

Nos. 17-1170 & 17-1196

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

LENAWEE STAMPING CORP., D/B/A KIRCHOFF VAN-ROB

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH HEANEY
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-1743
(202) 273-2989

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board certifies the following:

A. Parties and Amici

1. Lenawee Stamping Corp. d/b/a Kirchoff Van-Rob was the respondent before the Board (Case Nos. 07-CA-168498 et al.) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO was the charging party before the Board and is the Intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on June 14, 2017, reported at 365 NLRB No. 97.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 23rd day of March, 2018

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact	3
A. Background.....	3
B. The Company increases the starting wage rate of skilled bargaining-unit employees without the Union’s consent.....	4
C. The Company increases the starting wage rate of semiskilled bargaining-unit employees without the Union’s consent.....	5
D. The Company implements referral and sign-on bonus programs without notifying or bargaining with the Union.....	7
II. Procedural history	7
III. The Board’s Conclusions and Order.....	9
Summary of argument.....	10
Standard of review	12
Argument.....	14
I. The Board reasonably found that the Company violated Section 8(a)(5) and (1) and Section 8(d) of the Act by unlawfully modifying the wage scales in its existing collective-bargaining agreement	14
A. The Act prohibits employers from modifying terms of existing collective-bargaining agreements without the union’s consent unless it has a sound, arguable basis for doing so	14

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Company’s decision to increase the starting wages of unit employees, without the Union’s consent, was an unlawful contract modification that lacked a sound, arguable basis in the parties’ collective-bargaining agreement	16
C. The Board acted well within its broad remedial authority in requiring the Company to rescind the unlawful wage increases upon request of the Union	20
II. The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union.....	24
Conclusion	28

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	14
* <i>Bath Iron Works Corp.</i> , 345 NLRB 499 (2005)	16
<i>Bath Marine Draftsmen’s Association v. NLRB</i> , 475 F.3d 14 (1st Cir. 2007).....	15, 16
<i>Benchmark Industries, Inc.</i> , 270 NLRB 22 (1984), <i>aff’d sub nom.</i> , <i>Amalgamated Clothing v. NLRB</i> , 760 F.2d 267 (5th Cir. 1985).....	26, 27
<i>Bigelow v. RKO Radio Pictures, Inc.</i> , 327 U.S. 251 (1946).....	21
<i>California Pacific Medical Center v. NLRB</i> , 87 F.3d 304 (9th Cir. 1996)	22
<i>Daily News of Los Angeles v. NLRB</i> , 73 F.3d 406 (D.C. Cir. 1996).....	15, 24
<i>International Union of Electrical, Radio and Machine Workers v. NLRB</i> , 426 F.2d 1243 (D.C. Cir. 1970).....	21
<i>Federated Logistics & Operations v. NLRB</i> , 400 F.3d 920 (D.C. Cir. 2005).....	21
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	13
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	12, 25

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Goya Foods of Florida</i> , 356 NLRB 1461 (2011).....	22
* <i>Honeywell International, Inc. v. NLRB</i> , 253 F.3d 125 (D.C. Cir. 2001).....	13, 22, 23
<i>Inland Steel Co.</i> , 77 NLRB 1 (1948), <i>enforced</i> , 170 F.2d 247 (7th Cir. 1948).....	26
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991).....	12, 13
<i>Milwaukee Spring Division of Illinois Coil Spring Co.</i> , 268 NLRB 601 (1984), <i>aff'd sub nom.</i> , <i>International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. NLRB</i> , 765 F.2d 175 (D.C. Cir. 1985).....	14
<i>North American Pipe Corp.</i> , 347 NLRB 836 (2006).....	26, 27
* <i>NCR Corp.</i> , 271 NLRB 1212 (1984).....	16
<i>NLRB v. C & C Plywood Corp.</i> , 385 U.S. 421 (1967).....	15
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	21
* <i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	24

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Keystone Steel & Wire</i> , 653 F.2d 304 (7th Cir. 1981)	22
<i>NLRB v. Manley Truck Line, Inc.</i> , 779 F.2d 1327 (7th Cir. 1985)	20
<i>NLRB v. Seven-Up Bottling Co.</i> , 344 U.S. 344 (1953).....	13
<i>Oak Cliff-Golman Baking Co.</i> , 207 NLRB 1063 (1973), <i>enforced mem.</i> , 505 F.2d 1302 (5th Cir. 1974)	15, 20
<i>Office & Professional Employees International Union, Local 425 v. NLRB</i> , 419 F.2d 314 (D.C. Cir. 1969).....	15
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	21
* <i>Richfield Oil Corp.</i> , 110 NLRB 356 (1954), <i>enforced</i> , 231 F.2d 717 (1st Cir. 1956)	25
<i>Scepter, Inc. v. NLRB</i> , 448 F.3d 388 (D.C. Cir. 2006).....	22
<i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000).....	19
<i>St. Barnabas Medical Center</i> , 341 NLRB 1325 (2004)	19

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

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Teamsters Local 20 v. NLRB</i> , 610 F.2d 991 (D.C. Cir. 1979).....	13
<i>Teamsters Local Union No. 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	24
<i>United Food & Commercial Workers International Union v. NLRB</i> , 852 F.2d 1344 (D.C. Cir. 1988).....	13
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12, 13
 Statutes:	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	9
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 7, 8, 14, 15, 20, 24, 25, 27
*Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 3, 7, 8, 12, 14, 15, 20, 24, 25, 27
*Section 8(d) (29 U.S.C. § 158(d)).....	2, 7, 8, 12, 14, 15, 20
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	20
Section 10(e) (29 U.S.C. § 160(e))	2, 12
Section 10(f) (29 U.S.C. § 160(f)).....	2

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

GLOSSARY

“the Board”..... National Labor Relations Board

“Br.” Company’s opening brief

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

“the Company”..... Lenawee Stamping Corp., d/b/a Kirchoff Van-Rob

“JA” Joint Appendix

“the Union” International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW

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

Nos. 17-1170 & 17-1196

LENAWEE STAMPING CORP., D/B/A KIRCHOFF VAN-ROB

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Lenawee Stamping Corp., doing business as Kirchoff Van-Rob (“the Company”) for review, and the cross-

application of the National Labor Relations Board for enforcement, of a Board Order issued against the Company, reported at 365 NLRB No. 97, 2017 WL 2461573 (July 10, 2017) (JA 344-54).¹ The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, (“the Union”), which has intervened on the Board’s behalf, was the charging party before the Board.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act,” 29 U.S.C. §§ 151, 160(a)). The Board’s Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides for the filing of petitions for review in this Circuit. The petition and cross-application were timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUES

1. Did the Board reasonably find that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and Section 8(d) of the Act, 29 U.S.C. § 158(d), by unilaterally increasing bargaining-unit employees’ wage rates without the consent of the Union, thereby failing to continue in effect

¹ “JA” refers to the Joint Appendix. “Br” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

all of the terms and conditions of the parties' existing collective-bargaining agreement?

2. Did the Board reasonably find that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally granting referral and sign-on bonuses to unit employees without giving the Union prior notice and an opportunity to bargain?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is engaged in the stamping, assembly, and sale of automotive parts from its facility in Tecumseh, Michigan. (JA 346; 45-47.) Since 1993, the Union has represented a bargaining unit consisting of the Company's production and maintenance employees. (JA 346; 49.) The unit is comprised of "skilled" repairmen and maintenance employees, and "semiskilled" production employees. (JA 346; 48.) At the time of the hearing in this case, the Company employed 50-55 skilled employees and approximately 550 semiskilled employees. (JA 346; 48.)

B. The Company Increases the Starting Wage Rate of Skilled Bargaining-Unit Employees Without the Union's Consent

The Company and Union have been parties to several collective-bargaining agreements since 1993, the most recent of which runs from April 5, 2013 until April 5, 2018. (JA 346, 349; 49, 180-273.) Appendix A to that agreement is a "Wage Progression Schedule," which provides the following, in pertinent part:

The Company shall follow the following wage scales during the term of the Agreement:

Tier II Semi-Skilled Employees (*hired on or after ratification of this Agreement*):

April 2013 through April 2018

Start	\$10.00
12 Months	\$10.40
24 Months	\$10.90
36 Months	\$12.00
48 Months	\$14.35

Skilled Employees:

April 2013 through April 2018

New Hires	\$22.19
3 Months	Current Skilled Trades Rate

(JA 350; 248.) As the wage schedule indicates, skilled employees are paid \$22.19 per hour when hired; they receive an increase to \$24.10 per hour after 3 months. (JA 346; 51, 248.) Semiskilled employees are paid \$10.00 per hour when hired, and receive annual increases. (JA 347; 248.)

In late November 2015, the Union's local president, Steve Gonzalez, and its unit chairperson, Joseph Grisham, met with Company Plant Manager John Donahoe. (JA 347; 52-53.) Donahoe informed Gonzalez and Grisham that the Company intended to increase the skilled employees' starting wage to \$30 per hour. (JA 347; 52-53, 274.) The Company felt such increases were necessary to

recruit and retain skilled employees. (JA 347; 107-08.) The Union responded that the Company could not do so without bargaining with the Union. (JA 347; 52-53, 274.) The Union did not consent to the increase. (JA 347& n.2; 54.)

The Company increased the skilled employees' starting wage to \$30 per hour on November 30. (JA 347-48; 56.) That same day, Mike Thornton, a representative from the International Union, responded by emailing Company Human Resources Manager Melissa Tarsha and stating that, if the increase in fact occurred, it would be in violation of the parties' collective-bargaining agreement. (JA 347; 51-52, 274.) After the wage increase was implemented, the parties met several times between December 2015 and January 2016 to discuss proposed modifications to the collective-bargaining agreement, including the wages of skilled and semiskilled employees, but did not reach any agreement. (JA 347-48; 55-58.) In a January 11 letter to bargaining-unit employees, Grisham explained that the Union was not opposed to skilled employees receiving wage increases, but felt that all bargaining-unit employees should receive increases. (JA 348; 277-78.)

C. The Company Increases the Starting Wage Rate of Semiskilled Bargaining-Unit Employees Without the Union's Consent

On March 22, 2016, Donahoe held a meeting with some unit employees, including Grisham, and informed them that the Company intended to increase the wage rate of newly hired semiskilled employees from \$10.00 per hour to \$10.75 per hour. (JA 348, 349; 64-65.) As with skilled employees, the Company felt such

increases were necessary to recruit and retain semiskilled employees. (JA 349; 111-12.) That increase became effective that same day, March 22. (JA 348, 349; 67.) Existing semiskilled employees not yet earning \$10.75 an hour were given a raise to that amount while those earning \$10.75 an hour or more received no increase. (JA 348, 349; 67-68.) The Union never consented to that increase. (JA 348; 65-66.)

Later in the day on March 22, Grisham met with Donahoe and told him the Company's decision to increase the wages of some semiskilled employees was causing discontent among existing employees and could not be done without bargaining with the Union. (JA 348-49; 68.) Donahoe responded that the Company had to increase wages to try to attract new employees. (JA 349; 68.) The parties met again on April 8, 2016, to discuss potential modifications to the collective-bargaining agreement, but were unable to reach an agreement. (JA 349; 118.)

On April 21, Donahoe left Grisham a voicemail message stating the Company was going to increase the starting wage for semiskilled employees again, this time from \$10.75 per hour to \$11.50 per hour. (JA 349; 68-69, 77-78.) The Company did not bargain with the Union over that increase, and the Union never consented to it. (JA 349; 78.) That increase took effect on April 24. (JA 349; 69.) The Company does not dispute that, consistent with the implementation of the

prior increase, the employees earning more than the newly established minimum were not given any wage increase. (JA 349.)

D. The Company Implements Referral and Sign-On Bonus Programs Without Notifying or Bargaining With the Union

During the March 22 meeting, Donahoe also informed employees that the Company would begin paying existing employees a \$100 referral bonus for referring a person to work at the facility, and would pay \$1,000 to any new employee who completed his probationary period. (JA 348; 64-65, 281, 282.)

Those bonus programs became effective that same day, March 22. (JA 348; 70.)

The Company did not discuss the referral or sign-on bonuses with the Union prior to that meeting; the Union only learned of the bonuses through Girsham, who attended the meeting. (JA 348; 66-67.) The Union never consented to either bonus. (JA 348; 66.)

II. PROCEDURAL HISTORY

Pursuant to charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and Section 8(d) of the Act, 29 U.S.C. § 158(d), by unilaterally granting wage increases to skilled and semiskilled bargaining-unit employees without the Union's consent, thereby failing to continue in effect all of the terms and conditions of the parties' existing agreement, and further violated Section 8(a)(5) and (1) by unilaterally awarding referral and sign-on bonuses to

bargaining-unit employees without providing the Union with notice or an opportunity to bargain. (JA 346; 140-41, 145-46, 151-57.) After a one-day hearing, an administrative law judge issued a decision and recommended order finding that the Company violated the Act as alleged. (JA 346-54.)

In assessing whether the Company unlawfully modified the wage scale in the parties' existing collective-bargaining agreement, the judge analyzed whether the Company has a sound, arguable basis in the agreement to do so, and found that it did not. (JA 350.) The judge rejected the Company's argument that the agreement's management-rights clause permitted the modification. In doing so, the judge applied the "clear and unmistakable waiver" standard, and determined that the management-rights clause did not constitute a clear and unmistakable waiver by the Union of the Company's statutory obligation to bargain with the Union over the employees' wage scale, a mandatory subject of bargaining. (JA 350.) Accordingly, the judge found that the Company's midterm modification of the agreement's wage scale violated Section 8(a)(5) and (1) and Section 8(d) of the Act. (JA 350.) The judge also found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally granting referral and sign-on bonuses to unit employees without providing the Union with notice and an opportunity to bargain. (JA 351-52.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 14, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran), affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order as modified. (JA 344.) The Board agreed with the judge that the Company did not have a sound arguable basis for its midterm contract modification. (JA 344 n.2.) Unlike the judge, however, a majority of the Board relied solely on that standard, eschewing any reliance on the judge's application of the clear and unmistakable waiver standard, while Member McFerran alone agreed with the judge's application of the clear and unmistakable waiver standard in analyzing the Company's management-rights argument. (JA 344 n.2.)

To remedy those violations, the Board ordered the Company to cease and desist from failing to continue in effect the terms and conditions of the parties' 2013-2018 collective-bargaining agreement by granting wage increases without the Union's consent; from unilaterally changing terms and conditions of employment by granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union; and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act, 29 U.S.C. § 157. (JA 344.) Affirmatively, the Board ordered the Company to, upon the Union's request,

rescind the wage increases given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016; continue in effect all the terms and conditions of the 2013-2018 collective-bargaining agreement; upon the Union's request rescind the referral and sign-on bonuses granted to unit employees beginning on March 22, 2016; notify and on request bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees; and post a remedial notice. (JA 344-45.)

SUMMARY OF ARGUMENT

When an employer alters its employees' terms and conditions of employment without first bargaining in good faith with the employees' exclusive bargaining representative, it interferes with employees' right, at the heart of the Act, to engage in self-organization and collective bargaining. The Company did just that, by increasing the starting wage rates of bargaining-unit employees over those set forth in the parties' existing agreement without the Union's consent, and by implementing referral and sign-on bonuses without affording the Union notice and the opportunity to bargain.

1. Under settled law, an employer cannot modify the terms of an existing collective-bargaining agreement it has entered into with a union absent the union's consent, unless it has a sound arguable basis in the agreement for doing so. The

Company had neither the Union's consent nor a sound arguable basis when it increased the starting wage rates of skilled employees in November 2015, and semiskilled employees in both March and April 2016. Rather, doing so violated the agreement's express terms, which specified that the Company "shall follow" a specific wage schedule that included starting wage rates. While the Company (Br. 13) maintains that it reasonably believed that the wage scales only represented "contractual minimums," no language in the agreement supports that interpretation. Moreover, while the Company also argues that the modification was permissible under the agreement's management-rights clause, which grants the Company rights not expressly restricted elsewhere in the agreement, the Board reasonably found that the express terms of the wage provision constituted just such a restriction.

The Company also challenges the portion of the Board's Order that requires the Company to rescind the unlawful wage increases upon request of the Union. That remedy, however, which the Board has implemented in similar cases for decades, is a valid exercise of the Board's broad remedial discretion. Granting the Union the right to request rescission serves to restore the Union to its prior status in the eyes of its members by giving them a say in the bargaining process and not penalizing employees by taking away wage increases unlawfully implemented by the Company.

2. An employer also fails to bargain in good faith by implementing new terms and conditions of employment without providing its employees' bargaining representative with notice and an opportunity to bargain over the changes. Here, the Company failed to do either before implementing the referral and sign-on bonus programs. The Company argues that the bonuses it paid were akin to gifts rather than wages, and therefore were not mandatory subjects of bargaining. But that runs counter to Board's broad definition of wages. Here the Board reasonably found that the Company's bonuses were clearly tied to employment-related factors and thus were mandatory subjects of bargaining.

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 *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991). Accordingly, the Board's construction of Section 8(a)(5) and 8(d) of the Act 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 *Litton Fin. Printing*, 501 U.S. at 200. Additionally, the Board's findings of fact are "conclusive" when 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, 477

(1951). The Court owes the Board the same degree of deference even when, as here, the Board has disagreed with some aspect of the administrative law judge's decision. *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 995 n.5 (D.C. Cir. 1979) (citing *Universal Camera Corp.*, 340 U.S. at 496). The Board also is empowered to interpret collective-bargaining agreements in resolving unfair-labor practice cases, though its contractual interpretations are not entitled to judicial deference. *Litton Fin. Printing*, 501 U.S. at 202-03; *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 132 (D.C. Cir. 2001).

Finally, with respect to the Court's review of the Board's chosen remedy, the Board enjoys broad discretion "subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); accord *United Food & Commercial Workers Int'l Union v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988). A reviewing court enforces the Board's remedy unless it is shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (citation omitted).

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) AND SECTION 8(d) OF THE ACT BY UNLAWFULLY MODIFYING THE WAGE SCALES IN ITS EXISTING COLLECTIVE-BARGAINING AGREEMENT

A. The Act Prohibits Employers From Modifying Terms of Existing Collective-Bargaining Agreements Without the Union's Consent Unless It Has A Sound, Arguable Basis for Doing So

Section 8(a)(5) of the Act requires an employer to bargain with its employees' representative over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act, in turn, defines collective bargaining 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). Section 8(d) also mandates that no party to a collective-bargaining agreement "shall terminate or modify such contract" without obtaining the other party's consent. *Id.* An employer that unilaterally modifies an agreement during its term violates both Section 8(d) and 8(a)(5) and (1).² *See Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 NLRB 601, 602 (1984) (when contract is in effect, employer must obtain union consent before modifying terms), *aff'd sub nom.*, *Intl.*

² A Section 8(a)(5) violation results in a "derivative violation" of Section 8(a)(1), 29 U.S.C. § 158(a)(1). *See Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); accord *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 21-22 (1st Cir. 2007); see also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973) (Section 8(d) unambiguously forbids employer's midterm modification of contract provisions without union's consent and privileges union to withhold consent), *enforced mem.*, 505 F.2d 1302 (5th Cir. 1974). Such conduct violates the Act "whether the change at issue adds to or subtracts from employees' wages, or whether it institutes a new employment policy or withdraws one that already exists." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996).

In cases involving allegations of unlawful contract modification, contract interpretation is often a central issue. Although the Board is generally not charged with interpreting collective-bargaining agreements, it may do so if necessary for the adjudication of an unfair labor practice. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427-28 (1967); accord *Office & Prof'l Emp. Int'l Union, Local 425 v. NLRB*, 419 F.2d 314, 317 (D.C. Cir. 1969) (Board may "interpret and give effect" to collective-bargaining agreement to adjudicate unfair labor practice).

An employer violates Section 8(d) and Section 8(a)(5) and (1) of the Act by modifying the terms of an existing collective-bargaining agreement unless it can demonstrate a basis in the contract for doing so. Specifically, the employer must

establish that it had “a sound arguable basis for ascribing a particular meaning to [its] contract” and that its action was “in accordance with the terms of the contract as [it] construes it.” *NCR Corp.*, 271 NLRB 1212, 1213 (1984); *cf. Bath Marine*, 475 F.3d at 23. In assessing whether a party has a sound, arguable basis in contract to modify terms of employment, the Board focuses on the reasonableness of that interpretation. *Bath Iron Works Corp.*, 345 NLRB 499, 503 (2005). As shown below, the Company’s contractual argument for why it was privileged to increase the wages of skilled and semiskilled unit employees without the Union’s consent lacks a sound arguable basis.

B. The Company’s Decision To Increase the Starting Wages of Unit Employees, Without the Union’s Consent, Was an Unlawful Contract Modification that Lacked a Sound, Arguable Basis in the Parties’ Collective-Bargaining Agreement

It is undisputed that, during the term of the parties’ collective-bargaining agreement, the Company increased the hourly starting wage rates of skilled employees from \$22.19 to \$30.00, and of semiskilled employees from \$10.00 to \$10.75, and again to \$11.50. (Br. 5-6.) It is also undisputed that the Union did not consent to those midterm modifications. (Br. 5-6.) Because the Company presents no viable argument to show that the contract privileged its modification, the Board properly found that the midterm modification was unlawful.

The Company (Br. 13) insists that it was free to increase the starting wages of unit employees because, despite the existence of a detailed wage scale set forth

in Appendix A of the parties' collective-bargaining agreement, nothing prevented it from paying "overscale wages" above the amounts set forth in the wage scale, which the Company characterizes as "contractual minimums." As found by the Board (JA 350), there is simply no language in the agreement that supports that interpretation. Appendix A sets forth a "wage progression schedule" for several categories of employees, which provides "[t]he Company *shall follow* the following wage scales during the term of the Agreement." (JA 350; 248 (emphasis added)). That schedule establishes that the starting wage rates for semiskilled employees is \$10.00 an hour and for skilled employees is \$22.19. (JA 248.) It does not grant the Company what it seeks – "unfettered discretion" with respect to wage rates. (JA 350.) Rather, as found by the Board (JA 350), the Company's assertion that nothing forbade it from paying employees more than the wage rates set forth in the parties' agreement was "implausible" and thus lacked a sound arguable basis. That finding cannot be equated, as the Company suggests (Br. 13), to the Board imposing a new requirement that the Company must show "express language authorizing [the Company's] actions." Rather, what is required, and what the Company cannot establish here, is a showing that the language in the agreement permits a good-faith reasonable interpretation that allows for the midterm changes.

It follows, as found by the Board (JA 344 n.2), that the management-rights clause in the parties' agreement likewise does not provide a sound, arguable basis for the Company unilaterally to increase employees' wages. The Company argues (Br. 15) that its actions were privileged by Sections 2 and 3 of that clause (JA 350; 186-87.) Section 2 carves out certain rights that management may freely exercise, including "to make, enforce and amend or revise such work rules and regulations as it may from time to time, in its sole discretion, deem suitable for the purpose of maintaining the order, safety and/or effective and efficient operation of Company facilities." But as the Board explained (JA 350), the right to make or amend "work rules and regulations" does not authorize it to alter the specific wage rates set forth in the agreement. Section 3 provides that the Company "has all rights, powers, prerogatives, authority and functions except as those rights, powers, prerogatives, authority and functions are expressly and specifically restricted by the written provisions of this Agreement." The Board (JA 350) rejected this argument based on its finding, discussed above, that the agreement's express and specific wage rates that the Company "shall follow" preclude the Company from altering wage rates under that section.

The Company (Br. 14-15) also claims that the Board alternatively applied the clear and unmistakable waiver standard, which it "confused and conflated" with the sound arguable basis standard. Neither contention is correct. Although

the judge applied the clear and unmistakable waiver standard to determine whether the management-rights clause constituted a waiver of the right to bargain over midterm wage increase, the Board did not, and instead relied solely on the sound arguable basis standard.³

Additionally, the Company asserts (Br. 1) that the Board “erred by failing to apply properly its ‘contract coverage’ standard in assessing the lawfulness of the wage increases, but waived that argument by failing to develop it in its brief. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (argument merely referenced in opening brief is waived). In any event, that argument is irrelevant because, as discussed, the Board correctly applied the sound arguable basis standard.

The Company insists (Br. 4-6) that its decision to increase wages was necessary given the Company’s inability to hire and retain employees. But as the Board explained in dismissing that argument (JA 349-50), the Company’s motive for modifying the agreement is irrelevant to determining whether the modifications violated the Act, a point the Company fails to contend with in its opening brief. As the Board explained in rejecting a near-identical argument in *St. Barnabas Medical*

³ Member McFerran explained her belief that only the clear and unmistakable waiver standard applied with respect to the management-rights clause. Chairman Miscimarra, however, expressly disavowed reliance on that standard and Member Pearce stated his disagreement with extant law that articulated the sound arguable basis standard but nevertheless agreed that, under that standard, the Company’s actions violated the Act. (JA 344 n.2.)

Center, cited by the Board here (JA 349), a union is not obligated to agree to midterm wage increases even when such changes are “compelled by economic need.” 341 NLRB 1325, 1329 (2004) (quoting *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enforced mem.*, 505 F.2d 1302 (5th Cir. 1974)); *see also NLRB v. Manley Truck Line, Inc.*, 779 F.2d 1327, 1332 (7th Cir. 1985) (explaining Board’s decision not to create exception to Section 8(d) for economic necessity warrants court’s deference).

In short, the Company failed to establish a sound arguable basis for making the midterm modification to the wage schedule and, as pointed out by the judge (JA 350), failed to cite to a single Board case construing a wage scale as establishing merely a contractual floor that permits employers to unilaterally increase. Accordingly, the Board’s finding that the Company’s actions violated Section 8(a)(5) and (1) and Section 8(d) of the Act was reasonable.

C. The Board Acted Well Within Its Broad Remedial Authority in Requiring the Company To Rescind the Unlawful Wage Increases Upon Request of the Union

Section 10 of the Act authorizes the Board, upon finding an unfair labor practice, to order that the violator “cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). Congress conferred on the Board the authority to develop appropriate remedies because it could not “define the whole gamut of remedies to

effectuate [the policies of the Act] in an infinite variety of specific situations.”

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). To the extent that there are uncertainties in formulating appropriate remedies, “[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Intl. Union of Elec. Workers, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1251 (D.C. Cir. 1970) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946)). Because the Board “draws on a fund of knowledge and expertise all its own” when formulating a remedy, its choice, as discussed above (p. 13-14) is due “special respect” by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); *accord Federated Logistics & Ops. v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005).

The Board (JA 344) acted well within its broad remedial discretion by ordering the Company to, “[u]pon request of the Union, rescind the wage increases given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016.”⁴ By implementing unlawful unilateral changes, an employer “minimizes the influence of organized bargaining [by] interfere[ing] with the right of self-organization by emphasizing to the

⁴ The Board also ordered that the Company, upon the Union’s request, to rescind the unlawful referral and sign-on bonuses discussed below (Section II.). The Company did not challenge that that portion of the Order in its exceptions to the Board or its brief to the Court.

employees that there is no necessity for a collective bargaining agent.” *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (internal quotation omitted). While ordering the rescission of changes that are detrimental to employee interests restores the union to its prior status by demonstrating to the employees that the union can protect their interests, ordering the rescission of beneficial changes would only further undermine the union, as the employees would be penalized by losing wage increases or other improved benefits on account of the union’s having filed charges. *See NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 308 (7th Cir. 1981). To avoid such further damage, the Board has long remedied unilaterally implemented beneficial changes, as it has done here, by requiring that employers rescind such changes only upon the union’s request. *See Goya Foods of Fl.*, 356 NLRB 1461, 1462 (2011) (collecting cases). As the Seventh Circuit explained in *Keystone Steel*, doing so is “entirely consistent” with the Act’s purposes. 653 F.2d at 308; *accord Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 311 (9th Cir. 1996); *see also Scepter, Inc. v. NLRB*, 448 F.3d 388, 392 (D.C. Cir. 2006) (discussing *Keystone Steel*, but finding remedial issue waived).

The Company (Br. 17) complains that the Board’s Order grants the Union “[t]he ability to demand rescission” of the unlawful wage increases “in perpetuity,” and believes the right of rescission should be limited by an arbitrary, 30-day time limit to do so. This ignores that, as discussed above, Congress conferred on the

Board the authority to devise appropriate remedies. Moreover, the Board's Order (JA 344) also requires the Company to continue in effect the terms and conditions of the parties' 2013-2018 collective-bargaining agreement. Read together, it is evident that the Union may only request rescission of the wage increases while they remain in effect, and those unilaterally imposed wage rates will end once the parties agree to modify the terms of the wage scale or the Company lawfully implements a unilateral change upon first bargaining to impasse.

The Company also complains (Br. 17) that by granting the Union the right to rescind the wage increases, which it describes as a "bargaining chip" that the Union can use to "penalize" the Company and support other demands, the Board surpassed its remedial authority. That speculative claim, unsupported by any caselaw, ignores the fact that unilaterally implementing terms tends to damage a union's standing in the eyes of its members and "injure[d]s the process of collective bargaining itself." *Honeywell Int'l*, 253 F.3d at 131. The Board's longstanding remedy, in turn, serves to restore some balance of power and thereby return the parties to the status quo that existed prior to the Company's unlawful acts.

II. THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY GRANTING REFERRAL AND SIGN-ON BONUSES TO UNIT EMPLOYEES WITHOUT GIVING NOTICE AND AN OPPORTUNITY TO BARGAIN TO THE UNION

As set forth above, Section 8(a)(5) of the Act requires an employer to bargain with its employees' representative over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5). An employer's unilateral change in any term or condition of employment that is a mandatory subject of bargaining violates Section 8(a)(5), and derivatively Section 8(a)(1), "for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *see also id.* at 747 (making unilateral changes without prior discussion with union "must of necessity obstruct bargaining, contrary to the congressional policy"); *accord Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410-11 (D.C. Cir. 1996).

There is no dispute that the Company granted referral and sign-on bonuses to unit employees without providing the Union with notice and an opportunity to bargain. Indeed, the Union learned of the new bonus programs at the same time as unit employees. Thus, the Board properly found (JA 352) that the Company presented the Union with a *fait accompli*. *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988) (employer fails to fulfill bargaining

obligation where it does not present potential change in terms and conditions as a proposal but as a *fait accompli*). By failing to notify the Union in advance of those changes, the Company precluded the parties from engaging in good-faith bargaining in violation of Section 8(a)(5) and (1) of the Act.

The Company's only defense to its actions (JA 344 n.2; *see also* Br. 16) is the claim that bonuses it offers to employees are "gifts" and not "wages," so they are not a mandatory subject of bargaining and the Company was within its right to implement them unilaterally. But "the classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise, . . . [so] its judgment as to what is a mandatory bargaining subject is entitled to considerable deference." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (internal citation omitted). Substantial evidence supports the Board's findings that the bonuses are wages and thus mandatory subjects of bargaining. The Company therefore violated the Act by not providing the Union with notice of the proposed bonus programs and an opportunity to bargain.

The Company's argument that the bonuses are akin to gifts is inconsistent with the Board's court-approved decisions, which broadly construe the term "wages" in determining what constitutes a mandatory subject of bargaining. In *Richfield Oil Corp.*, the Board long ago stated "[i]t is now well established that the term 'wages' comprehends all emoluments of value which may accrue to

employees because of their employment relationship.” 110 NLRB 356, 359 (1954), *enforced*, 231 F.2d 717, 724 (1st Cir. 1956) (citing *Inland Steel Co.*, 77 NLRB 1, 4 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948)). The determination of whether payments to employees, including bonuses, constitute wages turns on whether the payments are tied to “various employment-related factors” such as wage rates, production, performance, seniority, or hours worked. *N. Am. Pipe Corp.*, 347 NLRB 836, 837-38 (2006) (citing *Benchmark Indus., Inc.*, 270 NLRB 22, 22 (1984), *aff’d sub nom.*, *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985) (Table)), *pet. for review denied sub nom.*, *Unite Here v. NLRB*, 546 F.3d 239, 242-44 (2d Cir. 2008).

Here, as explained by the Board (JA 351), the Company did not merely give employees a gift unrelated to any work-related act, but instead rewarded individual employees who successfully referred individuals for employment, as well as new employees who completed their probationary periods. The bonuses were thus tied to the employment-related factor of hiring new employees.

While the Company contends (Br. 16) that employees had “no control whether” they would receive a referral bonus, that is untrue. Only employees who took the initiative of referring others to work for the Company had the opportunity to earn a bonus. Likewise, the sign-on bonuses were not “given indiscriminately” of performance, as the Company asserts (Br. 16), because those bonuses were

promised to applicants and new employees and served as an additional incentive for completing the probationary period. In those ways, this case is distinguished from Board decisions finding that employers were entitled to unilaterally give gifts to their employees, whether a ham at Christmas, *Benchmark Indus.*, 270 NLRB at 22 (lawful to give all employees a 5-pound ham and a holiday lunch), or an across-the-board one-time stock award, *N. Am. Pipe Corp.*, 347 NLRB at 838 (lawful to give each employee a one-time stock award of equal value “wholly unrelated to any work performed or seniority attained” by employees).

Accordingly, the Board reasonably found that the referral and sign-on bonuses fall within the Board’s broad definition of “wages” and are therefore mandatory subjects of bargaining. Because there is no dispute that the Company failed to notify the Union that it was implementing the bonus programs or give the Union the opportunity to bargain, it was reasonable for the Board to find that the Company’s actions violated Section 8(a)(5) and (1) of the Act.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

s/ Jeffrey W. Burritt

JEFFREY W. BURRITT

Attorney

National Labor Relations Board

1015 Half Street, S.E.

Washington, D.C. 20570

(202) 273-1743

(202) 273-2989

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

March 2018

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

LENAWEE STAMPING CORP., D/B/A)	
KIRCHOFF VAN-ROB)	
)	
Petitioner/Cross-Respondent)	
)	
v.	)	Nos. 17-1170 & 17-1196
)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	07-CA-168498
Respondent/Cross-Petitioner	)	07-CA-172535
)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA, UAW)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 6,156 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

Dated at Washington, DC
this 23rd day of March, 2018

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

LENAWEE STAMPING CORP., D/B/A)	
KIRCHOFF VAN-ROB)	
)	
Petitioner/Cross-Respondent)	
)	
v.	)	Nos. 17-1170 & 17-1196
)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	07-CA-168498
Respondent/Cross-Petitioner	)	07-CA-172535
)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA, UAW)	
)	
Intervenor)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Section 7 (29 U.S.C. § 157)2

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....2

Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....2

Section 8(d) (29 U.S.C. § 158(d)2

Section 10(a) (29 U.S.C. § 160(a)4

Section 10(c) (29 U.S.C. § 160(c)5

Section 10(e) (29 U.S.C. § 160(e)6

Section 10(f) (29 U.S.C. § 160(f)6

NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157): Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

...

(d) Obligations to bargain collectively

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

(Section 8(d) cont'd)

collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

- (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
- (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
- (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
- (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and

(Section 8(d) cont'd)

when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

- (A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.
- (B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.
- (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

...

(c) Reduction of testimony to writing; findings and orders of Board

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

...

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

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

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

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

LENAWEE STAMPING CORP., D/B/A)	
KIRCHOFF VAN-ROB)	
)	
Petitioner/Cross-Respondent)	
)	
v.	)	Nos. 17-1170 & 17-1196
)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	07-CA-168498
Respondent/Cross-Petitioner	)	07-CA-172535
)	
and)	
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE AND)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA, UAW)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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

Dated at Washington, DC
this 23rd day of March, 2018