INC., D/B/A | ) |                       |
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| NATIONAL NURSES ORGANIZING       | ) |                       |
| COMMITTEE                        | ) |                       |
|                                  | ) |                       |
| Intervenor                       | ) |                       |

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 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.

/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 31st day of August, 2017