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

**PRIME HEALTHCARE SERVICES – ENCINO LLC,
d/b/a ENCINO HOSPITAL MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

SEIU LOCAL 121RN

Intervenor for Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

GREGOIRE SAUTER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-0656
(202) 273-1714

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

<hr/>		
PRIME HEALTHCARE SERVICES –)	
ENCINO LLC, d/b/a ENCINO HOSPITAL)	
MEDICAL CENTER)	
)	
Petitioner/Cross-Respondent)	
	)	Nos. 16-1370
v.	)	16-1423
)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	31-CA-066061
Respondent/Cross-Petitioner	)	31-CA-070323
-----)	
)	
SEIU LOCAL 121RN)	
)	
Intervenor for Respondent/Cross-Petitioner)	
<hr/>		

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Prime Healthcare Services – Encino LLC, d/b/a Encino Hospital Medical Center (“Prime”) is the Petitioner in case 16-1370 and the Cross-Respondent in case No. 16-1423. The Board is the Respondent in case No. 16-1370 and the Cross-Petitioner in case No. 16-1423. SEIU Local 121RN (“121RN”) is the Intervenor for the Board and was the charging party before the Board.

B. Ruling under Review

The case under review is a Decision and Order issued by the Board in Case Nos. 21-CA-080722, 31-CA-066061, 31-CA-070323, and 31-CA-080554, entitled Prime Healthcare Services-Encino, LLC d/b/a Encino Hospital Medical Center *and* SEIU Local 121RN *and* SEIU United Healthcare Workers-West; Prime Healthcare Services-Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center *and* SEIU United Healthcare Workers-West. The Board's Decision and Order is reported at 364 NLRB No. 128 (Oct. 17, 2016).

On July 11, 2017, pursuant to a joint, unopposed motion of the Board and Prime, the Court severed the portion of this case relating to the dispute between Prime and SEIU United Healthcare Workers-West (Board Case Nos. 21-CA-080722 and 31-CA-080554), and dismissed without prejudice, as to that portion of the Board's Order, Prime's petition for review and the Board's cross-application for enforcement. Accordingly, only the portion of the Order relating to the dispute between Prime and 121RN (Board Case Nos. 31-CA-066061 and 31-CA-070323), and the Board's resolution thereof, remains before the Court for review.

C. Related Cases

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570-0001

(202) 273-2960

Dated at Washington, DC
this 26th day of September 2017

TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of issues.....	2
Relevant statutory provisions.....	2
Statement of the case.....	2
I. Findings of fact	4
A. Background.....	4
B. Prime unilaterally discontinues anniversary step increases	4
C. Prime refuses to provide information requested by the Union related to employee healthcare benefits	6
II. Procedural history	9
III. The Board’s conclusions and Order.....	10
Summary of argument.....	11
Standard of review	12
Argument.....	13
I. Prime violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing step increases.....	13
A. The waiver of a union’s right to bargain must be clear and unmistakable	15
B. Prime failed to prove that the contractual language waives the Union’s right to bargain over step increases	17

Headings (continued)	Page(s)
C. Prime’s post-expiration conduct established step increases as a status-quo term of employment.....	19
1. Schottmiller’s acquiescence to continuing step increases after contract expiration triggered Prime’s duty to bargain	19
2. Prime could not unilaterally rescind step increases after continuing them for seven months	21
II. Prime violated Section 8(a)(5) and (1) of the Act by failing to provide relevant and necessary information requested by the Union.....	23
A. The requested information was relevant	24
B. Prime failed to justify its withholding of relevant information.....	27
Conclusion	31

TABLE OF AUTHORITIES

Cases	Page(s)
<i>1621 Route 22 West Operating Co. v. NLRB</i> , 825 F.3d 128 (3d Cir. 2016)	9
* <i>Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburg Plate Glass Co., Chemical Division</i> , 404 U.S. 157 (1971).....	24-25
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	12
<i>Borgess Medical Center</i> , 342 NLRB 1105 (2004).....	30
<i>Brockton Hospital v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	12
<i>Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.</i> , 863 F.2d 439 (6th Cir. 1988)	20
<i>Commonwealth Communications, Inc. v. NLRB</i> , 312 F.3d 465, 468 (D.C. Cir. 2002)	12
<i>Consolidated Communications, Inc. v. NLRB</i> , 837 F.3d 1 (D.C. Cir. 2016).....	13
* <i>Country Ford Trucks, Inc. v. NLRB</i> , 229 F.3d 1184 (D.C. Cir. 2000).....	24, 27
<i>Daily News of Los Angeles v. NLRB</i> , 73 F.3d 406 (D.C. Cir. 1996).....	14
* <i>DaimlerChrysler Corp. v. NLRB</i> , 288 F.3d 434 (D.C. Cir. 2002).....	27

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

Cases (continued)	Page(s)
<i>Daycon Products Co.</i> , 2010 NLRB LEXIS 10 (Jan. 8, 2010).....	22
<i>Daycon Products Co.</i> , 357 NLRB 508 (2011), <i>enforcement denied on other grounds</i> , 512 F. App'x 345 (4th Cir. 2013).....	22
<i>Department of the Navy, Marine Corps Logistics Base v. FLRA</i> , 962 F.2d 48 (D.C. Cir. 1992).....	15
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301 (1979).....	23
<i>Dierks Forests, Inc.</i> , 148 NLRB 923 (1964).....	22
<i>Disneyland Park</i> , 350 NLRB 1256 (2007).....	26
<i>Eagle Transport Corp.</i> , 338 NLRB 489 (2002).....	22
<i>Foster Transformer Co.</i> , 212 NLRB 936 (1974).....	22
* <i>Fox v. Government of the District of Columbia</i> , 794 F.3d 25 (D.C. Cir. 2015).....	24, 29
<i>Gannett Rochester Newspapers v. NLRB</i> , 988 F.2d 198 (D.C. Cir. 1993).....	15
* <i>Garden Grove Hospital & Medical Center</i> , 357 NLRB 653 (2011).....	21, 22

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

Cases (continued)	Page(s)
<i>Heartland Plymouth Court MI, LLC v. NLRB</i> , 650 F. App'x 11 (D.C. Cir. 2016)	16
<i>Hondo, Inc. d/b/a/ Coca-Cola Bottling Co. of Chicago</i> , 311 NLRB 424 (1993)	29
* <i>Honeywell International, Inc. v. NLRB</i> , 253 F.3d 125 (D.C. Cir. 2001).....	14, 15, 16, 17
<i>IBEW Local 47 v. NLRB</i> , 927 F.2d 635 (D.C. Cir. 1991).....	13
<i>Island Creek Coal Co.</i> , 292 NLRB 480 (1989)	27
* <i>JPH Management, Inc.</i> , 337 NLRB 72 (2001)	21, 22
* <i>KLB Industries, Inc. v. NLRB</i> , 700 F.3d 551 (D.C. Cir. 2012).....	23
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991).....	13, 14
<i>Marquez Brothers Enterprises, Inc. v. NLRB</i> , 650 F. App'x 25 (D.C. Cir. 2016)	9
<i>Martinsville Nylon Employees Council Corp. v. NLRB</i> , 969 F.2d 1263 (D.C. Cir. 1992).....	20
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	15
<i>Mission Foods</i> , 345 NLRB 788 (2005)	27

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

Cases (continued)	Page(s)
* <i>New York & Presbyterian Hospital v. NLRB</i> , 649 F.3d 723 (D.C. Cir. 2011).....	25
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	23
<i>NLRB v. Cauthorne</i> , 691 F.2d 1023 (D.C. Cir. 1982).....	14
<i>NLRB v. General Tire & Rubber Co.</i> , 795 F.2d 585 (6th Cir. 1986)	17
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	14
<i>NLRB v. SW General, Inc.</i> , 580 U.S. ___, 137 S. Ct. 929 (2017)	9
<i>NLRB v. Truitt Manufacturing Co.</i> , 351 U.S. 149 (1956).....	23
<i>NLRB v. United States Postal Service</i> , 8 F.3d 832 (D.C. Cir. 1993).....	16
<i>Oak Harbor Freight Lines, Inc. v. NLRB</i> , 855 F.3d 436 (D.C. Cir. 2017).....	16
* <i>Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983).....	24, 25
<i>Pacific Coast Supply, LLC v. NLRB</i> , 801 F.3d 321 (D.C. Cir. 2015).....	13

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

Cases (continued)	Page(s)
* <i>Provena St. Joseph Medical Center</i> , 350 NLRB 808 (2007)	15
<i>Quebecor World Mt. Morris II, LLC</i> , 353 NLRB 1 (2008)	19
<i>Safeway Steel Products, Inc.</i> , 333 NLRB 394 (2001)	20
* <i>Southern Nuclear Operating Co. v. NLRB</i> , 524 F.3d 1350 (D.C. Cir. 2008)	15
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	12
<i>SW General, Inc. v. NLRB</i> , 796 F.3d 67 (D.C. Cir. 2015)	9
* <i>United States Testing Co.</i> , 324 NLRB 854 (1997), <i>enforced</i> , 160 F.3d 14 (D.C. Cir. 1998)	26, 27, 30
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	12
<i>Wayneview Care Center v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011)	12
<i>Zukiewicz, Inc.</i> , 314 NLRB 114 (1994)	25

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

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	10, 13
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 9, 10, 11, 13, 15, 23
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 3, 9, 10, 11, 13, 14, 15, 23
Section 8(d) (29 U.S.C. § 158(d)).....	13
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 12
Section 10(f) (29 U.S.C. § 160(f)).....	2
Federal Vacancies Reform Act (5 U.S.C. § 3345 et seq.)	9

GLOSSARY

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board	National Labor Relations Board
The Board’s Order or The Order	Prime Healthcare Services – Encino, LLC d/b/a Encino Hospital Medical Center <i>and</i> SEIU Local 121RN <i>and</i> SEIU United Healthcare Workers – West Prime Healthcare Services – Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center <i>and</i> SEIU United Healthcare Workers – West 364 NLRB No. 128 (Oct. 17, 2016)
Br.	Opening brief of Prime Healthcare Services – Encino LLC, d/b/a Encino Hospital Medical Center
EPO	Exclusive-Provider-Organization Plan
JA	Joint Appendix (incl. Supplemental Joint Appendix filed Sept. 22, 2017)
PPO	Preferred-Provider-Organization Plan
Prime	Prime Healthcare Services – Encino LLC, d/b/a Encino Hospital Medical Center
UHW	SEIU United Healthcare Workers – West
The Union or 121RN	SEIU Local 121RN

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

Nos. 16-1370 & 16-1423

**PRIME HEALTHCARE SERVICES – ENCINO LLC
d/b/a ENCINO HOSPITAL MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

SEIU LOCAL 121RN

Intervenor for Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Prime Healthcare Services – Encino LLC, d/b/a Encino Hospital Medical Center (“Prime”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against Prime. SEIU Local 121RN (“121RN” or

“the Union”) has intervened on the Board’s behalf. The Board’s Decision and Order, reported at 364 NLRB No. 128 (Oct. 17, 2016), is final, and the Court has jurisdiction under Section 10(e) and (f), 29 U.S.C. § 160(e) and (f), of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151, et seq. All filings with the Court were timely. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act. *Id.* § 160(a).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board’s finding that Prime violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to grant anniversary step wage increases.
2. Whether substantial evidence supports the Board’s finding that Prime violated Section 8(a)(5) and (1) of the Act by failing to furnish relevant, necessary information requested by the Union.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

On October 17, 2016, the Board issued a Decision and Order finding that Prime violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally ceasing to grant anniversary step wage increases to three separate units of employees. The first unit consists of registered nurses represented by 121RN

and employed at Encino Hospital Medical Center (“Encino”), a hospital facility located in southern California. The two other units are represented by SEIU United Healthcare Workers – West (“UHW”) and consist of service and technical employees working at Encino and another Prime-owned facility, Garden Grove Hospital & Medical Center. The Board also found that Prime violated Section 8(a)(5) and (1) of the Act by failing to provide relevant, necessary information requested by 121RN and UHW during bargaining negotiations over the three units’ respective contracts.

On October 27, 2016, Prime petitioned this Court to review the Board’s Order. On December 21, the Board filed a cross-application to enforce its Order, which the Court consolidated with Prime’s review petition. After Prime filed its opening brief, Prime and UHW reached an agreement to settle the portion of this proceeding involving UHW and a number of other pending Board and court cases.¹ However, that agreement did not resolve the dispute between 121RN and Prime. Accordingly, the Board seeks enforcement of the portion of its Order finding that Prime violated the Act by unilaterally ceasing to grant anniversary wage increases to employees represented by 121RN, and by failing to furnish information

¹ On July 11, 2017, pursuant to a joint unopposed motion of the Board and Prime, the Court severed the portion of this case relating to the dispute between UHW and Prime, and dismissed without prejudice, as to that portion of the Board’s Order, Prime’s petition for review and the Board’s cross-application for enforcement.

requested by 121RN. The relevant Board findings and conclusions are summarized below.

I. FINDINGS OF FACT

A. Background

In June 2008, Prime acquired Encino and recognized the Union as the exclusive collective-bargaining representative for its registered nurses. (JA 6; JA 103 ¶¶1-2, 104 ¶¶4-5.)² Prime also adopted the Union's existing collective-bargaining agreement, which was slated to expire on March 31, 2011. (JA 6; JA 107 ¶18.) In anticipation of that expiration, Prime and the Union began to negotiate a successor agreement in January 2011. (JA 8; JA 107 ¶21.)

B. Prime Unilaterally Discontinues Anniversary Step Increases

The collective-bargaining agreement contains a provision granting annual wage increases (“annual increases”) and another granting anniversary step wage increases (“step increases”). The annual-increase provision (Article 13, Section 3) required Prime to give employees raises on specific dates each year the contract was in effect, from 2007 until 2010, with the caveat that “[n]o bargaining unit member will receive a wage increase greater than 9.25% in any twelve (12) month

² The record abbreviations in this final brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

period.” (JA 9; JA 151-52.) The step-increase provision (Article 13, Section 5) provides as follows:

5. Annual Increases/Advancing Through the Steps:

In addition to the above hospital-wide annual increases, beginning July 1, 2008, individual employees shall receive Anniversary Step Increases in accordance with the wage scales in the following manner:

- Full and part time employees: Employees who are at or below the scale on the anniversary date of their most recent date of hire shall advance to the next step on the wage scale on that anniversary date, subject to the annual caps provided in Section 3 above, which limit the maximum increase any employee may receive in any twelve (12) month period. Employees who are above the scale shall not receive a step increase on their anniversary date. However, employees who are less than one full step above scale shall advance to the next step on their anniversary date, again subject to the annual caps provided in Section 3 above.

(JA 9; JA 152-53.) During the contract’s term, Prime gave step increases to eligible employees in accordance with wage scales appended to the contract.

(JA 9; JA 108 ¶24, 196-98.)

After the contract expired, Prime’s lead negotiator, Mary Schottmiller, met with her Union counterpart, Judy Serlin, to discuss the post-expiration terms and conditions of employment of registered nurses represented by the Union. At that meeting, Serlin told Schottmiller that the Union believed step increases should continue as part of the post-expiration status quo, and Schottmiller agreed. (JA 9; JA 800-01, 814.)

Between April and November 2011, Prime gave step increases to roughly one third of employees represented by the Union. (JA 9 & n.20; JA 108 ¶25.) On

November 17, Schottmiller ordered those increases discontinued altogether. (JA 9; JA 803.) Schottmiller did not inform the Union of her decision; instead, the Union learned about it when inquiring about the missing increases. (JA 9-10; JA 746-47, 811.) Thereafter, the Union filed an unfair-labor-practice charge with the Board over Prime's discontinuance of step increases. (JA 76, 79, 81.)

C. Prime Refuses To Provide Information Requested by the Union Related to Employee Healthcare Benefits

Prime employees can obtain healthcare coverage either from its preferred-provider-organization ("PPO") plan, or from its exclusive-provider-organization ("EPO") plan. (JA 6; JA 755-56, 783, 793-94.) The PPO plan functions as regular insurance: employees pay monthly premiums to join healthcare networks like Anthem Blue Cross. The EPO plan is a fee-for-service plan in which Prime offers its services to employees at a discounted rate. Under that plan, employees must receive treatment at facilities, or from doctors, affiliated with Prime, unless specifically referred to out-of-network providers. (JA 6; JA 260-338.81, 757, 771-72, 783, 812, 817.) The vast majority of Prime's employees (95 percent) are in the EPO plan. (JA 6 n.9; JA 818.)

After the contract expired, the Union anticipated that Prime would seek significant changes to healthcare benefits, as it had done at other hospitals. (JA 10; JA 759-60.) In April 2011, the Union's research director, Maryanne Salm, gave Schottmiller a written request for information about Prime's healthcare plans,

explaining that the information was necessary for the Union to prepare its bargaining proposals. (JA 10; JA 211-12, 747-48, 750.) The request sought information about claims for care received at Prime facilities, including cost breakdowns for care provided. It also sought claims for care received at non-Prime facilities, noting that the Union had “concerns that the limited number of services and providers available at Prime facilities unduly restricts our members’ access to care.” (JA 11; JA 211.) Finally, the request asked for information about the quality of care at Prime facilities, including quarterly lists of in-patient discharges organized by their Medicare diagnostic code. (JA 10-11; JA 212.)

Prime did not provide any of the requested information except for an updated physicians’ list. (JA 11; JA 751.) Instead, Schottmiller disputed the information’s relevance, demanded that the Union explain its own anticipated healthcare proposals, and requested that the Union provide the same information regarding its proposed plan that the Union had asked of Prime. (JA 11; JA 213-14.) Schottmiller also asserted that the Union could obtain quality-of-care information from its members or from its parent organization, the Service Employees International Union, instead of Prime. (JA 11; JA 214.)

Salm responded that the requested information was needed “to properly evaluate the existing plans to determine whether to even propose changes.” (JA 11-12; JA 217.) She explained that Prime-network claims information was

“critical to determining plan costs, the allocation of those costs, administrative efficiencies, and to measuring quality of care” within the network. (JA 12; JA 216.) Salm further stated that out-of-network claims information was necessary because the Union’s members had “raised numerous complain[t]s about the limited access to certain services within the Prime Network,” but were required to “go through various administrative processes and often pay increased co-pays and deductibles” to receive out-of-network care. (JA 12; JA 217.) Salm explained that the requested information would allow the Union to “better review such concerns” and determine whether to propose modifications. (JA 12; JA 217.) Finally, Salm stated that the Union needed information about quality of care across the Prime network because its members could receive treatment at all Prime facilities under the EPO plan, not just at Encino. Such information was not readily available to the Union, Salm explained, because its members worked only at Encino, had “limited experience utilizing Prime facilities,” and “d[id] not have access to . . . aggregated data.” (JA 12; JA 217-18.)

In the ensuing months, Schottmiller continued to dispute the information’s relevance, asserting at one point that the Union appeared to be seeking “information that would violate the collective bargaining privilege, [Prime’s] own cost analysis.” (JA 12; JA 219.) Schottmiller also made several other “formal” requests for information from the Union. (JA 12; JA 221, 225.) For her part, Salm

reiterated that the information was necessary to bargain over healthcare coverage and renewed her request. (JA 12; JA 222-23.) Prime never produced the requested information. (JA 12-13; JA 752.) In September 2011, the Union filed an unfair-labor-practice charge with the Board. (JA 69, 72, 74.) Negotiations continued, meanwhile, and in late 2011, Prime proposed increasing employee copays, deductibles, and premiums. (JA 13; JA 815-16.)

II. PROCEDURAL HISTORY

On January 31, 2013, after investigating the Union's charges, the Board's Acting General Counsel Lafe Solomon issued a consolidated complaint alleging that Prime violated Section 8(a)(5) and (1) of the Act by ceasing to grant step increases and by failing to furnish relevant, necessary information requested by the Union.³ (JA 5-6; JA 83.) Following an administrative hearing, an administrative

³ In *NLRB v. SW General, Inc.*, 580 U.S. ___, 137 S. Ct. 929 (2017), the Supreme Court held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 et seq., after January 5, 2011. However, Prime failed to contest the complaint's validity before the Board or this Court, and therefore this Court lacks jurisdiction to consider that issue. *See 1621 Route 22 W. Operating Co. v. NLRB*, 825 F.3d 128, 142-43 (3d Cir. 2016) (court lacked jurisdiction to consider employer's FVRA challenge to Solomon's appointment, which was not properly raised to Board); *Marquez Bros. Enters., Inc. v. NLRB*, 650 F. App'x 25, 27 (D.C. Cir. 2016) (applying NLRA exhaustion doctrine to challenge to Acting General Counsel Solomon); *see also SW Gen., Inc. v. NLRB*, 796 F.3d 67, 83 (D.C. Cir. 2015). Moreover, *SW General* is not dispositive because General Counsel Richard F. Griffin ratified the issuance and continued prosecution of the complaint in this case. (JA 862-67.)

law judge issued a recommended decision and order on November 13, 2014, finding that Prime violated the Act as alleged. (JA 5-14.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On October 17, 2016, the Board (Chairman Pearce; Members Miscimarra and McFerran)⁴ issued a Decision and Order finding, in agreement with the judge, that Prime violated Section 8(a)(5) and (1) of the Act by ceasing to grant step increases and by failing to provide information requested by the Union. (JA 1.)

The Board's Order requires Prime to cease and desist from: refusing to bargain in good faith with the Union by failing to furnish relevant, necessary information upon request; unilaterally ceasing payment of step increases; 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, 29 U.S.C. § 157. (JA 1-2.) Affirmatively, the Order requires Prime to: furnish the information requested by the Union in a timely manner; resume granting step increases to eligible employees; compensate employees for their losses due to the unilateral cessation of step increases; notify and bargain with the Union on request before making changes to employees' terms and conditions of employment; and post a remedial notice. (JA 2, 4.)

⁴ On April 26, 2017, Member Miscimarra was named Chairman.

SUMMARY OF ARGUMENT

The Board reasonably found that Prime violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing step increases. Under established law, an employer cannot unilaterally change mandatory subjects of bargaining, like employee raises, after expiration of a collective-bargaining agreement unless the contractual language clearly and unmistakably waives the union's right to bargain. Prime concedes that the contract lacks any express waiver language regarding step increases, and the Board reasonably rejected Prime's strained attempt to link them to the expired annual raises. Further, even if the contract had waived the Union's right to bargain, Prime's post-expiration conduct established step increases as a status-quo term of employment separate from the contract. As the Board found, Prime expressly agreed to maintain step increases after the contract expired, and did so for seven months. Prime's defenses of ignorance and mistake are insufficient to excuse its subsequent unilateral decision to discontinue step increases without first seeking to bargain with the Union.

The Board also reasonably found that Prime violated Section 8(a)(5) and (1) of the Act by failing to provide relevant information requested by the Union to evaluate Prime's healthcare proposals. The requested information about healthcare costs, access to care, and quality of care was all presumptively or facially relevant to the Union's representational duties, particularly because Prime proposed

significant changes to employee copays, deductibles, and premiums as part of contract negotiations. The Board reasonably rejected Prime's various justifications for failing to provide relevant information, including the unfounded assertion that the Union's request was made in bad faith.

STANDARD OF REVIEW

This Court recognizes that its "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Wayneview*, 664 F.3d at 348. Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "[T]he Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Finally, to the extent that the Board's decision turns on the interpretation of a collective-bargaining agreement, the Court construes the contractual language *de novo*. *Commonwealth Commc'ns, Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002). However, the Board's factual findings

on related matters, such as the intent of the parties to the contract, are entitled to the same deference as any other factual findings. *IBEW Local 47 v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).

ARGUMENT

I. PRIME VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY DISCONTINUING STEP INCREASES

“Sections 8(a)(5) and 8(d) of the [Act] . . . require an employer to bargain ‘in good faith with respect to wages, hours, and other terms and conditions of employment’” with the union representing its employees. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (quoting 29 U.S.C. § 158(d)). It therefore follows that an employer who makes unilateral changes to those mandatory subjects of bargaining, without giving the union notice and an opportunity to bargain, violates Section 8(a)(5) and (1) of the Act.⁵ *Id.*; *accord Consol. Commc’ns, Inc. v. NLRB*, 837 F.3d 1, 19 (D.C. Cir. 2016). Indeed, the Supreme Court has held that such a unilateral change constitutes “a circumvention of the

⁵ Section 8(a)(5) makes it unlawful “for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it unlawful “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” *id.* § 158(a)(1), which includes employees’ “right . . . to bargain collectively through representatives of their own choosing,” *id.* § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 n.2 (D.C. Cir. 2015).

duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal [to bargain].” *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

Following the expiration of a collective-bargaining agreement, the expired contract “continues to define the status quo as to wages and working conditions.” *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). Its terms remain in effect by operation of law. *Litton*, 501 U.S. at 206-07; accord *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001). Therefore, the employer’s duty to maintain the status quo remains unchanged until the parties either agree on a new contract or reach a good-faith impasse, unless the union waives its right to bargain. *Litton*, 501 U.S. at 198; *Honeywell*, 253 F.3d at 131, 133.

Prime does not dispute that step increases are terms of employment, and thus constitute mandatory subjects of bargaining. See *Daily News of L.A. v. NLRB*, 73 F.3d 406, 410 (D.C. Cir. 1996) (merit-increase program held mandatory subject of bargaining). Nor does Prime contest that it unilaterally discontinued step increases without notifying, or bargaining with, the Union. (Br. 22.) As shown below, Prime failed to prove its asserted defense that the Union waived its right to bargain and, in any event, Prime’s post-expiration conduct ensured that step increases remained a status-quo term of employment separate from the contract. Therefore, substantial evidence supports the Board’s finding that Prime violated

Section 8(a)(5) and (1) of the Act by unilaterally discontinuing step increases.

(JA 1, 10.)

A. The Waiver of a Union's Right To Bargain Must Be Clear and Unmistakable

An employer may not lawfully alter its represented employees' terms or conditions of employment unilaterally unless the union waives its right to bargain. *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357 (D.C. Cir. 2008). The Board and the courts “require ‘clear and unmistakable’ evidence of waiver and have tended to construe waivers narrowly.” *Id.* (quoting *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)); *see also Honeywell*, 253 F.3d at 133-34 (applying clear-and-unmistakable standard to find that employer unlawfully denied union opportunity to bargain over changes to mandatory bargaining subjects). That heightened standard derives from the statutory nature of the union's right to bargain over terms of employment. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waiver of statutorily protected right “must be clear and unmistakable”).

To find a clear-and-unmistakable waiver, the evidence must show “that the parties have ‘consciously explored’ or ‘fully discussed’ the matter on which the union has ‘consciously yielded’ its rights.” *S. Nuclear*, 524 F.3d at 1357-58 (quoting *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 203 n.2 (D.C. Cir. 1993)); *see also Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007)

(“The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term . . .”). The party asserting waiver bears the burden of proof. *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 442 (D.C. Cir. 2017).

Prime’s claim that the clear-and-unmistakable-waiver standard has been “repeatedly rejected by this Court” (Br. 52 n.9) betrays its misunderstanding of D.C. Circuit law. In the cases on which Prime relies, *Heartland Plymouth Court MI, LLC v. NLRB*, 650 F. App’x 11, 13 (D.C. Cir. 2016), and *NLRB v. United States Postal Service (USPS)*, 8 F.3d 832, 836 (D.C. Cir. 1993), this Court held that the parties had exercised their statutory right to bargain on a particular subject and had reached an agreement that was still in force.⁶ By contrast, this case involves the parties’ statutory right to bargain over changes to the status quo *after* the contract expires; in such cases, the Court applies the clear-and-unmistakable-waiver standard.⁷ *See Honeywell*, 253 F.3d at 133-34.

⁶ For instance, in rejecting the Board’s application of the clear-and-unmistakable-waiver standard, the Court in *Heartland* explained that “if a subject is covered by the contract, then the employer generally has no ongoing obligation to bargain with its employees about that subject during the life of the agreement.” 650 F. App’x at 13 (citing *USPS*, 8 F.3d at 836).

⁷ Prime’s assertion that this case concerns “a run-of-the-mill contract wage clause” (Br. 52 n.9) misreads the Board’s decision, which did not find a violation of a

B. Prime Failed To Prove that the Contractual Language Waives the Union's Right To Bargain Over Step Increases

The Board correctly found that the parties' collective-bargaining agreement does not clearly and unmistakably waive the Union's right to bargain over Prime's cessation of step increases. To the contrary, the step-increase provision (Article 13, Section 5) mandates increases on each anniversary, subject only to caps on total annual raises, and excepting employees already above the wage scale. As the Board explained (JA 10), that provision is devoid of language unambiguously indicating that step increases expire with the contract, as would be required to establish a waiver. *See Honeywell*, 253 F.3d at 127-28 (contract-duration clause did not clearly and unmistakably waive union's right to bargain over changes to contractually defined terms of employment); *NLRB v. Gen. Tire & Rubber Co.*, 795 F.2d 585, 587-88 (6th Cir. 1986) (absent express language addressing post-expiration obligations, employer must continue providing contractual benefits). Prime itself does not dispute that the contract lacks any express waiver language; indeed, Schottmiller conceded as much in her testimony. (JA 813.)

Prime argues that because the *annual-increase* provision undisputedly expired upon expiration of contract, so did the step-increase provisions. It claims that "[t]he express language of [the step-increase and annual-increase provisions]

contractual right, but rather a violation of the Union's *statutory* right to bargain over changes to the status quo. (JA 10.)

make[s] clear that they are intended to operate in tandem” because the step-increase provision “makes no less than three references to” the annual-increase provision. (Br. 52-53.) A glance at the contract, however, establishes that the evidence does not live up to Prime’s rhetoric. The first of Prime’s three references simply states that step increases shall be awarded “in addition to” annual increases. That is hardly equivalent to saying the former are *contingent* on the latter, as Prime asserts. And even if that phrase could possibly be construed to support Prime’s interpretation, the Board rightly found that it falls far short of a clear-and-unmistakable statement that the step-increase provision cannot survive without its annual counterpart. (JA 10.)

The other two “references” to which Prime alludes are not to the annual-increase provision itself, but to the contractual 9.25% cap on all raises that appears in that provision. (Br. 53.) But the mere existence of such a cap does not mandate that, when one type of raise expires, all others must do so as well. Such an interpretation assumes that the parties intended to deprive employees of any avenue of wage progression after the contract expired. It is just as reasonable to infer that the parties intended to allow for regular wage evolution during bargaining, particularly where those increases have a built-in ceiling, *i.e.*, the top of the frozen contractual wage scale. Nor is there any logic to Prime’s argument that a combined cap on raises somehow becomes “impossible to administer” (Br. 53)

when annual increases end; if anything, that makes it less likely employees will reach the combined cap.

In sum, Prime attempts to conjure what it calls an “express contingent relationship” (Br. 52) between step increases and the annual-increase provision based on a few passing references. The Board soundly rejected that claim, finding that it was not even a reasonable interpretation of the contract, much less a clear and unmistakable waiver of the Union’s right to bargain.

C. Prime’s Post-Expiration Conduct Established Step Increases as a Status-Quo Term of Employment

The Board found that, even if the contract waived the Union’s right to bargain over cessation of step increases, Prime nevertheless maintained a duty to bargain over those increases. (JA 10.) Prime’s oral commitment to continue—and its actual continuation of—step increases established them as a status-quo working condition after the contract expired.

1. Schottmiller’s acquiescence to continuing step increases after contract expiration triggered Prime’s duty to bargain

The Board found that Schottmiller, Prime’s lead negotiator and admitted agent, expressly agreed with the Union’s representative that step increases survived the contract as a matter of law. (JA 9; JA 800-01, 814.) As the Board explained (JA 10), such oral agreements may be binding. *See, e.g., Quebecor World Mt. Morris II, LLC*, 353 NLRB 1, 2 (2008) (expired agreement may be orally extended

absent contractual prohibition on oral modifications); *Safeway Steel Prods., Inc.*, 333 NLRB 394, 400 (2001) (handshake agreement to raise welfare-fund contributions found binding); *cf. Martinsville Nylon Emps. Council Corp. v. NLRB*, 969 F.2d 1263, 1268 (D.C. Cir. 1992) (“[A] collective bargaining agreement need not be in writing in order to be enforceable.” (citation omitted)).

Prime’s sole rejoinder is that Schottmiller had only “passing” familiarity with the contract and that her agreement thus “resulted from confusion.” (Br. 54 n.10.) Unsurprisingly, Prime offers no legal support for the notion that ignorance of contractual language is a valid defense. Nor is it credible that a sophisticated actor like Prime was unfamiliar with the terms of its own contract. Regardless of whether Prime negotiated the contract, there is no dispute that Prime adopted it, was bound by it, and was actively negotiating a successor agreement building on its terms.

In fact, Schottmiller’s oral agreement to continue the step increases not only created an obligation to do so, but also belies Prime’s contractual-waiver argument because it confirms that Prime shared 121RN’s view that step increases survived the contract’s expiration. *See Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.*, 863 F.2d 439 (6th Cir. 1988) (“The practical construction placed upon a contract by people who have agreed to be bound by its terms is universally held to be relevant in determining . . . what those terms were supposed to mean.”).

Moreover, Prime's present reliance (Br. 53-54) on the plain-meaning rule of contract interpretation to support its waiver argument begs the question of why Schottmiller readily agreed to a contrary interpretation. Certainly, her prior position negates any finding of clear-and-unmistakable waiver.

2. Prime could not unilaterally rescind step increases after continuing them for seven months

The Board found that Prime was additionally precluded from unilaterally discontinuing step increases because it continued to award them for seven months after the contract expired, effectively establishing them as a status-quo term of employment separate from the contract. (JA 10.) Under Board law, an employer that regularly and repeatedly awards raises or benefits cannot rescind them without giving its employees' representative notice and an opportunity to bargain, even if the grants were in error. For instance, in *Garden Grove Hospital & Medical Center*, a hospital mistakenly continued the predecessor employer's non-contractual sick-leave benefit. 357 NLRB 653, 656 (2011). After nine months, the hospital realized its mistake and halted the practice, but the Board found that the benefit had become a term of employment that could not be unilaterally discontinued. *Id.* at 657-58; *see also JPH Mgmt., Inc.*, 337 NLRB 72, 72-73 (2001) (unlawful to unilaterally rescind raise mistakenly implemented for five weeks based on tentative agreement with union).

Prime's argument that post-expiration step increases were simply mistakes it was privileged to correct (Br. 54-56) is unavailing. As shown by *Garden Grove* and *JPH Management*, Prime's reasons for continuing to grant step increases, mistaken or otherwise, are not the determinative factor in the analysis. The key fact is that Prime continued for seven months to grant step increases to a significant portion of eligible employees, ostensibly maintaining the former contractual benefit as a term of employment before abruptly eliminating it. Finally, the "error" of maintaining an established term from an expired contract, even one the employer may legally cease, is not comparable to the sort of administrative error the Board has allowed employers to reverse.⁸ See, e.g., *Eagle Transp. Corp.*, 338 NLRB 489, 489-90 (2002) (promptly correcting computer error giving employees raises); *Foster Transformer Co.*, 212 NLRB 936, 936 (1974) (correcting employee's classification and salary to reflect change in work duties); *Dierks Forests, Inc.*, 148 NLRB 923, 924-26 (1964) (correcting misclassification error affecting multiple employees over nine months). In sum, even if Prime *could*

⁸ Prime cites *Daycon Products Co.*, 2010 NLRB LEXIS 10 (Jan. 8, 2010), for the proposition that unilaterally correcting an administrative error that resulted in overpayments to multiple employees over five years was lawful. (Br. 56.) In fact, that case stands for exactly the *opposite* proposition, for the Board reversed the administrative-law-judge decision Prime describes. *Daycon Prods. Co.*, 357 NLRB 508 (2011), *enforcement denied on other grounds*, 512 F. App'x 345, 349-50 (4th Cir. 2013).

have lawfully ended step increases upon contract expiration (contrary to the Board's waiver finding), it did not do so, and the window of opportunity closed.

II. PRIME VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO PROVIDE RELEVANT AND NECESSARY INFORMATION REQUESTED BY THE UNION

An employer's statutory duty to bargain in good faith "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012). Failure to provide relevant information upon request, or to offer a timely, legitimate basis for refusing to do so, is tantamount to bad-faith bargaining and violates Section 8(a)(5) and (1) of the Act. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 150-51 (1956).

Prime does not challenge the Board's finding that it did not provide the information the Union requested. Instead, Prime challenges the Board's finding that the requested information was relevant to bargaining, and claims that concerns over the potential use of those materials excused its refusal to produce them. (Br. 51-52.) Those defenses are unavailing, particularly in light of Prime's failure

to adequately argue relevance before the Court and to timely raise any confidentiality concern to the Union or to seek an accommodation.⁹

A. The Requested Information Was Relevant

Although Prime claims in a heading that “121RN’s Requests Were Irrelevant to Bargaining” (Br. 51), it offers no argument disputing their relevance. Accordingly, the Court should deem that argument waived. *See Fox v. Gov’t of D.C.*, 794 F.3d 25, 29-30 (D.C. Cir. 2015) (appellant forfeited challenge to dispositive issue by failing to argue it in opening brief). In any event, the Union more than met its burden to establish the relevance of the requested information.

In order to facilitate information exchanges, the Board has identified categories of information deemed “presumptively relevant” to unions’ fulfillment of their representational duties. *See Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1192 (D.C. Cir. 2000). Specifically, “[i]nformation related to the wages, benefits, hours, [and] working conditions . . . of represented employees is presumptively relevant.” *Id.* at 1191; *see also Allied Chem. & Alkali Workers of*

⁹ In its brief, Prime argues that *UHW’s* information request was irrelevant and unnecessary because Prime had already provided “the majority” of the requested information. (Br. 50.) Prime did not make that argument with regard to 121RN, however, and thus the Court should deem it waived. *See Fox v. Gov’t of D.C.*, 794 F.3d 25, 29-30 (D.C. Cir. 2015). In any event, Board law clearly provides that 121RN was entitled to receive *all* of the relevant responsive information unless Prime timely raised a legitimate and substantial confidentiality interest, which Prime did not. *See Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348, 354 (D.C. Cir. 1983).

Am., Local Union No. 1 v. Pittsburg Plate Glass Co., Chem. Div., 404 U.S. 157, 159 (1971) (employee insurance benefits). The requesting union need not explain the relevance of such information, which must be produced upon request unless the employer asserts a valid countervailing interest. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 359-60 (D.C. Cir. 1983).

For information to which the presumption does not apply, the requesting union bears the burden of demonstrating relevance. *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 730 (D.C. Cir. 2011). That bar is a low one, however, because the Board and this Court apply a “discovery-type standard” in which “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it.” *Id.* (ellipsis in original) (quotation marks and citations omitted). The determination of relevance “is, in the first instance, a matter for the NLRB, and the Board’s conclusions are given great weight by the courts.” *Oil, Chem. & Atomic Workers*, 711 F.2d at 360 (footnote omitted).

The Board reasonably found (JA 13) that the requested information about Prime’s costs of providing healthcare to unit employees was presumptively relevant to the Union’s duties as collective-bargaining representative. *See Zukiewicz, Inc.*, 314 NLRB 114, 123-24 (1994) (employer’s costs of providing health insurance presumptively relevant); *see also* JA 13 and cases cited therein.

And substantial evidence supports the Board's further finding (JA 13) that the requested access-to-healthcare and quality-of-care information was relevant on its face, which would have been obvious to Prime. *See Disneyland Park*, 350 NLRB 1256, 1258 (2007) (employer must provide information if relevance "should have been apparent . . . under the circumstances"). Not only are unit employees required to obtain healthcare through Prime's PPO or EPO plans, but Prime does not dispute that it put healthcare benefits in play by proposing to increase employee costs and premiums. (JA 13; JA 815-16.) That fact, by itself, establishes the relevance of the requested information. *See U.S. Testing Co.*, 324 NLRB 854, 859 (1997), *enforced*, 160 F.3d 14, 19 (D.C. Cir. 1998) (request for non-unit claims-and-benefits information found relevant after employer proposed making employees contribute to healthcare costs).

Finally, even if the requested information were neither presumptively nor facially relevant, the Union more than met its burden to show relevance. The request itself provided some explanation: for example, the Union explained that it was seeking information about claims for care received at non-Prime facilities due to "concerns that the limited number of services and providers available at Prime facilities unduly restricts our members' access to care." (JA 11; JA 211.) In addition, the Union responded to Schottmiller's inquiries with letters—exhaustively summarized by the Board—explaining in detail the basis for its

request. (JA 11-12; JA 216-18, 222-23.) Those explanations amply satisfied the Union's "minimal burden" to establish relevance. *U.S. Testing*, 160 F.3d at 19.

B. Prime Failed To Justify Its Withholding of Relevant Information

Prime argues (Br. 51) that it was justified in refusing to produce the information requested by the Union because the request included Medicare coding information that was similar to data used by UHW as part of a corporate campaign against Prime. Setting aside that this argument is relevant only to one of the many types of information comprising the Union's request, the Board reasonably rejected Prime's challenge to the Union's good faith. (JA 13-14.)

Information requests benefit from a presumption of good faith. *Mission Foods*, 345 NLRB 788, 789 (2005); accord *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002). To rebut that presumption, the challenging party must show that the request was driven *solely* by a bad-faith objective. *Island Creek Coal Co.*, 292 NLRB 480, 489 & n.14 (1989); accord *Country Ford Trucks*, 229 F.3d at 1192. As shown above (pp. 25-26), Prime is unable to refute the Board's finding that the requested information was relevant and necessary to bargaining over changes to healthcare benefits. Moreover, Salm (who made the request for the Union) testified that Medicare coding data in particular "is the best measure available for assessing the quality of care delivered within a particular

hospital o[r] hospital system.”¹⁰ (JA 758.) Alone, that legitimate purpose supports the Board’s determination that Prime failed to rebut the good-faith presumption. (JA 14.)

While Prime claims it provided “a mountain of evidence” of bad faith (Br. 51), it does not offer any evidence specific to 121RN; instead, Prime points to the purported misuse of similar coding data by UHW.¹¹ The Board reasonably found that UHW’s actions were insufficient to call into question the legitimacy of 121RN’s request for information plainly relevant to ongoing bargaining. (JA 14.) Moreover, to the extent Prime feared 121RN might publicize the Medicare data, that concern is undercut by the Board’s finding, which Prime does not dispute, that coding data is eventually made public. (JA 14.)

¹⁰ Though Schottmiller disputed that assertion, she admitted she was unfamiliar with Medicare codes and based her opinion on a discussion with Prime’s chief nursing officer, who did not testify. (JA 810, 819.) The Board reasonably accorded little weight to that uncorroborated, conclusory, hearsay testimony. (JA 14 n.26.)

¹¹ In early 2010, during contentious contract negotiations with Prime, UHW began a corporate campaign publicizing its various labor disputes with Prime hospitals and questioning Prime’s quality-of-care and billing practices. (JA 7.) As part of that campaign, UHW released two reports, which relied on Medicare coding data similar to that requested by 121RN, and which drew conclusions very critical of Prime. (JA 7.) Before the Board, Prime cited that campaign in arguing that UHW had a conflict of interest that disqualified it from representing Prime’s employees. (JA 16-18.) As a result of the settlement between Prime and UHW, those allegations, and the Board’s resolution thereof, are not before the Court.

Prime is equally misguided in its reliance (Br. 51-52) on *Hondo, Inc. d/b/a/ Coca-Cola Bottling Co. of Chicago*, 311 NLRB 424 (1993). In *Hondo*, the union shared a most-favored-nation agreement with the employer's competitors, who arranged for the union to request information from the employer and convey it to them. *Id.* at 424. When the employer questioned the union's need for the information—the parties had just entered into a new contract—the union simply invoked its status as collective-bargaining representative. *Id.* at 424-25. Here, by contrast, Prime does not claim that the Union had any separate obligation to Prime's competitors.¹² Moreover, the Union formulated its request during bargaining, specifically because it anticipated that Prime would propose to modify employee health benefits. And when Prime challenged the relevance of the information, the Union offered a detailed rationale for its request. (JA 216-18, 222-23.) Indeed, though Prime derides the Union's letters as "conclusory" and "self-serving" (Br. 51), even a cursory reading demonstrates that they are anything but.¹³

¹² Prime initially made the same conflict-of-interest argument with respect to 121RN as for UHW, but withdrew it at the hearing. (JA 6 n.2; JA 742-43.)

¹³ In its brief, Prime also claims that UHW's request about EPO-plan costs is "tantamount to a request to view financials." (Br. 49.) Prime did not make the same argument with regard to 121RN, and therefore it is waived. *See Fox*, 794 F.3d at 29-30. In any event, that argument relies on the flawed notion that, because it is itself a healthcare provider, any information about healthcare costs is *de facto* proprietary financial information. But *any* employer who provides

Finally, even if Prime could establish a confidentiality interest in its Medicare-coding data, that would not privilege Prime to categorically withhold that information. An employer harboring confidentiality concerns bears the burden to “seek an accommodation of its concerns and the Union’s need for the requested information.” *Borgess Med. Ctr.*, 342 NLRB 1105, 1106 (2004); *accord U.S. Testing*, 160 F.3d at 20 (citing cases). However, Prime never offered a proposal that would give the Union access to the requested information whilst alleviating its alleged concerns.

healthcare benefits must account for their cost in its financial records, and just because such records can be privileged does not exempt the underlying healthcare-cost data from disclosure. As the Board explained, “[Prime] cannot avoid its statutory obligations . . . simply because it chooses to provide healthcare to its employees directly . . . , rather than through other providers.” (JA 13.) Furthermore, Prime made healthcare costs especially relevant by proposing changes to its existing plans that would affect employees.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Prime's petition for review and enforcing the portion of the Order relative to the Board's finding that Prime violated the Act by unilaterally ceasing to grant anniversary wage increases to 121 RN unit employees, and by failing to furnish relevant, necessary information requested by 121 RN.

Respectfully submitted,

/s/ Kira Dellinger Vol

KIRA DELLINGER VOL

Supervisory Attorney

/s/ Gregoire Sauter

GREGOIRE SAUTER

Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-0656
(202) 273-1714

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

September 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

<hr/>		
PRIME HEALTHCARE SERVICES –)	
ENCINO LLC, d/b/a ENCINO HOSPITAL)	
MEDICAL CENTER,)	
)	
)	
Petitioner/Cross-Respondent)	
	)	Nos. 16-1370
v.	)	16-1423
)	
NATIONAL LABOR RELATIONS BOARD,	)	Board Case Nos.
	)	31-CA-066061
Respondent/Cross-Petitioner	)	31-CA-070323
-----)	
)	
SEIU LOCAL 121RN,)	
)	
Intervenor for Respondent/Cross-Petitioner)	
<hr/>		

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its final brief contains 7,005 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-1714

Dated at Washington, DC
this 26th day of September 2017

**STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS**

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

Section 7 (29 U.S.C. § 157) i
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) i
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) i
Section 8(b)(1) (29 U.S.C. § 158(d)) i
Section 10(a) (29 U.S.C. § 160(a)) ii
Section 10(e) (29 U.S.C. § 160(e)) ii
Section 10(f) (29 U.S.C. § 160(f)) iii

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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

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

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

* * *

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

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

(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 lockout, 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:

....

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

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

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of

extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) 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.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIME HEALTHCARE SERVICES –)
ENCINO LLC, d/b/a ENCINO HOSPITAL)
MEDICAL CENTER)
Petitioner/Cross-Respondent)
v.) Nos. 16-1370
) 16-1423
NATIONAL LABOR RELATIONS BOARD) Board Case Nos.
) 31-CA-066061
Respondent/Cross-Petitioner) 31-CA-070323
-----)
SEIU LOCAL 121RN)
Intervenor for Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-1714

Dated at Washington, DC
this 26th day of September 2017