

**No. 17-2516**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**ANDERSON EXCAVATING COMPANY**

**Respondent**

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**ON 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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## **SUMMARY OF THE CASE**

The National Labor Relations Board (“the Board”) seeks enforcement of its Order against Anderson Excavating Co. (“the Company”), requiring the Company to comply with a binding collective-bargaining agreement and recognize International Union of Operating Engineers Local 571 (“the Union”) as the representative of its employees. The Company does not dispute that it adopted the agreement and agreed to recognize the Union, as the Board found. And it has waived any challenge to the Board’s findings that it repudiated the agreement and withdrew recognition. Instead, the Company primarily argues that the Union filed the charge initiating this case outside the six-month statute of limitations. As the Board reasonably found, however, the July 2015 charge was timely because the Union did not have clear and unequivocal notice of the Company’s repudiation and withdrawal until May 2015, when the Company abruptly ceased making fringe benefit contributions and remitting union dues as required by the agreement.

The Company’s remaining arguments are irrelevant or contrary to the facts and the law. The Board believes that oral argument is unnecessary, but asks that it be permitted to participate should the Court decide otherwise.

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**UNITED STATES COURT OF APPEALS  
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**No. 17-2516**

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**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**ANDERSON EXCAVATING COMPANY**

**Respondent**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order issued against Anderson Excavating Co. (“the Company”) for unlawfully repudiating a collective-bargaining agreement and withdrawing recognition from International Union of Operating Engineers Local 571 (“the Union”). The Order issued on April 20,

2017, and it is reported at 365 NLRB No. 63. (PA 1-7.)<sup>1</sup> The Board filed its application on July 7, which was timely, as the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“the Act”), imposes no time limit on it.

The Board had subject matter jurisdiction under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes it to prevent unfair labor practices affecting commerce. The Board’s Order is final. The Court has jurisdiction under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the unfair labor practices occurred in Omaha, Nebraska.

### **STATEMENT OF THE ISSUES**

1. The Board found that the Company violated the Act by repudiating its 2014-2018 collective-bargaining agreement and withdrawing recognition from the Union. The Company has waived any challenge to those findings, which are supported by substantial evidence. Should the Court therefore uphold those findings?

*NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766 (8th Cir. 2012)

*NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075 (8th Cir. 1992)

2. The Company’s primary contention is that the Union filed the unfair-labor-practice charge initiating this case too late. The charge was timely if it was

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<sup>1</sup> “PA” refers to the petitioner Board’s appendix. “Br.” refers to the Company’s opening brief. Appendix citations preceding a semicolon are to the Board’s Decision and citations following a semicolon are to supporting evidence.

filed within six months after the Union had clear and unequivocal notice of the Company's unfair labor practices. Does substantial evidence support the Board's finding that the Union's charge, filed about two months after the Company stopped complying with the agreement, was timely?

*Twin City Pipe Trades Serv. Ass'n, Inc. v. Frank O'Laughlin Plumbing & Heating Co.*, 759 F.3d 881 (8th Cir. 2014)

*CAB Assocs.*, 340 NLRB 1391 (2003)

3. The Company raises additional arguments that are irrelevant or lack factual and legal support. Did the Board reasonably reject those meritless arguments?

*Iowa Beef Processors, Inc. v. NLRB*, 567 F.2d 791 (8th Cir. 1977)

*Cent. Cartage, Inc.*, 236 NLRB 1232 (1978), *enforced*, 607 F.2d 1007 (7th Cir. 1979)

*M.J. Mech. Servs., Inc.*, 324 NLRB 812 (1997)

## **STATEMENT OF THE CASE**

Acting on the unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated the Act by refusing to adhere to its 2014-2018 collective-bargaining agreement and withdrawing recognition from the Union. (PA 82-83.) An administrative law judge held a hearing and issued a decision and recommended order finding that the Company violated the Act as alleged. (PA 4-7.) On review, the Board issued a Decision and Order affirming the judge's findings and adopting his recommended order, with minor modifications to the remedial provisions. (PA 1-4.) The facts underlying the Board's Decision and Order are as follows.

### **I. The Board's Findings of Fact**

#### **A. The Company Recognizes the Union and Adopts a Series of Collective-Bargaining Agreements**

The Company is a construction contractor based in Omaha, Nebraska. (PA 4; PA 80, 87.) The Union represents heavy equipment operators, negotiating collective-bargaining agreements on their behalf with a group of large construction employers in the Omaha area. (PA 5; PA 8-10, 48-49, 51.) Smaller employers like the Company may then adopt those agreements. (PA 5; PA 49.) The agreements set employees' terms and conditions of employment and require their employers to make contributions to several benefit funds and withhold and remit dues to the Union. (PA 5; *e.g.*, PA 110-27.)

The Company has been a party to collective-bargaining agreements with the Union for decades. In 1996, the Company signed a Heavy Highway Agreement with the Union that contained a recognition clause explicitly acknowledging the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit described in the agreement. (PA 4; PA 45, 158.) In 2004, the Company executed another Heavy Highway Agreement negotiated by the Union with the group of large employers. (PA 4; PA 22, 55-56, 159-76.) After that agreement expired in 2006, the Union and the employer group reached successor agreements covering all subsequent years, including an agreement that was in effect from 2014 to 2018. (PA 5; PA 18-23, 52-53, 54-56, 110-27, 177-93, 194-212, 213-31, 232-50.)

The Union sent a copy of each successor agreement to the Company, and from 2006 to May 2015, the Company adhered to those agreements' terms. (PA 5; PA 52-53, 55-56.) Specifically, the Company sought and received employee referrals from the Union's hiring hall (PA 11-17, 98-102, 103-09), and it paid employees in accordance with the agreements (PA 23, 35, 36, 50, 56-58, 64-65). The Company made the contributions required by the agreements on behalf of its employees to the Contractors, Laborers, Teamsters and Engineers Health and Welfare Fund and Pension Fund ("the Benefit Funds"), and the Union's Training Fund. (PA 5; PA 22, 33, 37-40, 56-57, 60-61, 67.) Along with those

contributions, the Company regularly submitted reports signed by Virginia Anderson, the Company's president and co-owner, in which it attested that the funds were being paid on behalf of employees who had performed work covered by a collective-bargaining agreement between the Company and the Union. (PA 5; *e.g.*, PA 56-57, 251-70, 289-302.) The Company also remitted employee dues to the Union according to the amounts required under each agreement, and submitted corresponding reports signed by Virginia Anderson. (PA 5; PA 24-28, *see also*, *e.g.*, PA 33, 37-40, 57, 59.)

**B. Following a Dispute Over the Amount of the Company's Fringe Benefit Contributions, the Benefit Funds and the Union Sue the Company; the Company Denies Any Collective-Bargaining Obligations but Continues To Comply with the Agreement Then in Effect**

In 2010, the Benefit Funds audited the Company and discovered a shortfall of several thousand dollars in the Company's contributions to the Benefit Funds, which the Company then paid. (PA 62-63, 68-70, 71, 72.) Another audit in late 2013 revealed a larger deficit, based on the Benefit Funds' determination that the Company had not made contributions for certain employees who had, in the Benefit Funds' opinion, performed work covered by the relevant collective-bargaining agreement. *See Kim Quick, Trustee, et al. v. Anderson Excavating and Wrecking Co.*, 8:14-CV-96, Doc. No. 77, slip. op. at 9-10 (D. Neb. Aug. 11, 2016) ("*Quick*"). On March 25, 2014, the Benefit Funds and the Union sued the

Company in federal district court to recover the arrearage. (PA 5; PA 68-69.) The Complaint alleged that the Company was bound, under the 2004 Heavy Highway Agreement, by trust agreements requiring contributions to the Benefit Funds. (PA 5; PA 359.)

In an answer filed on May 16, 2014, the Company admitted that it had reported employee hours and made employer contributions to the Benefit Funds. (PA 5; PA 431.) But in a report filed on June 17, 2014, the Company took the position that the employees identified by the Benefit Funds' audit were not performing work covered by the collective-bargaining agreement. (PA 436.) The Company also asserted as an affirmative defense that the collective-bargaining agreement referenced in the Complaint had expired in 2006 and was no longer valid, and that it was not bound by the trust agreements. (PA 5; PA 432, 436.)

Nonetheless, as the litigation proceeded, the Company continued to make its usual payments to the Benefit Funds and the Training Fund, to remit dues to the Union, and to otherwise comply with the 2014-2018 Agreement. (PA 5; *see, e.g.*, PA 128-36, 137-39, 271-82, 283-87, 303-14, 315-26.)

**C. The Company Stops Contributing Altogether and the Union Files an Unfair-Labor-Practice Charge**

In May 2015, Virginia Anderson and her husband Virgil Anderson, the Company's other owner, gave depositions as part of the district court litigation in which both of them denied that the Company had any collective-bargaining

agreement with the Union. (PA 5; PA 42-44, 46-47, 73-74, 341-42, 450-51.) The same month, following the depositions, the Company stopped making any contributions to the Benefit Funds and the Training Fund or remitting any dues to the Union. (PA 5; PA 30-31, 32, 75-76.)

On July 16, 2015, the Union filed a charge with the Board alleging that the Company had violated Section 8(a)(5) and (1) of the Act by denying that it was bound by any collective-bargaining agreement with the Union. (PA 4, 6; PA 77-78.) That charge was later amended to allege that the Company had violated the Act by withdrawing recognition from the Union and repudiating the parties' 2014-2018 collective-bargaining agreement by stating it was not bound by the agreement and by failing to abide by its terms, including provisions requiring payments to the Benefit Funds and Training Fund and the remittance of dues to the Union. (PA 4; PA 79.)

In November 2015, the Company resumed making payments and remittances in accordance with the 2014-2018 Agreement. (PA 5; PA 29, 33-34, 66, 288, 315-26.) On August 11, 2016, the district court issued a judgment and accompanying findings of fact and conclusions of law. *See Kim Quick, Trustee, et al. v. Anderson Excavating and Wrecking Co.*, 8:14-CV-96, Doc. No. 77 (findings of fact and conclusions of law) and Doc. No. 78 (judgment) (D. Neb. Aug. 11, 2016). The district court concluded that, by withholding and remitting union dues

in accordance with each agreement and making contributions to the Benefit Funds and Training Fund according to the rates set forth in those agreements after 2006, the Company had “manifested acceptance to each successive [agreement] by its conduct.” *Quick*, slip op. at 14. *See id.*, slip op. at 5-7, 13-14 (discussing the Company’s compliance with the agreements). The district court also noted that the Company had requested guidance from the Union regarding dues withholding, sought referrals of employees from the Union’s hiring hall, and complied with audits by the Benefit Funds. *Id.*, slip op. at 14. The district court further found that the Company had failed to report or remit funds for work performed by three employees that was covered by a collective-bargaining agreement, and ordered the Company to pay \$11,956.96 in unpaid contributions to the Benefit Funds. *Id.*, slip op. at 14-20.<sup>2</sup>

## **II. The Board’s Conclusions and Order**

The Board (then-Acting Chairman Miscimarra and Members Pearce and McFerran) found, in agreement with the administrative law judge, that the Company, by its course of conduct, adopted and was bound by the 2014-2018

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<sup>2</sup> The Company’s appeal of the district court’s order is now fully briefed in this Court. *See Rod Marshall, Trustee, et al. v. Anderson Excavating & Wrecking Co., a.k.a. Anderson Excavating Co.*, No. 17-1887 (8th Cir.) (“*Marshall*”). The Company, in its appeal, has not challenged the district court’s finding that it adopted and was bound by collective-bargaining agreements with the Union, including the 2014-2018 Agreement. *See Marshall*, No. 17-1887, Docket Entry 4572208 (Aug. 24, 2017).

Agreement. (PA 1, 6.) The Board, agreeing with the judge, further found that the Company repudiated that agreement and withdrew recognition from the Union in violation of Section 8(a)(5) and (1) of the Act by refusing to make the payments required by the agreement and stating that the Company was not bound by the agreement. (PA 1, 6.) Like the judge, the Board rejected the Company's affirmative defense that the Union's charge was barred by the Act's six-month limitations period. (PA 1, 5-6.)

To remedy the Company's violations, the Board ordered it to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Board's Order requires the Company to recognize the Union as the exclusive collective-bargaining representative of its bargaining-unit employees, and to honor and comply with the 2014-2018 Agreement. (PA 1.) The Board also ordered the Company to make employees whole for any monetary losses they may have suffered as a result of the Company's repudiation of the Agreement, including any adverse tax consequences of receiving a lump-sum backpay award; to make any payments to the Benefit Funds and Training Fund that it had failed to make since May 20, 2015; to

reimburse the Union for dues it had failed to remit; and to post a remedial notice.  
(PA 1-3.)<sup>3</sup>

### **SUMMARY OF ARGUMENT**

The Company no longer contests the Board's finding that it voluntarily recognized the Union as its employees' majority-status representative and adopted a series of collective-bargaining agreements governing those employees' terms and conditions of employment. The Company has also waived any challenge to the Board's further finding that it repudiated the agreement that was in effect from 2014 to 2018 and withdrew recognition from the Union. Moreover, substantial evidence supports those findings. Under settled law, the Company's disavowal of its collective-bargaining obligations violated the Act.

Instead, the Company mainly challenges the Board's reasonable finding that it failed to meet its burden of showing that the Union's charge was untimely. Given the undisputed evidence that the Company at first continued to comply fully with the 2014-2018 Agreement after claiming it was not bound, the Board correctly determined that the Union did not have clear and unequivocal notice of repudiation until May 2015, when the Company abruptly cut off payments to the

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<sup>3</sup> The Company has made back payments for the period of noncompliance. (PA 30-31.) Whether it owes anything further, and if so how much, will be determined in compliance proceedings if any controversy on the issue exists after the Court enforces the Board's Order. *See, e.g., NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 771 (2d Cir. 1996), *NLRB v. Trident Seafoods Co.*, 642 F.2d 1148, 1150 (9th Cir. 1980).

various funds and stopped remitting dues to the Union, thereby bringing its conduct into line with its words. The Union’s unfair-labor-practice charge, filed less than two months later, was therefore timely.

The Company’s remaining arguments are meritless. Its claim that the Andersons’ deposition testimony could not be the basis for an unfair-labor-practice finding is irrelevant because the Board found a violation independent of their testimony. In any event, the Board and the Court have recognized that statements made in legal proceedings can be evidence of unfair labor practices. The Company also errs in claiming that it should escape liability because the Union somehow induced it to engage in unlawful conduct. That contention has no basis in the facts or the law. The Company alone is responsible for its decision not to abide by its collective-bargaining obligations.

### **STANDARD OF REVIEW**

The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 767-68 (8th Cir. 2012). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it de

novo.” *Universal Camera*, 340 U.S. at 488. *Accord St. John’s Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

The Court “defer[s] to the Board’s conclusions of law if they are based upon a reasonably defensible construction of the Act.” *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). It “review[s] de novo the Board’s contract interpretations that are not based on policy under the Act.” *Am. Firestop*, 673 F.3d at 768.

## **ARGUMENT**

### **Substantial Evidence Supports the Board’s Finding that the Company Violated Section 8(a)(5) and (1) of the Act by Repudiating Its Collective-Bargaining Agreement and Withdrawing Recognition from the Union**

#### **A. An Employer Violates the Act by Repudiating a Binding Collective-Bargaining Agreement and Withdrawing Recognition from a Majority-Status Union**

Section 7 of the Act grants employees the right “to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157. Under Section 9(a) of the Act, 29 U.S.C. § 159(a), employees in an appropriate bargaining unit may choose a union as their exclusive representative in an election, or their employer may agree to recognize the union as their exclusive representative based on a showing of majority support. *See NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012). Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer to refuse to bargain collectively with a

union that represents its employees under Section 9(a). And a violation of Section 8(a)(5), in turn, derivatively violates Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice to interfere with employees' Section 7 rights. *See St. John's Mercy*, 436 F.3d at 846 n.5.

“An employer’s repudiation of a collective bargaining agreement with a majority-status union”—that is, a union chosen by election or properly recognized by the employer as enjoying majority support—“has long been held to be a violation of the [Section] 8(a)(5) duty to bargain.” *McKenzie Eng’g Co. v. NLRB*, 303 F.3d 902, 908 (8th Cir. 2002). That is so because “[a]n employer’s duty to bargain under [S]ection 8(a)(5) would be empty, indeed, if after reaching agreement the employer could treat the contract as a scrap of paper.” *NLRB v. M&M Oldsmobile, Inc.*, 377 F.2d 712, 715-16 (2d Cir. 1967). Likewise, it is well established that an employer violates Section 8(a)(5) by withdrawing recognition from a majority-status union, unless the employer can show by objective evidence that the union has in fact lost the support of the majority of the unit employees. *See Levitz Furniture Co.*, 333 NLRB 717, 717 (2001).<sup>4</sup>

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<sup>4</sup> The law is different if the parties’ collective-bargaining relationship is governed by a pre-hire agreement under Section 8(f) of the Act, 29 U.S.C. § 158(f). A construction-industry employer may execute a Section 8(f) agreement without a demonstration of majority support for the union, and after a Section 8(f) agreement expires, the employer may lawfully withdraw recognition. *See Am. Firestop*, 673 F.3d at 768. *See generally Allied Mech. Servs, Inc. v. NLRB*, 688 F.3d 758 (D.C. Cir. 2012) (discussing Section 8(f) and Section 9(a) relationships). Here, as

**B. The Board Reasonably Found that the Company Unlawfully Repudiated the 2014-2018 Agreement and Withdrew Recognition**

The Board found that the Company was obligated to recognize the Union as its employees' representative and adhere to the 2014-2018 Agreement, and that it failed to do so. As we now show, the Court should uphold those findings both because the Company has failed to properly dispute them and because they are supported by substantial evidence. In addition, as we show below (pp. 20-29), the Board properly rejected the Company's statute-of-limitations defense, and its other challenges to the Board's Order are meritless.

**1. The Company has waived any challenge to the Board's findings, which are supported by substantial evidence, that it was required to abide by the 2014-2018 Agreement and recognize the Union, and failed to do so**

*Section 9(a) Relationship.* First, the Company has not challenged, before the Board or the Court, the Board's finding that the Union was the exclusive representative of the Company's employees under Section 9(a) of the Act. (PA 1 n.1, 6.) Under Section 10(e) of the Act, 29 U.S.C. § 160(e), the Court lacks jurisdiction to consider any objection the Company did not urge before the Board, absent extraordinary circumstances not present here. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Am. Firestop*, 673 F.3d at 771; *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). In

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discussed below (pp. 15-16), it is undisputed that the parties' bargaining relationship is governed by Section 9(a).

addition, before the Court, “points not meaningfully argued in an opening brief are waived.” *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007). For both of those reasons, no challenge to the Union’s majority status under Section 9(a) is properly before the Court, and the Board’s finding in that regard must be “accepted as true for purposes of this adjudication.” *Cornerstone Builders*, 963 F.2d at 1077.

In any event, substantial evidence supports the Board’s finding. The plain language of the agreement the Company executed in 1996 recited that the Union had submitted proof that it represented a majority of unit employees, and that the Company expressly “recognize[d] the Union as the exclusive bargaining agent for all employees within the contractually described bargaining unit.” (PA 4-5; PA 148.) Where, as here, there is no record evidence inconsistent with the agreement’s recitation, the Court has upheld the Board’s finding that similar language established a Section 9(a) relationship. *See Am. Firestop*, 673 F.3d at 770.

***Binding Agreement.*** Second, the Company no longer disputes the Board’s finding, which the record amply supports, that it was bound by the 2014-2018 Agreement. (PA 1, 6.) It is well established that an employer may adopt and become bound by a collective-bargaining agreement by engaging in “conduct manifesting an intention to abide by and be bound by the terms of an agreement.” *Twin City Pipe Trades Serv. Ass’n, Inc. v. Frank O’Laughlin Plumbing & Heating*

*Co.*, 759 F.3d 881, 885 (8th Cir. 2014). *Accord Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988); *CAB Assocs.*, 340 NLRB 1391, 1401-02 (2003) (collecting cases). Here, as the Board found, the Company adopted the 2014-2018 Agreement by conduct that “faithfully complied” with it for 9 months. (PA 5-6.) As described above (pp. 5-7), the Company adhered to the 2014-2018 Agreement by obtaining employees through the Union’s hiring hall, paying wages at or above the contractual minimum, making contributions to the Benefit Funds and Training Fund, deducting and remitting union dues, and submitting reports attesting that it was a party to a collective-bargaining agreement with the Union. The Board reasonably concluded that those actions unambiguously manifested the Company’s intent to be bound. *See, e.g., Robbins*, 836 F.2d at 332 (employer was bound by collective-bargaining agreement it did not sign where it “paid the union scale, turned over dues under a checkoff system, negotiated grievances, and paid (some) pension and welfare contributions”); *Arco Elec. Co. v. NLRB*, 618 F.2d 698, 699-700 (10th Cir. 1980) (employer used union hiring hall for referrals, deducted and remitted union dues, made fringe benefit contributions and submitted related reports, and paid the contractual wage scale or higher).

***Repudiation.*** Third, the Company does not contest the Board’s finding that it repudiated the 2014-2018 Agreement. (PA 1 & n.2, 5-6.) Indeed, throughout its brief, the Company expressly concedes that it did so. (*See, e.g., Br. 23* (arguing

that the Company manifested repudiation through the answer it filed in district court); Br. 26-27 (arguing that the Company’s answer and Rule 26 planning conference report reflected the Company’s “obvious position” that it “withdrew recognition and repudiated”).) The Company simply disputes (baselessly, as shown below (pp. 20-26)), the Board’s finding that the Union lacked clear and unequivocal notice of the repudiation as long as the Company continued to make required payments and remittances under the agreement and otherwise fully comply with its terms. (PA 6.)

In any event, substantial evidence supports the Board’s finding that the Company clearly and unequivocally repudiated the Agreement in May 2015. As the Board found, that was when the Company completely cut off its payments to the Benefit Funds and Training Fund, and ended its remittance of dues to the Union. (PA 5; pp. 7-8, above.) As the Court has noted, the Board has previously recognized that “where an employer repeatedly fails to make union benefit fund contributions as required by a collective bargaining agreement, the union is put on notice that the employer has repudiated the agreement.” *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1004 (8th Cir. 1992). *Accord St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1129 (2004). Thus, the Board reasonably concluded that the Company’s total cessation of required payments in May 2015 constituted a clear and unequivocal repudiation.

***Withdrawal of Recognition.*** Finally, in the exceptions it filed with the Board, the Company did not separately dispute the administrative law judge's finding that it withdrew recognition from the Union. (PA 5-6; PA 93-97.) The Court therefore lacks jurisdiction to consider any challenge to the withdrawal-of-recognition finding, which the Board adopted in the absence of exceptions. (PA 1 & n.2.) *See* Section 10(e), and cases cited above, p. 15. Further, before the Court, the Company waived the issue by only questioning the Board's withdrawal-of-recognition finding in passing (Br. 25), without developing any meaningful legal argument on the matter. *See Ahlberg*, 481 F.3d at 634.

In any event, the Board's finding that the Company withdrew recognition from the Union is consistent with Board and Court precedent concerning employers who, like the Company, disavow collective-bargaining obligations they are bound to respect. *See, e.g., Cornerstone Builders*, 963 F.2d at 1076 (stating that when employer moved its assets to an alter ego and ceased to observe a collective-bargaining agreement, it "withdrew recognition of the Union as representative of its employees and repudiated the labor contract"); *CAB Assocs.*, 340 NLRB at 1400-02 (finding unlawful withdrawal of recognition where employer denied that it had a contract with the union or intended to have one in the future). The Board reasonably construed the Company's statements and conduct as a denial of any collective-bargaining relationship with the Union, and thus a

withdrawal of recognition. (PA 5-6.) The Company has never attempted to establish at any stage of this case—before the judge, the Board, or the Court—that it was permitted to withdraw recognition because the Union actually lacked the support of a majority of unit employees. (PA 6.) *See Levitz Furniture*, 333 NLRB at 717. The Board, accordingly, properly found the Company’s withdrawal of recognition unlawful.

\* \* \*

In sum, as the Board reasonably found, the Company failed to meet its obligation under the Act to recognize the Union and abide by the 2014-2018 Agreement. As we now show, the arguments the Company raises in an attempt to absolve itself of unfair-labor-practice liability are meritless.

**2. The Union’s unfair-labor-practice charge was timely because it was filed within six months of the Company’s clear and unequivocal repudiation of its collective-bargaining obligations**

The Company’s principal contention is that the Union’s charge initiating this case was untimely under Section 10(b) of the Act. (Br. 14-24.) That section provides, in pertinent part, that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b). The Board’s longstanding rule, which the Court has accepted, is that the six-month limitations period “begins only when a party has clear and unequivocal notice of a violation of the Act.” *United Kiser Servs.*,

*LLC*, 355 NLRB 319, 319 (2010) (internal quotation omitted). *See Jerry Durham Drywall*, 974 F.2d at 1003-04. *See also NLRB v. Pub. Serv. Elec. & Gas Co.*, 157 F.3d 222, 227 (3d Cir. 1998) (collecting cases applying the rule). Under that rule, “actual or constructive notice will not be found where a party sends conflicting signals or otherwise engages in ambiguous conduct.” *Masonic Temple Ass’n of Detroit and 450 Temple, Inc.*, 364 NLRB No. 150, 2016 WL 7033086, at \*1 n.1 (2016), *enforced mem.*, No. 17-1108 (6th Cir. Dec. 4, 2017). *See Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996); *CAB Assocs.*, 340 NLRB 1391, 1392 (2003); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). The party relying on Section 10(b) as an affirmative defense—here, the Company—has the burden of establishing that notice of the violation was clear and unequivocal. *See Positive Elec. Enters., Inc.*, 345 NLRB 915, 918 (2005).

Applying those principles here, the Board reasonably rejected the Company’s argument that its litigation papers in the district court lawsuit initiated by the Benefit Funds and Union clearly and unequivocally notified the Union that it was withdrawing recognition and repudiating the 2014-2018 Agreement in May 2014. (PA 1, 5-6.) As the Board noted (PA 5-6), although the Company took the litigation stance in its May 16, 2014 answer to the district court complaint that it was not bound by a collective-bargaining agreement, it continued to act as if it were. For example, as detailed above (p. 7), after filing its answer the Company

continued to remit dues and make other payments, and to submit reports declaring itself a party to a union contract. The Board has previously found inadequate notice of an unfair labor practice where, as here, an employer's actions conveyed a message at odds with its words. *See, e.g., Positive Elec.*, 345 NLRB at 919 (employer's statements that it "had no intention of hiring union employees" did not provide clear and unequivocal notice of repudiation because "his actions otherwise communicated that he was complying with the terms of the agreement"); *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994) (no clear and unequivocal notice of unlawful work transfer where employers "may have talked one way" by saying the work belonged to distributors, "but they acted in another" by continuing to assign some of it to unit employees), *enforced*, 98 F.3d 892 (6th Cir. 1996); *Chinese Am. Planning Council, Inc.*, 307 NLRB 410, 410 (1992) (no clear and unequivocal notice where employer represented that it would take unlawful action but "subsequent conduct undercut the representations"), *review denied mem.*, 990 F.2d 624 (2d Cir. 1993).

The Court reached a similar conclusion in *Twin City Pipe Trades Service Association v. Frank O'Laughlin Plumbing & Heating Co.*, 759 F.3d 881 (8th Cir. 2014), in which an employee benefit fund sought to collect fringe benefits from an employer. There, the Court rejected the employer's contention that it had unequivocally terminated its participation in a collective-bargaining agreement by

sending the union two letters which purported to do so. The Court held that those letters, “when viewed alongside [the employer’s] inconsistent conduct . . . by continuing to make fringe benefit payments, d[id] not evidence the unequivocal intent necessary to terminate participation in a [collective-bargaining agreement].” *Id.* at 885. The Court explained that “[w]hen an employer’s objective conduct indicates a continued acceptance of [such an agreement], while at the same time the employer inconsistently states it intends to terminate the [agreement], we are hard pressed to conclude the intent to terminate is clear, explicit, and unequivocal.” *Id.* Similarly, in this case, even after filing its answer in May 2014, the Company “manifested an intention to abide by and be bound by the terms of the [2014-2018 Agreement] by continuing to make fringe benefit contributions on behalf of its employees,” *id.*, and otherwise complying with the agreement, until May 2015.

The Company’s contrary arguments fail. First, the Company errs in suggesting (Br. 22) that a report filed by the parties in the district court litigation provided the requisite notice. As that report clearly shows, the position of the Benefit Funds and Union there was not that the Company had disavowed the Agreement in full, but that it had failed to apply it correctly to certain employees.

(PA 436.)<sup>5</sup> The Company fails to establish that the alleged partial breach of

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<sup>5</sup> The Benefit Funds and Union disputed “[t]hat all required contributions were paid on all hours worked by all employees covered by the collective bargaining agreement,” while the Company asserted that certain employees “were improperly

contract was tantamount to a clear and unequivocal repudiation. *See Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Harkins Const. & Equip. Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984). Moreover, when the Company's payments had become partially delinquent in the past, the Company had made good on its obligations and continued to follow the applicable collective-bargaining agreement going forward. (*See* p. 6, above.) The Union had no reason to think that this time would be any different—that is, until May 2015, when the Company cut off its remittances and contributions entirely.

To the extent the Company attempts to establish a Section 10(b) defense based on the January 22, 2016 date of the Union's amended unfair-labor-practice charge (Br. 22), the attempt fails because that date is immaterial. "It is well settled that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge."

*Pankratz Forest Indus.*, 269 NLRB 33, 36-37 (1984), *affirmed mem.*, 762 F.2d 1018 (9th Cir. 1985). *Accord Tex. World Serv. Co. v. NLRB*, 928 F.2d 1426, 1436 (5th Cir. 1991); *Sonicraft, Inc. v. NLRB*, 905 F.2d 146, 148 (7th Cir. 1990). The Union's initial July 16, 2015 charge alleged that the Company was bound by a

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classified as operating engineers and were not performing covered work and are not covered by the collective bargaining agreement between [the Company] and [the Union]." (PA 436.)

series of collective-bargaining agreements, including the 2014-2018 Agreement, and that it violated Section 8(a)(5) by asserting that it was “not bound by the terms and conditions of the [collective-bargaining agreement].” (PA 78.) The Board’s ultimate finding—that the Company repudiated the 2014-2018 Agreement by ceasing to make the payments it required and asserting that it was not bound—plainly had a sufficiently close relationship to the Union’s initial charge, and the Union’s intervening amendment was therefore timely.

There is also no basis for the Company’s claim (Br. 18-21) that questions about the Company’s Answer posed during the Andersons’ May 2015 depositions in the district court litigation demonstrated the Union’s awareness of an earlier unambiguous repudiation. Ignoring the full range of deposition questioning, the Company cites (Br. 19-20) only the attempts by counsel for the Union and other plaintiffs to confirm that the Company, in its Answer, had asserted that there was no contract between the Company and the Union. Throughout the depositions, however, counsel also inquired about the Company’s compliance with its collective-bargaining obligations, and the Andersons confirmed that the Company had been paying fringe benefit contributions and remitting dues for employees (*e.g.*, PA 333, 335, 451) and submitting reports affirming that the payments were made pursuant to a collective-bargaining agreement with the Union (PA 453-54). Taken together, those questions probed the mixed signals the Company was giving

by stating that there was no contract while acting like there was. That conduct on the Company's part, as explained above (pp. 20-23), did not provide clear and unequivocal notice of repudiation.

### **3. The Company's remaining arguments fail**

The Company's remaining arguments are also meritless. First, the Company claims (Br. 25-31) that the Board erred in relying on the Andersons' deposition testimony to find a violation of the Act, but the Board did no such thing. Rather, the Board found that the Company unlawfully withdrew recognition and repudiated the 2014-2018 Agreement "even without relying on the depositions." (PA 1 n.2.)<sup>6</sup> As discussed above (pp. 17-18), the Company concedes that it repudiated the agreement prior to the depositions by stating in earlier legal filings that it was not bound. And the Board reasonably found that the Company clearly and unequivocally communicated its repudiation by cutting off required payments in May 2015. (PA 1, 5-6.) Thus, the Company's argument that deposition testimony cannot be the basis for an unfair-labor-practice finding is academic and the Court need not address it. *See Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 322 (D.C. Cir. 2015) (analysis upon which Board did not rely is irrelevant).

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<sup>6</sup> Then-Acting Chairman Miscimarra did not pass on the litigation-privilege issue because he agreed that, depositions aside, the record established that the Company had withdrawn recognition and failed to adhere to the 2014-2018 Agreement. (PA 1 n.2.)

The argument is misplaced, moreover, because as the Board noted the Company did not object to the admission of the Andersons' depositions at the Board hearing. (PA 1 n.2.) Indeed, as discussed above (p. 25), the Company itself relies on plaintiffs' counsel's questions during those depositions in an attempt to bolster its Section 10(b) defense. The Company cannot equitably rely on deposition questions and then avoid responsibility for its answers.

In any event, the Board reasonably rejected the Company's deposition-privilege argument. (PA 1 n.2.) Board law—not Nebraska state law—governs this case. And the Board long ago decided that the common-law privilege the Company cites (Br. 28), which precludes defamation or other tort liability for statements made in litigation, does not shield against unfair-labor-practice liability. *See Cent. Cartage, Inc.*, 236 NLRB 1232, 1254 & n.51 (1978), *enforced*, 607 F.2d 1007 (7th Cir. 1979). As the Board has explained, witnesses “should be afforded considerable leeway in presenting their positions in litigation,” but when “statement[s] of those positions in themselves violate the law, they must be subject to legal sanctions just as perjurious statements are.” *Id.* at 1254. The Court has upheld that policy. *See Iowa Beef Processors, Inc. v. NLRB*, 567 F.2d 791, 796

(8th Cir. 1977) (upholding Board’s finding that opening statement by employer’s counsel violated the Act).<sup>7</sup>

Nor is there any factual or legal basis for the Company’s claim that its repudiation should be excused because it was somehow induced by the Union. (Br. 31-34.) On the facts, nothing the Company cites constituted a threat or other inducement to stop it from making payments. The Company points to a letter the Union sent to the employees it represents, notifying them that it had been advised that it would be unlawful for the Benefit Funds to accept contributions from the Company if there was no collective-bargaining agreement in place. (PA 355-56.) That letter emphasized, however, that “[t]his is not the opinion of [the Union].” (PA 355.) On the contrary, the Union noted that the Company had been conducting itself as if it was bound, that there was no record of a termination of the agreement, and that the Union was prepared to take legal action in support of its position. (PA 355-56.) The Company also cites a deposition inquiry as to whether the Company’s president was aware that “it is unlawful to make payments” to the

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<sup>7</sup> The Court lacks jurisdiction to consider the Company’s distinct assertion that its statements were protected under Section 8(c) of the Act, 29 U.S.C. § 158(c), as the mere “expression of a view.” (Br. 29-30.) The Company never urged that position before the Board. *See St. John’s Mercy*, 436 F.3d at 848. In any event, the Company’s repudiation of its collective-bargaining obligations was not an opinion but an action with practical and legal consequences. *Cf. Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 253 (2d Cir. 2000) (upholding Board’s finding that employer’s “encouragement of employee objection and action was conduct beyond mere expression of opinion and, thus, beyond the protection of [Section] 8(c)” (internal quotation marks omitted)).

Benefit Plans and the Union in the absence of a collective-bargaining agreement. (PA 459.) But again, throughout that very litigation, the consistent position of the Union and the Benefit Funds was that the parties did have such an agreement and that contributions were not only lawful but legally required.

As a matter of law, moreover, it would make no difference even if there were factual support for the Company's theory that the Union somehow provoked it to bring its conduct into line with its legal posturing by cutting off payments. Provocation is no defense to unfair-labor-practice liability. *Cf. M.J. Mech. Servs., Inc.*, 324 NLRB 812, 813-14 (1997) (where employer unlawfully discharged employees who announced that they were union organizers, it was no defense if the employees "intended in part to provoke [the] employer to commit unfair labor practices"), *enforced mem.*, 172 F.3d 920 (D.C. Cir. 1998); *United Credit Bureau of Am., Inc.*, 242 NLRB 921, 925 (1979) (noting that "it is hardly a matter of defense that an employee could count on her employer to discharge her unlawfully"), *enforced*, 643 F.2d 1017 (4th Cir. 1981). The Company alone is responsible for erroneously stating that it was not bound by any collective-bargaining agreement and for then putting that statement into action by ceasing to make required payments. Its subjective reasons for that unlawful course of action are immaterial. *See Am. Firestop*, 673 F.3d at 771.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

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National Labor Relations Board

December 2017

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

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	No. 17-2516
v.	)	
	)	Board Case No.
ANDERSON EXCAVATING COMPANY	)	14-CA-156092
	)	
Respondent	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 6,838 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and 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.

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Dated at Washington, DC  
this 14th day of December 2017

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

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	)	No. 17-2516
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	)	
Respondent	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
this 14th day of December 2017