

Nos. 18-1017 & 18-1049

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

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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**

JULIE B. BROIDO
Supervisory Attorney

MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-2914

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	Nos. 18-1017 & 18-1049
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CA-038092 et al.
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Petitioner/Cross-Respondent Midwest Terminals of Toledo International, Inc. (“Midwest”) was the Respondent before the Board in the underlying proceeding (Board Case Nos. 08-CA-038092 et al.). The Board’s General Counsel was a party before the Board. Otis Brown, Miguel Rizo, Jr., Mark Lockett, and Local 1982, International Longshoremen’s Association, AFL-CIO, were the charging parties before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Midwest on December 15, 2017, and reported at 365 NLRB No. 157.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court. However, the parties herein were previously before the Court on review of another Board Decision and Order, 362 NLRB No. 57 (2015), which is incorporated by reference in the Decision and Order under review. *See Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 15-1126 & 15-1168.

The parties are additionally involved in two separate unfair-labor-practice cases currently pending before the Court: *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 17-1238 & 17-1094 (reviewing 365 NLRB No. 158), and *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 17-1239 & 17-1093 (reviewing 365 NLRB No. 159). The Court has ordered that these cases, and the instant case (Nos. 18-1017 & 18-1049), will be calendared for oral argument on the same day before the same panel.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, D.C. 20570

Dated at Washington, D.C.
this 25th day of July 2018

TABLE OF CONTENTS

Headings	Page(s)
Statement of Jurisdiction.....	1
Statement of the Issues Presented	2
Statement of the Case.....	3
I. Procedural History	3
II. The Board’s Findings of Fact	5
A. Background; Midwest allocates work based on a contractual order of call.....	5
B. After Brown complains and files grievances about Midwest’s deviation from the order of call, Midwest reduces his work assignments	7
C. Midwest denies Brown customary light-duty assignments after an injury	8
D. A manager tells an employee that Midwest will not hire from a contractual seniority list because those at the top filed charges or lawsuits against Midwest	10
E. Midwest threatens to discipline an employee for filing a grievance over its award of bargaining-unit work to non-unit employees.....	11
F. A manager tells an employee that his Union had caused him to lose overtime.....	12
G. A manager threatens and physically grabs an employee for investigating a possible grievance.....	13
H. Midwest breaches a Memorandum of Understanding with Local 1982 requiring it to continue dues checkoffs.....	14
II. The Board’s Conclusions and Order	15

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
Summary of argument.....	17
Standard of review	19
Argument.....	20
I. Substantial evidence supports the Board’s findings that Midwest violated Section 8(a)(3) and (1) of the Act by discriminating against employee Otis Brown because of his grievance-related activity	20
A. An employer violates Section 8(a)(3) and (1) of the Act by taking action against an employee for asserting his right to file a grievance...20	
B. Brown’s protected grievance activity was a motivating factor in Midwest’s decision to drastically reduce his work hours.....23	
1. Midwest was well aware of Brown’s protected grievance activity	23
2. The timing of Midwest’s precipitous cut in Brown’s hours, at the height of the shipping season and despite his superior skills and seniority, strongly supports the Board’s finding of unlawful motivation	25
3. Midwest failed to carry its burden of proving that it would have drastically reduced Brown’s work hours even in the absence of his protected grievance activity	27
C. Midwest further violated the Act by denying Brown light-duty work based on his protected grievance activity.....	31
II. Midwest has waived nearly all challenges to the Board’s findings that it violated Section 8(a)(1) of the Act by threatening, coercing, and grabbing employees	34
A. The Act prohibits employer interference, restraint, or coercion of employees in the exercise of the Section 7 rights.....	34

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
B. The Board is entitled to summary enforcement of those portions of its Order Remediating the unlawful-threat findings, which in any event are supported by substantial evidence	35
1. Midwest has waived any challenge to the relevant Section 8(a)(1) findings	35
2. In any event, the record amply supports the Board’s findings of unlawful threats	37
C. Midwest waived nearly all challenges to the Board’s amply supported finding that it violated Section 8(a)(1) by threatening and grabbing an employee	39
III. Substantial evidence supports the Board’s finding that Midwest violated Section 8(a)(5) and (1) of the Act by refusing to comply with the dues-checkoff provision of the parties’ Memorandum of Understanding	41
A. Where parties have agreed on a term or condition of employment through collective bargaining, the employer cannot alter their agreement without the Union’s consent	41
B. The Board reasonably found that Midwest modified the parties’ Memorandum of Understanding regarding dues checkoff without the Union’s consent.....	43
C. The Board did not violate due process by finding an unlawful contract modification	44
IV. The Board properly found no impediment to the General Counsel’s prosecution of this case.....	47
A. The Board reasonably rejected Midwest’s Laches defense.....	47

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
B. The Board properly permitted the General Counsel to proceed on a ratified complaint	51
Conclusion	55

TABLE OF AUTHORITIES

Cases	Page(s)
<i>1621 Route 22 West Operating Co., LLC v. NLRB</i> , 725 F. App'x 129 (3d Cir. 2017).....	53, 54
<i>Advanced Disposal Servs. East, Inc. v. NLRB</i> , 820 F.3d 592 (3d Cir. 2016)	53
<i>Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	41, 42
* <i>Allied Mech. Servs., Inc. v. NLRB</i> , 668 F.3d 758, 770-71 (D.C. Cir. 2012).....	53
<i>Bally's Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	19
<i>Bruce Packing Co. v. NLRB</i> , 795 F.3d 18 (D.C. Cir. 2015).....	29
<i>C & S Indus., Inc.</i> , 158 NLRB 454 (1966)	42
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998).....	28, 33
<i>Chesapeake Plywood, Inc.</i> , 294 NLRB 201 (1989), <i>enforced in relevant part</i> , 917 F.2d 22 (4th Cir. 1990)	41, 42
<i>Chevron Mining, Inc. v. NLRB</i> , 684 F.3d 1318 (D.C. Cir. 2012).....	27
<i>Citizens Inv. Servs. Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005).....	26

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
* <i>City of Waukesha v. EPA</i> , 320 F.3d 228 (D.C. Cir. 2003).....	36
<i>Conair Corp. v. NLRB</i> , 721 F.2d 1355 (D.C. Cir. 1983).....	46
* <i>Davis Supermarkets, Inc. v. NLRB</i> , 2 F.3d 1162 (D.C. Cir. 1993).....	22, 44, 45
<i>Davis v. PBGC</i> , 734 F.3d 1161 (D.C. Cir. 2013).....	36
<i>Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision</i> , 139 F.3d 203 (D.C. Cir. 1998)	52
<i>E.G. & G. Rocky Flats, Inc.</i> , 314 NLRB 489 (1994)	43
<i>Equitable Gas Co. v. NLRB</i> , 966 F.2d 861 (4th Cir. 1992)	37
<i>FEC v. Legi-Tech</i> , 75 F.3d 704 (D.C. Cir. 1996).....	53
<i>Flagstaff Med. Ctr., Inc. v. NLRB</i> , 715 F.3d 928 (D.C. Cir. 2013).....	22-23
<i>Fort Dearborn Co. v. NLRB</i> , 827 F.3d 1067 (D.C. Cir. 2016).....	20, 28, 34
<i>G&R Corp. v. Am. Sec. & Trust Co.</i> , 523 F.2d 1164 (D.C. Cir. 1975).....	53

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Hammontree v. NLRB</i> , 925 F.2d 1486 (D.C. Cir. 1991).....	50
<i>Hi-Tech Cable Corp.</i> , 309 NLRB 3 (1992), <i>enforced mem.</i> , 25 F.3d 1044 (5th Cir. 1994)	23
<i>Hillhaven Corp.</i> , 290 NLRB 258 (1988).....	39
<i>Honda of America Manufacturing, Inc.</i> , 334 NLRB 746 (2001).....	40
<i>Illinois Cent. R.R. Co. v. Rogers</i> , 253 F.2d 349 (D.C.Cir.1958).....	49
* <i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	19, 20, 25, 26
* <i>Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.</i> , 796 F.3d 111 (D.C. Cir. 2015)	52
<i>J.H. Rutter-Rex Manufacturing Company</i> , 396 U.S. 258 (1969).....	49
* <i>Laro Maintenance Corp. v. NLRB</i> , 56 F.3d 224 (D.C. Cir. 1995).....	23, 33-34
<i>Limestone Apparel Corp.</i> , 255 NLRB 722 (1981), <i>enforced mem.</i> , 705 F.2d 799 (6th Cir. 1982)	22

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Link Corp.</i> , 288 NLRB No. 132, 1988 WL 213934 (1988), <i>enforced mem.</i> , 869 F.2d 1492 (6th Cir. 1989)	42-43
<i>Menominee Indian Tribe of Wisconsin v. U.S.</i> , 614 F.3d 519 (D.C. Cir. 2010).....	50
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	21
<i>Midwest Terminals of Toledo Int’l, Inc. v. NLRB</i> , 2017 WL 5662235 (D.C. Cir.) <i>reh’g en banc denied</i> (2017), <i>cert denied</i> , 138 S. Ct. 1181 (2018).....	54
<i>New York Tel. Co.</i> , 266 NLRB 580 (1983)	39
<i>NLRB v. Blake Constr. Co.</i> , 663 F.2d 272 (D.C. Cir. 1981).....	46
<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984).....	21
<i>NLRB v. Fant Milling Co.</i> , 360 U.S. 301 (1959).....	49
<i>NLRB v. Keystone Steel & Wire</i> , 653 F.2d 304 (7th Cir. 1981)	42
<i>NLRB v. Local 90, Operative Plasterers & Cement Masons’ Int’l Ass’n</i> , 606 F.2d 189 (7th Cir. 1979)	24

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013)	29
<i>NLRB v. SW General, Inc.</i> , 136 S. Ct. 2489, 929 (April 6, 2016), <i>granting cert. review of</i> 796 F.3d 67 (D.C. Cir. 2015).....	4
<i>NLRB v. SW General, Inc.</i> , 137 S. Ct. 929 (2017), <i>affirming</i> 796 F.3d 67 (D.C. Cir. 2015)	52
<i>NLRB v. Tecmec, Inc.</i> , 992 F.2d 1217 (table), 1993 WL 100086 (6th Cir. 1993)	24
<i>NLRB v. Transportation Management Corporation</i> , 462 U.S. 393 (1983).....	21
<i>Oak Harbor Freight Lines, Inc. v. NLRB</i> , 855 F.3d 436 (D.C. Cir. 2017).....	19
<i>*Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	19-20, 30, 33, 41
<i>Pall Corp. v. N.L.R.B.</i> , 275 F.3d 116 (D.C. Cir. 2002).....	42
<i>*Pergament United Sales, Inc. v. NLRB</i> , 920 F.2d 130 (2d Cir. 1990)	44, 45
<i>Property Resources Corp. v. NLRB</i> , 863 F.2d 964 (D.C. Cir. 1988).....	22

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	25
<i>S. Power Co. v. NLRB</i> , 664 F.3d 946 (D.C. Cir. 2012).....	31
<i>Schneider v. Kissinger</i> , 412 F.3d 190	40
<i>Sears Roebuck & Co.</i> , 337 NLRB 443 (2002)	26
<i>Shamrock Foods Co. v. NLRB</i> , 346 F.3d 1130 (D.C. Cir. 2003).....	21
<i>Southwest Merchandising</i> , 53 F.3d 1334 (D. Cir. 1995)	22, 32
<i>St. Vincent Hosp.</i> , 320 NLRB 42 (1995)	42
<i>Stephens Media, LLC v. NLRB</i> , 677 F.3d 1241 (D.C. Cir. 2012).....	38
* <i>Tasty Baking Co v. NLRB</i> , 254 F.3d 114, 124-25 (D.C. Cir. 2001)	22, 24
<i>U.S. v. Dalles Military Road Co.</i> , 140 U.S. 599 (1891).....	49
<i>United States Postal Service</i> , 256 NLRB 78 (1981), <i>enforced in relevant part</i> , 689 F.2d 835 (9th Cir. 1982)	38

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

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>United States v. Summerlin</i> , 310 U.S. 414 (1940).....	49
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917)	48-49
* <i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011).....	36-37
* <i>Wilkes-Barre Hosp. Co., LLC v. NLRB</i> , 857 F.3d 364 (D.C. Cir. 2017).....	52, 53
* <i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced</i> , 662 F.2d 899 (1st Cir. 1981).....	21, 22, 28, 30, 31, 33

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	16, 20, 34, 37, 39
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 15, 17, 18, 21, 34 - 41
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2, 15, 17, 20, 21, 22, 33
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 16, 18, 41, 42, 43, 44, 45
Section 8(d) (29 U.S.C. § 158(d)).....	16, 18, 41, 42, 44, 46, 47
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	19, 31
Section 10(f) (29 U.S.C. § 160(f))	2

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

TABLE OF AUTHORITIES (cont'd)

Statutes	Page(s)
Federal Vacancies Reform Act (5 U.S.C. §§ 3345, et seq.)	
5 U.S.C. §§ 3345 et seq.....	4
5 U.S.C. § 3348(e)	52
Rules	Page(s)
D.C. Circuit Rule 32(e).....	36
Federal Rule of Appellate Procedure 32(a)(7).....	36
Regulations	Page(s)
29 C.F.R. § 102.46(a)(1).....	31

GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Midwest Terminals of Toledo International, Inc.
FVRA	Federal Vacancies Reform Act (5 U.S.C. §§ 3345, et seq.)
JA	Joint Appendix
MOU	Memorandum of Understanding
Midwest	Midwest Terminals of Toledo International, Inc.
SA	Supplemental Appendix
Union	International Longshoremen's Association and its Local 1982

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

Nos. 18-1017 & 18-1049

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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 Midwest Terminals of Toledo International, Inc. to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order against Midwest. The Board's Decision

and Order issued on December 15, 2017, and is reported at 365 NLRB No. 157. (JA 233-36.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

Midwest filed its petition for review on January 19, 2018. The Board filed its cross-application for enforcement on February 20, 2018. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s findings that Midwest violated Section 8(a)(3) and (1) of the Act by denying work assignments to employee Otis Brown for complaining and filing grievances about Midwest’s non-compliance with a collective-bargaining agreement.

¹ Record references are to the Joint Appendix (“JA”) and Supplemental Appendix (“SA”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Midwest’s opening brief.

2. Whether Midwest has waived nearly all challenges to the Board's findings, which are supported by substantial evidence, that it violated Section 8(a)(1) of the Act by threatening, coercing, and grabbing employees.

3. Whether substantial evidence supports the Board's finding that Midwest violated Section 8(a)(5) and (1) of the Act by refusing to comply with the dues-checkoff provision of the parties' memorandum of understanding.

4. Whether the Board properly found no impediment to the General Counsel's prosecution of this case.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case first came before the Board on a consolidated complaint issued under the Board's Acting General Counsel on March 28, 2013.² (JA 201; 45-58.) Following a hearing on the complaint, an administrative law judge issued a recommended decision and order finding that Midwest had committed numerous unfair labor practices, and dismissing some complaint allegations. (JA 201-24.) The judge also rejected Midwest's contention that Acting General Counsel Lafe Solomon did not lawfully hold office when the complaint issued. (JA 202-03.)

² That complaint, in turn, was based on numerous unfair-labor-practice charges filed between 2008 and 2012 by individual Midwest employees and their union, the International Longshoremen's Association ("ILA") and its Local 1982 (collectively, "the Union").

On March 31, 2015, after reviewing the parties' exceptions, the Board issued a Decision and Order affirming the judge's rulings, findings, and conclusions, with minor modifications. (JA 198-201.) Midwest petitioned for review of the Order in this Court (No. 15-1126), and the Board cross-applied for enforcement (No. 15-1168).

On May 19, 2016, the Court placed the case in abeyance pending the Supreme Court's consideration of *NLRB v. SW General, Inc.*, 136 S. Ct. 2489 (Apr. 6, 2016) (No. 15-1251), *granting cert. review of* 796 F.3d 67 (D.C. Cir. 2015). On March 21, 2017, the Supreme Court issued its decision, holding that under the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) ("FVRA"), Acting General Counsel Solomon could not continue serving in his position after former President Obama nominated him to be General Counsel on January 5, 2011. *SW General, Inc.*, 137 S. Ct. 929. Accordingly, on July 14, 2017, the Court granted the Board's motion to vacate its 2015 Order and remand the case.

On July 18, 2017, the Board advised the parties that it had accepted the remand and invited them to file position statements. (JA 225-26.) While the case was pending on remand, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification, ratifying the complaint previously issued under Acting General Counsel Solomon and its continued prosecution. (JA 230-32.) On December 15, 2017, the Board issued a Decision and Order finding that the allegations of the

ratified complaint were properly before it. (JA 233.) Considering the earlier proceedings *de novo*, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended Order, to the extent and for the reasons stated in the 2015 Decision and Order. (JA 233-35.)

II. THE BOARD'S FINDINGS OF FACT

A. Background; Midwest Allocates Work Based on a Contractual Order of Call

Midwest provides stevedoring and warehousing services at its 125-acre facility near the mouth of the Maumee River in Toledo, Ohio. Midwest conducts the bulk of its operations from April through November, during the Great Lakes shipping season. (JA 203 & n.5, 204; 47, 62, 250, SA 114-18.)

The employees at issue here load and unload cargo vessels and perform warehousing work on the "wet" side of the facility nearest the Maumee River. For decades, they have been represented for purposes of collective bargaining by the Union. (JA 203-04; SA 115-16.)

Local 1982 executed a collective-bargaining agreement with Midwest ("the local agreement") that was effective by its terms from January 1, 2006, through December 31, 2010. Immediately thereafter, a "master agreement" took effect between the ILA and a multiemployer group that included Midwest. That agreement was effective by its terms from January 1, 2011, through December 31, 2012. (JA 203-04; 311-37, SA 141-80.)

Pursuant to Section 5.2.1 of the local agreement and longstanding practice, Midwest allocated available work each day using an “order of call” procedure. Under that procedure, Midwest first looked to its “skilled list” to assign available work to appropriately qualified employees. The skilled list consisted of employees who could perform at least four out of five designated functions. If Midwest exhausted the skilled list and still had work available, it would turn to the “regular list” of employees who were not necessarily qualified in any particular area. After exhausting the regular list, Midwest would turn to its “casual list,” which consisted of newer, part-time, or on-call employees. (JA 204; 270, 274, 311-17, SA 93.)

Midwest was required, by contract and past practice, to proceed through each list in order, beginning with the most senior employees at the top. For the skilled list, seniority was determined by date of hire; for the regular and casual lists, seniority was determined by the number of hours worked in the prior year. (JA 204; 272-73, 311-17.)

Employees on the skilled list had to appear for work every day or notify Midwest in advance. Employees on the regular and casual lists had to call a telephone number for information about hiring needs for the following day. If they wished to work on a given day, they would have to appear for the “shape up,” where Midwest made specific work assignments. (JA 204; 271-72.)

The parties' collective-bargaining agreements established a grievance procedure for resolution of alleged contractual violations. As discussed below, several employees invoked that procedure to challenge irregularities in Midwest's work assignments. (JA 205-20; 331-32, SA 153-55.)

**B. After Brown Complains and Files Grievances
About Midwest's Deviation from the Order of Call,
Midwest Reduces His Work Assignments**

In the spring of 2008, as in past years, Midwest asked employee Otis Brown to move from the regular list to the skilled list, but he declined. Brown accordingly remained a sought-after and highly qualified employee on the regular list for the 2008 season. Based on his work hours in the prior year, Brown ranked second in seniority on that list. (JA 205 & n.8; 480, SA 33-37.)

On May 9, 2008, as Brown was completing his work for the day, he noticed that lower-seniority employees from the regular list, and employees from the casual list, were preparing to begin work on a barge. Brown complained to Operations Manager John Staler about what he had seen, noting that more senior employees like Mark Ward and Jerome Brown had been told not to come in because there supposedly was not enough work for them. Staler responded that Union Steward Bob Moody had agreed to the assignment of work to less senior employees. Moody, who arrived in the area as Staler said this, joined the conversation and confirmed Staler's statement. Brown then told both of them that

what they were doing was “wrong” and said he would file a grievance. (JA 205; SA 38-45, 63-67.)

Later, just as Brown was gathering the paperwork for a grievance, Staler informed Brown that he had offered work to the two senior employees that Brown had mentioned. On hearing this, Brown decided not to file a grievance. (JA 205; SA 41-45, 63-67.)

Following the May 9 incident, however, Midwest continued to bypass senior employees, including Brown, in favor of lower-seniority and casual employees. Brown responded by filing several grievances—on July 22, August 1, 4, and 7, and September 19, 2008—over what he viewed as improper work assignments. Meanwhile, even as the shipping season reached full swing in the summer of 2008, Midwest significantly decreased Brown’s work assignments—from 117.25 hours in May 2008 to 48.5 hours in June, 59.25 hours in July, and 59.25 hours in August. (JA 205-06; 481-724, SA 68, 581-92, 93-98, 102-04, 119-21.)

C. Midwest Denies Brown Customary Light-Duty Assignments After an Injury

On November 21, 2008, Brown suffered a neck injury while driving a truck at work. After treatment at a local hospital, the doctor cleared him to return to work on November 24 with two restrictions: he was to limit neck movement, and he was not to drive. In a written report, the doctor memorialized Brown’s work restrictions and stated that he would reexamine Brown on December 1 with the

expectation that he would be able to return to regular duty at that time. (JA 208; 466-69, SA 46-48.)

Brown provided the doctor's report to Company Safety Officer Jim Hasenfratz, consistent with standard practice. Hasenfratz assured Brown that Midwest would find him work that complied with his restrictions. True to this statement, Midwest assigned Brown to work on the "hopper" on November 26, and he completed that work without incident. (JA 208; 276-80, 399, SA 48-51, 56-58, 60-62, 74-80.)

At the shape up the following day (November 27), Brown's name was again posted for the hopper. However, after Operations Director Terry Leach conferred with other managers in the room, he removed Brown's name from the assignment board, and gave the hopper job to an employee on the skilled list. Leach then proceeded to assign work to those on the regular list, but skipped over Brown's name. (JA 208; 281-82 SA 51-55, 113.)

When Brown spoke up about being skipped, Leach averred that Brown could not work because he was injured. Brown responded that he could work on the hopper again, but Leach said that job was taken. Brown then suggested that he could open bags in the warehouse—another light-duty task that would comply with his work restrictions. Leach rejected this suggestion as well, claiming that he had spoken to Brown's doctor, who purportedly said Brown's injury was more serious

than noted in his report. Brown accused Leach of lying and said he would file a grievance. (JA 208-09; SA 1-4, 24-28, 51-55, 59-60.)

Soon thereafter, Brown asked his doctor about Leach's purported communications with him. The doctor denied any such communications and gave Brown a signed statement confirming that he had not spoken to anyone from Midwest and had never told anyone that Brown should be placed on restrictions other than those noted in his earlier written report. Brown attached the doctor's signed statement to his grievance over the late-November denial of light-duty work. (JA 208-09; 470-71.)

In early December 2008, the doctor lifted Brown's restrictions. He resumed his regular duties on December 3. (JA 209; 400-08.)

D. A Manager Tells an Employee that Midwest Will Not Hire From a Contractual Seniority List Because Those at the Top Filed Charges or Lawsuits Against Midwest

On April 24, 2009, Vice President of Operations Tim Jones told employee Miguel Rizo, Sr. that he had a problem—there were not enough employees to staff an incoming coal ship, even after moving eight skilled employees from their present tasks to the ship. Rizo, Sr. replied that there should be no problem, because Jones could simply hire additional workers from the regular list. Jones rejected that suggestion out of hand, stating that it was “not going to happen” because the people at the top of the regular list “either had charges or lawsuits filed

against Midwest.” Calling this “very discriminatory,” Rizo, Sr. said he would file a grievance. (JA 209; SA 28-32.)

In a written response to Rizo, Sr.’s grievance, Jones did not deny making the statement that Rizo, Sr. attributed to him. Instead, he suggested that Rizo, Sr. may have misunderstood or taken his statement out of context. (JA 209; SA 131-32.)

E. Midwest Threatens To Discipline an Employee For Filing a Grievance Over Its Award of Bargaining-Unit Work to Non-Unit Employees

On August 7, 2011, Midwest hired eight welders from a third party, purportedly because none of the employees present at the shape up that day were qualified. Subsequently, all of the employees who appeared for the shape up filed grievances. (JA 211; SA 99-101, 105-06, 108-12, 136-38.)

Employee Miguel Rizo, Jr. was not at the shape up, but he heard about Midwest’s conduct from a coworker. After consulting a union official, Rizo, Jr. filed a grievance alleging that Midwest’s award of bargaining-unit work to non-unit employees violated the parties’ collective-bargaining agreement. As a remedy, Rizo, Jr. asked that Midwest make him whole for losses suffered as a result of the contractual violation. (JA 211-12; SA 100-01, 136-38.)

Midwest denied Rizo, Jr.’s grievance, stating that, because he was not present and eligible for hire at the shape-up, his request to be made whole was “baseless and fraudulent,” and violated company policy. Midwest then warned

Rizo, Jr. that he could face “additional discipline up to and including termination” if he engaged in “[a]ny future conduct similar to” this grievance-related conduct. (JA 211-12; SA 107, 111-12, 137.)

F. A Manager Tells an Employee That His Union Had Caused Him To Lose Overtime

On September 28, 2012, Midwest assigned overtime work to one of its skilled employees, Kevin Newcomer. Upon learning of the assignment, Union Steward Raymond Sims decided to stay at the facility beyond the end of this shift, consistent with his understanding that a steward must be on-site at all times when employees are working. (JA 217-18; SA 17-23, 69-73.)

Shortly after the shift ended, Leach encountered Sims in a breakroom and asked what he was doing there. Sims said he was present as a steward because an employee was working overtime. After telling Sims his steward status was irrelevant and he had to leave, Leach called Newcomer and ordered him to stop his assigned overtime work and “get the fuck off the property.” As Newcomer prepared to leave, Leach pulled up in his truck and apologized for his abruptness, adding that Newcomer could “blame [his] fucking Union guy for fucking [him] out of [his] overtime.” (JA 218; SA 17-23, 69-73.)

G. A Manager Threatens and Physically Grabs an Employee for Investigating a Possible Grievance

On November 14, 2012, Union Steward Mark Lockett received information from a bargaining-unit employee that non-unit employees were performing unit work in front of the facility's maintenance office. Driving his forklift to the area to investigate, Lockett found two non-unit employees performing what he believed to be unit work. He told them to stop and then called Operations Director Leach. (JA 219; SA 4-13, 16.)

As he was doing so, Leach happened to drive up. Lockett asked Leach about the work that the non-unit employees were performing. Leach asserted that it was non-unit work. Lockett called this "bullshit" and told Leach that he could have assigned the work to skilled employees who were present that day, or to employees who appeared for the shape up. Leach then told Lockett that he had no business in the area. Lockett responded that he had a right to go wherever there was a contractual dispute. Leach replied that Lockett needed to shut up and go back to work. As the dispute escalated, Lockett assured Leach that he would file a grievance over the work performed by non-unit employees; and Leach told Lockett to "shut his pie hole" and "get [his] ass back on [his] forklift and go back to work before [Leach] had him removed from the job." Lockett invited Leach to "go ahead and try it." As Lockett proceeded to his forklift, Leach grabbed him by the arm, turned him around, and said that if he continued to talk that way, he would be

fired. Lockett told Leach not to ever lay hands on him again and then went back to work. (JA 219; SA 4-16.)

The following day, Lockett filed a complaint against Leach with the local police department, alleging that Leach had “grabbed him by his forearm and whipped him around.” Several days later, Lockett filed a contractual grievance over the performance of unit work by non-unit employees. (JA 219; SA 13, 133-35.)

H. Midwest Breaches a Memorandum of Understanding with Local 1982 Requiring It To Continue Dues Checkoffs

Early in 2012, the final year of the master agreement with the ILA, Midwest gave notice of its intent to withdraw from the multiemployer association that had negotiated the agreement. Midwest further informed the ILA that it would negotiate all future agreements on its own behalf, with Local 1982. (JA 220; SA 139-40.)

A few months later, on May 22, Midwest executed a Memorandum of Understanding (“MOU”) with Local 1982 fixing certain terms and conditions of employment “[u]ntil ILA Local 1982 and Midwest Terminals of Toledo International, Inc. ratify a new local collective bargaining agreement.” Specifically, the MOU provided that, pending negotiations for a new agreement, Midwest “shall make appropriate payroll deductions for each employee who furnishes [Midwest] formal written authorization for check-off...deductions.” The

MOU further provided that this dues-checkoff commitment “replaced” the commitment in the soon-to-expire master agreement. (JA 220; 890.)

Notwithstanding the checkoff commitment in the MOU, on November 19, 2012, Midwest’s attorney announced to Local 1982 that his client would “stop deducting Union dues under the check-off if we have no contract or agreed extension in effect as of January 1, 2013.” Midwest stopped deducting union dues on that date, even though the parties were still negotiating a new collective-bargaining agreement. (JA 220; 412, 890, SA 122-30.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing credited facts, the Board (Members Pearce, McFerran, and Kaplan) found that Midwest violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to assign work to Brown in June, July, and August 2008, and refusing to give him customary light-duty assignments after a later injury, all because he asserted his right to file grievances against Midwest. (JA 198 n.2, 205-09, 233-34.) The Board (Member Kaplan dissenting) further found that Midwest violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling Rizo, Sr. that it would not use the contractually agreed-upon regular list to hire needed workers because those at the top of the list had filed charges or lawsuits against Midwest. The Board unanimously found that Midwest further violated Section 8(a)(1) by threatening Rizo, Jr. that he could face discipline up to and

including discharge based on the content of his grievances; telling Newcomer that the Union had caused him to lose paid overtime; and threatening and grabbing Lockett for investigating a possible grievance in his capacity as a union steward. (JA 209-12, 217-20.) Finally, the Board unanimously found that Midwest violated Section 8(d) and Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 158(d) and 158(a)(5) and (1)) by ceasing to check off union dues during the term of a collectively bargained agreement (the 2012 MOU) requiring such checkoff. (JA 220-21.)

The Board's Order requires Midwest to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 234.) Affirmatively, the Order requires Midwest to: make Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him; compensate him for the adverse tax consequences, if any, of a lump-sum backpay award; remove from its files any reference to the written threat to discipline Rizo, Jr.; begin deducting and remitting union dues owed under the parties' 2012 MOU, and reimburse the Union for losses resulting from Midwest's failure to comply with that agreement; and post a remedial notice. (JA 234-25.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that Midwest violated Section 8(a)(3) and (1) of the Act by denying work to employee Otis Brown. The record shows that Midwest dramatically reduced his work hours in the summer of 2008 without justification, shortly after he began complaining that Midwest was not complying with the parties' collective-bargaining agreement. Given the suspicious timing of this action, and its decision to pass over Brown despite his greater seniority and superior qualifications, the Board reasonably inferred that Midwest was motivated by his protected efforts to enforce the agreement. As the Board further found, Midwest utterly failed to show that it would have made the same reduction in hours even if Brown had not engaged in protected activity.

Substantial evidence likewise supports the Board's finding that in the fall Midwest denied Brown light-duty work for the same unlawful reason. As the Board found, and Midwest did not dispute, its actions against Brown over the summer firmly established its animus towards his grievance-filing activity. As the Board further found, Midwest's stated reason for refusing him light-duty work was demonstrably false and therefore a pretext that not only failed as a defense but also underscored Midwest's unlawful motivation.

2. Midwest does not substantively challenge the Board's findings that it violated Section 8(a)(1) of the Act by telling an employee that it would not draw

workers from its regular list because those at the top had filed grievances or unfair-labor-practice charges; threatening to discipline an employee for the content of a good-faith grievance; and falsely telling an employee that his union had caused him to lose overtime. The Board is accordingly entitled to summary enforcement of those findings, which are in any event supported by substantial evidence. In addition, substantial evidence supports the Board's finding that Midwest violated Section 8(a)(1) by threatening and physically grabbing an employee who was serving as a union steward and investigating a possible grievance. Although Midwest challenges the employee-steward's credited account of events, it fails to meet this Court's high standard for overruling the Board's credibility determination.

3. Substantial evidence likewise supports the Board's finding that Midwest violated Sections 8(a)(5) and 8(d) of the Act by refusing to abide by an agreement with the Union regarding the checkoff of employees' union dues. Midwest makes little effort to defend its action on the merits. Instead, it asserts that a violation cannot be found because it was not given advance notice of the specific legal theory on which the Board proceeded. However, what due process requires is notice of the acts alleged to constitute the unfair labor practice, and here Midwest received that notice, both in the complaint and at the hearing, and it had every opportunity to fully litigate the matter.

4. Midwest's attempts to challenge the General Counsel's prosecution of this case fail. As an initial matter, Midwest abandoned its laches defense before the Board. Moreover, it is well settled that laches cannot bar an action by the government to vindicate public rights, and Midwest has not even established the basic elements of its laches claim. Similarly, Midwest is wrong that the complaint, originally issued by the Board's Acting General Counsel, remains unauthorized despite the General Counsel's lawful ratification of it.

STANDARD OF REVIEW

This Court's review of Board decisions "is narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (internal quotation marks and citation omitted). The Board's finding of an unfair labor practice will be upheld "unless it has no rational basis or is unsupported by substantial evidence." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks and citation omitted); *see also* 29 U.S.C. § 160(e).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017) (internal quotation marks and citation omitted). Accordingly, the Court will reverse the Board's findings "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir.

2016) (internal quotation marks and citation omitted). In other words, the Court “may not reject [the Board’s findings] simply because other reasonable inferences may also be drawn.” *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016) (internal quotation marks and citation omitted). The Court only asks “whether the Board’s interpretation of the facts is reasonably defensible,” *Inova Health Sys.*, 795 F.3d at 81. Where the Board’s factual findings rely on the credibility determinations of an administrative law judge, the Court will uphold those determinations so long as they are not “hopelessly incredible, self-contradictory, or patently insupportable.” *Id.* (internal quotation marks and citation omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT MIDWEST VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATING AGAINST EMPLOYEE OTIS BROWN BECAUSE OF HIS GRIEVANCE-RELATED ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Taking Action Against an Employee for Asserting His Right To File a Grievance

Section 7 of the Act guarantees to employees “the right to bargain collectively through representatives of their own choosing,” and the right to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. This provision has long been interpreted to protect individual employees in raising violations of a collective-

bargaining agreement, whether they choose to file a contractual grievance or to informally complain to their employer. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830, 836-37 (1984).

Section 8(a)(3) of the Act enforces the protections of Section 7 by prohibiting employer “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.” 29 U.S.C. § 158(a)(3).³ Thus, an employer violates Section 8(a)(3) by, for example, taking an adverse employment action against a unionized employee because he filed a grievance or sought to enforce the terms of a collective-bargaining agreement.

Where the employer’s action is “for a reason assertedly unconnected to protected activity,” the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003) (emphasis omitted). Under *Wright Line*, if the employee’s protected activity is shown to be “a motivating factor” for the adverse action, that action is unlawful

³ A violation of Section 8(a)(3) of the Act produces a derivative violation of Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act].” 29 U.S.C. § 158(a)(1).

unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; accord *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). If the employer's proffered reasons for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer has failed to establish its affirmative defense, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); see also *Wright Line*, 251 NLRB at 1084.

“As direct evidence of employer motivation is generally scarce, this [C]ourt has found that ‘circumstantial evidence alone may establish unlawful motivation in a [Section] 8(a)(3) case.’” *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer's knowledge of and hostility toward protected activity, the timing of its action, and “‘the absence of any legitimate basis for an action’—i.e., the absence of a credible explanation from the employer” or its shifting reasons. *Southwest Merchandising*, 53 F.3d 1334, 1340, 1344 (D. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)); accord *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001). Ultimately, because motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is “entitled to substantial deference.”

Flagstaff Med. Ctr., Inc. v. NLRB, 715 F.3d 928, 933 (D.C. Cir. 2013); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995).

B. Brown’s Protected Grievance Activity Was a Motivating Factor in Midwest’s Decision To Drastically Reduce His Work Hours

1. Midwest was well aware of Brown’s protected grievance activity

Substantial evidence supports the Board’s findings that Brown was involved in protected grievance-related activity of which Midwest was well aware. Thus, on May 9, 2008, he confronted Operations Manager John Staler, in the presence of Union Steward Robert Moody, about Midwest’s decision to bypass at least two senior employees on the regular list and assign what should have been their work to lower-seniority and casual employees. Brown told Staler and Moody that what they were doing was “wrong,” and said he would file a grievance. *See Hi-Tech Cable Corp.*, 309 NLRB 3, 12 (1992) (employee engaged in protected activity by protesting that employer’s work assignment contravened parties’ agreement), *enforced mem.*, 25 F.3d 1044 (5th Cir. 1994).

Thereafter, Brown filed grievances on July 22, August 1, August 4, and August 7, pressing his view that Midwest was circumventing the work-assignment procedures set forth in the parties’ collective-bargaining agreement. Midwest responded in writing to each of those grievances, evincing its knowledge of them.

Although Midwest does not dispute that it knew of Brown's grievance activity in the summer of 2008, it now contends that it did not know of Brown's activity on May 9, when he threatened to file a grievance for failure to follow the contractual order-of-call procedure. (Br. 18 n.4, 21.) Taking specific aim at the credited testimony of Brown, on which the Board relied, Midwest argues that he is not worthy of belief as to *any* matter because at some point in the past he had a felony conviction and was imprisoned. (Br. 8-9, 18.) Contrary to Midwest's contentions, those events, which are unrelated to this case, did not cause Brown to forfeit all credibility. *See NLRB v. Local 90, Operative Plasterers & Cement Masons' Int'l Ass'n*, 606 F.2d 189, 192 n.1 (7th Cir. 1979) (employee's status as an "admitted felon" does not render his testimony incredible or warrant reversal of the Board's credibility determinations); *accord NLRB v. Tecmec, Inc.*, 992 F.2d 1217 (table), 1993 WL 100086, at *6 (6th Cir. 1993) (the Federal Rules of Evidence "do[] not mandate that, upon the introduction of evidence that a witness committed a felony, the witness's testimony is to be automatically and completely discredited"). Accordingly, although Midwest suggests that this May 9 conversation may never have occurred, Brown's testimony—found credible by the administrative law judge—provides substantial evidence that it did, and that the conversation occurred as Brown recounted. *See Tasty Baking*, 254 F.3d at 124-25.

Moreover, to the extent Midwest complains it had no effective means of countering Brown's testimony at the hearing, it is mistaken. (Br. 18 n.4.)

Although Staler died before the hearing, Midwest could have called former Union Steward Robert Moody as a witness, if it had wanted to challenge Brown's account of his exchange with Staler. According to Brown, Moody was present when Brown said that Staler's assignments were "wrong" and threatened to file a grievance. (JA 205; SA 41-45, 63-67.)

2. The timing of Midwest's precipitous cut in Brown's hours, at the height of the shipping season and despite his superior skills and seniority, strongly supports the Board's finding of unlawful motivation

As this Court has held, "timing is a telling consideration in determining whether employer action is motivated by anti-union animus." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999). *Accord Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015) ("[t]iming alone may suggest antiunion animus" (internal quotation marks and citation omitted)). Here, as the Board noted, "within weeks after his initial threat to file a grievance...Brown experienced a precipitous decline in the number of hours he worked in June as compared to May." (JA 206.) Specifically, Midwest reduced Brown's hours from 117.25 hours

in May to just 48.5 hours in June.⁴ And after he filed grievances in July and August, Midwest kept his hours low, at 51.5 hours in July and 59.25 hours in August.

Midwest's reduction of Brown's hours is all the more suspicious given the surrounding circumstances. As the Board found, "[t]he summer months are the height of the shipping season and [Midwest's] busiest time," meaning that it should have *increased* Brown's work hours relative to the spring. Instead, Midwest cut them by over 50 percent in June as compared to May, and kept them low for the rest of the summer.

As the Board found, this "precipitous" drop in Brown's work hours is particularly striking and unexpected given his attributes as an employee. (JA 206.) At the time, he was ranked second on the regular list. And he obviously had greater skills than almost everyone on that list, as evidenced by the fact that

⁴ Contrary to Midwest's claims, the fact that it did not immediately cut Brown's hours in May 2008 does not render its action just a few weeks later, in June, any less suspicious. (Br. 21.) As this Court has held, unlawful motivation may be established by showing "a reasonable proximity in time" between an adverse action and protected activity. *Inova Health Sys.*, 795 F.3d at 80; *see also Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005) (timing of discharge, "two weeks after [the employee] had identified himself as 'union president' in an email to his supervisor," suggested unlawful motive); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, "several weeks" after employer learned of protected concerted activities, suggested unlawful motive). Moreover, the timing of Midwest's refusal to assign work to Brown does not lose its telling effect simply because Midwest eventually relented and restored Brown's usual work assignments *after* the summer period at issue. (*See* Br. 20.)

Midwest repeatedly courted him to move to the skilled list. Nevertheless, that summer, Midwest “assigned work that [Brown] was capable of performing to less senior employees.” (JA 205.) Considering the suspicious timing of Midwest’s cut in Brown’s work hours, at the height of the shipping season and despite his superior seniority and qualifications, as well as its diversion of work to less senior employees, the Board reasonably inferred that Midwest’s sudden and dramatic reduction of his work hours was unlawfully motivated by his protected grievance activity beginning in May and continuing through the summer.

3. Midwest failed to carry its burden of proving that it would have drastically reduced Brown’s work hours even in the absence of his protected grievance activity

Faced with this strong evidence of unlawful motivation, it was incumbent on Midwest to show that it would have cut Brown’s hours just as it did regardless of his grievance activity. *See Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-28 (D.C. Cir. 2012) (“The emphasis is always on...the particular act that discouraged union activity.”). Before the Board, Midwest tried to meet its burden by claiming that it did not refuse to assign him work. However, as the Board found, Midwest utterly failed to substantiate its claim because it “offer[ed] no specific reason for the precipitous decline in the number of hours of work Brown performed in June or July and August.” (JA 206.)

In its brief to this Court, as before the Board, Midwest does not attempt to show that Brown would have suffered the same precipitous drop in work hours, during the height of the shipping season, even if he had not engaged in any protected grievance activity. Instead, Midwest misguidedly parses its records in an attempt to cobble together entirely hypothetical explanations, which, even if true, would only partly account for its failure to assign Brown work on certain dates. (Br. 21-25.) Thus, relying on the absence of gate records for some dates, Midwest hypothesizes that perhaps it did not hire Brown on those dates because he did not appear for the shape-up. (Br. 21-25.) Midwest further suggests that, on some days during the height of the shipping season, it may have been able to load and unload cargo and fulfill all of its other stevedoring needs using just the 12 employees on the skilled list, and one or two employees who were either ahead of Brown on Midwest's lists or more qualified to perform specific tasks. (Br. 21-25.)

In advancing such suggestions, Midwest fundamentally misunderstands its obligation under *Wright Line*. To establish its affirmative defense, Midwest must prove that it would have made *the same* reduction in Brown's work hours even in the absence of his protected activity. See *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016); *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). Accordingly, it is not enough for Midwest to simply point to partial or possible explanations that might be constructed with time and gate

records. *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (“In order to satisfy [its] burden, the [employer’s] rationale cannot only be a potential or partial reason for the [adverse action], it must be ‘*the* justification.’” (internal quotation marks and citation omitted)).

In any event, the question on review before this Court is not “whether record evidence could support the [employer’s] view of the issue, but whether it supports the [agency’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). Here, the Board reasonably based its decision on credited testimony, corroborating evidence, and reasonable inferences from the evidence. And importantly, Midwest’s partial and possible explanations are fundamentally at odds with that testimony. Its suggestion, for instance, that Brown did not appear for the shape-up on those dates for which it did not produce gate records runs headlong into Brown’s credited testimony—which is corroborated by the gate records it did produce—that he regularly presented himself at the morning shape-up between June and August. Likewise, Midwest’s assertion that it often fulfilled its staffing needs by mechanically following the contractual order-of-call procedure, and relying exclusively on just over a dozen employees who had priority over Brown in either seniority or qualifications, is in tension with the credited testimony of employee Rizo, Jr. His testimony, which was corroborated by several other employee witnesses, shows that during the time period in question

Midwest did not mechanically dole out assignments in accordance with the contractual order-of-call, but exploited opportunities to hire employees lower in seniority than Brown, outside the contractually mandated shape-up.

Importantly, moreover, Midwest has not shown that the relevant credibility determinations must be overturned as “hopelessly incredible, self-contradictory, or patently insupportable.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016). Indeed, Midwest fails to provide any basis for rejecting the administrative law judge’s decision to credit Rizo, Jr. And for Brown, Midwest hearkens back (Br. 8-9, 25) to an unrelated criminal conviction, which as explained above p. 24, does not necessitate reversal of the judge’s determination to credit his testimony. Moreover, contrary to Midwest’s claims, there is nothing “self-contradictory” about the judge’s finding that, for personal reasons, Brown declined to join the skilled list, which would have required him to appear for work or call in every day, but nevertheless presented himself for work on a regular and frequent basis. (Br. 19, 25, JA 205 & n.8.) Thus, Midwest fails to establish its defense under *Wright Line*, and it therefore does not undermine the substantial evidence supporting the Board’s finding that it unlawfully reduced Brown’s work hours in retaliation for his protected grievance activity.

C. Midwest Further Violated the Act by Denying Brown Light-Duty Work Based on His Protected Grievance Activity

Substantial evidence also supports the Board's finding that, between November 27 and December 2, 2008, Midwest denied Brown's request for light-duty work following an injury because of his protected grievance-filing activity. As shown, Midwest was well aware of his summer grievances. Likewise, Midwest could hardly deny its knowledge that Brown filed a further grievance on September 17, 2008, since Midwest responded in writing to it.

Contrary to Midwest's claims, in the absence of exceptions, the Board properly adopted the administrative law judge's finding that Brown's protected activity was a substantial factor in its adverse actions taken against him, and accordingly turned directly to Midwest's *Wright Line* defense. (JA 209, 233-34 n.1.) *See* 29 C.F.R. § 102.46(a)(1) (requiring parties before the Board to except with specificity, and noting that exceptions "not specifically urged will be deemed to have been waived").⁵

⁵ Notwithstanding Midwest's extensive quotation of its own prior submissions to the Board, it cannot identify a single statement in which it specifically challenged the administrative law judge's finding of unlawful motivation, and it does not suggest that its omission should be excused because of extraordinary circumstances. (Br. 28-30.) Accordingly, the Court lacks jurisdiction to consider any challenge to that finding. *See* 29 U.S.C. 160(e) ("No objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012)

At the time of its decision, Company Operations Director Leach told Brown, in the presence of several other employees at the shape-up, that he could not assign him light-duty work because he had spoken to his doctor, who purportedly said his injury was more serious than stated in the doctor's report he had previously submitted. As the Board found, however, Leach's statement was "demonstrably false." (JA 209.) The record contains a signed statement from Brown's doctor—which he secured shortly after the shape-up in question—denying that he had ever spoken to anyone from Midwest, and further denying that he had said Brown's work restrictions were other than those he initially documented.

In light of the patent falsehood of Midwest's asserted reason for denying light-duty work to Brown, the Board reasonably inferred that it had employed a pretext to mask its "real motivation," which was "to retaliate against Brown for engaging in the protected conduct of stating an intent to file a grievance on May 9 and actually filing a series of grievances in July, August, and September 2008." (JA 209.) This inference is entirely consistent with Board and court precedent, under which the Board may treat an employer's false explanation for an adverse action as a pretext that "shielded an illicit motive." *Southwest Merchandising*

(Section 10(e) of the Act renders court without jurisdiction to consider arguments that were not raised either in exceptions to the Board or in a motion for reconsideration).

Corp. v. NLRB, 53 F.3d 1334, 1344 (D.C. Cir. 1995); accord *Wright Line*, 251 NLRB at 1088 & n.12.

Moreover, where, as here, the Board finds that the employer’s explanation for its action was pretextual, the Board need not go any further. The finding of pretext is “a conclusive rejection of [Midwest’s] affirmative defense.” *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31-32 (D.C. Cir. 1998). As the Court has explained, if the Board finds pretext, “the employer fails as a matter of law to carry its burden at the second prong of *Wright Line*.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016).⁶

Notwithstanding the conclusiveness of this pretext finding, the Board went on to find “further support[.]” for its rejection of Midwest’s *Wright Line* defense in the admission of Operations Director Leach that it was Midwest’s usual “practice” to “assign injured employees light-duty work consistent with their restrictions.” (JA 208-09.) Midwest’s failure to follow this practice in regard to Brown—in effect, its disparate treatment of him—only serves as further circumstantial evidence that Midwest was actuated by an unlawful motive. *See Laro*

⁶ Midwest contends that the Board resorted to a finding of pretext as a “creative” way to find a violation. (Br. 26-27.) On the contrary, it is Midwest that attempts creativity by asserting that Leach denied Brown light-duty work because there was none available that would conform to his work restrictions. (Br. 26-27.) Moreover, far from offering Brown any such justification, Leach simply made up the lie discussed above.

Maintenance Corp. v. NLRB, 56 F.3d 224, 230 (D.C. Cir. 1995). There is, accordingly, ample evidence to support the Board’s finding that Midwest discriminatorily denied light-duty work to Brown, in violation of Section 8(a)(3) and (1) of the Act. And although Midwest suggests (Br. 26-29) other credibility determinations and inferences that the Board might have made, it fails to establish that the Board’s factual findings must be reversed. *See* above pp. 19-20.

II. MIDWEST HAS WAIVED NEARLY ALL CHALLENGES TO THE BOARD’S FINDINGS THAT IT VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING, COERCING, AND GRABBING EMPLOYEES

A. The Act Prohibits Employer Interference, Restraint, or Coercion of Employees in the Exercise of Their Section 7 Rights

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). In determining whether an employer has violated this provision, the question is not whether the employer’s language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate, coerce or interfere with employees in the exercise of their Section 7 rights. *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016).

B. The Board Is Entitled to Summary Enforcement of Those Portions of Its Order Remediating the Unlawful-Threat Findings, Which In Any Event Are Supported by Substantial Evidence

Applying this well-settled standard, the Board found that Midwest violated Section 8(a)(1) of the Act by: telling an employee that it would not assign work in accordance with an established seniority list because those at the top had filed unfair-labor-practice charges against Midwest; threatening an employee with discipline for filing a grievance against Midwest; and telling an employee that the Union caused him to lose overtime. (JA 209-12, 217-19.) As explained below, the Board is entitled to summary enforcement of its Order addressing these findings, given Midwest's failure to specifically challenge them. In any event, substantial evidence supports the findings.

1. Midwest has waived any challenge to the relevant Section 8(a)(1) findings

Midwest's opening brief fails to challenge the Section 8(a)(1) findings listed above. Instead, it merely makes generic claims that "the Board's rulings, findings and conclusions are irrational and arbitrary and not substantially supported by record evidence," and that the Board's Order "should not be enforced." (Br. 30-32.) Midwest also impermissibly attempts to incorporate by reference a brief that it filed before the Board "as if fully rewritten herein." (Br. 30-32.) Contrary to

Midwest's apparent belief, these statements do not preserve any claims for this Court to review.

As an initial matter, the Court does not allow litigants to incorporate by reference arguments presented before a subordinate tribunal, because that would circumvent the applicable word limit established by Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(e). *Davis v. PBGC*, 734 F.3d 1161, 1167 (D.C. Cir. 2013). Here, moreover, the Court specifically denied Midwest's motion to exceed the word limit for its opening brief. Thus, Midwest's effort to incorporate arguments by reference is doubly offensive, as it flouts not only the applicable rules establishing the word limit for principal briefs, but also this Court's specific ruling.

Once Midwest's purportedly "incorporate[d]" arguments are disregarded, all that remains are its generic claims that the Board's findings should be reversed and the Order denied enforcement. But under the Court's precedent, those statements will not be dignified as arguments warranting judicial review. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (argument raised "only summarily" in opening brief, "without explanation or reasoning," waived). Accordingly, because Midwest has effectively waived any challenge to the Section 8(a)(1) findings listed above, the Board is entitled to summary enforcement of the corresponding portions of its Order. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d

341, 347 (D.C. Cir. 2011) (granting summary enforcement where employer waived challenge to violations on appeal).

2. In any event, the record amply supports the Board's findings of unlawful threats

Affirming the judge, the Board correctly found the credited testimony of employee Miguel Rizo, Sr. establishes that Operations Manager Jones told him that he would not hire employees from the regular list because “the people at the top of the list either had charges or lawsuits filed against Midwest.” (SA 28-32.) When Rizo, Sr. filed a grievance over this discriminatory statement, Jones did not deny making it, but simply asserted that Rizo, Sr. may have misunderstood what he meant. For purposes of Section 8(a)(1), however, Rizo, Sr.’s subjective understanding of the statement is irrelevant. As the Board reasonably found, “[i]n context...Jones’ reference to ‘charges’ encompassed both the filing of grievances and unfair-labor-practice charges,” which were a known and ongoing issue for Midwest. (JA 210.) Jones’ statement had a reasonable tendency to coerce employees in the exercise of their Section 7 rights, and therefore violated Section 8(a)(1), because it conveyed that those who exercised their protected rights to file grievances and unfair-labor-practice charges would not be hired for available work. (JA 210.) *See Equitable Gas Co. v. NLRB*, 966 F.2d 861, 866 (4th Cir. 1992) (employer violates Section 8(a)(1) by threatening reprisals for filing grievances and Board charges).

Similarly, Midwest openly interfered with employee grievance activity, in violation of Section 8(a)(1), in its written denial of employee Miguel Rizo, Jr.'s August 19, 2011 grievance. As the Board found, Rizo, Jr. filed his grievance based on his good-faith belief that Midwest had violated the parties' collective-bargaining agreement in hiring non-unit employees to perform unit work. (JA 211-12.) *See Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1252 (D.C. Cir. 2012) (grievance-filing protected where based on reasonable belief that contractual violation occurred). Indeed, Rizo, Jr. conferred with a union official in advance, to ensure that he had a basis for proceeding. Nevertheless, Midwest responded by telling him that the content of his grievance—specifically, his requested remedy—violated company policy, and that he could face “additional discipline up to and including termination” for “any future conduct similar” to this grievance-related conduct. (JA 212.) The Board reasonably found that those statements unlawfully interfered with Rizo, Jr.'s protected right to file a good-faith grievance. (JA 212.) *See United States Postal Service*, 256 NLRB 78, 79-80 (1981) (threat to discipline employee for filing grievances would have the “natural and foreseeable” effect of “inhibit[ing]” the employee “from filing grievances in the future,” and therefore violated Section 8(a)(1)), *enforced in relevant part*, 689 F.2d 835 (9th Cir. 1982).

Likewise, substantial evidence supports the Board's finding that Operations Director Leach violated Section 8(a)(1) by telling employee Kevin Newcomer that

he should “blame [his] Union guy for fucking him out of his overtime.” (JA 218; SA 17-23, 69-73) The credited testimony establishes that Leach alone made the decision to cancel Newcomer’s overtime, and there was no obvious connection between his decision and any request by the Union. Accordingly, as the Board found, Leach’s sudden attribution of the overtime cancellation to the Union “would reasonably discourage Newcomer and other employees from supporting the Union and thus violated Section 8(a)(1) of the Act.” (JA 219.) *Hillhaven Corp.*, 290 NLRB 258, 258 (1988) (employer violated Section 8(a)(1) by “informing employees that benefits were lost . . . because of the [u]nion”).

C. Midwest Waived Nearly All Challenges to the Board’s Amply Supported Finding that It Violated Section 8(a)(1) by Threatening and Grabbing an Employee

Relying on credited testimony, the Board found that Operations Director Leach also threatened to remove and physically grabbed Union Steward Mark Lockett when he forcefully asserted his right to investigate a potential grievance. (JA 219-20.) *See New York Tel. Co.*, 266 NLRB 580, 582 (1983) (investigation into whether a grievance should be filed is protected activity). As the Board found, Lockett did not lose the protection of the Act by raising his voice and using some profanity. (JA 219-20.) Accordingly, Leach’s threat and physical assault in response to Lockett’s protected activity obviously interfered with the exercise of his Section 7 rights, in violation of Section 8(a)(1) of the Act.

In its brief, Midwest does little to challenge this perfectly reasonable finding. (Br. 32-33.) Instead, as with the Section 8(a)(1) violations discussed above pp. 35-36, Midwest improperly attempts to incorporate by reference its brief to the Board, adding only several statements that are conclusory at best. (Br. 32-33.) As shown, however, arguments cannot be incorporated by reference, and conclusory statements do not preserve any matter for review.

In addition, Midwest summarily claims that “Lockett lost the protection of the Act” and cites a case (*Honda of America Manufacturing, Inc.*, 334 NLRB 746, 747 (2001)), without explaining its relevance or developing any supporting argument. (Br. 33.) In doing so, Midwest effectively “leav[es] the court to do counsel’s work, [to] create the ossature for the argument, and put flesh on its bones.” *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). As this Court has stated, this will not do, and accordingly Midwest’s cursory argument must be deemed waived. *See id.*

Midwest also cursorily challenges the Board’s reliance on the credited testimony of Lockett regarding the incident in question, emphasizing that he was eventually discharged for fraud and speculating about his motivations for alleging a physical assault. Midwest, however, fails to show that the judge’s reasoned assessment of Lockett’s credibility, which he based on a detailed and corroborated account of relevant events (JA 219), must be set aside as “hopelessly incredible,

self-contradictory, or patently insupportable.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (internal quotation marks and citation omitted). Thus, Midwest fails to establish any basis for reversing the Board’s straightforward finding of coercive conduct towards Lockett.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MIDWEST VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO COMPLY WITH THE DUES-CHECKOFF PROVISION OF THE PARTIES’ MEMORANDUM OF UNDERSTANDING

A. Where Parties Have Agreed on a Term or Condition of Employment Through Collective Bargaining, the Employer Cannot Alter The Agreement Without the Union’s Consent

An employer has a statutory obligation to bargain in good faith with the representative of its employees over terms and conditions of employment, 29 U.S.C. § 158(d), and violates Section 8(a)(5) and (1) of the Act by refusing to do so, 29 U.S.C. § 158(a)(5) and (1).⁷ And Section 8(d) of the Act provides that no party is required “to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period.” 29 U.S.C. § 158(d). In other words, “[a] party is not required to rebargain that which has already been secured to him by binding past agreement.” *Chesapeake Plywood, Inc.*, 294 NLRB 201,

⁷ A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). See *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

212 (1989) (internal quotation marks and citation omitted), *enforced in relevant part*, 917 F.2d 22 (4th Cir. 1990). Thus, once an employer and a union reach an agreement on terms and conditions of employment—so-called mandatory subjects of bargaining—both sides have a statutory duty to honor it. *See Pall Corp. v. N.L.R.B.*, 275 F.3d 116, 119 (D.C. Cir. 2002).

Accordingly, if an employer “alter[s] contractual terms concerning mandatory subjects of bargaining during the life of a collective bargaining agreement[,] without the consent of the union,” it violates Section 8(a)(5) and (1) of the Act. *Id.*; accord *Chesapeake Plywood*, 294 NLRB at 201, 211-12. The prohibition on non-consensual, midterm modifications reflects Congress’ intent to “stabilize collective-bargaining agreements.” *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186 (1971); see also *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) (“Industrial stability depends, in part, upon the binding nature of collective bargaining agreements.”).

The Board has defined “modification” for Section 8(d) purposes to include “a change that has a continuing effect on a basic contractual term or condition.” *St. Vincent Hosp.*, 320 NLRB 42, 44 (1995); see also *C & S Indus., Inc.*, 158 NLRB 454, 458 (1966) (same). Such modifications include both express changes to contractual terms, *St. Vincent Hosp.*, 320 NLRB at 42, and failures to adhere to such terms so as to “effectively terminat[e]” them, *Link Corp.*, 288 NLRB No. 132,

1988 WL 213934, at *2 (1988), *enforced mem.*, 869 F.2d 1492 (6th Cir. 1989).

Indeed, even a temporary suspension of a contractual employment term can constitute a midterm modification. *E.G. & G. Rocky Flats, Inc.*, 314 NLRB 489, 497 (1994).

B. The Board Reasonably Found That Midwest Modified the Parties' Memorandum of Understanding Regarding Dues Checkoff Without the Union's Consent

The undisputed facts plainly establish that Midwest made an unlawful midterm modification of the parties' MOU entered into on May 22, 2012. In that agreement, Midwest agreed to a system of dues deductions and committed to adhere to that system “[u]ntil the [Union] and [Midwest] ratif[ied] a new local collective-bargaining agreement.” (JA 220; JA 890.) Despite this clear durational language, Midwest prematurely ceased honoring the parties' dues-checkoff agreement on January 1, 2013, even though the parties were still negotiating for a new collective-bargaining agreement. At no point, moreover, did Midwest secure the Union's consent to the cessation of dues checkoff. Accordingly, substantial evidence supports the Board's finding that Midwest unlawfully modified the MOU's terms without the Union's consent.

Before this Court, Midwest does not challenge the operative facts recited above. Instead, it claims that it “terminated” a “midterm modification” in a October 23, 2012 letter to the Union. (Br. 41.) This unclear contention is illogical

at best, as the October 23 letter announced, rather than terminated, a midterm modification (namely, Midwest's cessation of the contractually-mandated dues-checkoff provision). To the extent Midwest is suggesting that its October 23 letter terminated the MOU entirely, as shown, Section 8(d) prohibits one party to a collective-bargaining agreement from modifying the agreement absent consent of the other party. Accordingly, Midwest could not have lawfully terminated the MOU or its dues-checkoff provision by fiat on October 23, 2012.

C. The Board Did Not Violate Due Process by Finding an Unlawful Contract Modification

There is no more merit to Midwest's argument that the Board's finding of an unlawful contract modification is barred by due process because that particular theory of a Section 8(a)(5) violation was not alleged in the complaint or litigated at the hearing. (Br. 33-41.) As the lead case in this area explains, due process "does not require a precise statement of the theory upon which the General Counsel intends to proceed under the Act, with the threat that failure of precision in pleading will require the General Counsel to re-try the case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990), *cited with approval in Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). Rather, due process is satisfied where the complaint gives notice of "the acts alleged to constitute the unfair labor practice," or where unpleaded violations are nevertheless

“fully and fairly litigated.” *Pergament*, 920 F.2d at 134; *Davis Supermarkets*, 2 F.3d at 1169.

Here, the complaint gave notice of the specific act that constituted the unfair labor practice by alleging that “[o]n or about January 1, 2013, [Midwest] ceased dues checkoff for employees in the [bargaining-unit],” and by further alleging that this conduct represented a “refus[al] to bargain collectively with representatives of its employees in violation of Section 8(a)(5) of the Act.” (JA 48-49.) Midwest now argues that an intervening paragraph in the complaint misled it as to the relevant Section 8(a)(5) theory, because that paragraph alleged, not a contract modification, but a unilateral change to a mandatory subject of bargaining “without prior notice to the Union and without affording the Union an opportunity to bargain.” (Br. 35-37.) However, as already noted, the General Counsel did not have an obligation to broadcast all possible theories of Section 8(a)(5) violation in the complaint. Rather, Midwest bore the responsibility of “investigating the basis of the complaint and fashioning an explanation of events that [would] refute[] the charge of unlawful behavior.” *See Pergament*, 920 F.2d at 135.

To the extent that Midwest desired guidance as to the legal theories at play, Counsel for the General Counsel provided it in her opening statement at the hearing, when she said that Midwest had ceased deducting and remitting employees’ union dues at a time when it was “legally *and contractually bound* to

continue” doing so.⁸ (JA 249, emphasis added.) Thus, as the Board reasonably found, “the contract modification argument was clearly presented at the hearing.” (JA 199 n.2)

Midwest nevertheless argues that the General Counsel’s clear statement was insufficient in the absence of subsequent testimony about the alleged contractual commitment. (Br. 38-40.) But this argument is entirely specious. No testimony was necessary to establish Midwest’s contractual obligation because the MOU, which the General Counsel submitted into evidence, speaks for itself.

As a testament to the General Counsel’s clearly presented contract-modification argument and supporting evidence, the administrative law judge made several findings relevant to that argument, in the course of addressing Midwest’s defense that the Union had waived bargaining over the cessation of dues checkoff. *Cf. Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (considering the judge’s decision as one indication of the issues “fairly posed for resolution”). Thus, the judge found that “[b]y executing the May 22 [MOU] dealing with [the] mandatory subject of dues checkoff the parties executed a collective-bargaining agreement within the meaning of Section 8(d).” (JA 221.)

⁸ Contrary to Midwest’s claims, it is entirely appropriate for the Court, in reviewing a due process challenge, to consider statements made at the hearing. (Br. 38.) *See NLRB v. Blake Constr. Co.*, 663 F.2d 272, 281 & n.27 (D.C. Cir. 1981) (considering General Counsel’s opening statement and other statements at hearing as relevant to the issue of notice).

The judge further found that the Union did not consent to any modification of that agreement, as required for a lawful contract modification under Section 8(d). (JA 221.)

Importantly, the judge’s finding that Midwest had made a dues-checkoff commitment by entering into the MOU did not go unnoticed by Midwest. Indeed, on exceptions to the judge’s decision, Midwest specifically “contested the applicability of the memorandum of understanding.” (JA 199 n.2; JA 174.) Thus, it was entirely reasonable for the Board to consider the issue of contract modification “squarely before [it],” and Midwest cannot credibly claim that it was taken by surprise or denied adequate notice and an opportunity to respond to the straightforward contract-modification theory that the Board ultimately adopted.

IV. THE BOARD PROPERLY FOUND NO IMPEDIMENT TO THE GENERAL COUNSEL’S PROSECUTION OF THIS CASE

A. The Board Reasonably Rejected Midwest’s Laches Defense

Midwest argues that the doctrine of laches bars consideration of complaint allegations stemming from three early unfair-labor-practice charges. (Br. 41-49.)⁹ As explained below, however, Midwest failed to preserve its argument and, importantly, laches does not run against federal government agencies seeking to vindicate public rights. (JA 233 n.1.) In any event, as Midwest’s own narrative

⁹ Board Case Nos. 08-CA-038092, 08-CA-038581, and 08-CA-038627.

shows, any delay in proceeding to a consolidated hearing stems from pretrial complexities—including the General Counsel’s investigation of multiple related charges filed over a lengthy period of time, some of which were deferred to arbitration, settled or dismissed. As explained below, the Board therefore properly rejected Midwest’s laches defense.

First, although Midwest repeatedly pressed its laches claim on the Court in a prior proceeding (Nos. 15-1126 & 15-1168), the Court declined to address the merits of that argument, and in remanding the case stated only that Midwest could “raise its laches argument” before the Board. Despite this specific invitation, and the Board’s subsequent call for statements of position “with respect to the issues raised by the remand,” Midwest failed to raise any laches defense on remand. Accordingly, the Board reasonably considered any such defense to be abandoned. (JA 233 n.1.)

More fundamentally, as the Board explained, “[e]ven if [Midwest] had properly raised this defense,” it would not eliminate Midwest’s unfair-labor-practice liability “because the defense of laches does not bar action by the Board, as a federal government agency, to vindicate public rights.” (JA 233 n.1.) In so ruling, the Board appropriately relied on the settled principle that “laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.” *Utah Power & Light Co. v.*

United States, 243 U.S. 389, 409 (1917); accord *Illinois Cent. R.R. Co. v. Rogers*, 253 F.2d 349, 353 (D.C.Cir.1958) (“No rule is better established than that the United States are not bound by limitations or barred by laches where they are asserting a public right.” (internal quotation marks omitted)).¹⁰ Midwest does not, and cannot, cite any authority to support its suggested limitation on this settled principle, which would effectively bar the General Counsel from vindicating the public rights encompassed in the Act and implicated in the subject charges. See generally *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959) (noting that the machinery of the Board exists “not to adjudicate private controversies” but to “protect[] public rights” and “advance the public interest in eliminating obstructions to interstate commerce”).

Midwest questions this principle by noting that one of the cases cited by the Board—*J.H. Rutter-Rex Manufacturing Company*, 396 U.S. 258 (1969)—involved a backpay determination, which is not at issue here. (Br. 47.) But this is a distinction without a difference. As shown above, *J.H. Rutter-Rex* is simply one of many cases applying the settled principle that laches does not run against the government.

¹⁰ See also *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (it is “well settled that the United States is not...subject to the defense of laches in enforcing its rights”); *United States v. Dalles Military Road Co.*, 140 U.S. 599, 632 (1891) (“the defenses of stale claim and laches cannot be set up against the government”).

In any event, by Midwest's own account, litigation complexities played a large part in the lengthy procedural history of this case. Specifically, as Midwest acknowledges, the General Counsel received and processed a number of related unfair-labor-practice charges while the three charges at issue were pending. (Br. 41-43.) In addition, as Midwest is well aware, there were intervening efforts to resolve some of the charges through deferral to the parties' contractual arbitration process and settlement. *See Hammtree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (explaining that deferral to arbitration delays complaint processing). And still other allegations were dismissed following investigation by the General Counsel. Thus, the time it took to process the initial three charges cannot be attributed to any dereliction on the General Counsel's part, and it can hardly be said that he slept on public rights protected by the Act. *See generally Menominee Indian Tribe of Wisconsin v. U.S.*, 614 F.3d 519, 531 (D.C. Cir. 2010) ("The equitable defense of laches is designed to promote diligence and prevent enforcement of stale claims by those who have slumber[ed] on their rights." (internal quotation marks and citations omitted)).

Further, Midwest fails to show that the General Counsel's handling of the first three charges "precluded" it from mounting an effective defense. Midwest speculates that if the General Counsel had tried those allegations sooner, its former Vice President of Operations, Tim Jones, could have testified about two charges

(08-CA-038581 and 08-CA-038627) alleging unlawful statements and conduct by him. (Br. 44-45.) But, as Midwest acknowledges, Jones left Midwest's employ months before those charges were even filed. (Br. 41-42, 45-46.) Accordingly, it is not at all clear that Midwest was "precluded" from producing Jones as a witness because of any hearing postponement. Midwest likewise fails to show that the unavailability of another potential witness at the time of the hearing (John Staler) "precluded" it from presenting an effective defense to the remaining early unfair-labor-practice charge (08-CA-038092). Instead, Midwest merely suggests that Staler "might have been able to testify" about Midwest's hiring practices in 2008. (Br. 46-47.) But Midwest already had at least one other witness and voluminous documentary evidence on that point, so his unavailability did not prevent Midwest from defending itself. Midwest's speculative claims, thus, do not establish a predicate for the defense of laches, even if it could bar an action by the Board's General Counsel to vindicate public rights, which it could not.

B. The Board Properly Permitted the General Counsel To Proceed on a Ratified Complaint

To no avail, Midwest claims (Br. 49-51) that the underlying complaint issued by Acting General Counsel Solomon remains somehow "unauthorized," despite General Counsel Griffin's ratification. To the contrary, Midwest has presented no argument that would call the validity of the ratification into question.

As noted (p. 4), this case was previously before the Court (No. 15-1126), and remanded to the Board after the Supreme Court issued *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015). Exercising his statutory prerogative, General Counsel Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice of ratification stating that, “[a]fter appropriate review and consultation with [] staff,” he had “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.” (JA 233.)¹¹

The General Counsel’s ratification is consistent with this Court’s precedent, upholding ratification as valid where “a properly appointed official has the power to conduct an independent evaluation of the merits and does so.” *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015), which in turn cites, among other cases, *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)).

¹¹ This Court recognized in *SW General* that the Board’s General Counsel is one of only several officers expressly exempted from the FVRA’s “void-ab-initio” and “no-ratification” provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e), and assuming that Sec. 3348(e) “renders the actions of an improperly serving Acting General Counsel *voidable*, not void”) (original emphasis)). The Supreme Court acknowledged that proposition, but did not address it because the issue was not presented, 137 S. Ct. at 938 n.2, and therefore it remains the law of this Circuit.

That is exactly the case here. And Midwest has not shown, or even alleged, as required, that the General Counsel “failed to make a detached and considered judgment,” or that it “suffered any ‘continuing prejudice’ from the violation.” *Id.* at 372 (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 708-09 (D.C. Cir. 1996)); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) (noting that a “strong presumption of regularity” applies to the actions of administrative officials, including the Board’s General Counsel (citation omitted)); *accord 1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App’x 129, 137 (3d Cir. 2017) (a party can overcome the “presumption of regularity” that applies to a public official’s action only by showing “clear evidence” of an irregularity). Thus, the Court should, as it has done previously, “take his ratification ‘at face value and treat it as an adequate remedy.’” *Wilkes-Barre*, 857 F.3d at 372 (quoting *Legi-Tech*, 75 F.3d at 709) (holding that the Board’s ratification of the appointment of a regional director, who was appointed when the Board lacked a quorum, “remedied any defect arising from the quorum violation”).¹² Indeed, on the basis of such principles, the Third Circuit rejected a similar challenge to General Counsel

¹² See *G&R Corp. v. Am. Sec. & Trust Co.*, 523 F.2d 1164, 1172 (D.C. Cir. 1975) (“the subsequent ratification relates back and provides original authorization for the unauthorized act”); *accord Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (ratification generally “‘relates back’ in time to the date of the act by the agent”).

Griffin's ratification of a complaint issued initially by Acting General Counsel Solomon. *See 1621 Route 22*, 725 F. App'x at 137.

Citing no support, Midwest argues that the ratification was invalid because it occurred "after [] the case ha[d] been decided." (Br. 49.) But that claim is based on a factual inaccuracy. As Midwest acknowledges (Br. 49), the General Counsel issued his notice of ratification *after* the Court vacated the Board's 2015 decision and remanded the case for further proceedings, and *prior* to the Board's decision now under review. Indeed, in remanding the case, the Court granted the Board's motion that explicitly requested remand in part to "enable the current General Counsel to consider ratification or other appropriate action under the FVRA, and the Board to consider the effect of any action taken by the General Counsel." Motion for Remand, D.C. Cir. No. 15-1126, Dkt. # 1668223 (Mar. 28, 2015).

Having failed to establish any basis for rejecting the General Counsel's ratification, Midwest returns to its attacks on the Court's antecedent remand of the case to the Board. (*See* Br. 50-51.) But Midwest fought that battle, and the Court definitively rejected its argument. *See Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 2017 WL 5662235 (D.C. Cir.) (order denying motion to recall mandate), *reh'g en banc denied* (2017), and *cert denied*, 138 S. Ct. 1181 (2018).

CONCLUSION

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

/s/ Julie B. Broido
JULIE B. BROIDO
Supervisory Attorney

/s/ Milakshmi V. Rajapakse
MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2996
(202) 273-2914

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2018

H:/Midwest I-final brief-jbmr

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

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	Nos. 18-1017 & 18-1049
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CA-038092 et al.
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,625 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

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

Dated at Washington, D.C.
this 25th day of July 2018

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

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	Nos. 18-1017 & 18-1049
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CA-038092 et al.
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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 parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Ronald L. Mason, Esq.
Aaron T. Tulencik, Esq.
Mason Law Firm Co., L.P.A.
P.O. Box 398
Dublin, OH 43017

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

Dated at Washington, D.C.
this 25th day of July 2018

ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):**

Sec. 7. [§ 157.] 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 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 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (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 7 [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: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

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

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Sec. 10. [§ 160.] (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 8 [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 predominately 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 Act [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 proceeding, as provided in section 2112 of title 28, United States Code [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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the

Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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 court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Federal Vacancies Reform Act
5 U.S.C. §§ 3345, et. seq.

Section 3348. (a) In this section—

(1) the term “action” includes any agency action as defined under [section 551\(13\)](#); and

(2) the term “function or duty” means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with [sections 3345, 3346, and 3347](#), if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under [section 3346](#) is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under [section 3345, 3346, or 3347](#), or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and [sections 3346, 3347, 3349, 3349a, 3349b, and 3349c](#) apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.