

Nos. 17-1226 & 17-1234

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

HENDRICKSON TRUCKING CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038

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**

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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. Hendrickson Trucking Co. was the respondent before the Board (Case No. 07-CA-086624) and is the Petitioner/Cross-Respondent before the Court.

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

3. International Brotherhood of Teamsters, Local 1038, 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 October 11, 2017, reported at 365 NLRB No. 139.

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
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Dated at Washington, DC
this 29th day of June, 2018

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GLOSSARY

“A__” Joint Appendix

“the Board” National Labor Relations Board

“Br.” Company’s opening brief

“D&O” Board’s Decision and Order, *Hendrickson Trucking Co.*,
365 NLRB No. 139, 2017 WL 4571184 (Oct. 11, 2017)

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

“the Company” Hendrickson Trucking Co.

“the Union” International Brotherhood of Teamsters, Local 1038

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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 Hendrickson Trucking Co. (“the Company”) for review, and the cross-application of the National Labor Relations Board for enforcement, of an Order issued against the Company,

reported at 365 NLRB No. 139, 2017 WL 4571184 (Oct. 11, 2017) (“A57-83.”)¹

The International Brotherhood of Teamsters, Local 1038, (“the Union”) is the successor bargaining representative to the International Brotherhood of Teamsters, Local 164, which 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). The petition and cross-application were timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board’s finding that the parties did not bargain to a valid impasse, so the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), when it unilaterally implemented its final offer?

2. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to immediately

¹ “A__” 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.

reinstate employees, who had engaged in an unfair-labor-practice strike, after they made an unconditional offer to return to work?

3. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with relevant requested information?

4. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to resume bargaining?

5. Did the Board properly reject the Company's argument that the administrative law judge was invalidly appointed and thus lacked authority to preside over the hearing and issue the decision and recommended order?

RELEVANT STATUTORY PROVISIONS

The Addendum contains relevant statutory provisions.

STATEMENT OF THE CASE

In this case, which arose from the parties' negotiations for a successor collective-bargaining agreement in 2012, the Board found that the Company violated the Act by implementing its final bargaining offer without bargaining to a good-faith impasse, failing to provide the Union with relevant information it requested, refusing to reinstate employees who engaged in an unfair-labor-practice strike that resulted from the Company's implementation of its offer, and refusing to

resume bargaining upon request of the Union. The Company has challenged not only those findings, but also the authority of the administrative law judge who presided over the hearing in this matter and issued a decision and recommended order. The Board's factual findings, and conclusions and order rejecting the Company's arguments, are as follows.

I. THE BOARD'S FINDINGS OF FACT

A. The Parties' Bargaining History

The Company, operating from its facility in Jackson, Michigan, is a trucking company that hauls aggregate materials including sand and gravel. (A62; A359 ¶2.) Since about 1977, the Union has represented the Company's drivers, mechanics, mechanics helpers, and parts/utility employees. (A62; A360 ¶¶7,8.) The Company operates seasonally, with most employees working from April 1 through December 1 each year. (A62; A123-24,325.) During the relevant time period, the Union represented about 20 employees. (A62; A211.)

The parties successfully negotiated collective-bargaining agreements in 2002, 2005, and 2008. (A62, 76; A360 ¶8.) In prior bargaining, the Union stood its ground before eventually agreeing to wage and other concessions sought by the Company. (A76; A242, 243, 254.) It also historically used the threat of a strike to advance its bargaining position without reaching impasse or failing to ratify a contract. (A76; A164-65,230, 231-32, 238-39.) Prior to the strike at issue in this

case, the Union last went on strike in 2002, which lasted for 7 days. (A76; A107. 230.)

B. The Parties Undertake Negotiations for a Successor Collective-Bargaining Agreement; the Union Requests Information

The parties' 2008 agreement was effective through the end of March 2012. (A62; A364-80.) As its expiration neared, the parties undertook negotiations for a successor agreement. (A62; A381, 382-83.) The parties met on seven occasions between February and June 2012. (A63; A227-28.) At all bargaining sessions, the Union was represented by business agent Al Sprague and steward/recording secretary Tom Mathews, and the Company was represented by In-House Counsel Tom Hendrickson, Mechanic Supervisor Ryan Hendrickson, and Chief Financial Officer/Treasurer Jack Durbrow. (A63 & n.5; A117-18.)

1. February 27 Bargaining Session

The parties spent the first bargaining session, held on February 27, exchanging and explaining their initial bargaining proposals. (A63; A227-28, A384-94, 395-96.) The Company's proposals included the following, which would prove to be the main points of contention throughout bargaining:

- Eliminating final and binding arbitration and providing grievances would be resolved through "trial." (A384-85.)
- Requiring that employees pay 25 percent of contributions paid to the Michigan Conference of Teamsters Welfare Fund for health and welfare insurance. (A388.)

- Discontinuing the Company's match to employees' contributions to their 401(k) accounts. (A388-89.)
- Changing the calculation of overtime from daily overtime after 8 hours to weekly overtime after 40 hours. (A392.)

The Company's other proposals included eliminating payroll dues deduction. (A384); freezing wages (A392); and changing the vacation policy (A387).

The Union's proposals included revising the arbitration provision to require that unresolved grievances be heard by the Western Michigan Industrial Board, increasing wages, and eliminating the super-seniority provision afforded to union stewards. (A63-64; A395-96.)

The Company explained, as it did throughout bargaining, that it needed to save money and "stop the bleeding" from recent losses. It sought to have employees contribute toward their health-and-welfare fund premiums for the first time. (A63-64; A129-30.) The Union sought to restore lost wages and benefits that it had sacrificed in previous years to help the Company save money. (A63; A150, 242, 254.)

In response to the Company's claimed need to save money, the Union asked to review the Company's financial records, and the Company agreed. (A64; A135-36.) The Union's accountant met with Durbrow to review the Company's books and 2008-2010 tax returns. The accountant provided the Union a report explaining

that the Company had made a small profit in 2008 and 2010 and had a small loss in 2009, information that the Union relayed to its members. (A64; A598-602.)

2. April 10 Bargaining Session

During the next session, held April 10, the Company presented the same proposal as it had previously. (A64; A397-408.) The parties reached tentative agreements on minor issues and the Company withdrew several proposals about vacation days. (A64; A397-408.) The Company had no response to the Union's proposals. (A65; A147-48.) It reiterated that it was not profitable and needed to save money, and the Union expressed frustration that it had made wage and other concessions in prior contracts. (A64; A149.) The Union asked the Company how much money it anticipated saving with its proposals, including its proposed overtime-calculation revision and elimination of its match to employees' 401(k) contributions. (A64; A148.) Sprague asked "what do you need? \$25,000, \$50,000, \$175,000?" and Durbrow responded that \$75,000 "sounds good." (A64; A148, 222.) Sprague asked for specific amounts of savings, and Durbrow said that the Company would save about \$20,000 eliminating the 401(k) match, \$25,000 revising the overtime-pay calculation, and \$40,000 on health-and-welfare fund premiums. (A64; A149-50, 222-23.) Concerned that the Company was "just throwing out numbers," he asked Durbrow for documentation and underlying numbers to support those figures. (A64; A149-50.)

The Union also proposed that the Company allow employees to opt out of the health-and-welfare plan in exchange for a \$1.00 per hour wage increase. (A65; A152-53.) The Company believed that would be too complicated and involve too much paperwork. (A65; A153.)

Several days later, the Union faxed the Company a proposal for a 1-year contract that would freeze wages and require the Company to pay increases to health-and-welfare fund premiums, and otherwise maintain the status quo. (A65 & n.14; A155, 409-11.) The proposal was an attempt to reach an agreement before the Company's busy season began and provide additional time for the Company to provide cost-savings information associated with its proposals. (A65; A155-57.)

3. April 25 Bargaining Session

At the next bargaining session, held on April 25, the Company updated its offer. (A65; A160, A412-40.) It withdrew a number of proposals, including eliminating payroll dues deductions, (A65; A413), and agreed to the Union's proposal to eliminate the super-seniority provision. (A65; A414.) It revised its health-and-welfare proposal to reduce employees' proposed contributions from 25% to 20% for drivers and 15% for mechanics. (A65; A421-23.) Rather than eliminate the 401(k) match, it proposed suspending the match until the Company returned to profitability. (A65; A424, 256-57.) With respect to the grievance process, the Company stated it was waiting for additional information about

resolving grievances through the Western Michigan Industrial Board and it wanted to attend an Industrial Board hearing. (A65; A160, 415.)

The Union asked again for documentation showing the estimated cost savings of the Company's proposals to eliminate the 401(k) match, revise its overtime-calculation method, and require employees to contribute toward health-and-welfare fund premiums. (A65; A161, 236.) The Company responded that it needed to "stop the bleeding" and asked the Union what it was going to do to help. (A65; A265.) Several days later, the Company sent the Union a nearly identical proposal, except it proposed revising how it would determine which employees were entitled to employer-paid health-and-welfare fund contributions. (A65; A441-70.)

Several days later, the Union held a meeting at which employees voted on several matters. First, they rejected the Company's most recent proposals. (A66; A164.) Second, they voted to pre-ratify a proposal that would then be submitted to the Company. That proposal was for a 1-year contract at the status quo except employees would pay approximately \$15 per week toward health-and-welfare premiums. (A66; A165-66.) Third, they authorized the Union to strike if necessary, which was intended to prompt the Company to seriously consider the Union's proposal. (A66; A164, 239.) The Company was not interested in that proposal. (A66; A167.)

4. May 16 Bargaining Session

At the next bargaining session, held May 16, the parties met for the first time with a federal mediator. (A66; A169-70.) The parties separately discussed their proposals with the mediator but did not exchange new proposals. (A66; A169-70.)

5. May 21 Bargaining Session

The parties met again with the mediator on May 21. (A67; A226.) The Company provided a new proposal that reverted back to its initial proposal of resolving grievances in federal district court. (A67; 170, A472-73.) The Union objected, and the Company responded by suggesting that if that proposal was all that stood in the way of a contract, it could be taken care of. (A67; A171-72.) The Union stated that there were still a lot of other issues on the table. (A67; A172.) The Company also further reduced its proposal on employee health-and-welfare fund contributions from 20% to 15% for drivers and from 15% to 13% for mechanics. (A67; A475-77.) It also proposed that new hires would not be eligible for insurance until employed for 180 days. (A67; A475.)

During that meeting, the Union submitted information from the health and welfare fund about the opt-out proposal and informed the Company that fund representatives were willing to assist the Company with implementing the proposal. (A67; A172, 228-29, 277.) The Company rejected the opt-out process as too difficult to administer. (A67; A172.) They also discussed the Company's

proposal to eliminate the 401(k) match. (A67; A173.) The Union stated that only a few employees participated so the proposal would not result in a significant savings, while the Company believed about half of the bargaining-unit employees participated. (A67; A175-76.) The Company explained that the proposals on eliminating the 401(k) match and requiring that employees contribute toward health-and-welfare premiums would apply to all employees, not just those in the bargaining unit. (A67; A283-85.)

The Union reminded the Company that it had not yet provided cost-savings information related to its proposals. (A67; A173.) The Company continued to state that it needed to save money but again did not provide the Union with the requested information. (A67; A173.)

On May 23, the Company faxed to the Union two options regarding the health-and-welfare fund contributions. (A67; A478-85.) The first required employees to contribute 13% and 15% toward their premiums, and to pay into a separate fund for laid-off employees. (A67; A479.) The second required employees to pay set amounts and limited their insurance during layoffs. (A67; 483-84.) The Union rejected both options. (A67; A177-78.)

6. May 30 Bargaining Session

On May 30, the Company presented the Union with its “LAST BEST OFFER,” which was to take effect June 4. (A67; A486-515.) It included the same terms as the May 21 offer except for health-and-welfare contributions, with the Company inserting option one from its May 23 proposal. (A67; A497-99.) Again, it provided no documentation to support its claimed cost-savings estimates. (A67; A179-81.) The Union rejected the offer. Tom Hendrickson stated “it looks like we’re at impasse,” to which Sprague responded that he did not believe they were, and that “[w]e still have a lot of stuff on the table here.” (A67-68; A180-81.) The Union members met and voted to reject the Company’s offer and to strike if the Company implemented the offer. (A68; A244.)

The Company did not implement that offer, but instead, on June 4, sent the Union a “Revised Proposal and Last, Best, and Final Offer,” to take effect June 11. (A68; A516-79.) The only change from its previous proposal was that rather than requiring that parties take grievances to federal court, parties could resort to “whatever judicial remedies” were available. (A68; A521-22.)

In a June 8 letter, the Union informed the Company that its members had rejected the June 4 offer. (A68; A580-81.) It reminded the Company that the Union had offered to have employees contribute \$15 each week to healthcare premiums, and pointed out that the Union had tentatively agreed to nine of the

Company's contract proposals on April 10 whereas the Company had not tentatively agreed to any of the Union's proposals. (A68; A580-81.) The Union offered to resume negotiations on June 13. (A68; A580-81.)

7. June 13 Bargaining Session

The parties met again on June 13. The Union provided the Company with its "Final Proposal," which included three options. (A68; A582.) The first was a 1-year contract extension of the expired agreement but with employees contributing \$15 each week to health-and-welfare fund premiums. (A68; A582.) The second was similar to the first but also included the health-and-welfare fund opt-out provision and required the parties to use the Industrial Board's arbitration and grievance process. (A68; A582.) The third option read "Work Stoppage." (A68; A582.) The Union stated that the employees would not accept the Company's offer and that it needed feedback on the economic proposals since the Company had not yet provided any guidance or anything in writing. (A68; A190-91.) The Union also warned that it may strike in order to push negotiations. (A68-69; A190.) The Company responded that it would not change its offer or discuss their proposals any further. (A69; A191-92.) The Union did not intend to end negotiations with their final offer and wanted to continue working on reaching an agreement. (A69; A190.)

C. The Company Implements Its Last Offer; The Union Strikes

Following the June 13 session, Sprague informed Union members that the Company would not change its mind about imposing its last offer. (A69; A192.) They decided not to strike and instead wait to see whether the Company would do so. (A69; A192.)

Around June 23, several employees, upon receiving their paychecks, learned that the Company had implemented its overtime-calculation proposal. (A69; A193, 245-46.) As a result, the Union decided to strike beginning on June 25. (A69; A194, 232-33, 244-45.)

While the strike continued, the parties met on July 26 along with the federal mediator. (A69; A197-246.) Neither party submitted any new proposals. (A69; A197.)

D. The Company Operates as AGG Trucking, LLC; the Union Requests Information

After the strike began, the Company changed the names on some of its trucks to “AGG Trucking, LLC.” (A69; A247.) Mathews found on the internet that AGG appeared to be a Hendrickson company. (A80; A248.)

On July 31, the Union filed a grievance with the Company over its decision to operate as AGG, and requested information about AGG and its drivers. (A69-71; A586-91.) The Company did not respond. (A71; A108-09.)

E. The Union Makes an Unconditional Offer for the Strikers To Return to Work and Requests Bargaining

On November 30, the Union sent the Company several letters. In one, it stated that the Union had stopped its picketing and strike activity and offered to return to work on December 3. (A71; A592.) In a separate letter, it informed the Company that it was prepared to resume negotiations and asked the Company to provide dates it was available for bargaining. (A71; A594.) That letter also asked the Company to rescind the unilaterally implemented changes it made in June 2012, and reiterated its July 31 request for information about AGG. (A71; A594.) The Company responded that there would be no work for returning strikers on December 3, and that it would evaluate its needs and get back in touch with the Union. (A71; A595.)

On December 10, the Company advised the Union that it had hired permanent replacement workers during the strike, that they would handle all available work during the winter slowdown, and that the strikers would be placed on a preferential hire/recall list and would be contacted once business picks up. (A71; A596.) The Union responded on December 11, reiterating that its members had been prepared to return to work on December 3 and stating that the replacement employees should be placed at the bottom of the seniority list for the purposes of recall. (A71-72; A597.) On December 27, the Union submitted a grievance to the Company challenging the Company's use of replacement

employees and requested information about the replacement employees and the Company's financial records. (A72; A603-06.) In a January 9, 2013 letter, Company counsel Tim Ryan denied the December 27 grievance, partially responded to the information request about the replacements, and stated that the Company did not dispute that Hendrickson Trucking and AGG Trucking are a single employer. (A72; A607-09.)²

II. PROCEDURAL HISTORY

A. The Complaint and the Administrative Law Judge's Decision

Acting on unfair-labor-practice 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), by unilaterally implementing the terms of its final bargaining offer without bargaining to a valid impasse; refusing to provide the Union with information it requested in July and November 2012; and refusing to bargain after the Union made a request to do so on November 30; and violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by refusing to reinstate unfair-labor-practice strikers after they made an unconditional offer to return to work. (A61.) On May 16, 2014,

² Although the Company argues (Br. 15) that it provided the information requested by the Union on December 27, the complaint did not allege a violation arising from that request. (A71.)

Administrative Law Judge Donna Dawson issued a decision and recommended order finding that the Company violated the Act as alleged.³ (A61-83.)

B. The Administrative Law Judge's Appointment

Before the Board, the Company excepted to not only Judge Dawson's findings, but also to her authority to serve as a judge in the proceeding. (A60.) Specifically, it argued that, under the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board lacked a quorum when it appointed Judge Dawson in April 2013, so her appointment, and the decision she issued in this case, were invalid. (A60-61.)

On July 18, 2014, a validly constituted Board ratified "all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive." *See* Minute of Board Action (July 18, 2014), Attachment 1, available at: <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf> (last visited May 4, 2018). In doing so, the Board expressly authorized certain actions of the Board, including "[t]he selection of...Donna Dawson as Administrative Law Judge[]." *Id.*

³ Though not alleged in the complaint, Judge Dawson also found that the Company violated Section 8(a)(5) and (1) by failing to provide the requested cost-savings information. (A75.)

The Board maintained that its ratification “resolve[d] any uncertainty regarding Judge Dawson’s appointment as an administrative law judge.” (A51.) Nevertheless, “in an effort to remove any lingering questions” about her appointment, on April 6, 2016, the Board issued an Order remanding the case to her to “decide whether or not to ratify her prior actions.” (A61; A52.)

On April 12, 2006, Judge Dawson issued an order ratifying and adopting her previous decision. (A60-61.) The judge explained that she fully reviewed her prior decision and determined that the decision – including her findings of fact, analysis, credibility determinations, conclusions, and recommended order – are based on the entire record and that it remains correct. (A61.)⁴

III. THE BOARD’S CONCLUSIONS AND ORDER

On October 11, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran), affirmed the judge’s rulings, findings, and conclusions, amended the remedy, and adopted the recommended Order as modified. (A57.)⁵

⁴ In its remand Order, the Board notes that the Company challenged the authority of the Regional Director and General Counsel to prosecute this case. The Board rejected both arguments (A50 n.2, 52 n.4; A57 n.1) and the Company has abandoned them by not raising either contention in its opening brief. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing Fed. R. App. P. 28(a)(9)) (presently Rule 28(a)(8)(A)).

⁵ In affirming the judge’s findings, the Board explained (A58) that, because the General Counsel did not allege that the Company’s failure to furnish the cost-savings information was a separate unfair labor practice, the judge’s finding of a violation was a mistake. Nevertheless, the Board explained (A58) that the judge

To remedy those violations, the Board ordered the Company to cease and desist from changing employees' terms and conditions of employment without first providing the Union notice and an opportunity to bargain; refusing to immediately reinstate unfair-labor-practice strikers upon their unconditional offer to return to work; refusing to furnish relevant and necessary information that the Union requested; refusing to bargain on request with the Union; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (A58.)

Affirmatively, the Board ordered the Company to rescind the changes that it unilaterally implemented on about June 23, 2012; make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes; make all contractually required contributions to the Union's health, welfare, and other funds on behalf of eligible employees that it has failed to make since its unlawful unilateral changes, and reimburse employees for any expenses ensuing from the failure to make the required payments, with interest; offer full reinstatement to all unfair-labor-practice strikers who were not immediately reinstated upon their unconditional offer to return to work; make the

appropriately relied on the failure to furnish information as evidence that the Company did not bargain in good faith to a valid impasse. Also, because the complaint did not allege that the Company violated Section 8(a)(5) by bargaining in bad faith, the Board (A58) disavowed the judge's statements to that effect in the 2014 and 2016 decisions (A61, 75).

unfair-labor-practice strikers whole for any loss of earnings or other benefits suffered as a result of the Company's unlawful discrimination against them; compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award; furnish to the Union the information it requested on July 31, 2012, and November 30, 2012; on request, bargain with the Union; and post a remedial notice. (A58-59.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated its duty to bargain in good faith with the Union when it unilaterally implemented its final bargaining proposals in June 2012. The Board, relying on two separate grounds, properly rejected the Company's claim that the parties were at impasse. First, the Board found that the Company failed to furnish the Union with information it requested during bargaining to corroborate the Company's claims that its bargaining proposals would achieve its cost-savings goals. Under settled law, that failure precludes impasse. The Board properly rejected, on credibility grounds, the Company's claim that the Union asked for the information only once and that the Company provided a spreadsheet detailing cost savings. The Board further found that, even accepting the Company's assertion as true, the Union did not have to make multiple requests to trigger the Company's obligation to provide the information, and the spreadsheet, even if provided, was insufficient to

corroborate the Company's asserted cost savings. In the alternative, the Board found that if the Company's failure to furnish information did not preclude impasse, the totality of the circumstances established that the parties were not, in fact, at impasse. As such, the Company violated Section 8(a)(5) and (1) by unilaterally implementing its bargaining proposals.

After the Company's implementation, the employees went on strike. Because they voted to strike only if the Company implemented its proposals, and ultimately waited to strike until it confirmed that the Company had done so, the Company's unlawful implementation was, at the least, a contributing factor to the strike decision. Thus, the Board properly found that the employees engaged in an unfair-labor-practice strike and were entitled to reinstatement when they unconditionally offered to return to work on November 30. Therefore, the Company's refusal to reinstate them violated Section 8(a)(3) and (1).

While the strike continued, on July 31 the Union requested information from the Company about its decision to change the name on its trucks from Hendrickson Trucking to AGG Trucking. It renewed that request on November 30. The Company provided no response until January 9, when it advised the Union only that Hendrickson and AGG are a single employer. The Company's unreasonably delayed and insufficient response violated Section 8(a)(5) and (1).

Once the strike ended, the Union notified the Company that it was prepared to bargain, and asked the Company to provide available bargaining dates. The Board properly credited the Union's witnesses to find that the Company did not respond until March 25. While the Company challenges that finding, it acknowledges that it did not provide bargaining dates. Substantial evidence thus supports the Board's finding that the Company refused to bargain with the Union between the Union's November 30 request and the Company's March 25 response, violating Section 8(a)(5) and (1).

Finally, the Company's argument that Administrative Law Judge Dawson lacked authority to ratify and adopt her previous decision should be rejected. It is established in this Court, most recently in *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017), that a properly appointed official, through ratification, can remedy a defect arising from the decision of an improperly appointed officer. In accord with that precedent, Judge Dawson, after conducting an independent evaluation of the merits, ratified her earlier decision, removing any lingering questions about her authority to issue that decision. Ignoring that body of caselaw, the Company claims that Judge Dawson merely rubberstamped her prior decision, acted with bias, and violated various codes of conduct, but it offered no evidence supporting those contentions.

STANDARD OF REVIEW

The Court accords adjudications by the Board “a very high degree of deference.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Board’s findings of fact are “conclusive” when supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). And this Court accepts credibility determinations unless they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted). Thus, the “Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 772 (D.C. Cir. 2012) (quoting *Bally’s*, 646 F.3d at 935).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE PARTIES DID NOT BARGAIN TO A VALID IMPASSE, SO THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN IT UNILATERALLY IMPLEMENTED ITS FINAL OFFER

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 [its] employees.” 29 U.S.C. § 158(a)(5). An employer violates Section 8(a)(5) and (1) by unilaterally implementing terms and conditions of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *accord Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).⁶ As discussed below (29-31), a lawful impasse cannot exist where an employer has failed to satisfy its statutory obligation to provide information relevant to the matters on which the parties are divided. *See, e.g., U.S. Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999). Moreover, if impasse is not precluded, it exists only when “good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful.” *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (quotation cleaned up).

⁶ A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See, e.g., Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

It is undisputed that the Company unilaterally implemented the terms of its revised final proposal in June 2012. While the Company claims the parties were at impasse, substantial evidence supports the Board's findings that impasse was precluded by the Company's failure to furnish relevant information pertaining to issues dividing the parties. And even if that failure did not preclude impasse, substantial evidence support the Board's finding that under the totality of the circumstances the parties did not reach a lawful impasse. Accordingly, under either basis the Company's unilateral implementation was unlawful.

A. The Company Failed To Provide the Union With Requested Relevant Cost-Savings Information, Precluding a Valid Impasse

1. An employer must provide a union with requested, relevant information

An employer's duty to bargain in good faith includes the obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1977)). The critical question in determining whether information must be produced is that of relevance to the union's bargaining duties. The "Board's relevance standard is 'a liberal discovery-type standard.'" *E.I. DuPont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1316 (D.C. Cir. 2007) (citation omitted); accord *Acme Indus.*, 385 U.S. at 437 & n.6. Under that standard "[t]he fact that the information is of

probable or potential relevance is sufficient to give rise to an obligation...to provide it.” *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted). The Board’s “relevancy-based, pro-disclosure standard...allows a union to request specific information to verify a company’s stated position” made at the bargaining table. *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Finally, “[b]ecause Congress has determined that the Board has the primary responsibility of marking out the scope of the statutory duty to bargain, great deference is due to the Board’s determination[] of the scope of an employer’s obligation to provide requested information to a union....” *Pub. Serv. Co. of N.M.*, 843 F.3d at 1004 (internal quotation and citations omitted).

2. The Company refused to furnish the Union with the requested relevant information

Throughout negotiations, the Company asked the Union to accept contract proposals that would save money and thereby “stop the bleeding” it was experiencing financially. Those proposals included eliminating its match to employees’ 401(k) accounts, requiring that employees contribute toward their health-and-welfare premiums, and changing the calculation of overtime. The Company claimed that these proposals would result in annual savings of about \$20,000 from 401(k) contributions, \$40,000 in health-insurance premiums, and \$25,000 in overtime wages. (A64; A149-50, 222-23.) Skeptical of those figures,

the Union asked the Company to provide information that would corroborate its estimated savings and help the Union determine how else savings might be achieved. (A67.) The Company maintained that its estimates were based on payroll and other historical financial data, but refused to furnish that information. (A74; A281-83.)

Substantial evidence supports the Board's findings that the requested information was relevant to the parties' negotiations. As the Board explained (D&O 18), the Company put into issue the cost-savings information when it asserted that its proposals were necessary to save money. Having done so, it cannot then claim that the Union did not need that information to determine how to respond to the Company's proposals. *See KLB Indus.*, 700 F.3d at 557 ("a claim of pending competitive ruin generally requires some external verification before a union can reasonably rely upon it in deciding how to structure its negotiating strategy") (internal citation omitted); *U.S. Testing Co.*, 160 F.3d at 19 (agreeing with Board that employer violated Act by failing to furnish health-insurance information in response to employer's proposal that employees contribute 30% towards premiums).

The Company does not challenge the Board's finding that the requested information was relevant, waiving that argument.⁷ See *N.Y. Rehab.*, 506 F.3d at 1076. Instead, it insists (Br. 6) that the Union only asked for the information once, and that it provided a spreadsheet (A603-06) containing that information. But as the Board found (A75), the Company's concession that the Union requested the information on May 16 was sufficient to trigger the Company's obligation to furnish that information; the Union was not required to repeat its request or put it in writing.⁸ See *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (request need not be repeated); *NLRB v. Harvstone Mfg. Co.*, 785 F.2d 570, 578-79 (7th Cir. 1986) (request need not be repeated or made in writing). And the Board also found (A66) that the spreadsheet the Company claimed to provide was not responsive, as it provided only a summary of the Company's tax returns and past profits and losses and did not include information

⁷ Likewise, the Company has abandoned its argument, made to the Board (A73-74), that it had no duty to provide the requested information because it never asserted an inability to pay the benefits in question. As explained by the Board (A74), and discussed by this Court in *KLB Industries*, 700 F.3d at 555-56, while an employer need only "open its books" to the union requesting information if it raises an "inability to pay" defense during bargaining, it remains obligated to furnish relevant information, including specific financial information, necessary to the Union's performance of its bargaining duties.

⁸ While the Board found that the Company acknowledged the May 16 request, the Company also concedes (Br. 19) that the Union's bargaining notes reflect that the Union requested the information on May 30.

establishing how the Company arrived at its estimated cost savings from its bargaining proposals. (A66, 74; A110, 286, A603-04.)

Moreover, the Board credited the Union's witnesses over the Company's witnesses in finding that the Union requested the cost-savings information on numerous occasions and that the Company did not provide the spreadsheet to the Union. Specifically, the judge found (A64-68) Sprague provided more detail about the bargaining sessions than the Company's witnesses, and (A75.17) that Chief Financial Officer Durbrow "waivered in his testimony, and was not entirely forthcoming." In addition, while the Company has argued that Sprague's and Mathews' affidavits provided to the Board, and the Union's bargaining notes, did not reference repeated requests for the information, the judge explained that neither Sprague nor Mathews claimed to recall all of the details of the bargaining sessions and that both credibly testified that their affidavits and bargaining notes were not meant to be comprehensive with respect to everything that was said during the negotiation sessions. Having credited the Union's witnesses, the Board found (A64-68) that the Union also requested the cost-savings information on April 10 and May 21, and that the Company did not, as it claims, provide the Union with the spreadsheet. The judge's findings, which she based "[o]n the entire record, including [her] observation of the demeanor of all witnesses," (A61), and which the Board "carefully examined" and left undisturbed (A61 n.2), are not to be

reversed unless they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted).

In sum, substantial evidence supports the Board’s finding that the Union requested cost-savings information that would have allowed it to assess and respond to the Company’s proposals, and that the Company failed to respond.

3. The Company’s failure to provide requested cost-savings information precluded a valid impasse

The duty to provide information relevant to issues on the bargaining table is a “fundamental obligation” that is “predicated on the need of the union for information that will promote intelligent representation of the employees.” *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358-59 (D.C. Cir. 1983) (internal quotation omitted). Access to information in an employer’s possession ensures that a union is not required to evaluate and respond to the employer’s bargaining proposals, and possibly agree to concessions on behalf of its members, in the dark. *Acme Indus.*, 385 U.S. at 438 n.8; *accord Beyerl Chevrolet, Inc.*, 221 NLRB 710, 721 (1977). Consequently, the Board, with court approval, has long recognized that “impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations.” *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *see also, e.g., Monmouth*, 672 F.3d at 1093. As the

Board explained here (A58), that is true whether or not the General Counsel has alleged that the failure to furnish information constituted a separate violation of Section 8(a)(5). *Id.*

As demonstrated above, the record amply supports the Board's finding that impasse was precluded by the Company's refusal to furnish the Union with requested, relevant information corroborating its claimed need to eliminate the 401(k) match, require employee contributions to health-and-welfare premiums, and adopt a less employee-favorable overtime-calculation method. The Board found (A75) that the Company's "outright failure" to do so "[wa]s of particular concern given the division between the parties on th[os]e issues...." By contrast, *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 121 (D.C. Cir. 2000), which the Company asserts is "particularly instructive," (Br. 33), did not involve an employer's failure to provide information, as the Company claims, but whether a separate, unremedied unfair labor practice precluded impasse. The Court found that the prior violation did not preclude impasse because it related to a bargaining proposal that was "relatively unimportant" to negotiations. *Id.*

It thus follows that the parties never reached impasse. Consequently, as found by the Board (A75), the Company violated Section 8(a)(5) and (1) by unilaterally implementing its revised final bargaining proposals in June 2012.

B. Under the Totality of the Circumstances, the Parties Did Not Reach Impasse

Although the Board found that the Company's failure to furnish the Union with requested relevant information precluded a bargaining impasse, it went on to find that the parties had not, in fact, bargained to "the end of their rope," so the Company's unilateral implementation of its bargaining proposals was in any event unlawful. That finding is supported by substantial evidence and reasonable, and entitled to deference. *See Monmouth*, 672 F.3d at 1089. After all, as this Court has recognized, "in the whole complex of industrial relations, few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems." *Id.* (quoting *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011) (internal quotations omitted)).

1. An employer cannot unilaterally implement its bargaining proposals unless the parties have bargained to impasse

Because impasse is an affirmative defense, the burden of proof rests with the party asserting it. *Wayneview*, 664 F.3d at 347. A party seeking to establish impasse must establish that further bargaining would have been futile, not merely that there existed "frustration, discouragement, or apparent gamesmanship" during bargaining. *Daycon Prods. Co.*, 357 NLRB 1071, 1081 (2011), *enforced*, 494 F. App'x 97 (D.C. Cir. 2012) (internal quotation omitted). More specifically,

impasse exists only when “good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful.” *Monmouth*, 672 F.3d at 1088 (quotation cleaned up). Put another way, there can be no impasse unless “both parties...believe that they are at the end of their rope.” *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 444 (D.C. Cir. 2017).

“The Board considers a number of factors to determine whether the parties have reached impasse, including the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.” *Monmouth*, 672 F.3d at 1088-89 (internal quotation and citation omitted). One or two factors alone, however, may be sufficient to demonstrate the absence of impasse. *See id.* at 1084.

2. The Company failed to establish that the parties reached impasse

Substantial evidence supports the Board’s finding, discussed below, that the parties were not at impasse when the Company unilaterally implemented its bargaining proposals in June 2012.

a. Bargaining History

The parties had a history of successful collective bargaining, having ratified previous agreements in 2002, 2005, and 2008. During prior negotiations, the

Union agreed to cost-savings concessions. The Union also stood its ground and used strike votes as part of its bargaining strategy, and on one occasion engaged in a brief work stoppage. But as the Board explained (A58), the Union's unwillingness to roll over and accept the Company's offers does not mean that it believed further negotiations would not be fruitful. *See Ead Motors E. Air Devices, Inc.*, 346 NLRB 1060, 1064 (2006) (finding union's recommendation that members not ratify proposed contract, which members followed, was not indicative of impasse; there was no evidence that in prior bargaining parties had been unable to reach agreement after union refused to ratify a final offer).

b. Lack of good-faith bargaining

The Board found (A76-77) that the Company's refusal to provide cost-savings information, and its insistence on resolving grievances in court rather than arbitration, showed a lack of good-faith bargaining. As the Board explained, (A58 & n.6, 76), the Company's failure to produce relevant information itself constitutes a failure to bargain in good faith. *See Acme Indus.*, 385 U.S. at 435-36; *accord Oil, Chemical & Atomic Workers*, 711 F.2d at 358.

Substantial evidence also supports the Board's finding (A76-77) that the Company's various proposals insisting that the parties resolve grievances through "TRIAL" (A384-94), in federal court (A412-40), or through whatever judicial remedies might be available (A516-579), rather than arbitration, was unreasonable

and supported finding a lack of good-faith bargaining. The Board properly found (A76-77) that the Company's asserted reasons for eliminating the right to pursue grievances in arbitration "defied logic." As the Board noted (A77), federal labor policy establishes arbitration as an essential part of collective bargaining. Indeed, the Supreme Court has explained that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government," and within that system, "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); *see also id.* (in resolving labor disputes "arbitration is the substitute for industrial strife").

Against that background, the Board properly found that the Company's inability to substantiate its claimed desire to eliminate arbitration tainted the bargaining process. The Company's proposal for requiring grievances go to a trial court in lieu of arbitration ran contrary to its goal of controlling costs. While the Company claimed that arbitration is more expensive than litigation, it acknowledged (A76; A106) that its cost of using a non-judicial system of resolution in the past was fairly minimal. And while In-House Counsel Hendrickson testified that he could help minimize costs by representing the

Company in court, and that he had more experience in court than arbitration, he did not explain why he was ill-prepared to handle arbitration. Hendrickson also believed that he could not represent the Company before the Industrial Board, which the Union proposed they use, and that the Industrial Board was biased towards unions, but the Company provided proof of neither. Moreover, the Union alternatively proposed proceeding to arbitration through the American Arbitration Association, and no evidence was presented that Hendrickson could not represent the Company in that forum or that the Company had even an unsupported belief that the AAA was biased.

The Board also found (A77) it troubling that by eliminating arbitration, and requiring all disputes to be resolved in court, the Company seemed to limit or bar employees from filing Board charges and instead require that they resolve those disputes in court as well. The Board explained that while it did not find that was a separate violation, it nonetheless supports a finding that the Company did not bargain in good faith.

The Company (Br. 27-30) challenges the Board's assessment of the Company's grievance proposals, arguing the Board "second-guess[ed]" the Company's judgment. But while the Board may not compel acceptance of a bargaining proposal, it nevertheless "has wide latitude to monitor the bargaining process." *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1031 (D.C. Cir.

1997) (citing *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 54 U.S. 404 (1982)). Accordingly, although the Board's evaluation of "substantive terms of a proposal always must be drawn with caution," a party's "rigid adherence to disadvantageous proposals" and "insist[ing] on terms that no self-respecting union could brook" are relevant in deciding whether an employer is bargaining in good faith. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990) (internal quotations and citations omitted). Here, the Company's insistence that the Union give up its right to take disputes to arbitration, without providing convincing reasons supporting the proposal, showed a lack of good faith by the Company, which was evident when T.J. Hendrickson indicated a quick willingness to cast aside that proposal if that was all that was standing in the way of agreement. (A76; A172.)

In any event, even if the Court agrees that the Company's proposal to abandon arbitration did not show a lack of good faith, the Board's impasse finding still stands because the Board would reach the same result even absent the Company's insistence on court-based dispute resolution. Specifically, then-Chairman Miscimarra (A58 n.5) disagreed that the Company demonstrated a lack of good faith by refusing arbitration as a dispute mechanism yet nevertheless agreed that the parties had not reached impasse. And Member McFerran (A58 n.5) explained that while she agreed that the Company unreasonably insisted on

resolving grievances in court, even absent that finding she “would conclude that [the Company] failed to establish that the parties reached a valid impasse.”

c. Contemporaneous understanding of the parties

The Court has explained that “[i]f either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties’ perception regarding the progress of the negotiations is of central importance to the Board’s impasse inquiry.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Here, substantial evidence supports the Board’s finding (A77-78) that the Company failed to establish that a contemporaneous understanding existed.

The parties made continued, albeit at times slow, progress towards an agreement. They reached tentative agreements on certain provisions, and each showed a willingness to make concessions. For instance, on April 25, the Company withdrew several of its initial proposals and agreed to eliminate super seniority. (A65, 77.) While the Company initially proposed terminating its 401(k) match, it later proposed only suspending the match until it resumed profitability. (A65, 77.) It also revised its proposal on health-and-welfare contributions, lowering its initial proposal that employees pay 25% of premiums to 20% for drivers and 15% for mechanics and mechanics helpers, then, on May 21, lowered those amounts to \$15% and 13%, respectively. (A65, 67, 77.) And on May 23 it

offered additional options with respect to healthcare, proposing under one such option that employees would contribute a set dollar amount between \$17 to \$32 each week, with increases over the life of the agreement. (A67, 77.)

While the Union did not agree to those specific proposals, it agreed that the employees would make health-and-welfare contributions for the first time, and proposed that they would pay \$15 each week. And it proposed reinstating the opt-out provision which would allow eligible employees to opt out from coverage and instead receive a \$1 per hour wage increase. It also proposed a 1-year, status quo agreement that included a wage freeze, which was a huge concession after years of flat wages, except the employees would pay the \$15 weekly contribution. (A66, 68, 77.) Those advancements show that the Union did not hold to a fixed bargaining position but instead maintained its flexibility and desire to continue bargaining. *Compare Monmouth*, 672 F.3d at 1090-91 (union's concessions and willingness to compromise, including status-quo proposal to allow more bargaining time, demonstrated flexibility showing parties were not at impasse), *with Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1374 (D.C. Cir. 2012) (impasse reached where parties "remained steadfastly fixed in their respective positions" on benefit-fund contributions).

The facts listed by the Company (Br. 32) in support of its claim that the parties were at impasse do not establish that there was no further ground to be

gained. The strike votes did not evince unwillingness to continue negotiations. *See Bonanno Linen*, 454 U.S. at 414 (noting strikes “often occur in the course of negotiations prior to impasse” and are not “necessarily associated with impasse”); *see also Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187 (5th Cir. 1982) (explaining judge “could have found...the strike was designed to soften the Company’s rigid position in ongoing negotiations and was not an indication of deadlock”). Rather, the evidence establishes that the Union commonly utilized strike votes to get the Company to take it more seriously, (A66, 78), and here voted to strike only if the Company unilaterally implemented its terms. (A68 n.18.)

The parties’ exchange of “final” bargaining proposals also did not support an impasse finding. The Company submitted several “final” offers and the Union merely provided the Company with several options, and alternatively stated that the Union could strike, which does not demonstrate an intractable position. Likewise, when the Union rejected the Company’s final offer on May 30, Sprague responded to Hendrickson’s statement “it looks like we’re at impasse,” by stating in no uncertain terms that they were not. (A68; A180-81.) While not dispositive, such declarations “manifest that one party did not view the negotiations as having reached impasse; they provide substantial evidence to support the Board’s finding of no impasse” that the Court will not disturb. *Teamsters Local Union No. 639*, 924 F.2d at 1084. Finally, the Company suggests (Br. 32) that the Union’s actions

at the July 26 meeting further demonstrate impasse, but “the Board may not premise its impasse finding on events occurring after the declaration of impasse.”

Id. at 1084 n.6.

d. Number of Bargaining Sessions

Finally, the Board found that the six bargaining sessions held by the parties before the Company implemented its revised final proposal, including one in which the parties merely exchanged and explained their proposals, and another in which they explained their proposals to a mediator, was insufficient to establish impasse. *See U.S. Testing Co.*, 324 NLRB 854, 860-61 (1997), *enforced*, 160 F.3d 14 (D.C. Cir. 1998). While the Company (Br. 30) asserts that the parties negotiated on 12 occasions, which included exchanging correspondence and talking on the phone, the Board reasonably found (A78) that those actions, without any discussion or meeting among the bargaining representatives, did not constitute bargaining sessions.

In sum, substantial evidence supports the Board’s finding that the parties had not reached impasse. Accordingly, both because the Company’s failure to provide the Union with information precluded impasse, and because the totality of the circumstances fail to show impasse, the Company violated Section 8(a)(5) and (1) by unilaterally implemented its final bargaining proposals.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE EMPLOYEES, WHO HAD ENGAGED IN AN UNFAIR-LABOR-PRACTICE STRIKE, AFTER THEY UNCONDITIONALLY OFFERED TO RETURN TO WORK

After the Union learned that the Company unilaterally implemented its final offer, the employees went on strike. Because the Company's unlawful implementation was a contributing factor to the employees' decision, they were engaged in an unfair-labor-practice strike. Accordingly, they retained the right to return to work upon unconditionally offering to return, even if the Company had hired replacement employees in the interim. The Company's refusal to reinstate them after the Union made such an offer on November 30, 2012, violated Section 8(a)(3) and (1).

A. An Employer Must Reinstate Unfair-Labor-Practice Strikers Upon Their Unconditional Offer To Return to Work

When employees covered by the Act go on strike, their right to return to work depends on whether they engaged in an "economic strike" to obtain favorable employment terms or an "unfair-labor-practice strike" taken in response to an employer's violation of the Act. *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). In differentiating between the two, "[t]he dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether,

without that motivation, the employees might have struck for some other reason.” *Teamsters Local Union No. 515*, 906 F.2d at 723. “The employer’s unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor.” *Id.* The Board’s determination that a strike is an unfair-labor-practice strike is a factual determination that must be upheld if supported by substantial evidence. *Id.*

Unfair-labor-practice strikers retain their status as employees and are entitled to immediate reinstatement upon their unconditional offer to return to work. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *accord Spurlino Materials*, 805 F.3d at 1137. As the Supreme Court explained in establishing that principle, “failure of the Board to sustain the right to strike against [unlawful] conduct would seriously undermine the primary objectives of the Act.” *Mastro Plastics*, 350 U.S. at 279. As such, employers are required to discharge replacement workers, if necessary, to make room for the reinstatement of unfair-labor-practice strikers. *See George Banta Co. v. NLRB*, 686 F.2d 10, 20-21 (D.C. Cir. 1982). Failure or refusal to reinstate unfair-labor-practice strikers upon their unconditional offer to return therefore constitutes “discrimination in regard to hire or tenure of employment or any term or condition of employment to...discourage membership in any labor organization,” in violation of Section

8(a)(3) of the Act, 29 U.S.C. § 158(a)(3).⁹ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *accord Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 141 (D.C. Cir. 1999).

B. The Employees Struck Over the Company’s Unlawful Unilateral Implementation, Rendering Them Unfair-Labor-Practice Strikers Entitled to Reinstatement Once They Offered To Return to Work

Substantial evidence supports the Board’s findings (A78-79) that the employees engaged in an unfair-labor-practice strike and were therefore entitled to reinstatement when they made an unconditional offer to return to work. As the Board explained (A78), there is no dispute that the employees did not go on strike until they had proof that the Company had implemented its final offer. While the employees had voted to authorize a strike in April, they voted again in early June to strike only if the Company implemented its proposal. As credited by the Board (A79), around June 13 or 14 union representatives met with the employees and discussed the Company’s unwillingness to continue negotiations based on its impasse declaration, and the employees decided not to strike until the Company actually implemented its last offer. Nearly two weeks later, after learning through their paychecks that the Company revised its overtime-calculation method as proposed during bargaining, the employees made good on their decision and went

⁹ A violation of Section 8(a)(3) produces a “derivative” violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

on strike. Accordingly, the Company's unlawful declaration of impasse and implementation of its final offer were contributing factors to the strike decision, so the employees engaged in an unfair-labor-practice strike.

The Company challenges that finding, arguing that "the Union's strike *vote* was based solely on economic factors." (Br. 36 (emphasis added)). But as discussed (p. 39-40), the evidence showed that on May 30, the employees only voted to strike *if* the Company implemented its offer. More importantly, when the employees finally decided to strike weeks later, it was prompted to do so by the Company's declaration of impasse and implementation of its final offer. (A79.) That finding is consistent with *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), *reversed sub nom. Teamsters Local Union No. 515*, 906 F.2d 719, despite the Company's suggestion otherwise (Br. 35-36). There, the Board explained that the information on which employees acted when they voted to strike was crucial in characterizing the strike that ensued immediately thereafter, and found the strike was an economic one. Reversing that finding, this Court explained that "the obvious flaw in the Board's reasoning [wa]s that it simply ignore[d] evidence that proves the point on causation," and that "[t]he dispositive criterion...is the real and actuating motivation for the strike." *Teamsters Local Union No. 515*, 906 F.2d at 724. Here, as discussed, the employees' motivation to strike was the Company's unlawful declaration of impasse and implementation. The other cases relied on by

the Company (Br. 35) in arguing that the employees engaged in an economic strike are distinguishable on their facts, for in those cases employees voted to strike, and ultimately did so, based solely on economic considerations. *See Mobile Home Estates, Inc.*, 259 NLRB 1384, 1402 (1982) (employees did not discuss unfair labor practices during strike votes or the strike itself), *enforced on other grounds*, 707 F.2d 264(6th Cir. 1983); *Facet Enters., Inc.*, 290 NLRB 152, 155 (1988) (finding economic strike where union sought strike authorization from employees based on economic issues alone), *enforced*, 907 F.2d 963 (10th Cir. 1990).

Having determined that the employees engaged in an unfair-labor-practice strike, the Board (A79) reasonably found that the Company violated Section 8(a)(3) and (1) by refusing (A595) to reinstate the strikers upon their November 30 unconditional offer to return to work. While the Company maintains (Br. 37) that the employees were engaged in an economic strike, and that it was therefore entitled to retain the permanent replacement workers it hired during the strike, that argument lacks merit because it is contrary to the established precedent discussed above, and the Company has asserted no other defense of its actions. Accordingly, the Board's finding that the Company's failure to reinstate the strikers violated the Act is reasonable and supported by substantial evidence.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH INFORMATION ABOUT AGG TRUCKING

As discussed above (p. 25-26), an employer is obligated to furnish information that is “needed by the bargaining representative for the proper performance of its duties.” *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016). An employer violates Section 8(a)(5) and (1) of the Act “not only by refusing to provide...relevant information but also by not providing it in a timely manner.” *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (6-month delay unlawful). Here, substantial evidence supports the Board’s finding (A80) that the Company violated Section 8(a)(5) and (1) by refusing to provide the Union with information it requested about AGG Trucking.

On July 31, after the name “AGG Trucking, LLC” appeared on Company trucks, and the Union found information on the internet suggesting AGG was affiliated with the Company, the Union requested information about AGG Trucking, including why it was opened during the strike, what type of work it performed, and who it employed. It repeated that request on November 30. The Board properly found (A80) that the Union had a reasonable belief that AGG was the Company’s alter ego and that others were performing the strikers’ work, and therefore the information sought about AGG was relevant and necessary for the

Union to carry out its representative function. As explained by the Board (A80), the Company violated the Act both through its unreasonable 6-month delay in responding, which “far exceeds the delays found acceptable by the Board,” and the eventual “inadequate” response that it provided on January 9 (A607-09), in which it merely advised the Union that the Company and AGG were a single employer without responding to the Union’s specific requests.

In its opening brief, the Company has not challenged the Board’s finding that the information sought was relevant, or that its unreasonable delay in responding was itself a violation of the Act. Accordingly, it has waived any such argument. *See N.Y. Rehab.*, 506 F.3d at 1076. Instead, it insists (Br. 37) that its January 9 response was sufficient. In support of that contention, the Company states (Br. 16,37) that the Union acknowledged the sufficiency of those responses, when Union attorney John Canzano and Company Counsel Ryan were discussing outstanding information requests and Canzano requested only payroll information. But the Company fails to acknowledge Ryan’s testimony (A322) that although Canzano asked for the payroll information “as soon as [Ryan] could get it to him,” Canzano also said he “wasn’t waiving anything or giving up; he wasn’t saying he didn’t ultimately want more stuff.”

Likewise, the Company argues (Br. 16,37) that Mathews waived the right to receive additional information by testifying (A224) that he “didn’t need the

information anymore” after receiving the January 9 response. But again, the Company selectively cites the record, omitting the fact that Mathews immediately clarified his testimony by explaining (A224) that the Union still needed “to know if AGG exists,” and that he did not “know what[] happened to AGG”; and concluding “They [the Company] haven’t given me anything. I don’t know if it still exists, if it’s gone; I don’t know what’s going on with AGG. With not knowing what’s going on with it, I guess I would still want the information....” In short, the Company failed to justify its refusal to furnish the Union with the detailed information that it requested on July 31 and November 30, and thereby violated Section 8(a)(5) and (1).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING THE UNION’S REQUEST TO RESUME BARGAINING

As discussed, Section 8(a)(5) and (1) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). That obligation persists even if an employer unilaterally implements bargaining proposals following negotiation to a good-faith impasse. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996).

On November 30, the Union sent the Company a letter (A593) stating the strike was over and unconditionally offering to return employees to work, and a separate letter (A594) stating it was prepared to meet and bargain and asking the

Company to provide available dates to resume bargaining. Although the Company immediately responded that it would not allow the employees to return to work, the Board found, based on Sprague's credited testimony, that the Company waited until March 25 to communicate with the Union about potential bargaining dates. (A71-72, 80; A216-19.)

The Company insists (Br. 33-34) that Company counsel Ryan contacted Sprague by phone shortly after receiving the letter to discuss bargaining. The judge (A80), however, credited Sprague's testimony that he could not recall that conversation. As the judge explained, Ryan could not remember the circumstances of the call. Ryan's testimony was also troubling because he insisted that he later tried to contact Sprague to obtain bargaining dates in March and April, which was the Company's "slow season" and the Company was ready to resume negotiations. The "slow season," however, began in December—when the original request had been made but ignored by the Company. (A72; A316, 323.) The Company has failed to overcome the high hurdle of establishing that the judge's credibility determination was "hopelessly incredible, self-contradictory, or patently unsupportable," and therefore must be reversed. *Stephens Media*, 677 F.3d at 1250. Regardless, the judge explained that even if Ryan spoke with the Union, he acknowledged that he did not propose bargaining dates during that call, or thereafter, until March 25. (A80; A323-24.) Substantial evidence thus supports

the Board's finding (A80) that the Company refused to bargain with the Union between the Union's November 30 request to do so and the Company's eventual response on March 25.

V. THE BOARD PROPERLY REJECTED THE COMPANY'S ARGUMENT THAT THE ADMINISTRATIVE LAW JUDGE WAS INVALIDLY APPOINTED AND THUS LACKED AUTHORITY TO TAKE ANY ACTION IN THIS PROCEEDING

Finally, the Company (Br. 24, 38-42) challenges the Board's Order by arguing that, having been appointed by a Board that lacked a quorum, Administrative Law Judge Donna Dawson lacked authority to preside over the hearing in this matter, and that her ratification of her earlier decision cannot cure any defect caused by her invalid appointment. The Company's argument must be rejected.

In *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014), the Supreme Court held that the Board lacked a valid quorum between January 4, 2012, and August 5, 2013, which called into doubt the validity of the Board's April 2013 appointment of Judge Dawson. On July 18, 2014, however, the Board, consisting of five members whose appointments were indisputably valid, ratified all personnel and administrative actions taken during that time frame, and "expressly authorize[d]" appointments made by the invalid Board, including Judge Dawson's.¹⁰ The Board

¹⁰ The Company has not challenged the Board's July 18 ratification, and in any event this Court has held that "the properly constituted Board's ratification" of its

subsequently remanded this case to Judge Dawson. On April 12, 2016, she ratified and adopted her previous decision, explaining (A61) that she had “fully reviewed” her prior decision, which she “adopted in its entirety.”

This Court’s “precedents establish that ratification can remedy a defect arising from the decision of ‘an improperly appointed official...when...a properly appointed official has the power to conduct an independent evaluation of the merits and does so.’” *Wilkes-Barre Hosp.*, 857 F.3d at 371 (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015) (citations omitted)); accord *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998) (upholding official’s cease-and-desist order, finding it implicitly ratified prior action of a possibly improperly appointed “acting” official); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding reconstituted FEC could properly ratify decisions made when it was unconstitutionally constituted). Other courts have reached the same conclusion. See *Advanced Disposal*, 820 F.3d at 602-05 (holding Board’s Regional Director validly ratified his earlier action); *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016) (director of Consumer Financial Protection Bureau validly ratified

prior personnel actions “remedied any defect arising from the quorum violation.” *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017); see also *Advanced Disposal Servs. East v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016) (finding the Board’s July 18 ratification of personnel matters was proper).

actions taken when serving under unconstitutional recess appointment), *cert denied*, 137 S. Ct. 2291 (2017).

Here, Judge Dawson properly ratified her prior decision after conducting an independent evaluation of the merits, thereby removing any question about the validity of the decision. (A61 (quoting A50-52.)) As she explained in her order ratifying and adopting that decision (A61), she “fully reviewed [her] decision in light of the...allegations and Respondent’s defenses” and “determined that [her] decision (including the findings of fact, analysis, credibility determinations, conclusions and recommended order) is based on the entire record, and that it remains correct and should stand on its entirety.” Her actions were in accord with this Court’s decisions, most notably *Wilkes-Barre Hospital*, 857 F.3d at 371-72. There, the Court held that, after a properly constituted Board ratified the appointment of a Regional Director by the invalid Board, that Regional Director validly ratified his own actions. *Id.* at 371. The Court rejected claims that the Regional Director’s ratification of his own actions was improper, finding that it should take his ratification “at face value and treat it as an adequate remedy.” *Id.* at 372 (*Legi-Tech*, 75 F.3d at 709). Likewise, here Judge Dawson’s ratification of her prior actions was a proper method – and one approved by this Court – of correcting any alleged infirmities in her authority to issue her earlier decision.

Without addressing that body of caselaw, and without providing supporting evidence, the Company variously argues (Br. 39-42) that Judge Dawson's act of ratifying her earlier decision amounted to a "rubber-stamp approval of her previous opinion," (Br. 39), created the "appearance of a partisan tribunal," (Br. 38), and established that she was "biased by her prejudgment of the case" (Br. 39-41). Those unsupported assertions, however, are insufficient to overcome the long-established "presumption of regularity" under which courts presume that public officials have properly discharged their official duties absent "clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926)); see also *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) (affording presumption to actions of Board's General Counsel); see also *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186-87 (D.C. Cir. 2012) (acknowledging presumption of regularity applies to Board decisions; dismissing employer's claim that Board action was improper because taken within days after court remand).

The Company has failed to offer any evidence, much less the sort of "clear evidence to the contrary," *Chem. Found.*, 272 U.S. at 14-15, that would overcome that presumption and warrant setting aside Judge Dawson's ratification of her prior decision. The Company baldly asserts (Br. 39) that Judge Dawson "rubberstamp[ed]" her previous decision, but this unsubstantiated assertion does

not disprove Judge Dawson's claim that she "fully reviewed" her prior decision and determined that it "remains correct and should stand on its entirety." *See Advanced Disposal*, 820 F.3d at 605 (presumption of regularity cannot be defeated by unsupported claim that ratification is a "rubberstamp"). Moreover, this Court and others have suggested that, absent specific evidence that a valid official either "failed to make a detached and considered judgment" or was "actually biased," "ratification may be sufficient even if the subsequent decision rubberstamped the previous decision." *Wilkes-Barre Hosp.*, 857 F.3d at 372 (discussing *Intercollegiate Broad. Sys.*, 796 F.3d at 118 & n.1; *Legi-Tech*, 75 F.3d at 709); *see also Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (finding properly appointed official with final authority, but who had been in office only three days, ratified and implemented program extensively planned by his improperly appointed predecessor); *accord Advanced Disposal*, 820 F.3d at 605; *Gordon*, 819 F.3d at 1191-92.

The Company has also neither substantiated its claim that Judge Dawson was biased against the Company, nor established any prejudice that resulted from the earlier defect in her appointment. While the Company (Br. 40) quotes various codes of conduct addressing impartiality, it fails to explain how Judge Dawson ran afoul of those requirements. Instead, it relies on "the sheer multiplication of innuendo," which this Court has explained cannot "overcome the strong

presumption of agency regularity.” *La. Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). It is the failure to provide specific evidence of bias or prejudice that sets this case apart from those relied on by the Company (Br. 38-39, 41). *See Dayton Power & Light Co.*, 267 NLRB 202, 202-03 (1983) (administrative law judge’s statements before hearing opened indicated he predetermined case and approached case with closed mind); *New York Times Co.*, 265 NLRB 353, 353 (1982) (ALJ “impugned the good faith of the Union and questioned whether the General Counsel and the Charging Party were abusing the Board’s processes”); *Ctr. for United Labor Action*, 209 NLRB 814, 814 (1974) (ALJ’s statements indicated prejudgment); *Indianapolis Glove Co.*, 88 NLRB 986, 986 (1950) (trial examiner questioned witnesses in “hostile manner in an over-zealous effort to attack their credibility”). Lacking any evidence that raises even the appearance of impropriety by Judge Dawson, it was appropriate for her to remedy any alleged defect in her initial appointment by ratifying her prior actions once the Board ratified her appointment and she considered those actions anew.

The Company has also failed to establish that Judge Dawson’s involvement in the case before her appointment was ratified amounted to prejudgment that would warrant her disqualification, as the Company seeks (Br. 39, 41). *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208-09 (D.C. Cir. 1981)

(explaining presumption not overcome by “mere proof that [a decisionmaker] has taken a public position on an issue; disqualification only required through public statements revealing she has “adjudged the facts as well as the law of a particular case in advance of hearing it”). Lacking such evidence, “the better course” is to take Judge Dawson’s ratification “at face value and treat it as an adequate remedy.” *See Wilkes-Barre Hosp.*, 857 F.3d at 372.

Finally, there is no merit to the Company’s claims (Br. 40-41) that Judge Dawson ran afoul of the Administrative Procedure Act’s provision prohibiting an individual who participates or advises in an adjudicatory decision of an administrative agency from also performing “investigative or prosecuting functions.” 5 U.S.C. § 554(d). The plain language of that provision restricts the ability of a person who has served in a prosecutorial role in a particular matter from subsequently serving in an adjudicative role in the same or a factually related matter. That Judge Dawson’s initial appointment was subsequently called into question does not, as the Company appears to claim (Br. 41-42), transform her earlier actions in conducting the hearing and issuing a decision into an investigation of the underlying unfair-labor-practice charges or the prosecution of those charges against the Company so as to prevent her from issuing a decision in this case. *See generally Withrow v. Larkin*, 421 U.S. 35, 56 (1975) (explaining individuals do not run afoul of Section 554(d) of the APA by receiving results of

investigations then participating in hearings or by deciding questions a second time after initial decision reversed on appeal). Thus, the Company has failed to meet its burden of showing that Judge Dawson's ratification is insufficient to cure any alleged defect in her appointment.

CONCLUSION

The Board respectfully requests that the Court deny the petition for review and enforce the Board's Order in full.

s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

s/ Jeffrey W. Burritt

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June 2018

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

HENDRICKSON TRUCKING CO.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 17-1226 & 17-1234
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	07-CA-086624
Respondent/Cross-Petitioner)	07-CA-095591
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 1038)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,845 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
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Dated at Washington, DC
this 29th day of June, 2018

ADDENDUM

Minute of Board Action

July 18, 2014

In *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, __ S. Ct. __, 2014 WL 2882090 (June 26, 2014), the Supreme Court held that three Board members who received recess appointments on January 4, 2012 were not validly appointed. During the time period from January 4, 2012 until August 5, 2013, when the Board regained a quorum after the confirmation of five Presidentially-appointed Board Members, the Board acted on numerous administrative, personnel, and procurement matters including but not limited to appointments of various Regional Directors, Administrative Law Judges, and Senior Executives, and restructurings of regional and headquarters offices. Prior to the recess appointments of January 4, 2012, the Board issued an Order contingently delegating certain authorities to other NLRB officials.¹

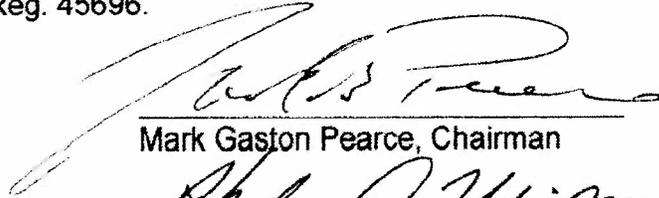
We believe that all the administrative, personnel and procurement matters described above were timely and appropriate. Nevertheless, in an abundance of caution, with a full complement of five Board Members we now confirm, adopt and ratify *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive. This action is intended to remove any question that may arise concerning the validity of the administrative, personnel, and procurement matters undertaken during that period.

In a further abundance of caution, and in an effort to bring an end to ongoing litigation regarding the actions of the Board and its personnel between January 4, 2012 and August 5, 2013, having considered the relevant supporting materials, the Board hereby expressly authorizes the following actions:

1. The selection of Dennis Walsh as Regional Director for Region 4 (Philadelphia);
2. The selection of Margaret Diaz as Regional Director for Region 12 (Tampa);
3. The selection of Mori Rubin as Regional Director for Region 31 (Los Angeles);
4. The selection of Kenneth Chu, Christine Dibble, Melissa Olivero, Susan Flynn, and Donna Dawson as Administrative Law Judges;
5. The Amendment of Statement of Organization and Functions and the Restructuring of National Labor Relations Board's Field Offices described in notices published in the Federal Register on December 6, 2012, and July 24, 2013, 77 Fed Reg. 72886 and 78 Fed Reg. 44602, and all related actions in furtherance thereof;

¹ See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011).

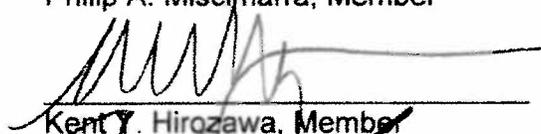
- 6. The Restructuring of National Labor Relations Board's Headquarters' Offices described in the notice published in the Federal Register on July 25, 2013, 78 Fed Reg. 44981; and
- 7. The Further Amendment to Memorandum Describing Authority and Assigned Responsibilities of the General Counsel described in the notices published in the Federal Register on July 23, 2012 and August 1, 2012, 77 Fed Reg. 43127 and 77 Fed Reg. 45696.



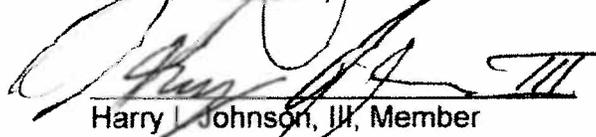
Mark Gaston Pearce, Chairman



Philip A. Miscimarra, Member



Kent Y. Hirozawa, Member



Harry I. Johnson, III, Member



Nancy Schiffer, Member

STATUTORY ADDENDUM

**UNITED STATES COURT OF APPEALS
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INTERNATIONAL BROTHERHOOD)
OF TEAMSTERS, LOCAL 1038)
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Intervenor)
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**Case Nos. 17-1226
& 17-1234**

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)(3) (29 U.S.C. § 158(a)(3)).....2
 Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....2
 Section 10(a) (29 U.S.C. § 160(a))2
 Section 10(e) (29 U.S.C. § 160(e))3
 Section 10(f) (29 U.S.C. § 160(f))3

Administrative Procedure Act, 5 U.S.C. § 500, et. seq.

Section 554(d) (5 U.S.C. § 554(d))4

NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157): Rights 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;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

...

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.

...

(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....

ADMINISTRATIVE PROCEDURE ACT

Section 554 of the APA (5 U.S.C. § 554): Adjudications

- (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—
- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
 - (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency.

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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 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 29th day of June, 2018