

**Nos. 17-1133 and 17-1147**

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

**TRAMONT MANUFACTURING, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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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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**UNITED STATES COURT OF APPEALS  
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	)	
<b>Petitioner/Cross-Respondent</b>	)	<b>Nos. 17-1133 and 17-1147</b>
	)	
<b>v.</b>	)	<b>Board Case No.</b>
	)	<b>18-CA-155608</b>
<b>NATIONAL LABOR RELATIONS BOARD,</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	

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

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

(A) Parties and Amici: Tramont Manufacturing, LLC (“Tramont”), was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board’s General Counsel was also a party before the Board, and the Board is the respondent/cross-petitioner before the Court. United Electrical Radio and Machine Workers of America, Local 1103 was the charging party before the Board. There are no intervenors or amici.

(B) Ruling Under Review: This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of the Board’s Decision and Order in Case No. 18-CA-155608, issued on April 7, 2017, and reported at 365 NLRB No. 59.

(C) Related Cases: The underlying unfair-labor-practice case (Board Case No. 18-155608) was previously before the Court (D.C. Cir. Nos. 16-1184, 16-1231), but was remanded to the Board prior to decision on the Board's own motion. On remand, the Board vacated its earlier decision and order (364 NLRB No. 5), and issued a new decision and order (365 NLRB No. 59), which is now before the Court for review. The Board is unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

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## GLOSSARY

A.	Joint Appendix
Act	The National Labor Relations Act
Board	The National Labor Relations Board
Br.	Tramont's brief to the Court
Tramont	Tramont Manufacturing, LLC
Union	United Electrical Workers of America, Local 1103

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Tramont Manufacturing, LLC (“Tramont”) to review an order issued by the National Labor Relations Board (“the Board”) against Tramont, and the Board’s cross-application to enforce that order.

The Board's Order Vacating, and Decision and Order on Remand, issued on April 7, 2017, and is reported at 365 NLRB No. 59. (A. 400-09.)<sup>1</sup>

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"), which empowers the Board to remedy unfair labor practices. The Board's Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction under the same section of the Act. The petition and cross-application were both timely because the Act places no time limits on such filings.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that Tramont violated Section 8(a)(5) and (1) of the Act by failing to timely notify the Union and afford the Union an opportunity to bargain over the effects of its decision to lay off 12 unit employees.

### **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

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

### **STATEMENT OF THE CASE**

The United Electrical, Radio, and Machine Workers of America, Local 1103 ("the Union") filed charges alleging that Tramont, a successor employer to Tramont Corporation, laid off 12 unit employees without bargaining with the

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<sup>1</sup> "A." refers to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Union over the decision to layoff the employees or its effects. (A. 5, 172.) The Board's General Counsel dismissed the charge allegation regarding Tramont's layoff decision, but issued a complaint alleging that Tramont violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to timely notify the Union and afford it an opportunity to bargain over the effects of its decision to layoff 12 unit employees. (A. 7-13, 173-77.) Following a hearing, an administrative law judge issued a recommended decision and order finding merit to the complaint allegations. (A. 403-09.)

On May 23, 2016, after Tramont filed exceptions and the Board's General Counsel filed cross-exceptions, the Board issued its Decision and Order affirming the judge's unfair-labor-practice finding. (A. 331-39.) Tramont petitioned for review of that order in this Court, and the Board cross-applied for enforcement. (A. 340-41, 356-57) (D.C. Cir. Nos. 16-1184 and 16-1231.) Subsequently, the Board recognized that it had overlooked and not yet addressed an issue raised by Tramont in its exceptions to the Board. Specifically, Tramont had claimed in an exception to the Board that the administrative law judge erred by applying a "clear-and-unmistakable waiver" standard rather than a "contract coverage" standard in finding that the Union had not waived its right to bargain over the effects of Tramont's layoff decision. Accordingly, the Board moved the Court to remand the case. The Court thereafter temporarily remanded the case for the Board to

consider the overlooked issue and placed the case in abeyance pending further order of the Court. (A. 368-73, 399, 400.)

On remand, the Board vacated its original Decision and Order and took “up the case anew.” (A. 400.) In its decision and order on remand, the Board found, in agreement with the administrative law judge, that Tramont violated Section 8(a)(5) and (1) of the Act by failing to timely notify the Union and afford it an opportunity to bargain over the effects of its layoff decision. (A. 400.) The Board found that the same result follows from application of either the clear-and-unmistakable waiver standard or the contract-coverage standard. (A. 401.) The Board issued a remedial order consistent with its extant law. (A. 400 n.2, 402.)

On May 15, 2017, the Court granted the joint motion of the Board and Tramont to lift the abeyance and dismiss the consolidated cases as moot given that the Board had vacated its prior order. (D.C. Cir. Nos. 16-1184 and 16-1231.) Thereafter, Tramont filed a petition for review of the Board’s Order Vacating, and Decision and Order on Remand, and the Board cross-applied for enforcement. Below are summaries of the Board’s findings of fact and its conclusions and order.

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

### **A. In May 2014, Tramont, a Successor Employer, Recognizes the Union and Implements New Terms and Conditions of Employment**

Tramont manufactures diesel engines and parts. (A. 404; 204-05, 261-62.)

In May 2014, Tramont purchased the assets of Tramont Corporation. (A. 404; 205-06, 262.) Under the terms of the purchase agreement, Tramont would “offer employment to substantially all of the employees” of Tramont Corporation. (A. 404; 37.) Further, Tramont agreed to recognize and bargain in good faith with the Union, who had represented the predecessor’s production and maintenance employees since 2003. (A. 404; 37, 206, 225-26.) Finally, Tramont did not agree to assume the current collective-bargaining agreement, but would make employment offers on its “own terms and conditions of employment.” (A. 404; 37, 264.)

Tramont hired approximately 60 production and maintenance employees, all of whom who had worked for the predecessor. (A. 205, 226-27, 263.) Tramont announced that the initial terms and conditions of employment would be controlled by the Employee Handbook that it distributed to the employees. (A. 404; 103-58, 229-30, 265.) During 2014, the parties met for one bargaining session for a collective-bargaining agreement, during which they mentioned layoffs as a subject of bargaining, but did not reach any agreements. (A. 404; 50, 249-50, 264.)

The Employee Handbook included a provision concerning layoffs. (A. 404; 126-27.) As relevant here, Section 5.5 entitled “Workforce Reductions (Layoffs)” stated: “From time to time, management may decide to implement a reduction in force (‘RIF’).” (A. 126.) It then set out selection criteria and described two methods of selecting employees to be retained. (A. 126.) The “Selection Criteria” for such RIFs stated that employees will be retained based on “skills, experience, and job performance,” with one of two methods—“Ranking of Employees” or “Placement in Available Jobs”—“used to select employees to be retained.” (A. 126-27.)

**B. In February 2015 Tramont Lays Off 12 Unit Employees; the Union Requests Information and Bargaining Over the Layoff Decision and Its Effects**

On January 29, 2015, Tramont began to plan for a layoff. (A. 404; 53, 219.) On February 9, without any prior notice to the Union, Tramont laid off 12 unit employees effective immediately. (A. 404; 220-21, 274-75.) Human Resources Manager Stephanie Pagan provided layoff notices to the 12 employees, including Union President Lauro Bonilla, who had worked for the predecessor for 21 years. (A. 404; 39-50, 210-11, 261-62.) Bonilla asked Pagan if he was the only employee laid off. After Pagan replied that others were also laid off, Bonilla asked for a list of those laid off. Pagan stated that she needed to talk to Tramont’s owner. (A. 404; 268-69.)

Thereafter, Bonillo notified Timothy Curtin, the Union's National Union representative, of the layoff. Curtin directed Bonilla to request the names of the laid-off employees. (A. 404; 223, 268-69.) On February 11, Bonilla hand delivered a written information request to Pagan. Bonilla asked for the names of the laid off employees, the length of the layoffs, and whether Tramont considered any alternatives to layoffs. (A. 404; 51, 214-15.)

In a subsequent letter dated February 18 and an email dated March 3, Curtin requested a grievance meeting with Tramont to discuss Bonilla's layoff. (A. 405; 159-60.) Curtin also left a phone message in late February for Tony Renning, Tramont's attorney, stating that the Union still needed a list of employees laid off and that he had not yet heard from Tramont regarding the Union's request for a meeting. (A. 405; 233-34.) On March 6, Renning emailed Curtin that Tramont was "perplexed" by the request for a grievance meeting because it had complied with the handbook's layoff provisions in laying off Bonilla and the other employees. (A. 405; 161.)

In a March 10 letter to Curtin, Executive Vice President Vijay Raichura stated that Bonilla was one of the employees laid off pursuant to the handbook provision, and stated that he did not know how long the layoffs would last. (A. 405; 162.) Two days later, in a March 12 letter to Vice-President Raichura, Curtin requested a meeting with management no later than March 18. (A. 405; 163.)

Thereafter, the parties agreed to meet on March 30. (A. 405; 242.) At some point prior to the March 30 meeting, the Union received a letter dated February 26 from Raichura which identified 11 employees as laid off for an unknown period. The other laid off employee was left off the list without explanation. (A. 404; 52, 271-73.)

At the March 30 meeting, Curtin and Bonilla represented the Union, and Raichura and Renning represented Tramont. (A. 405; 242-43.) Raichura stated that he had followed the handbook provisions regarding the layoff. (A. 405; 243.) Curtin stated that the Union wanted “status quo ante” and bargaining over the decision and the effects of the layoff. (A. 405; 164-66, 243-46.) Tramont did not respond to the Union’s request. (A. 245.)

In an email to Renning dated April 1, Curtin stated that the Union had been denied its right to bargain over the layoff decision and the effects of the layoff. He demanded bargaining and reinstatement with backpay for the laid-off employees. (A. 405; 168.) Curtin received no response. (A. 405; 248.)

The Union filed charges alleging that Tramont failed to provide notice and bargain over the layoff decision and the effects of the layoff. (A. 5, 172.) The Board’s General Counsel issued a complaint based solely on the allegations that Tramont had unlawfully failed to provide timely notice of the layoffs to the Union and had failed to bargain over the effects of its layoff decision. (A. 405; 7-16.) An

administrative law judge issued a recommended decision and order finding that Tramont failed to provide the Union with sufficient notice of the layoffs to provide an opportunity to bargain over effects. (A. 406.) She rejected Tramont's defense that under the contract-coverage analysis the Union had no right to bargain because Tramont's handbook included layoff language, explaining that the Union had not agreed to the layoff provision and the handbook was not a contract. (A. 406.) Following Board precedent, the judge applied the Board's clear-and-unmistakable waiver standard and found that the Union had not waived its right to bargain about effects of the layoff. Examining the language of the handbook, the judge found that the handbook provisions only identify how employees are selected for layoff and are silent about notification and effects regarding layoffs. (A. 407.)

On review, after Tramont filed exceptions and the Board's General Counsel filed cross-exceptions, the Board issued its Decision and Order affirming the judge's unfair-labor-practice findings. (A. 331-39.) In doing so, the Board stated that no party had argued that it was improper for the judge to apply the clear-and-unmistakable waiver standard. (A. 331 n.1.) Therefore, "[a]ssuming, without deciding, the waiver analysis is applicable," the Board agreed for the reasons stated by the judge that the Union had not waived its right to effects bargaining. (A. 331 n.1.)

After Tramont petitioned for review with the Court, and the Board cross-applied for enforcement, the Board recognized that it had overlooked Tramont's exception claiming that the judge should have applied a contract-coverage standard to the layoff provision. (A. 340-41, 356-57) (D.C. Cir. Nos. 16-1184 and 16-1231.) The Board then filed a motion for remand to permit it to review the overlooked exception, which the Court granted. (A. 368-73, 399, 400.)

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

The Board (then-Acting Chairman Miscimarra and Members Pearce and McFerran) issued its Order Vacating, and Decision and Order on Remand, in which it vacated its prior decision and order and took up the case anew. (A. 400-03.) The Board found, in agreement with the administrative law judge, that Tramont violated Section 8(a)(5) and (1) of the Act by failing to provide timely notice to the Union of its intent to layoff 12 unit employees, and without affording the Union an opportunity to bargain about the effects of the layoff. (A. 402, 407.) In so holding, the Board found the violation followed from application of either the clear-and-unmistakable-waiver standard or the contract-coverage standard urged by Tramont. (A. 401.) With respect to the latter analysis, the Board explained that "no provision *in a collective-bargaining agreement between [Tramont] and the Union* covered the subject of layoffs," the Union had not agreed to the layoff provisions in the Employee Handbook, and no judicial authority supported an

argument that the contract-coverage standard “could apply in the absence of a negotiated contract.” (A. 401 (emphasis in original).) In any event, the Board determined, even if the handbook provision on layoffs could be treated as a contract, it only addressed how employees are selected for layoff, not the effects of layoffs on the employees who are selected. (A. 401.)

The Board’s Order requires Tramont to cease and desist from the unfair-labor-practices found, and from any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A. 402.) Affirmatively, the Order requires Tramont to bargain on request with the Union concerning the effects of its decision to layoff 12 unit employees. The Order imposes a limited backpay requirement designed to make the employees whole for the losses suffered as a result of Tramont’s failure to bargain. (A. 401-02.) Additionally, the Order requires Tramont to compensate affected employees for search-for-work expenses and for the adverse tax consequences, if any, of receiving a lump-sum backpay award. (A. 402.) Finally, the Order requires Tramont to post a remedial notice. (A. 402.)

## SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Tramont violated Section 8(a)(5) and (1) of the Act by failing to timely notify the Union and afford it an opportunity to bargain over the effects of its decision to lay off the 12 unit employees. In reaching that conclusion, the Board reasonably found that under either the contract-coverage analysis sought by Tramont, or the clear-and-unmistakable-waiver analysis applied by the administrative law judge, the Union had not lost its right to bargain over the effects of the layoffs.

The Board first noted the "crucial fact" that the Union and Tramont had not entered into a collective-bargaining agreement that addressed the subject of layoffs in any manner. It then properly rejected Tramont's claim that, under the contract-coverage standard, it was entitled to act unilaterally based on a provision in its handbook addressing the selection of employees for layoff. As the Board observed, the Union never agreed to the layoff provision in the handbook, and there is no judicial authority supporting the application of the contract-coverage standard in the absence of a negotiated agreement between a union and an employer. Further, the Board found that, even if it were assumed that the Employee Handbook could be considered a contract, it contains no language that could reasonably be interpreted as covering the effects of layoff.

The Board also found that the Union did not clearly and unmistakably waive its right to bargain about effects of a layoff. Tramont did not contest that finding before the Board, nor does it challenge it before the Court.

The Board reasonably found that Tramont had not properly preserved any challenge to the administrative law judge's finding that Tramont violated Section 8(a)(5) and (1) of the Act by failing to provide timely notice to the Union of the layoff decision. Accordingly, the Court is without jurisdiction to consider any challenge to that Board finding. But, in any event, it is clear under settled case law that providing notice on the day of a decision, as Tramont did here, does not constitute timely notice, but rather is a *fait accompli*.

Finally, in vacating and considering the case anew after the Court's remand, the Board reasonably applied extant Board precedent, which included its modified remedy that requires that discriminates be compensated for their search-for-work expenses. Tramont's failure to file a motion for reconsideration regarding what it now claims to be inequitable application of the remedy precludes the Court from considering Tramont's challenge to that portion of the Board's Order.

### **STANDARD OF REVIEW**

The Board is vested with "the primary responsibility of marking out the scope . . . of the statutory duty to bargain," and "[c]onstruing and applying [that] duty . . . [lies] at the heart of the Board's function." *Ford Motor Co. v. NLRB*, 441

U.S. 488, 496-97 (1979); accord *Minteq Int'l v. NLRB*, 855 F.3d 329, 332-33 (D.C. Cir. 2017). Accordingly, the Board's construction of Section 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) is "entitled to considerable deference," and must be upheld as long as it is "reasonably defensible." *Ford Motor*, 441 U.S. at 495, 497; accord *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Reviewing courts may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. The Court applies the same "familiar substantial evidence test" to the Board's application of law to the facts. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). However, while the Board has the authority to interpret collective-bargaining agreements in order to adjudicate unfair labor practices, *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court gives "no special deference" to the Board's contract interpretation and the Court will interpret such contracts *de novo*. *Int'l Bhd. of Elec. Workers, Local 47 v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT TRAMONT VIOLATED SECTION 8(a)(5) OF THE ACT BY FAILING TO TIMELY NOTIFY THE UNION AND BARGAIN WITH THE UNION REGARDING THE EFFECTS OF ITS DECISION TO LAYOFF 12 EMPLOYEES**

#### **A. Applicable Principles**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines collective bargaining in relevant part as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” 29 U.S.C. § 158(d).

When a new employer acquires a unionized business it must recognize and bargain with the union representing the predecessor’s employees if the new employer is a “successor employer” to the predecessor. *NLRB v. Burns Int’l Sec. Servs.*, 406 U.S. 272, 287-88 (1972). The new employer becomes a *Burns* successor when it conducts essentially the same business as the former employer, and it employs a “substantial and representative complement” of the predecessor’s work force. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41, 47-48 (1987); *Burns*, 406 U.S. at 278-81. If these conditions are met, a union’s demand to bargain triggers the successor’s bargaining obligation. *Fall River*, 482 U.S. at

46. Ordinarily, a successor employer is not bound by the substantive terms of the predecessor's collective-bargaining agreement and it can set initial terms and conditions of employment. *Burns*, 406 U.S. at 284.

Even when an employer has no obligation to bargain over a layoff decision, it violates Section 8(a)(5) and (1) of the Act when it fails to give a union advance notice and an opportunity to bargain about that decision's impact on employees' interests. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677, 681-82 (1981); *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 204-05, 208 (D.C. Cir. 2003); *NLRB v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009); *Allison Corp.*, 330 NLRB 1363, 1365 (2000). As this Court has explained, an employer's failure to comply with its obligation to bargain over the effects of a decision "denigrate[s] the [u]nion and the viability of the process of collective bargaining itself in the eyes of the unit employees." *Vico Prods.*, 333 F.3d at 208. Effects bargaining regarding layoffs includes matters such as severance pay and recall rights for those discharged. *First Nat'l Maintenance Corp.*, 452 U.S. at 677 n.15, 681-82; *Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 880 (7th Cir. 2016).

**B. Tramont Was Required to Notify and Bargain with the Union Over the Effects of Its Layoff Decision and Failed to Do So**

Before this Court, there is no dispute, as the Board found (A. 400), that Tramont is a *Burns* successor who agreed to recognize the Union, that it lawfully unilaterally established initial terms and conditions of employment as set forth in

an Employee Handbook, and that its decision to lay off 12 unit employees on February 9, 2015, was not subject to bargaining. However, the Board reasonably found that Tramont violated Section 8(a)(5) and (1) of the Act by failing to timely notify the Union and give it an opportunity to bargain over the effects of the layoffs. Indeed, Tramont only notified the Union of the layoffs on the day it issued the layoff notices to employees and at no point bargained with the Union over the effects of the layoffs. See p. 8. Tramont argues that it was not obligated to notify the Union about the layoffs and to bargain about the effects of the layoff, relying on the provision in its Employee Handbook addressing the selection of employees for layoff. As shown below, the Board properly rejected Tramont's claim.

**1. Tramont's handbook provision did not negate the Union's right to timely notice and effects bargaining over the layoffs**

As both the Board and the Court have recognized, in evaluating whether an employer is contractually privileged to implement a unilateral change involving a mandatory subject of bargaining, the Board and the Court have had a "long-running disagreement" as to the appropriate approach to determine "whether an employer has violated Section 8(a)(5) of [the Act] when it refuses to bargain with its union over a subject allegedly contained in a collective bargaining agreement." *Heartland Plymouth Court MI, LLC v. NLRB*, 650 F. App'x 11, 12 (D.C. Cir. 2016) (quoting *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 835 (D.C. Cir. 2005)). See A. 401 (recognizing the different standards applied by the Board and the Court).

As the Board stated here (A. 401), it focuses on whether a union has clearly and unmistakably waived its statutory bargaining right. *See Enloe Med. Ctr.*, 433 F.3d at 837 (setting out the Board's test).

Under this Court's contract-coverage approach, the issue is not one of waiver but simply whether the language contained in the parties' collective-bargaining agreement covers the dispute. *Wilkes-Barre Hosp.*, 857 F.3d at 376; *Enloe Med. Ctr. v. NLRB*, 433 F.3d at 838. The application of the Court's contract-coverage approach is premised on the notion that a union has already affirmatively "*exercised its bargaining right*," and the covered issue has therefore been removed from the range of further bargaining. *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (quoting *Dep't of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (emphasis in original); accord *Wilkes-Barre Hosp.*, 857 F.3d at 376-77. "A dispute regarding a subject that is 'covered by' a collective bargaining agreement presents an issue of contract interpretation, and when parties negotiate for a contractual provision limiting the union's statutory rights [the Court] will give full effect to the plain meaning of such provision." *Id.* (internal quotation marks and citations omitted). The Court's analysis is thus "a matter of ordinary contract interpretation," which the Court performs *de novo*. *Enloe Med. Ctr.*, 433 F.3d at 836-37.

Here, the disagreement between the Board and the Court is not implicated because, as the Board found (A. 401), Tramont acted unlawfully applying either the Court’s contract-coverage analysis, on which Tramont relies, or the Board’s clear-and-unmistakable-waiver standard. Significantly, as the Board emphasized, the “crucial fact” is that the Union and Tramont “had not entered into a collective-bargaining agreement that addressed the subject of layoffs in any manner.” (A. 401.) Specifically analyzing the case under the contract-coverage standard, the Board stressed that “no provision in a *collective-bargaining agreement between [Tramont] and the Union* covered the subject of layoffs.” (A. 401 (emphasis in original)). Nor, as the Board found, does the Employee Handbook provide a basis for application of the contract-coverage standard. The handbook was not a negotiated document. Tramont unilaterally implemented it and “the Union never agreed to the layoff provision in [Tramont’s] handbook.” (A. 401.) In short, here, the prerequisite for a contract-coverage analysis—a contract that was negotiated and agreed to by the parties—is not present, and there is “no judicial authority for the proposition that the ‘contract coverage’ standard could apply in the absence of a negotiated contract.” (A. 401)<sup>2</sup> Accordingly, the Board reasonably found that

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<sup>2</sup> Cases on which Tramont relies confirm that the contract-coverage analysis applies only where the parties, unlike here, have already bargained the subject and have a contract memorializing their agreement. *See, e.g. Heartland Plymouth Court MI, LLC v. NLRB*, 650 F. App’x 11, 13 (D.C. Cir. 2016) (Br. 26-27) (when an employer “refuses to bargain with its union over a subject allegedly contained in

Tramont was not “entitled to act unilaterally” regarding the effects of the layoffs “predicated on a handbook provision that . . . was itself unilaterally implemented by [Tramont] when it assumed operations and to which the Union had never agreed.” (A. 401.)

Nevertheless, as the Board determined, even assuming that the Employee Handbook could be treated as a contract, Tramont’s argument gains no ground. As the Board explained, the layoff provisions in the handbook address only “how employees are selected for layoff.” (A. 401, 407.) The provisions “do not address the effects on employees when a layoff occurs,” and likewise are silent about notification regarding layoffs. (A. 407.) Instead, describing the process, the handbook expressly states “the following procedures will be used.” (A. 126.) Thus, the first section of the layoff provision, entitled “Selection Criteria,” sets forth that “employees will be retained based on skills, experience, and job performance.” (A. 126.) The two remaining sections set forth the two separate methods Tramont may use for conducting a layoff: either by “Ranking of Employees,” or by “Placement in Available Jobs.” (A. 126-27.) The first method, “Ranking of Employees” involves department and/or division heads “rank[ing]

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a collective bargaining agreement . . . the proper inquiry is simply whether the subject that is the focus of the dispute is ‘covered by’ the agreement”); *U.S. Postal Service*, 8 F.3d at 836-37 (D.C. Cir. 2003) (Br. 27) (“where the employer acts pursuant to a claim of right under the parties’ agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue”).

employees based on the employee's overall ability to contribute to Tramont's ongoing needs." (A. 126.) Under the later method, Tramont assesses "the positions that will exist in a work unit following the reduction in force, and which employees are best suited to fill those remaining positions." (A. 127.)

In the absence of any language in the handbook's layoff provision regarding the effects of a layoff (such as, for example, recall rights), the Board reasonably found, applying a contract coverage standard, that "as a matter of contract interpretation . . . the handbook provision addressing the selection of employees for layoff cannot be read to authorize [Tramont] to refuse to bargain with the Union over the *effects* of such layoffs on the employees who are selected." (A. 401 (emphasis in original).)

As noted, the Board also found that applying the clear-and-unmistakable-waiver test, "[n]othing reflects that the Union waived its right to be notified or bargain effects before [Tramont] laid off employees." (A. 400,407) *See generally, Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312-14 (D.C. Cir. 2003) (rejecting employer's "covered by" argument and affirming the Board's finding that union did not clearly and unmistakably waive its right to bargain over a transfer of unit work; the contractual clause cited was too general to encompass such a transfer under the "covered by" approach); *Wilkes-Barre Hosp.*, 857 F.3d at 377-78 (rejecting employer's "covered by" argument and affirming the Board's finding that the union

did not clearly and unmistakably waive its right to receive longevity bonuses after expiration of a bargaining agreement); *KGTV*, 355 NLRB 1283, 1285-86 (2010) (employer required to bargain over effects of layoff where bargaining agreement provision on layoff addressed layoff procedures but did not address the effects). Neither before the Board or the Court has Tramont argued that, if the contract-coverage standard does not apply, the Union nevertheless clearly and unmistakably waived its right to bargain over the effects of the layoffs. Instead, Tramont rested its claim *solely* on the application of the contract-coverage standard, which, as shown, the Board reasonably found did not apply on this record in the absence of a negotiated agreement between the parties. Therefore, if the Court agrees with the Board that contract coverage is inapplicable here, it should uphold the Board's determination that the Union did not waive its right to bargain about the effects of the layoffs.

**2. The Board reasonably found that Tramont failed to provide timely notice of the layoffs to the Union**

In the absence of sufficient exception, the Board adopted the administrative law judge's finding that Tramont failed to give timely notice to the Union of its decision to lay off the 12 employees. (A. 400.) The Board properly disregarded Tramont's insufficiently pleaded exception to the judge's finding because Tramont failed to present an "argument in support of this exception" and therefore its exception was not in compliance with the Board's rules. (A. 400.) *See* 29 C.F.R. §

102.46(a), (b) (requiring a party to file exceptions that also contain supporting arguments, or to file exceptions with a supporting brief that contains supporting arguments).

Pursuant to Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). The Board’s regulations fortify this statutory mandate by providing that “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.” 29 C.F.R. § 102.46(b)(2). Likewise, the Board’s regulations further provide that “[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any other further proceeding.” 29 C.F.R. § 102.46(f). Here Tramont failed to conform its exception to the Board’s regulations and put the Board on notice of its argument challenging the judge’s finding that it failed to provide the Union with timely notice of the layoffs. *See, e.g., Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (disregarding exceptions because the employer “merely recites the findings excepted to and cites to the judge’s decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned”), *enforced*, 456 F.3d 265 (1st Cir. 2006).

Because the Board properly disposed of Tramont's non-conforming exception, the Court has no jurisdiction to consider Tramont's argument (Br. 48-49) that it provided sufficient notice of the layoffs to the Union. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). “Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).<sup>3</sup>

In any event, “pre-implementation notice is required to satisfy the obligation to bargain over the effects’ of a decision that impacts conditions of employment.” *Vico Prods.*, 333 F.3d at 208 (quoting *Los Angeles Soap Co.*, 300 NLRB 289, 289 n.1 (1990)). Here, although Tramont claims that it provided notice to the Union (Br. 22-23, 48-49), it does not argue—nor could it—that it provided *prior* notice of the layoffs. Rather, Tramont notified Union President Bonilla of his individual layoff in a letter presented to him on the same day of his

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<sup>3</sup> Tramont suggests that its exceptions were sufficiently specific because “the issue of whether Tramont failed to provide timely notice is encompassed in the issue of whether Tramont failed to bargain the effects (or decision).” (Br. 19 n.2.) However, an exception and accompanying argument that the judge erred by failing to apply the contract-coverage standard, and if she had, there would be no notice requirement, is markedly different from the separate argument that Tramont provided proper timely notice *at the time* of the layoffs.

layoff. On the day that the 12 employees were laid off, Tramont refused to divulge to Bonilla how many other employees were laid off or their names. (A. 404; 268-70.) In these circumstances, as the Board found, “[t]he Union was presented with a *fait accompli*.” (A. 406.) *See Miami Rivet of Puerto Rico*, 318 NLRB 769, 771-72 (1995) (union received no timely notice for effects bargaining when it received no prior notice of the layoff or names of those laid off). Moreover, as the Board further found, even if the notice to Bonilla could be construed as notice to the Union, same day notice of a decision is “insufficient time to provide a meaningful opportunity to bargain” over the effects of that decision. (A. 406.) *See Willamette Tug & Barge Co.*, 300 NLRB 282, 282-83 (1990).

In sum, the Board reasonably found that there is no basis on this record to find that the Union relinquished its right to effects bargaining, and further properly adopted the judge’s conclusion that Tramont did not provide the Union with timely notice of its layoff decision.

**C. Tramont’s Contentions Regarding the Merits of the Board’s Reasoning Are Without Merit**

Tramont raises meritless arguments regarding the Board’s finding that it unlawfully failed to bargain over the effects of its layoff decision. Obviously mistaken, as demonstrated above, are its contention that the Board ignored the Court’s controlling precedent that applies a contract-coverage standard (Br. 18, 24-29), its claim that the Board erred by *only* applying the clear-and-unmistakable-

waiver standard (Br. 19-20, 24, 25, 27), and its assertion that the Board simply “readopted” the administrative law judge’s recommended order without further analysis (Br. 18, 25-27).<sup>4</sup>

Tramont now argues also (Br. 21, 34-37) that the Board’s finding that the contract-coverage standard did not apply because there was no contract cannot be reconciled with its analysis under the clear-and-unmistakable-waiver standard, because both standards require a written agreement. However, no party argued to the Board that, it was improper for the judge to apply the clear-and-unmistakable-waiver standard in the circumstances presented. Rather, Tramont simply argued to the Board, as it had to the judge, that the contract-coverage standard should apply here. (A. 375.)

Tramont’s repeated characterization of the handbook as either “the Employee Handbook (the contract),” or “the contract (the Employee Handbook)” (Br. 20, 21, 28, 29, 30, 32, 33, 37, 47), is without foundation. Tramont fails even to attempt to explain how that unilaterally implemented document, which contained only non-bargained-for initial terms, could be the legal equivalent of a

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<sup>4</sup> Tramont again misrepresents the Board’s decision (Br. 25) with its claim that the Board “reaffirmed its commitment” to the clear and unmistakable waiver standard following a long-standing policy of non-acquiescence. That quote is taken from the judge’s decision prior to the Board’s remand request. Upon remand, as shown, the Board applied both standards and found neither privileged Tramont’s unlawful refusal to engage in effects bargaining. (A. 401.)

fully negotiated collective-bargaining agreement. Under settled successorship principles, the Union did not become the bargaining representative until Tramont had hired a representative complement of its employees. In this regard, the cases cited by Tramont (Br. 26-28) are inapplicable because, as shown, p. 19 n.2, the holdings of those cases are based on records that contain evidence that a union had negotiated over the relevant matter. Indeed, Tramont acknowledges (Br. 27), quoting *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), that the Court has held that “questions of ‘waiver’ normally do not come into play with respect to subjects *already covered by a collective bargaining agreement.*” *Id.* at 838 (emphasis added).

Tramont unpersuasively seeks to challenge the Board’s alternative finding that even assuming the contract-coverage standard applied here, the Employee Handbook did not cover effects bargaining. Tramont (Br. 29, 33) cites specific language in the handbook that it asserts could be interpreted as covering the effects of layoffs. Thus, Tramont points to the handbook language that it “may decide to implement a reduction in force,” and would “acknowledge[e] the needs of its workforce,” should be interpreted as covering effects bargaining. (A. 126.) Read in context, that language does not encompass the effects of layoff, but merely recognizes that layoffs constitute a difficult time for employees and details the

selection process that would be implemented.<sup>5</sup> Tramont's contention (Br. 20-21, 29-34), that the Board is collapsing the two standards by requiring the handbook to contain specific language regarding effects of layoffs misses the mark. As the Board recognized, Tramont established the initial terms and conditions. Now Tramont seeks to avoid the plain meaning of the language it drafted, which does not implicate the Union's right to bargaining over the effects of a layoff decision.

Nor does the Court's decision in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), foreclose the Board's interpretation of the Employee Handbook as not covering effects bargaining. In *Enloe*, the Court applied its contract-coverage analysis and held that the employer had no duty to bargain over either the decision to adopt a new mandatory on-call policy or the effects of that decision. In contrast to the record here, the collective-bargaining agreement in *Enloe* contained a "broad" management rights clause under which the employer "retain[ed] the sole and exclusive right to exercise all the authority, rights, and/or functions of management," and "expressly retain[ed] the complete and exclusive

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<sup>5</sup> The introductory statement to the layoff provision reads as follows:

From time to time, management may decide to implement a reduction in force ("RIF"). We are quick to acknowledge that RIFs can be a trying experience for management and employees alike. The Company will make its best effort to make sound business decisions while acknowledging the needs of its workforce. Unless specified otherwise in connection with a particular reduction in force, the following procedures will be used.

authority, right and power to manage its operations.” *Id.* at 836. A separate provision allowed the employer to promulgate and implement policies not in conflict with express provisions of the agreement. *Id.* In those circumstances, the Court agreed with the employer that the management-rights clause justified its refusal to bargain over effects because “the agreement authorized [the employer] to ‘implement’ its mandatory on-call policy.” *Id.* That holding has no application to the very different language Tramont crafted in its Employee Handbook.

Further, in contending (Br. 21, 22, 28, 38-48) that the Board acted inconsistently with successorship precedent, Tramont seeks to create a successorship controversy where there is none. The cases Tramont relies on (Br. 38-40) simply address the principle, not in dispute here, that a successor employer can set initial terms and conditions of employment. *See Burns*, 406 U.S. at 294 (a successor employer did not act unlawfully when it unilaterally set the initial terms and conditions of employment for those hired, which may have differed from the terms applied by the predecessor).

Because there is no dispute that Tramont timely set initial terms and conditions of employment, its reliance (Br. 40-42) on *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 362-63 (D.C. Cir. 2009), which addressed when a successor employer must fully set forth its initial terms and conditions of employment, has no bearing here. Similarly, because Tramont’s detailed

procedures for laying off employees is distinct from the issues entailed in effects bargaining, its reliance (Br. 46-47) on *Monterey Newspapers, Inc.*, 334 NLRB 1019, 1020-21 (2001), is unavailing. There the Board found that initial terms establishing a new pay band encompassed the right to set individual starting wages.

Tramont's notification of the layoffs, at the earliest on the day the layoffs were implemented, presented the Union with a *fait accompli*, which dooms its claim (Br. 22, 48-51) that the Union waived its right to bargain by not requesting effects bargaining until March 30, six weeks after the layoffs. As this Court has held, "Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow a reasonable scope for bargaining." *Int'l Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). Therefore "[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *Regal Cinemas*, 317 F.3d at 314 (quoting *Int'l Ladies Garment Workers*, 463 F.2d at 919); *see also Seaport Printing & Ad Specialties, Inc.*, 589 F.3d at 817 (the employer's "failure to provide the [u]nion adequate notice of its actions requiring bargaining made it impossible for the Union to have waived bargaining"). As the Board explained, absent providing the Union with sufficient time for "a meaningful opportunity to bargain" over the effects of the layoff, the violation "occurred when [Tramont] failed to notify the Union before the layoff occurred." (A. 406-07.) And having presented

the Union with a *fait accompli*, the Board was fully warranted to find that “the Union could not have given up its bargaining rights by asking to bargain over effects after the layoffs took place.” (A. 407.)

Tramont improperly relies on *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996) (Br. 48-49), to support its position that the Union waived its right to effects bargaining by not immediately requesting to bargain about effects when it first learned of the layoffs as they were happening. In that case, the court found waiver based on the union’s receipt of timely notice four days before the employer’s subcontracting decision, and its failure to request effects bargaining. *Id.* at 1035-36. The court also relied on evidence that the employer was prepared and willing to engage in effects bargaining over severance pay. *Id.* at 1036-37. Here, by contrast, Tramont failed to provide any advance notice of its layoff decision. Nor is there any evidence that Tramont was willing to engage in effects bargaining. Indeed, Tramont did not give the Union a list of laid off employees until weeks after the layoff, and when the Union requested effects bargaining when the parties finally had a face-to-face meeting on March 30, Tramont simply ignored the Union’s request.

**D. Tramont's Challenge To the Board's Remedy Is Not Before the Court and, In Any Event, Has No Merit**

As the Board noted in its original decision and order, it denied the General Counsel's specific exception to the administrative law judge's decision regarding reimbursement of job-search expenses because "awarding such expenses would require a change in Board law, and we are not prepared at this time to deviate from our current remedial practice." (A. 343 n.3.) When considering the case anew on remand, the Board took into account its recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enforced in relevant part*, 859 F.3d 23 (D.C. Cir. 2017), found merit in the General Counsel's exception, and ordered Tramont "to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceeded interim earnings." (A. 400 n.2.)

Tramont claims (Br. 22-23, 52-53) that the Board's application of its extant remedial precedent was inequitable. Tramont, however, did not file a motion for reconsideration raising that argument to the Board, but immediately filed a petition for review. As shown above, p. 23, Section 10(e) of the Act precludes the Court from considering an objection not raised to the Board unless it is excused for extraordinary circumstances. The Board's Rules and Regulations provided Tramont with the opportunity to file a motion for reconsideration "within 28 days

. . . after service of the Board’s decision and order.” 29 C.F.R. § 102.48(c)(2).

Because Tramont failed to avail itself of the Board’s procedures to preserve objections to the remedy, the Court lacks jurisdiction to consider the challenge to the Board’s remedy articulated for the first time in Tramont’s brief. *See Woelke*, 456 U.S. at 665-66; *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185-86 (D.C. Cir. 2006).

Moreover, Tramont does not dispute that the Board’s overall remedy, or its specific application here, falls well within the Board’s broad discretion to craft appropriate remedies for violations of the Act. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (the 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); *see generally* Section 10(c) of the Act, 29 U.S.C. § 160(c).

Prior to remand, the Court had not addressed the Board’s remedy in this case, and on remand the Board followed its settled practice of applying new or revised policies “to all pending cases in whatever stage.” *Aramark School Servs.*, 337 NLRB 1063, 1063 n.1 (2002) (internal quotation marks omitted); *see also Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (“Retroactivity is the norm in agency adjudications . . . .”). The Court will “bar retroactive application of a new rule only when such application would work a manifest injustice.” *Gen.*

*Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (internal quotation marks omitted). Here, Tramont has not demonstrated that it would be manifestly unjust for affected employees to receive the remedy available to them under current Board law. That is particularly true here, where the Board's remedy does not impact the Board's underlying unfair-labor-practice finding, and where Tramont does not, and could not, claim that it somehow relied to its detriment on the prior Board law regarding reimbursement for job-search expenses.

## CONCLUSION

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

Respectfully submitted,

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November 2017

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

TRAMONT MANUFACTURING, LLC,	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 17-1133 and 17-1147
	)	
v.	)	Board Case Nos.
	)	18-CA-155608
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 7,897 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 3rd day of November, 2017

## STATUTORY AND REGULATORY ADDENDUM

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## 1. NATIONAL LABOR RELATIONS ACT

### **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:**

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

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

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

\* \* \*

(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

\* \* \*

(e) The Board shall have power to petition . . . for the enforcement of such order . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

\* \* \*

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

**29 C.F.R. § 102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.**

(a) Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in

support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50–page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) Answering briefs to exceptions.

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

...

(f) Failure to except. Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding

**29 C.F.R. § 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record**

\* \* \*

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

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

TRAMONT MANUFACTURING, LLC,	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 17-1133 and 17-1147
	)	
v.	)	Board Case Nos.
	)	18-CA-155608
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Washington, DC 20570

Dated at Washington, DC  
this 3rd day of November, 2017