Oral Argument Not Yet Scheduled

Nos. 17-2497, 17-2930

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

v.

MIDLAND ELECTRICAL CONTRACTING CORP.

Petitioner/Cross-Respondent

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

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v.

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board for enforcement, and the cross-petition of Midland Electrical Contracting Corporation (Midland) for review, of a Board Order issued against Midland on June 6, 2017, reported at 365 NLRB No. 87. (JA 3-17.)[1] The Board

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[1] "JA" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(e) and (f) because Midland is headquartered and transacts business in New Jersey. The Board's application and Midland's cross-petition were timely, as the Act places no time limit on the institution of proceedings to enforce or review Board orders.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that Midland violated Section 8(a)(5), (a)(1), and (d) of the Act by failing to adhere to a collective-bargaining agreement (CBA) to which it was bound.

STATEMENT OF RELATED CASES

Trustees of the Building Trades Educational Benefit Fund et al. v. Midland Electrical Contracting Corp., No. 2:15-cv-04872-JFB-ARL, is currently pending in the Southern District of New York. To Board counsel's knowledge, that case involves an action by affected benefit funds to recover missed contributions from Midland stemming from Midland's repudiation of the CBA at issue here, and is currently stayed pending the outcome of this case.

STATEMENT OF THE CASE

Following charges filed by the United Electrical Workers of America, IUJAT, Local 363 (the Union), the Board's General Counsel issued a complaint alleging that Midland violated Section 8(a)(5), (a)(1), and (d) of the Act by failing to adhere to a CBA between the Union and the Building Industry Electrical Contractors Association (the Association), which was effective December 1, 2014, through November 30, 2017. After a hearing, an administrative law judge found that Midland was bound to that CBA as a member of the Association, which had negotiated the CBA on behalf of its members. The judge further rejected Midland's argument that it had timely withdrawn in September 2014 from the Association and from future Union-Association CBAs and, therefore, found that Midland had violated the Act as alleged. (JA 11-17.) After considering Midland's exceptions, the Board adopted the judge's findings. (JA 1-5.) The Board's findings, conclusions, and Order are described below.

I. THE BOARD'S FINDINGS OF FACT

A. Background: Midland, the Union, and the Association

Midland is an electrical contractor, and the Union is a labor organization representing electrical workers. The Association is a multiemployer association of electrical contractors that negotiates CBAs with the Union on behalf of its members. The Association and the Union had a CBA covering a unit of

electricians, electrical maintenance workers, helpers, apprentices, and trainees employed by the Association's members in effect from December 1, 2008, through November 20, 2011. (JA 12; 47-48.)

In the spring of 2010, Midland contacted the Union to discuss its employees joining the Union and obtaining coverage under that CBA. Midland informed the Union that it was interested in obtaining work under project-labor agreements with the New York City School Construction Authority, which had historically been performed by employees in a different union. The Union stated that it was considering filing a lawsuit to become eligible to perform such work, but that it had not yet done so. (JA 12; 52.)

B. Midland Designates the Association as Its Bargaining Representative and Assumes the 2008-2011 Union-Association CBA

On June 30, 2010, Midland signed the Membership Application, under which Midland became a member of the Association and expressly designated the Association to represent it in negotiations with the Union, agreeing "to be bound by all the terms of any agreement entered into between the Association and [the Union] . . . with the same force and effect as though [Midland] had executed the agreement as a party." (JA 1, 12; 239.) The Membership Application specifies that "[r]esignation from the Association must be in writing and served on the

Association by certified mail no less than 90 days prior to the day of the expiration of the agreement between the Association and [the Union]." (JA 1, 12; 240.)

Thereafter, the Union, Midland, and the Association signed the Assumption Agreement, under which Midland assumed the 2008-2011 CBA already in place between the Union and the Association. The Assumption Agreement states that the Union requested recognition and that Midland "hereby recognizes the Union as the majority Section 9(a) [29 U.S.C. § 159(a)] representative under the Act."[2] (JA 3, 13; 227-28.) It further provides that Midland is bound to the Association's CBA with the Union, and to associated benefit-fund agreements. Finally, the Assumption Agreement states that "the Association shall, on behalf of [Midland], negotiate successor [CBAs], amendments, renewals and extensions," and that Midland "agrees to be bound by any and all amendments, renewals and/or extensions of the above referenced Association [CBAs] unless and until this Agreement is properly terminated by either [Midland] or the Union in accordance

[2] Under Section 9(a) of the Act, representatives designated by a majority of employees in a unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 9(a). Midland and the Union also signed a Recognition Agreement, which explicitly states that "the Union has presented to [Midland] evidence that it represents a majority" of Midland's employees and that Midland "has satisfied itself" that the Union represents such a majority and recognizes the Union "as the sole and exclusive collective bargaining agent for all employees of [Midland]" in the relevant unit. (JA 10-11; 231.)

with the renewal and/or Termination Provisions of the Association [CBA]." (JA 3, 13; 227-28.)

Midland adhered to the 2008-2011 CBA for the remainder of that agreement's term. On November 30, 2011, the Association and the Union executed a successor CBA, effective through November 30, 2014. Article 38 of the 2011-2014 CBA provided that the agreement "shall remain and continue in full force and effect . . . from year to year thereafter, unless either party gives written notice to the other by certified mail, return receipt requested, at least sixty (60) days prior to the date of expiration of this Agreement, that it desires to modify or amend and/or re-negotiate same." (JA 3, 11; 175, 196-97.) Employers bound to the 2011-2014 CBA were obligated to deduct dues from each unit employee's paycheck and remit those dues to the Union. The CBA also required contributions to employee benefit funds, including the Security Fund, the Building Trades' Welfare Benefit Fund, the Building Trades' Annuity Fund, the Building Trades' Education Fund, and the Electricians' Retirement Fund. (JA 11; 178, 186-93.)

C. Midland Attempts To Repudiate the 2011-2014 CBA

On January 17, 2013, Midland sent the Union a letter stating that Midland "need[s] to opt out of the Union" because the Union had not become eligible to perform work under the project labor agreements as Midland had hoped. The letter further stated that "as of January 31, 2013, [Midland] and all of its employees will

no longer be members of [the Union.]" (JA 13; 233.) The Union replied that it would not release Midland from its collective-bargaining obligations, and that Midland would remain bound to the CBA until at least the CBA's expiration date of November 30, 2014, as well as "for any additional time that [Midland] may be bound by any successor agreement." (JA 13; 234.)

In early 2013, Midland called the Union several times, asserting that Midland could not afford to operate without work under project labor agreements. The Union referred Midland to the Association. (JA 14; 145-46). On March 29, Midland emailed the Association and requested, without elaboration or explanation, a copy of "the Building Industry Electrical Contractors Association agreement." (JA 14; 119-20, 269.) In response, the Association mailed Midland a copy of the 2011-2014 CBA. (JA 14; 120-26, 269.)

In May 2013, Midland filed a lawsuit against the Union and the Association seeking to nullify the 2011-2014 CBA on the grounds of fraudulent inducement and breach of contract, based on the Union's failure to become eligible to perform work under project labor agreements. The parties stipulated to dismissal of the lawsuit with prejudice on October 1, and it was dismissed shortly thereafter. (JA 14; 241-67.) Midland continued to adhere to the 2011-2014 CBA. (JA 3-4; 63.)

D. The Union and the Association Begin Negotiating the 2014-2017 CBA; Midland Purports To Terminate the Assumption Agreement and Reject Future CBAs

In August 2014, the Union and the Association began negotiations for a successor agreement to the 2011-2014 CBA. On September 4, Midland sent both entities a letter by certified mail stating that, under Article 38 of that CBA, as incorporated in the Assumption Agreement, Midland desired to withdraw from the Assumption Agreement and would not be bound to subsequent CBAs. Midland sent a follow-up letter on September 16, enclosing the September 4 letter, because it had not received any acknowledgement that the Union had received the September 4 letter. (JA 4; 235-38.)

On November 30, the Association and the Union executed a memorandum of agreement extending the 2011-2014 CBA with modifications through November 30, 2017. (JA 4, 14; 199-200.) Since September 2014, Midland has not made fund payments due under either the 2011-2014 or 2014-2017 CBAs. (JA 4, 15; 32-34.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting) adopted the judge's finding that Midland failed to withdraw from the Association in a timely manner and therefore violated Section 8(a)(5), (a)(1), and (d) of the Act by failing to adhere to the 2014-2017 CBA.

To remedy that violation, the Board ordered Midland to cease and desist from refusing to bargain collectively with the Union by: (1) withdrawing authorization from the Association to represent it in negotiations with the Union at a time when Midland is obligated to bargain through the Association; (2) refusing to abide by and honor the CBA negotiated by the Association at a time when the Association represents Midland or Midland has agreed to be bound; and (3) refusing, since September 2014, to make contractually required benefit-fund payments to the Union's Security Fund, the Building Trades' Welfare Benefit, Annuity, and Education Funds, and the Electricians' Retirement Fund. It further ordered Midland to cease and desist 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 (29 U.S.C. § 157).

In addition, the Board ordered Midland to: (1) notify the Association and the Union that Midland continues to authorize the Association to represent it in collective bargaining until that authorization is withdrawn in accordance with the terms of the Membership Application; (2) make bargaining-unit employees whole for any loss of earnings or other benefits suffered as a result of its failure to adhere to the Union-Association CBAs; (3) reimburse the affected funds for missed contributions since September 2014; and (4) post a remedial notice. (JA 6-7.)

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "The Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). The Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)). In particular, courts give great deference to Board rules in areas of the Board's expertise, including "ground rules for multiemployer bargaining," which involve "precisely the type of judgment that . . . should be left to the Board." *Charles D. Bonanno Linen Svc., Inc. v. NLRB*, 454 U.S. 404, 413 (1982).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Midland was bound to the 2014-2017 CBA and thus violated Section 8(a)(5), (a)(1), and (d) of the Act by failing to comply with that agreement. Employers are bound to any CBAs reached between a multiemployer association and a union while the employer is a member of that multiemployer association. Here, it is undisputed that Midland

lawfully joined the Association in 2010 and that the Association and the Union executed the 2014-2017 CBA. Midland was thus bound by that CBA unless it timely withdrew from the Association, and the Board reasonably found, for two independent reasons, that Midland's attempted withdrawal was untimely.

First, Midland's withdrawal was untimely because Union-Association negotiations had already started. Midland neither disputes that its withdrawal came after negotiations began nor challenges the Board's well-settled principle that such withdrawals are untimely absent mutual consent or unusual circumstances. Instead, it contends that the Union and the Association consented to its late withdrawal and that its previous conduct gave both entities notice that it intended to withdraw. However, this Court lacks jurisdiction to consider those arguments, because Midland did not raise them to the Board. In any event, the Board reasonably rejected Midland's defenses. Notably, there is no record evidence that the Union or the Association consented to allow late withdrawal; the Assumption Agreement, on which Midland relies, does not mention membership in, or withdrawal from, the Association at all.

Second, Midland's withdrawal was untimely because it did not comport with the Membership Application's 90-day-notice requirement. The Board reasonably concluded that the Assumption Agreement did not abrogate that requirement. Although an agreement can supersede a previous agreement if the two agreements

completely cover the same subject matter, the Assumption Agreement covers assumption of the 2008-2011 CBA, whereas the Membership Application covers Association membership. Contrary to Midland's assertions, moreover, there is no record evidence that the Association told Midland that the Membership Application's 90-day-notice requirement did not apply.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT MIDLAND VIOLATED SECTION 8(a)(5), (a)(1), AND (d) BY FAILING TO ADHERE TO A CBA TO WHICH IT WAS BOUND

Section 8(d) of the Act defines the duty to bargain collectively as the performance of the mutual obligation "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 . . . ." 29 U.S.C. § 158(d). Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5). Such refusals to bargain also violate Section 8(a)(1) of the Act, which proscribes employer interference with, restraint, or coercion in employees' exercise of their statutory rights. 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

A. Members of Multiemployer Bargaining Associations Are Bound By All CBAs the Association Executes Until They Lawfully Withdraw Their Membership

The Board, with the Supreme Court's approval, has long recognized that employers may pool their resources and increase their bargaining strength by authorizing an association to bargain with a union and execute CBAs on their behalf. *See NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-95 (1957). An employer member of such a multiemployer bargaining association is bound to comply with any contract negotiated by the association. *See Sheet Metal Workers Local 19 v. Herre Bros.*, 201 F.3d 231, 244 (3d Cir. 1999). Multiemployer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Truck Drivers*, 353 U.S. at 95. But multiemployer bargaining units "can be afforded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation." *Retail Assocs., Inc.*, 120 NLRB 388, 394 (1958).

In order to promote the requisite stability, the Board has established "reasonable controls . . . as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit." *Id*. As an initial matter, once negotiations involving an existing multiemployer unit have begun, an employer may not abandon the negotiations or withdraw from the multiemployer unit absent mutual consent or unusual circumstances. *Id.* at 394; *see also Herre*

Bros., 201 F.3d at 244. "Prohibiting such withdrawals contributes to the stability of multiemployer units and prevents the use of the scope of the bargaining unit as a bargaining lever to secure an economic advantage for one side over the other." *Id.* (quoting *NLRB v. Marine Mach. Works*, 635 F.2d 522, 524 (5th Cir. 1981)). Moreover, regardless of whether negotiations have started, an employer's withdrawal from multiemployer bargaining must be otherwise timely to be effective. *S. Freedman Elec.*, 256 NLRB 432, 434 (1981) (internal quotation marks omitted), *enforced mem.*, 679 F.2d 873 (2d Cir. 1981). Specifically, for a withdrawal to be timely, it must be "upon adequate notice before the date set by the contract" or "the agreed-upon date to begin the multiemployer negotiations." *Retail Associates*, 120 NLRB at 395.

Here, it is undisputed that Midland lawfully joined the Association, that the Association and the Union agreed to the 2014-2017 CBA, and that Midland refused to adhere to that CBA. The only remaining issue is whether Midland established that it timely withdrew from the Association. The Board found that Midland's withdrawal was untimely for two independent reasons: first, Midland withdrew after CBA negotiations had begun, and second, Midland failed to comply with the Membership Application's requirement that withdrawal be effectuated 90 days before the 2011-2014 CBA's expiration. Because substantial evidence

supports each of those findings, the Board is entitled to enforcement of its finding that Midland's failure to adhere to the 2014-2017 CBA violated the Act.

B. Midland's Withdrawal Was Untimely Because CBA Negotiations Between the Association and the Union Had Already Begun

It is undisputed that negotiations for the extension to the 2011-2014 CBA began in early August 2014, a month before Midland notified the Association and the Union that it intended to withdraw from the Association. As the Board found (JA 5), Midland's attempted withdrawal was thus untimely under *Retail Associates*, and ineffective to terminate Midland's delegation of bargaining authority to the Association. In its opening brief, Midland contends for the first time (Br. 18-20) that its withdrawal from the Association was timely under exceptions to the *Retail Associates* rule because, it claims, the parties consented in the Assumption Agreement to allow withdrawal after negotiations began and because its January 13, 2013 letter, May 2014 lawsuit, and subsequent correspondence with the Union provided actual notice of its intent to withdraw from the Association. As demonstrated below, this Court is barred from considering Midland's belated contentions, which are, in any event, meritless.

Under Section 10(e) of the Act, the Court lacks jurisdiction to consider arguments not raised to the Board. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary

circumstances"); *Woelke & Romero Framing*, 456 U.S. 645, 665 (1982) (stating Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to Board). To satisfy Section 10(e), moreover, a party must raise its objections in the time and manner required by the Board. *See Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008).

To preserve an argument before the Board, the Board's rules require that an exception to an administrative law judge's decision contain "the questions of procedure, fact, law, or policy to which exception is taken." 29 C.F.R. § 102.46. Thus, a party cannot preserve a particular issue by filing generalized exceptions to an administrative law judge's rulings. *See NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 89 (3d Cir. 2002) (challenge to judge's factual findings and inferences regarding a conversation insufficient to preserve separate argument that the conversation did not serve as evidence of anti-union animus). Nor does a dissenting Board member's discussion of an issue "excuse [a party] from its statutory obligation under § 10(e) to file exceptions presenting and preserving its argument to the Board." *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 343 (3d Cir. 1984).

As the Board found, "[a]lthough [Midland] generally excepted to the judge's findings, it ma[de] no supporting argument in its brief as to why the judge's finding [that the withdrawal notices were untimely because CBA negotiations had

begun] should be overturned." (JA 5.) Midland's sole exception states that "[t]he [judge's] determination that [Midland] is bound to the 2014-2017 [CBA] between [the Union] and [the Association] is erroneous," and its accompanying brief mentions neither *Retail Associates* nor the timing of negotiations. (Midland Exceptions, p. ii-8.) The Board therefore applied its well-established policy of adopting a judge's unchallenged findings.[3] *See Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005), *enforced*, 456 F.3d 265 (1st Cir. 2006).

Before the Court, Midland neither challenges the finding that it did not preserve its *Retail Associates* argument before the Board nor contends that extraordinary circumstances within the meaning of Section 10(e) excuse its failure to do so. (Br. 18-20.) Because "an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal," Midland has now waived any such contentions. *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005). Accordingly, the Court cannot consider Midland's challenges to the Board's finding that the ongoing multiemployer negotiations precluded Midland's attempt to withdraw from the Association in September 2014.

In any event, even if the Court were to reach the merits of that finding, the Board reasonably found that there is no record evidence that either the Association

[3] The Board majority did also reject, on the merits, the dissent's challenge to the *Retail Associates* finding, but only after making clear that Midland had waived any such challenge.

or the Union consented to allow Midland to withdraw before negotiations began. (JA 5.) First, Midland's reliance (Br. 18) on the Assumption Agreement is unavailing. That agreement, in tandem with the CBA, requires only 60-day notice for terminating the CBA. But it does not address Midland's ability to withdraw from Association membership, as discussed in more detail below (pp. 22-24). Notably, as the Board found, the Assumption Agreement mentions neither withdrawal from membership in the Association nor negotiations. Moreover, Midland cites no authority for the proposition that a contractually valid termination of a CBA is sufficient on its own to override the rule in *Retail Associates*, and the Board has allowed withdrawal under such circumstances only when the CBA explicitly addresses withdrawal from *negotiations*. *See Acropolis Painting & Decorating*, 272 NLRB 150, 150 (1984) (company lawfully withdrew from multiemployer bargaining unit where the CBA "provided an agreed-upon means for withdrawing not only from the [CBA] itself but also from 'any negotiations regarding [the CBA]'"). The Assumption Agreement thus falls far short of demonstrating "mutual consent" within the meaning of *Retail Associates* to withdrawal during ongoing multiemployer negotiations.

Second, contrary to Midland's contention (Br. 19-20), its various attempts in 2013 and 2014 to terminate its obligations under the 2011-2014 CBA were also insufficient to warrant an exception to the *Retail Associates* rule. As an initial

matter, Midland has not cited any authority in support of the proposition that notice to the Association of Midland's desire or intention to withdraw from membership would constitute such "unusual circumstances." (Br. 19-20.) The contractual requirements for withdrawal under both the Membership Application and the CBA as incorporated in the Assumption Agreement included written notice served by certified mail. Midland does not explain why lesser notice would suffice to accomplish withdrawal, much less extraordinary withdrawal after the commencement of Union-Association negotiations.

Even if informal notice were sufficient to override *Retail Associates*, Midland's January 2013 letter to the Union did not put the Association on notice that Midland wished to withdraw from the Association when the 2011-2014 CBA expired, much less "comport with the clear requirements set forth in the Membership Application" for withdrawing. (JA 16.) The letter was never sent to the Association, did not mention the Association, and stated not that Midland intended to terminate membership or its CBA obligations at the end of the CBA term, but that Midland wished to "opt out of the Union" as of January 31, 2013. (JA 233.) To the extent Midland meant for the letter to repudiate the 2011-2014 CBA before the CBA expired, such mid-term repudiation is unlawful and was

specifically rejected by the Union in its response to the letter.[4] Moreover, read literally, Midland's letter was also invalid because an employer cannot "opt out" of its employees' right to be represented by the union of their choice.[5]

Nor did Midland's 2013 lawsuit and "numerous representations and correspondences" (Br. 19) establish an exception to *Retail Associates*. As the Board found (JA 16), the lawsuit asked the court to nullify the 2011-2014 CBA, not Midland's membership in the Association, and did not reference future bargaining by the Association on Midland's behalf. And the correspondences Midland cites were, like the January 2013 letters, exchanged exclusively with the Union, not the Association, and referred only to Midland's desire to "get[] out of the Union." (JA 146.) Accordingly, the lawsuit and subsequent correspondence cannot constitute clear and unequivocal notice that Midland intended to withdraw from membership in the Association.

In sum, as the Board found, Midland's September 2014 "withdrawal notices were untimely" under the *Retail Associates* requirement that withdrawal occur

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[4] "[A]n employer's mid-term modification of [contractual] benefits constitutes an unfair labor practice." *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 n.2 (1971) (citing cases).

[5] Although an employer may withdraw recognition from a union under some circumstances, such withdrawal is always unlawful during the first three years of a collective-bargaining agreement, and, in the case of a Section 9(a) bargaining-relationship, unlawful at all other times absent "proof of loss of majority support." *Grane Health Care v. NLRB*, 712 F.3d 145, 151 n.5 (3d Cir. 2013).

before negotiations begin. (JA 4.) That untimeliness finding is dispositive regardless of whether the notices otherwise satisfied the parties' contractual requirements for withdrawal, and the Board's application of *Retail Associates* cannot be challenged for the first time on appeal.

C. Midland's Withdrawal Was Untimely Under the Express Terms of the Membership Application

Even disregarding the ongoing negotiations, Midland's attempted withdrawal was ineffective because it was contractually untimely. Midland joined the Association by signing the Membership Application and, as the Board found, "the unambiguous terms of the Membership Application barred [Midland] from resigning its membership in the Association during the final 90 days of any CBA between the Association and the Union." (JA 5.) The 2011-2014 CBA expired on November 30, 2014, and 90 days before that date is September 1, 2014. But Midland did not send its withdrawal letters until September 5 and 16. Therefore, its withdrawal was indisputably untimely under the Membership Application. Indeed, Midland does not contest that point. It solely argues (Br. 10-17) that the subsequent Assumption Agreement modified or superseded the Membership Application under the contract-merger principle. The Board reasonably rejected that argument.

A contract supersedes a prior contract between the same parties if the agreements "completely cover[] the same subject matter," but contain inconsistent

terms. *Unique Art Mfg. Co.*, 83 NLRB 1250, 1251 (1949). The Board reasonably concluded that the Assumption Agreement did not modify the Membership Application because the two agreements do not completely cover the same subject matter. The June 2010 Membership Application solely involves Midland's membership in the Association, and binds Midland only to the results of *future* negotiations conducted on its behalf.[6] The Assumption Agreement, on the other hand, focuses on Midland's CBA obligations. When the parties signed the Assumption Agreement, it bound Midland to the then-current 2008-2011 CBA, which had been negotiated before Midland conferred bargaining authority on the Association, and to any extensions or modifications to the 2008-2011 CBA.

Midland's statement that it "would not have otherwise executed the Assumption Agreement if it was already bound to the 2011-2014 CBA" (Br. 11) thus ignores the Assumption Agreement's primary purpose of binding it to the 2008-2011 CBA. And it ignores that, even in the absence of the Assumption Agreement, Midland would have been bound to the 2011-2014 CBA as a member of the Association after having signed the Membership Application. Although the Assumption Agreement reiterates that the Association will bargain on behalf of Midland, it does not directly refer to the subject of the Membership Application—

[6] Accordingly, it is irrelevant that the Union did not sign the Membership Agreement. As the Board explained (JA 6 n.6), multiemployer associations do not need unions' permission to add members.

Midland's membership in the Association—and says nothing about Midland's withdrawal from the Association. In those circumstances, the Board reasonably treated the two agreements as covering different subjects.

Indeed, in *Rome Electrical Systems*, 349 NLRB 745 (2007), *enforced*, 286 F. App'x 697 (11th Cir. 2008), the Board confronted a similar situation and reached the same conclusion. There, the employer and the union executed a letter of assent under which the employer assumed an existing CBA and authorized the multiemployer association to bargain with the union on the employer's behalf. To cancel that authorization and withdraw from association membership, the letter explicitly required the employer to notify both the association and the union at least 150 days in advance of any CBA's expiration. Thereafter, the association and the union executed a successor CBA stating that an employer that, having withdrawn from the association, "desir[ed] to change or terminate this Agreement must provide written notification at least 90 days prior to the expiration date of the Agreement or any anniversary date occurring thereafter." *Id*. at 745. The Board held that the two agreements covered different subject matters; the letter of assent covered the employer's withdrawal from the multiemployer association and the CBA provision covered its own termination. Because the two agreements did not cover the same subject matter, the letter of assent's 150-day-notice requirement for withdrawing membership remained in effect. *Id.* at 747-49. Similarly, here, the

Assumption Agreement deals with terminating the CBA, and the Membership Application governs withdrawal from the Association.[7]

In addition to finding that the requirements for contractual merger were not met, the Board found that reading the Assumption Agreement as an abrogation of the Membership Agreement would lead to illogical results. First, the Assumption Agreement and the CBA require only that Midland notify the Union, not the Association, before terminating the CBA. If that procedure sufficed to simultaneously terminate Midland's membership in the Association, Midland could leave the Association without even notifying the Association. Second, if the parties wished to modify a contract they had signed just 1 month before, "they likely would have done so in an explicit manner, not by 'the insertion of one phrase with no further elaboration.'" (JA 4, quoting *Rome Electrical*, 349 NLRB at 748.)

The record does not support Midland's contention that the Association itself "confirmed that Midland was solely required to follow the termination provision in the CBA." (Br. 17.) Midland only requested that the Association provide a copy of the "Building Industry Electrical Contractors Association agreement," without

[7] For that reason, it is immaterial whether, as Midland asserts (Br. 15), the CBA provision in *Rome Electrical*, unlike here, established who could provide notice of CBA termination, but not how to do so. It is also factually inaccurate: the CBA provision in *Rome Electrical* established both who could invoke it (employers who had withdrawn from the association) and how (by giving 90 days' notice).

further elaboration as to why Midland wanted it. (JA 269.) The Association reasonably interpreted Midland's request as a request for a copy of the extant CBA, and sent the CBA to Midland. The Association's president testified that the Association's members frequently requested copies of the CBA, which stands to reason: the CBA dictated wages and other terms of employment for those members' employees. (JA 120.) Notably, the Membership Application does not have the word "agreement" in the title, but the CBA does.

Thus, the Association's failure to send the Membership Application to Midland indicates nothing other than that the Association had no reason to believe that Midland wanted that document. Midland never asked for a copy of the Membership Application or an explanation of how to withdraw from the Association and, as the Board found, "[t]here is no evidence that [Midland] failed to receive a copy of the Membership Application, which it, in fact, executed and then forwarded to [the Association]." (JA 16.) The Association never stated or implied that Midland could withdraw from membership by terminating the CBA.

CONCLUSION

As set forth above, Midland indisputably attempted to withdraw from the Association both after negotiations had begun and without following the Membership Application's termination provision; each of those facts independently renders the withdrawal untimely and ineffective. The Court lacks jurisdiction to consider Midland's challenge to the untimeliness finding based on ongoing negotiations, which is thus dispositive. Even if the Court reaches the merits of this case, the Board reasonably rejected Midland's argument that the Assumption Agreement, which does not mention withdrawal from the Association, constitutes consent to withdraw during negotiations *and* supersedes the Membership Application. The Board therefore respectfully requests that the Court deny the Company's petitions for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
March 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-2497, 17-2930
v.	)	
	)	Board Case Nos.
MIDLAND ELECTRICAL CONTRACTING	)	29-CA-144562
CORP.	)	29-CA-144584
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David Casserly certifies that he is a member in good standing of the State Bar of Pennsylvania. He is not required to be a member of this Court's bar, as he is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,727 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; 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 15th day of March, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 15th day of March, 2018