

**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**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	Nos. 17-1238 & 18-1094
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CA-119493
)	08-CA-119535
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-119493 and 08-CA-119535). The Board’s General Counsel was a party before the Board. Prentis Hubbard and International Longshoremen’s Association, Local 1982, 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. 158.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court.

The parties are involved in two separate unfair-labor-practice cases currently pending before the Court: *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (reviewing 365 NLRB No. 157), and *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 17-1239 & 18-1093 (reviewing 365 NLRB No. 159). The Court has ordered that these cases, and the instant case (Nos. 17-1238 & 18-1094), will be calendared for oral argument on the same day before the same panel.

/s/ Linda Dreeben _____

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Dated at Washington, D.C.
this 30th day of July 2018

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

GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	Midwest’s Opening Brief
“ILA”	International Longshoremen’s Association
“JA”	Joint Appendix
“Midwest”	Midwest Terminals of Toledo, International, Inc.
“NCCCO”	National Commission for the Certification of Crane Operators
“SA”	Supplemental Appendix
“Teamsters”	Teamsters Local 20
“the Union”	International Longshoremen’s Association and its Local 1982

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Midwest Terminals of Toledo International, Inc. (“Midwest”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Decision and Order issued against Midwest on December 15, 2017, and reported at 365 NLRB

No. 158. (JA 75-111).¹ The petition and the cross-application are timely because the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. § 151, et seq.) imposes no time limitation for such filings.

The Board had jurisdiction over the proceeding below under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction because the Board’s Order is final, and venue is proper under Section 10 (f) of the Act (29 U.S.C. § 160 (f)), which provides that petitions for review may be filed in this Court, and, in turn, that the Board may cross-apply for enforcement.

¹ “JA” refers to the Joint Appendix. “SA” refers to the Supplemental Appendix filed with this brief. “Br.” refers to Midwest’s Brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's findings that Midwest violated Section 8(a)(5) and (1) of the Act by changing mandatory terms and conditions of employment without bargaining with the Union when it changed the availability of informal crane training for employees, deprived them of their work in the transfer of aluminum, and reassigned the unloading of calcium to non-unit employees represented by the Teamsters.

2. Whether substantial evidence supports the Board's findings that Midwest violated Sections 8(a)(3), (4), and (1) of the Act by discharging local union president Otis Brown for engaging in union activity and participating in Board processes.

3. Whether the Board is entitled to summary enforcement of those portions of its Order remedying its findings that Midwest violated Section 8(a)(1) of the Act by threatening local union vice-president and steward Prentis Hubbard, and violated Sections 8(a)(3), (4), (5), and (1) of the Act by denying Hubbard pay because he engaged in union activity and participated in Board processes.

RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following the investigation of timely charges, the Board's Regional Director issued complaint on behalf of the General Counsel alleging that Midwest committed numerous unfair labor practices. Following a hearing, an administrative law judge issued a decision and recommended order finding many of the alleged violations. Specifically, the judge found that Midwest violated Sections 8(a)(5) and (1) of the Act by unilaterally changing informal crane training procedures and its processes for transferring aluminum and unloading calcium. The judge further found that Midwest violated Sections 8(a)(3), (4), and (1) of the Act by discharging union president Otis Brown for engaging in union activity and participating in Board processes. In addition, the judge found that Midwest violated Section 8(a)(1) of the Act by threatening union vice-president and steward Prentis Hubbard, and violated Sections 8(a)(3), (4), (5), and (1) of the Act by denying Hubbard pay because he engaged in union activity and participated in Board processes. The judge dismissed the remaining allegations. On review, the Board affirmed the judge's findings with some modification.

II. THE BOARD'S FINDINGS OF FACT

A. Background

1. Midwest's operations and bargaining relationships

Midwest provides stevedoring and warehousing services at the Port of Toledo in Toledo, Ohio. Its employees load and unload cargo vessels, railcars, and trucks, and move cargo to and from warehouses. (JA83; JA758.)

Midwest and its predecessors at the port facility have a decades-long bargaining history with the International Longshoremen's Association ("ILA"), and its Local 1982 ("Local 1982," or "the Union"). (JA83; JA330,757.) The most recent collective-bargaining agreement between Midwest and Local 1982 covered the period from January 2006 to December 2010, and continued in effect at the time of the events in this case. (JA83; JA720,757.) Midwest also has a separate bargaining relationship with a unit of employees represented by Teamsters Local 20 ("the Teamsters"). (JA83; JA330.)

Generally, employees represented by Local 1982 perform stevedoring and warehouse work on the "wet side" of Midwest's facility, which runs along the Maumee River, where vessels dock in order to be loaded or unloaded. (JA83;

JA422-423.) Those employees operate a variety of equipment, including forklifts, end loaders,² and cranes. (JA83; JA758.)

In turn, employees represented by the Teamsters perform warehouse work on the “dry side” of the facility, which does not abut the Maumee River. (JA83; JA422,646-648.) The dry side is separated from the wet side by a road that runs through the property. There are six warehouses at the facility, three on the wet side and three on the dry side. (JA83; JA646-653.)

2. Midwest’s history of discriminating against Otis Brown, who became Local 1982 President in August 2012

Otis Brown began working at the facility in 2004, and quickly qualified to be placed on the “skilled” list. Only a small minority of employees ever qualify to be on the skilled list, which enables them to work more hours than others. (JA103; JA364-366,384,406.) Over the years, Brown qualified as a “signalman,” rigger, crane operator, checker, forklift operator, and end loader operator. He was also qualified in fall protection. As such, Brown was qualified in the highest number of areas of any employee. Brown’s tenure was also marked by active participation in Local 1982, and he filed numerous grievances and Board charges. (JA104; SA5-6.)

² An end loader is a heavy equipment machine used to move or load materials with a bucket. (JA444; SA1.)

Midwest and Local 1982 were involved in an earlier unfair-labor-practice case involving Brown, which culminated in the Board's decision in *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 157 (2017), *pending on review*, D.C. Cir. Nos. 18-1017 and 18-1049 ("*Midwest I*"). In *Midwest I*, the Board found that Midwest committed numerous unfair labor practices, including discriminating against Brown in the summer and fall of 2008 by denying him regular and light duty work because of his union activity. In that decision, the Board determined based on the credited evidence that Director of Operations Terry Leach had lied to Brown as to the reason he denied him light duty work, finding it pretext for unlawful discrimination. Among other findings, the Board also found that in 2012, Leach physically assaulted another employee, Mark Lockett, because of Lockett's union activity. (JA 104; JA742).

In August 2012, Brown became the president of Local 1982. As president, he also served as the Union's chief contract negotiator, chairman of the safety committee, and representative for grievance processing. (JA83; JA363.)

B. Midwest Makes Three Changes to Employees' Work in 2013

1. Midwest's summer 2013 changes to informal crane training procedures

(a) Midwest's past practice

The parties' most recent collective-bargaining agreement provides for crane operator training. It states, in relevant part:

Midwest will man the crane operator's position as work opportunities warrant both in terms of seniority and in terms of work availability. When such conditions warrant, a crane operator trainee will be placed in the crane along with the crane operator for purposes of training.

(JA87; JA781.)

The parties refer to the informal training as "seat time." In 2010, Midwest began using two new, more modern mobile cranes, called Liebherr cranes, owned by the Port of Toledo. Midwest then began requiring formal crane training through an outside organization to prepare employees to be certified by the National Commission for the Certification of Crane Operators ("NCCCO"). (JA88; JA1048.) Between 2010 and 2013, a number of Local 1982 members attended formal training and became NCCCO-certified. Three of these employees—Brown, Randy Baumert, and Kevin Newcomer—were allowed to have informal seat time training on the new cranes, and to operate them, without first receiving certification. (JA88; JA139,143,191-197,367-377.)

(b) In early June 2013, Leach asks Brown to suggest two employees for crane training; Brown states the Union seeks informal crane training first and further discussion

On June 5, 2013, Leach approached Brown about sending two unit employees to a formal, third-party training for NCCCO certification. Leach wanted the employees to begin in July. (JA76; JA391-397.) Brown told Leach that he "got the guys, they're ready to go," but he expressed concern that

employees would be set up for failure if they were required to attend the formal crane training program without first getting informal seat time on the new cranes. (JA76; JA396.) Brown stated that the training committees “need to sit down and work out something to get these guys some seat time.” (JA76; JA397.) Shortly after the June 5 conversation, Brown e-mailed Leach and asked when they could meet. (JA76; JA398.) He also tried to call Leach to set up a meeting. (JA76; JA400.)

(c) Throughout June 2013, Brown asks for informal crane training; Leach states employees must attend formal training without prior informal training and ignores Brown’s further entreaties

On June 14, after not receiving a response to his earlier requests to meet with Leach, Brown sent Company Human Resources Manager Christopher Blakely a letter. Brown explained that the Union could not agree to the July date for crane training because the trainees needed seat time before they attended. Brown ended the letter by stating that “once again I am hereby asking Midwest when our training committees can meet to work out the details for this crane training program. Please, let me know as soon as possible.” (JA76; JA1044.)

In late June, Leach again approached Brown about enrolling employees in the July training session. Brown reminded Leach that they had discussed the need to first provide the employees with seat time and he requested that they “sit down and work this out about the seat time . . . that we had talked about.” (JA76;

JA403.) Leach replied that the crane school preferred that the employees have no experience that might “taint their minds.” (JA76; JA403.) Brown disagreed and suggested that they have a conference call with the crane school to discuss it. However, Leach, who was in his truck, ended the conversation by abruptly driving away. (JA76; JA403.) Even after Leach brushed Brown off and drove away, Brown continued to contact Leach to discuss seat time before training, but Leach ignored his efforts. (JA76; JA404.)

2. Midwest’s summer 2013 changes to its aluminum transfer procedures

(a) Midwest’s past practice

For many years, when barges carrying aluminum docked at the facility, Local 1982-represented employees unloaded the aluminum and staged it on the wet side of the dock. From 2004 to August 2013, the established practice was that transfer trucks transported the aluminum staged on the wet side to warehouses on the dry side. Local 1982-represented employees loaded the trucks using forklifts, but other employees drove the trucks. During some period of time before 2010, Teamsters-represented employees drove the transfer trucks that had been loaded by Local 1982 members. From 2010 forward, the transfer trucks were driven by employees of a third-party trucking company. (JA84; JA149-150,223-231, 478,743-753.)

(b) In June 2013, Midwest orders Teamsters to drive forklifts onto the wet side and load aluminum; Local 1982 stops work in protest; Leach angrily responds

On June 1, 2013, Midwest ordered Teamsters-represented employees to drive forklifts to the wet side of the dock to pick up and move aluminum to the dry side of the dock. Local 1982 employees immediately challenged that action, which deprived them of their work loading the aluminum onto the transfer trucks before transport to the dry side. Local 1982 employees then stopped staging the aluminum where the Teamsters employees could reach it on their forklifts. (JA 84-85; JA219-231.)

That same day, three Local 1982 members—Local 1982 Vice-President and steward Prentis Hubbard, Fred Victorian Jr., and Russell Sims—met with Leach. Leach told them that one month earlier, on April 30, the Board had made a decision under Section 10(k) of the Act that Leach asserted awarded the Teamsters, rather than Local 1982, the work of picking up the aluminum from the wet side on forklifts.³ Hubbard contradicted that, stating that in the 10(k) decision, the Board ruled that the Teamsters could only transport the aluminum consistent with the past practice of using trucks loaded on the wet side by Local 1982-represented employees. (JA85; JA226-227.) Victorian seconded Hubbard’s position, and the

³ Section 10(k) of the Act empowers the Board, in certain situations, to “hear and determine” a dispute between two unions claiming the same work of an employer. 29 U.S.C. §160(k). The Section 10(k) decision referenced above is reported at 359 NLRB 983 (2013).

conversation between Hubbard and Leach became heated. Leach held his thumb and index finger close together and told Victorian, “I’m about this far off your ass.” (JA85; JA227.) Eventually, Leach told Hubbard that Local 1982 members should go back to work and he directed the Teamsters-represented employees to stop using forklifts to retrieve aluminum from the wet side of the facility. (JA84-85; JA219-231.)

(c) In August 2013, Leach tells Local 1982 that Midwest is again going to have Teamsters drive to the wet side and load aluminum; Local 1982 protests again

On August 5, Leach informed Hubbard that Teamsters-represented employees would be driving to the wet side on forklifts that day to pick up and move aluminum. Hubbard again challenged Leach about this change, which deprived Local 1982 members of their work in loading the aluminum before transport to the dry side. (JA85; JA219-231.)

Subsequently, Hubbard talked to Brown, who told Hubbard to have Local 1982 employees gather where the Teamsters-represented employees were driving forklifts onto the wet side. Local 1982 members blocked the path of the Teamsters members, and one of them urged the Teamsters not to “come over here and start no shit.” (JA85; JA232.) Leach and Brown both arrived at the scene, and Brown stated to Leach, “you can’t have them coming over here taking our stuff.” (JA85; JA232.) Leach showed Brown a copy of the Board’s decision in the Section 10(k)

case, and asserted that the decision provided that the Teamsters employees could enter the wet side on forklifts to retrieve the aluminum. Brown disputed Leach's claim about the decision, and eventually Leach said, "It's going to stop now. Y'all go on back to work." (JA85; JA234.) Local 1982 members resumed their normal duties. On August 10, Teamsters members again moved material from the wet side using forklifts, and have continued to do so. (JA85; JA235.)

3. Midwest's fall 2013 changes to its calcium unloading procedures

Prior to the fall of 2013, Midwest's practice was for Local 1982 members to unload calcium cargo from barges on the dock. They then loaded it onto trucks that transported it exclusively to Local 1982-serviced warehouses where Local 1982 members unloaded it. (JA86; JA122-126,451-453.)

In November 2013, Local 1982 members observed that trucks were moving calcium to Teamsters-serviced warehouses rather than to the Local 1982-serviced warehouses, as they had done before. The Teamsters then unloaded the trucks on the dry side of the dock and loaded calcium into their warehouse, depriving Local 1982 members of their previous work unloading the calcium into Local 1982-serviced warehouses. (JA86; JA122-130.)

C. After Hubbard's Workplace Injury in August 2013, Midwest Threatens Him Regarding Grievances and Board Charges He Filed and Does Not Pay Him for Hours He Lost

On August 10, 2013, Hubbard's shift began around 6:00 p.m., continued overnight, and was extended through much of August 11. (JA93; JA235-236.) At the shift's start, Midwest told employees that it would likely continue past 6:00 a.m., when it would normally be expected to end. (JA93; JA237.) The employees who accepted the assignment agreed to continue until the work was completed and worked for almost 24 hours straight. (JA93; JA411-412,1371.)

On August 11 at about 2:45 a.m., Hubbard fell and injured his legs while working. He followed Midwest's policy to initiate an incident report, but the acting supervisor told him that he would have to wait until supervisor Brad Hendricks arrived at the facility. At about 5:45 a.m., Hendricks arrived and Hubbard got the necessary incident report forms from him. Hendricks photographed Hubbard's injured lower legs. (JA93; JA237-242.)

Hubbard left the facility and, on his way home, called Brown. Brown urged Hubbard to go to a hospital emergency room. The hospital staff took x-rays of Hubbard's legs and told him to follow up with his own doctor. (JA244-245.)

The next morning, August 12, Hubbard scheduled an appointment with his doctor's office, which encouraged him to obtain a worker's compensation number for his injury. Hubbard called Corporate Human Resources Director Lauri Justen

to do so. She told him that she was working on getting it and he should call again in an hour. (JA94; JA246-247.) Hubbard then called Blakely who said that he had not had a chance to work on the incident report, stating, “Well, Prentis, you know all these charges and stuff that—you done filed grievances and charges. You done filed, I guess . . . with the NLRB against us. I just been too busy working on those.” (JA94; JA247.)⁴

The collective-bargaining agreement provides, in relevant part, “An employee who is injured on the job shall be paid for the hours he would have worked on that day had he not been injured.” (JA95; JA778.) In addition, Midwest’s practice was to pay injured employees who went to the hospital for hours they would have worked if not for their injury. (JA95; JA418-419.) Although the employees on Hubbard’s shift that day were paid for almost 24 hours, Midwest only paid Hubbard for the 12 hours he worked prior to leaving the facility. (JA95; JA249-250.)

⁴ On June 27, Hubbard had filed an unfair-labor-practice charge against Midwest alleging that it had discriminatorily failed to pay him for time engaging in union steward activities. (JA93; JA1040.)

D. About Six Weeks After Brown Finishes Testifying in *Midwest I* in Summer 2013, Midwest Discharges Him, Ostensibly For Damaging An End Loader

1. In summer 2013, Brown testifies for multiple days at the unfair-labor-practice hearing in *Midwest I*

From June 10-14, and on August 21, 2013, Midwest and Local 1982 participated in the unfair-labor-practice hearing held before an administrative law judge that culminated in the Board's decision and order in *Midwest I*.

(JA104,107.) Brown was present throughout the hearing as a party representative and testified on behalf of himself and the Union. (JA104; SA7.)

2. Brown's operation of an end loader on the September 19-20 overnight shift

Since September 15, 2013, an end loader known as the "3-Kawasaki" had been operated around-the-clock. Ralph Lieby operated it during the day shift on September 19. During an overnight shift from September 19-20, Brown operated it to pick up coke and coal from a pile and move it to a dumping location. (JA104; JA437.) That night, Christopher Fussell, who was doing the same work as Brown on a different end loader, followed behind Brown as the two went back and forth between the pile and the dumping location. (JA104; JA145.)

For most of the shift, Brown did not experience any problems with the 3-Kawasaki. Nor did he ride the 3-Kawasaki's brakes during that shift. Had he done so, he would have slowed the work unreasonably and brake lights would have been

clearly visible from the outside of the 3-Kawasaki. Fussell did not observe any slowdown or brake lights during this shift while he was following behind Brown. (JA104; JA145-146.)

Charles Moody, the supervisor on that night shift, communicated with Brown and Fussell via radio. During the shift, Moody sometimes approached Brown and Fussell while they were on their end loaders in order to talk with them in person with the last time occurring about midnight. Moody did not notice anything that would suggest a problem with the 3-Kawasaki's brakes, nor did he observe Brown operating it in an improper manner. (JA104; JA446-449, 493-494.)

Towards the end of Brown's shift, a warning light was triggered in the 3-Kawasaki and stayed lit. Brown was not familiar with the particular warning light. Brown also noticed a buzzing sound. He stopped the 3-Kawasaki, called Moody on the radio, and told him that a sensor had been triggered on it. Moody told Brown to take 3-Kawasaki to the maintenance shop. Brown did so. (JA104; SA8, JA450.)

3. The next morning, Hendricks and Leach look at the 3-Kawasaki; Leach calls outside contractor, Reco, to inspect it

When Hendricks arrived at work the next morning, a maintenance employee advised him that there was a problem with 3-Kawasaki. Hendricks observed the warning light, a burning odor, and heat "coming off" of it. (JA104; JA507-508.)

When Leach arrived, Hendricks informed him of the problem. Leach could "smell

the brakes” on 3-Kawasaki and observed heat-related discoloration to parts of the brakes on closer inspection. (JA104; JA689-690.)

Leach did not know whether anyone had moved the 3-Kawasaki after Brown brought it to maintenance the night before. (JA104; JA721.) Leach told Hendricks not to let anyone else move the end loader until a representative arrived from the outside contractor, Reco Equipment, Inc. (“Reco”), that Midwest used to do major repairs to Kawasaki end loaders. (JA104-105; JA355-356.)

4. Leach asks Reco mechanic Groweg to assess the 3-Kawasaki; upon a request from Midwest’s maintenance department, Groweg adds information about operator error to his service report

Later on September 20—the same day the damage was discovered—Robert Groweg, a heavy equipment mechanic from Reco with 23 years’ experience, arrived at the facility. Leach asked Groweg to do a full assessment of what was wrong with the 3-Kawasaki. (JA104; JA517-522.) At this point, Leach already thought that the damage was the result of “inattentive operating” by Brown, but he wanted this conclusion to come from Reco, rather than from himself, because he was concerned that he would be accused of discriminating against Brown. (JA 105; JA698.) Leach had no further conversation with Groweg about the matter. (JA 105; JA538-539.) Leach did, however, discuss the situation and Groweg’s assignment with Laverne Jones, an employee in the maintenance department. (JA 105; SA3-4.)

That same day, September 20, Groweg did an initial examination of the 3-Kawasaki. The damage he observed went well beyond normal wear and tear and eventually required approximately \$25,000 in repairs. Also that day, Jones asked Groweg what was wrong with the 3-Kawasaki. (JA105; JA522-523.) Groweg told Jones that he had not found anything mechanically wrong that would explain the damage. In response to Jones' questioning, Groweg stated that the "only thing that could be left is if an operator was resting his foot on the brake pedal when they were running it." (JA105; JA523.) Groweg also told Jones that it could have been unintentionally done by the operator. (JA105; JA553-555.)

Jones asked Groweg to put information in the service report about operator error. Midwest had never asked Groweg to include such a statement in a service report before. Groweg did so in this case because of Jones' request. (JA105; JA522-523,541.) Groweg's single-page service report stated at the very end, "Problem was do [sic] to operator not using machine properly." (JA105; JA1135.) Groweg did not talk to Brown or any other operator, nor did he complete a full inspection, before making this initial report. (JA105; JA538-539.)

5. Seven days later, Leach asks Brown about the 3-Kawasaki and requests a written statement; Brown agrees to give him a statement when they next met, which never occurred

On Friday, September 27—7 days after Midwest discovered the damage to the 3-Kawasaki—Leach approached Brown about the damage for the first time.

Leach said, “Tell me what happened to the end loader.” Brown did not understand what Leach’s question referred to since he had recently operated three or four different end loaders, and had not operated the 3-Kawasaki since September 20. Leach eventually revealed that he was talking about the 3-Kawasaki and said, “I want to know what you did to it.” Brown replied, “I didn’t do nothing to it. What’s wrong with it?” Leach told Brown, “Tell me anything that might have . . . happened to it.” Brown related that Leiby had mentioned concerns about the transmission. Leach said, “I ain’t talking about the transmission. The brakes.” Leach said he wanted Brown to give him a written statement regarding “everything that happened.” Brown said that he would give a statement when they could meet and Leach could explain what he was asking about. Leach said, “Okay. We’ll probably meet on Monday.” Leach, however, did not attempt to meet with Brown on Monday (September 30). (JA105; JA429-431.)

6. Leach discharges Brown and denies his step one grievance

On Tuesday October 1, Leach gave Brown a letter terminating his employment. (JA106; JA425.) The letter was signed by Leach and stated, in relevant part:

After completing the investigation for equipment abuse and misuse, it is my duty to inform you that your employment with Midwest Terminals of Toledo International, Inc. is terminated effective immediately.

(JA106; JA1045.)

No investigative report or documentation was attached. When Brown read the letter, he asked, “Where is the investigation? Where is the documentation?” Leach answered, “You have what you need in front of you. I will tell you right now, verbally, that we are already at \$20,000.” (JA106; JA425-426,1046.)

The primary basis for Leach’s decision was the one-page initial report that Groweg completed on September 20. Leach never spoke to Groweg about that report. Although Leach talked to Leiby and Hendricks, he did not memorialize these conversations in writing. He also did not interview Fussell or Moody, who had both observed Brown operating the 3-Kawasaki throughout the September 19–20 shift. (JA 106; JA698-699,716,721.) Brown asked for a Step One grievance meeting, which they scheduled for October 3. (JA106; JA1046.)⁵ On October 3, Leach stated that Brown had caused damage by “riding the brakes.” Brown told Leach that he had not been riding the brakes. (JA106; JA426.) Leach responded: “the Union wants [Brown] reinstated. That is not going to happen.” (JA106; JA1532.)

7. Groweg’s subsequent inspection reports indicate the 3-Kawasaki’s transmission malfunctioned and brake pressure switch was broken when Brown operated it

After his initial report, Groweg completed 12 more service reports on the 3-Kawasaki. Among his findings, he discovered that the 3-Kawasaki’s “transmission

⁵ The parties’ practice was to hold Step One meetings prior to the filing of a written grievance. (JA 954.)

disconnect” was not working at the time Brown was operating it, compromising a mechanism that was to ensure that the “transmission is not trying to pull through the brakes when you’re raising the loader.” (JA108; JA525-526,529-530.) He also concluded that at the time Brown was operating the 3-Kawasaki, its brake pressure switch was broken. (JA108; JA531.) On October 4, he memorialized in a report that the transmission disconnect failed to operate and the brake pressure switch was “bad.” Leach never spoke to Groweg about these subsequent reports. (JA108; JA531,538,SA2.)

On October 9, Brown filed a formal, written grievance. On October 16, Midwest denied the grievance at Step Two, referring back to the reasons in the termination letter. (JA106; JA954.)

8. Midwest’s policies and discipline regarding equipment damage

Midwest had a policy called “Equipment Abuse & Misuse Policy #3050” under which it claims (Br. 6) it discharged Brown. (JA106; JA1046.) That policy classifies “hard breaking” [sic] as a Level I offense, “excessive hard breaking” [sic] as a Level II offense, and “brake system damage due to hard breaking” [sic] as a Level III offense. For Level III offenses, termination is generally not a possibility until the second offense, however, it may result from “equipment damage and facility damage over \$500.” (JA106; JA798-799.) Midwest also had “Equipment Policy #3000,” which provides that “damage to any piece of

equipment, facility, or property,” or “mistreatment of equipment” may result in termination in the case of first offense, and “will result in termination in the case of a second offense.” (JA106; JA795-796.)

Midwest has given many other employees penalties short of termination under the above policies. (Br. 22-24; JA106-107; JA924,927,930, 933,935, 939,941,951,1244,1330,1332,1334,1336). In one example, Midwest issued Moody only a written reprimand for causing over \$28,000 of damage by running a forklift into a transformer. (JA106; JA1275.)

In the past, Midwest had discharged another employee, J. Victorian Sr. for damaging equipment, after multiple previous incidents under Midwest’s progressive disciplinary policy. Those earlier incidents included causing over \$55,000 damage to a new end loader in June 2012, for which he was only suspended. (JA106; JA141-142,1154,1262.) Six months before that, he damaged barrier poles and end lines while operating an end loader. (JA106; JA1321.) He was finally discharged in August 2013, in a letter citing Midwest’s progressive discipline policy, after colliding with the main support beam in the largest warehouse at the facility and causing over \$6800 in repairs. (JA107; JA1336-1338.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Miscimarra and Members Pearce and McFerran) found (JA 75-79), in agreement with the administrative law judge, that Midwest violated Section 8(a)(5) and (1) of the Act by making three unilateral changes. Specifically, the Board found that Midwest altered mandatory terms and conditions of employment without bargaining with the Union when it changed the availability of informal crane training for employees (Miscimarra dissenting), and deprived unit employees of their work transferring aluminum and unloading calcium, by reassigning it to Teamster-represented employees. Regarding the unilateral change to the transfer of aluminum, the Board stated (JA 75 n.1) that the Section 10(k) decision that Midwest relied on “provides no support” to justify that unilateral action.⁶

In addition, the Board upheld the judge's findings that Midwest violated Sections 8(a)(3), (4), and (1) of the Act by discharging Brown for his union and Board activities. (JA 75, 107-109.) The Board also agreed with the judge that Midwest violated Section 8(a)(1) of the Act by threatening Hubbard. (JA 75, 94-96.) The Board further upheld the judge's findings that Midwest violated Sections

⁶ The Board also observed (JA 75 n.1) that the Section 10(k) determination was invalidated under the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), but neither party had argued that it was not binding on the parties to that dispute.

8(a)(3) and (4) of the Act by denying Hubbard pay because of his union activity and his participation in Board processes, and violated Section 8(a)(5) and (1) by unilaterally changing its past practice of paying employees for time missed because of a work injury.⁷ (JA 75, 95-96.) The Board's Order requires Midwest to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their statutory rights. (JA 78.)

Affirmatively, the Order requires Midwest, upon request, to bargain with the Union before making any changes to the employees' terms and conditions of employment, to rescind its unilateral changes, and to make employees whole for any losses suffered as a result of the unlawful unilateral changes. (JA 78-79.) In addition, the Board ordered Midwest to make Hubbard whole for the loss of earnings he suffered, and to reinstate Brown and make him whole. (JA 79.) Finally, Midwest is required to post a remedial notice. (JA 78-79.)

⁷ Chairman Miscimarra would have found it unnecessary to pass on the Section 8(a)(5) violation regarding Hubbard's pay because it would be cumulative and would not materially affect the remedy. (JA 79 n.1.)

STANDARD OF REVIEW

The Court “accord[s] a very high degree of deference to administrative adjudications by the [Board]’ and [will] reverse its 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) (citation omitted). Under that deferential standard, the Court will uphold the Board’s findings if they are supported by substantial evidence, and will overturn them only if the Board “acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); 29 U.S.C. § 160(e).

The Court will uphold the Board’s credibility determinations unless they are “hopelessly incredible, self-contradictory, or patently insupportable.” *Federated Logistics & Operations, a Div. of Federated Corporate Servs., Inc. v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005).⁸

⁸ Although Midwest’s statement of issues claims (Br.2) the Board erred in its credibility findings, it does not challenge any specific credibility determinations.

SUMMARY OF ARGUMENT

The Board reasonably found that recidivist employer Midwest committed multiple violations of the Act in the instant case. Specifically, Midwest unlawfully made three unilateral changes to mandatory subjects of bargaining. Midwest also unlawfully discharged Union President Brown because he engaged in union activity and participated in Board processes, including representing the Union and testifying on its behalf at the unfair-labor-practice hearing in *Midwest I*. In addition, Midwest unlawfully threatened Union Vice-President Hubbard and denied him pay because Hubbard, like Brown, engaged in union activity and participated in Board processes. The denial of pay was also a unilateral change from past practice. Substantial evidence supports all of these findings.

The credited evidence clearly establishes that Midwest violated Section 8(a)(5) of the Act by eliminating informal crane training for untrained employees, and failed to respond to the Union's repeated requests to bargain over this change. In its opening brief, Midwest has almost completely abandoned any defense to this violation by making only cursory assertions without any corresponding argumentation, and attempting instead to inappropriately incorporate by reference arguments made in its briefs before the Board. Midwest's only adequately presented argument here—that Midwest had already changed its informal crane

training practice years before the Union requested bargaining—flouts the credited evidence and is easily dispensed with.

The Board reasonably found that Midwest made two other unlawful unilateral changes by depriving Local 1982-represented employees of their aluminum loading and calcium unloading work. Midwest's defenses to these violations rely on discredited testimony about its past practices, an inapplicable Section 10(k) award of different work to the Teamsters which the Board rejected as not justifying the unilateral changes, and unsupported challenges to the administrative law judge's evidentiary rulings.

Also supported by substantial evidence are the Board's findings that Midwest violated Sections 8(a)(3), (4), and (1) of the Act by unlawfully discharging Brown for his union activity and for his participation in Board processes. Compelling credited evidence supports these findings, including Midwest's pervasive animus toward the Union and Brown, Midwest's past and contemporaneous unfair labor practices, the timing of the discharge, Midwest's harsher discipline of Brown than other employees who had damaged equipment, and the pretextual nature of the stated reason for his discharge, demonstrated by Midwest's cursory investigation and rush to judgment. Faced with this compelling evidence, much of which it simply ignores, Midwest did not show before the

Board, and cannot now show under this Court's standard of review, that it would have discharged Brown absent his protected activities.

Finally, the Board is entitled to summary enforcement of those portions of its Order remedying its findings that Midwest violated Sections 8(a)(1), (3), (4), and (5) of the Act by unlawfully threatening and denying Hubbard pay because of his union activity and his participation in the Board's processes. Midwest fully abandoned any challenge to these findings by relying only on arguments in its briefs to the Board and cursory assertions, thus warranting summary enforcement. In any event, the Board's findings regarding Hubbard are supported by substantial evidence.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT MIDWEST VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING INFORMAL CRANE TRAINING PROCEDURES AND CHANGING PROCEDURES FOR ALUMINUM TRANSFER AND CALCIUM UNLOADING THAT DEPRIVED EMPLOYEES OF WORK

A. Applicable Principles

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act requires employers to bargain collectively before introducing changes "with respect to wages, hours, and other terms and conditions of employment." *Id.* § 158(d). Accordingly, an employer

violates Section 8(a)(5) by making any unilateral changes to mandatory bargaining subjects covered by Section 8(d) without first bargaining to impasse or agreement.⁹ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Agreement or impasse prior to making such changes is required even after a collective-bargaining agreement has expired because the terms and conditions of employment from that previous agreement continue in effect by operation of the Act. *Katz*, 369 U.S. at 736. Moreover, the prohibition on unilateral changes applies to established past practices even if they are not set forth in a collective-bargaining agreement. *Golden State Warriors*, 334 NLRB 651 (2001), *enforced*, 50 F. App'x 3 (D.C. Cir. 2002).

Employee training is a mandatory subject of bargaining. *Southern California Gas Co.*, 346 NLRB 449 (2006). The elimination of bargaining unit work is also a mandatory subject of bargaining. *Mi Pueblo Foods*, 360 NLRB 1097, 1097-99 (2014). An employer asserting a justification for a unilateral change in a mandatory subject of bargaining bears the burden of establishing it as affirmative defense. *Northland Camps, Inc.*, 179 NLRB 36, 40 (1969).

⁹ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1), which prohibits interference with employees' rights under the Act. 29 U.S.C. § 158(a)(1); *see Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

B. The Board Reasonably Found That Midwest Violated Section 8(a)(5) and (1) of the Act By Unilaterally Changing Its Informal Crane Training Procedures

1. Midwest failed to bargain with the Union before changing its informal crane training procedures

Substantial evidence supports the Board's finding that Midwest changed "the parties' past practice, which was firmly rooted in their expired collective-bargaining agreement" by refusing to give employees the informal crane training they had in years' past. (JA 3.) The relevant collective-bargaining agreement provided for informal "seat time" training. (JA77,87; JA781.) And as shown above at p. 8, prior to June 2013, three Local 1982 employees had been given that training over the years, even after Midwest acquired the new Liebherr cranes and required its operators to attain NCCCO certification. Midwest changed that practice in June 2013 when Leach informed Brown that employees would no longer get such training before attending certification classes, and then failed to respond to Brown's repeated entreaties to discuss the issue. (JA76, 88-89.)

Moreover, the Board reasonably found that there could "be little doubt based on th[e] sequence of events that the Union sought to bargain with the [Midwest] about providing seat time for crane trainees." (JA 76.) As shown above at pp. 8-10, "[e]very time the subject arose, Brown expressed the Union's position that the trainees needed seat time before they attended formal training and he repeatedly requested that the parties meet to discuss the issue." (JA76.) Thus, the

Board found that Brown “clearly communicated a desire to bargain over [Midwest’s] refusal to provide seat time,” but Midwest failed to do so.

Accordingly, Midwest violated Section 8(a)(5) and (1) of the Act.

2. Midwest waived all but one challenge to the Board’s finding, and that challenge is without merit

Midwest primarily defends its unilateral action by improperly attempting to “incorporate[] the argument from its Brief in Support of Exceptions [before the Board] as if fully rewritten herein.” (Br. 52.) This 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)(1). *Davis v. PBGC*, 734 F.3d 1161, 1167 (D.C. Cir. 2013); *UNF West, Inc. v. NLRB*, 2016 WL 6080795, at *1-2 (D.C. Cir. 2016) (unpublished).

Once Midwest’s purportedly “incorporate[d]” arguments are disregarded, Midwest is left with its exceedingly general statements that the Board’s relevant rulings, findings, and conclusions should be reversed and that the Order should be denied enforcement. But under this 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).

Midwest's only remaining challenge (Br. 52) is an assertion that Midwest put the Union on notice that it would be eliminating informal crane training back in 2010 or 2011 by announcing to the ILA trustees the Port Authority's requirement for NCCCO certification. But the notice of formal training did not give the Union notice that Midwest was going to discontinue informal seat time. (JA 1048). As the judge observed, neither Midwest nor the Port Authority required "that crane trainees obtain NCCCO certification before receiving informal training on the Liebherr cranes." (JA 88.) Even assuming, as Midwest asserts (Br. 52), that the ILA trustees believed that to be the case in 2010 or 2011, any such requirement was belied by Midwest's later actions in providing seat time to Baumert, Newcomer, and Brown before they were NCCCO certified. For example, Brown was allowed informal training by seat time in 2011 and 2012, although he was not certified until 2013. (JA369-372.)

Finally, Midwest asserts that the Board should have "at least adopted" what it generically characterizes as Member Miscimarra's "dissenting view that [Midwest] did not discontinue 'seat time' without giving the union notice and opportunity to bargain." (Br. 53.) 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.*

In any event, as discussed above, the view that the Union somehow waived bargaining flouts the credited record evidence that it was not until June 2013 that Midwest, through Leach, put the Union on notice that it would no longer provide informal crane training before NCCCO certification. Brown then timely sought bargaining, to no avail. Accordingly, Midwest has failed to disturb the Board's reasonable finding that Midwest violated its bargaining obligation regarding informal crane training.

C. The Board Reasonably Found That Midwest Violated Section 8(a)(5) and (1) of the Act By Unilaterally Changing How It Transferred Aluminum, a Change that Deprived Employees of Unit Work

Substantial evidence supports the Board's finding (JA 85-86) that Midwest violated the Act by changing its practice regarding the transfer of aluminum that deprived the employees of work without bargaining with the Union. The parties' established past practice for many years had been that Local 1982-represented employees loaded transfer trucks with aluminum on the wet side. (JA83-85; JA149-150, 223-231,333-338,478,743-753.) In June and August 2013, when Midwest unilaterally ordered the Teamsters-represented employees to come onto the wet side and use their forklifts to pick up and transport the aluminum to the dry side, it stopped using transfer trucks and therefore deprived Local 1982 employees

of their previous work loading those trucks. Midwest does not dispute that it failed to bargain with the Local 1982 over this change. It instead asserts—contrary to the record—that it did not change its past practice, and, even if it did change its past practice, the Board’s Section 10(k) decision authorized it. As discussed below, Midwest has failed to prove these affirmative defenses.

1. Midwest’s assertion that it merely continued its past practice is contrary to the credited evidence

Midwest’s claims (Br. 42, 45-47) about its past practice are confusing. On the one hand, Midwest seems to admit that it changed its past practice, stating that the Local 1982-represented employees “are no longer” performing the “loading of the transfer trucks.” (Br. 42.) But Midwest also seems to assert (Br. 42, 45-47) that prior to summer 2013, Local 1982 employees had already been deprived of their truck-loading work by Teamsters and their forklifts.

The Board reasonably rejected any such past practice assertion, finding (JA 83, 84& n.3) that it was contrary to the testimony of “multiple witnesses . . . including present and former employees Brown, Christopher Fussell, Kevin Newcomer, and Miguel Rizo.” (JA149-150, 223-231, 478,743-753.) The Board also found (JA 83, 84 & n.3) that the past practice assertion was primarily based on Leach’s testimony, which was discredited. Midwest has not challenged this credibility determination.

Midwest points to the testimony of Teamsters' steward Charles Erichson (Br. 42, 45-47) that "at other times" before the summer of 2013, the Teamsters would "transport cargo/aluminum with forklifts." As the Board noted (JA 83), however, Erichson testified that in 2005-2006, Midwest had occasionally used Teamsters-operated forklifts to transfer small quantities of aluminum, but the standard practice had been to use transfer trucks. (JA582-96.) This brief period of time is insufficient to establish a past practice of using Teamsters' forklifts. *See Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (past practice must occur "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis"); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enforced*, 112 F. App'x 65 (D.C. Cir. 2004).

Nor can Midwest hang its hat (Br. 45-47) on the proffered testimony and Board affidavit of Teamsters Local 20 Business Agent Martin Jay. As an initial matter, Midwest has failed to show that the administrative law judge abused his discretion in excluding the proffered evidence. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion). The judge rationally determined (JA482-485,726-727) that Jay's testimony and affidavit regarding past practice should be excluded as hearsay because Jay had not been working at the facility prior to 2014,

and had merely spoken to others who had. Jay's testimony about what he heard from others *is* hearsay. In any event, Midwest has failed to establish any prejudice from the judge's ruling. *See Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67, 70-74 (D.C. Cir. 2015) (alleged procedural missteps did not result in prejudice); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from judge's exclusion of evidence). Jay's proffer is merely that at some time "prior to the NLRB hearing date," Teamsters bargaining unit employees drove forklifts to the wet side of the dock to pick up aluminum. (JA486-487; JA1008-1009.) Midwest has not shown that this testimony would speak to anything other than the brief period about which Erichson—whom Midwest claims "corroborates" Jay— testified.

Finally, the Board reasonably determined (JA 84) that the claim that there was no change to past practice was inconsistent with contemporaneous statements made to Local 1982. Tellingly Leach informed the Union that these actions were a result of the recent Section 10(k) decision that issued in April 2013, rather than a continuation of past practice, as Midwest claims. (JA84; Tr.654.) And, as the Board noted, Hendricks also identified the Section 10(k) decision, rather than past practice, as Midwest's basis for beginning to send Teamsters employees to the wet side on forklifts. (JA498-499.)

2. Midwest failed to establish that the Section 10(k) decision authorized Midwest to change its aluminum procedures without bargaining

As the Board found (JA 75 n.1, 84, 85-86), its April 2013 Section 10(k) decision provides “no support” for Midwest’s defense (Br. 39-44) that it was somehow authorized to unilaterally transfer Local 1982’s loading work on the wet side to the Teamsters-represented employees. The Section 10(k) decision simply awards the Teamsters-represented employees work that at that time, was being performed by a third-party trucking company. (JA 85); *see* 359 NLRB 983, 986. As the Board here explained, that work consisted of driving trucks onto the wet side of the facility in order to transport material to the dry side. (JA 85); *see* 359 NLRB at 986. Indeed, the decision discussed Midwest’s established past practice of having Local 1982-represented employees load the aluminum onto those trucks, and awarded all loading work on the wet side of the facility to Local 1982-represented employees. (JA 85); *see* 359 NLRB at 983, 985.

Midwest spills a lot of ink arguing (Br. 41-44) that the following “proviso” in the Section 10(k) decision means that the Teamsters can drive forklifts onto the wet side and use them to take the aluminum back to the dry side:

These employees [represented by Teamsters Local 20] are also entitled to enter the west/wet side of the facility in order to transport cargo that is to be transferred from the wet side to the dry side

359 NLRB at 987. Midwest admits (Br. 41) that the word “loading” is not in this proviso, but essentially argues (Br. 41-42) that because a forklift can both “load” and transport aluminum, Midwest was authorized to have the Teamsters use their forklifts on the wet side to do both. This strained analysis ignores the explicit findings of the Section 10(k) decision. It also fails to grapple with the fact that the Section 10(k) decision focused on how to allocate work involving transfer trucks and, as the judge stated, made “no reference at all to Teamsters members on forklifts entering onto the wet side of the facility.” (JA84.) Accordingly, as the Board concluded, “[c]ontrary to Midwest’s contention, there is nothing in that decision stating that any loading work on the wet side is being awarded to the Teamsters-represented employees, nor is there anything that authorizes a change that would deprive [Local 1982] of loading work that it was the established past practice for them to perform.” (JA 85.)

Moreover, Midwest’s contention (Br. 42) that using forklifts is more efficient is beside the point. Midwest’s change from using transfer trucks to using Teamsters’ forklifts deprived Local 1982-represented employees of their past loading work, and, as such, was a mandatory subject of bargaining, which Midwest does not dispute. As the Board recognized, any efficiency arguments “should in the first instance be discussed between [Midwest] and [Local 1982] in the bargaining context.” (JA 86.)

Midwest also claims (Br. 44) that the administrative law judge erred by not allowing it to include the transcript and exhibits from the Section 10(k) proceeding. But Midwest has not shown how the judge abused his discretion in finding that those documents “would muddle and unduly burden the record.” (JA473-474.) The Section 10(k) decision itself represents the Board’s consideration of all of the underlying evidence in that proceeding. Moreover, Midwest has not identified any relevant evidence from that proceeding that it was prevented from presenting in the instant case. Accordingly, Midwest failed to show the requisite prejudice from the judge’s ruling. *See Exxon Chem. Co.*, 386 F.3d at 1166.

D. The Board Reasonably Found That Midwest Violated Section 8(a)(5) and (1) of the Act By Unilaterally Changing Its Procedures For Unloading Calcium which Further Deprived Employees of Work

Substantial evidence supports the Board’s finding (JA85-86) that Midwest violated the Act by changing its practice regarding the unloading of calcium without bargaining with the Union over that mandatory subject of bargaining. There is no dispute that the parties’ established past practice for many years had been that Local 1982-represented employees unloaded calcium into Local 1982-serviced warehouses. Midwest also does not dispute that it changed this practice in November 2013, when it ordered the Teamsters to unload the calcium into Teamsters-serviced warehouses. (JA86; JA122-130.)

Instead, Midwest argues (Br. 50-51) that its change was a management prerogative and that by ordering it to bargain, the Board is “unlawfully interfering with Midwest’s business operations and dictating to Midwest where certain types of cargo are to be stored.” (Br. 50.) But management does not have the prerogative to unilaterally eliminate Local 1982’s loading work—an undisputed mandatory subject of bargaining. Midwest’s citation to *Welsh Co.*, 149 NLRB 415, 419 (1964), is not to the contrary, as that case, involving employer discipline of an employee, has nothing to do with bargaining. Moreover, as with the Board’s aluminum finding, the Board did not find that Midwest violated the Act because it made changes to its business operations. Midwest violated the Act because it made a change in a mandatory subject of bargaining without giving Local 1982 an opportunity to bargain, an axiomatic violation of the Act. *See* JA 86, citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 214 (1964). Midwest will be required to restore the status quo ante pending good-faith bargaining. Meeting the basic bargaining obligation is not “unlawful interference” with an employer’s business operations. Midwest has not raised any other defenses obviating this obligation.¹⁰

¹⁰ Midwest makes a confusing claim (Br. 51) that the Board’s interpretation of the Section 10(k) decision regarding aluminum is inconsistent with the Board’s finding of a violation with regard to the calcium, but Midwest fails to demonstrate how anything in the Section 10(k) decision authorizes it to unilaterally change the unloading of calcium. In addition, although Midwest indicates (Br. 48-49) that

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT MIDWEST VIOLATED SECTIONS 8(a)(3), (4), AND (1) OF THE ACT BY DISCHARGING BROWN FOR HIS UNION ACTIVITY AND FOR PARTICIPATING IN THE BOARD'S PROCESSES

Midwest discharged Local 1982 President and leading union activist Brown less than two months after he led a work stoppage over Leach's use of non-ILA employees to transfer aluminum, and just six weeks after Brown testified against Midwest in the unfair-labor-practice hearing. As shown below, the Board reasonably found (JA 75, 107-109) that Midwest seized on the damage to the 3-Kawasaki as a pretext to discharge Brown for engaging in his protected activity, and failed to demonstrate that it would have discharged him even in the absence of his protected activity.

A. Applicable Principles

Section 7 of the Act guarantees employees the right "to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157.

Section 8(a)(3) of the Act implements Section 7 by prohibiting employer

"discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29

U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) by

there are different requirements for storing cargo in different warehouses, it has not established that any such requirements privileged its unilateral change.

discharging or taking other adverse employment actions against employees for engaging in activities protected by Section 7. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001). Relatedly, Section 8(a)(4) of the Act (29 U.S.C. §158(a)(4)) prohibits an employer from discharging or discriminating against an employee “because [he or she] has filed charges or given testimony under the Act.” See *NLRB v. Scrivener*, 405 U.S. 117, 121, 124-25 (1972). An employer therefore violates Section 8(a)(4) by taking adverse action against an employee for such activity. See *Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413, 422-24 (D.C. Cir. 1996).¹¹

In *Transportation Management*, 462 U.S. 393, the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-1089 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board’s finding that an employee’s protected activity was “a motivating factor” in an employer’s decision to take adverse action against the employee, the adverse

¹¹ Violations of Section 8(a)(3) and 8(a)(4) result in derivative violations of Section 8(a)(1), which forbids employers from interfering with, restraining, or coercing employees in the exercise of rights protected by the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *see also 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.

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Evidence of unlawful motivation includes the employer's knowledge of protected activity, *Tasty Baking*, 254 F.3d at 125, hostility toward protected conduct, including the commission of other unfair labor practices, *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000), the timing of the adverse action, *Tasty Baking*, 254 F.3d at 126; *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), and disparate treatment of employees, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016).

Determining an employer's motive “invokes the expertise of the Board, and consequently, the court gives ‘substantial deference to inferences the Board has

drawn from the facts,’ including inferences of impermissible motive.” *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (citation omitted). Thus, the Court’s “review of the Board’s conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial.” *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016).

B. Brown’s Protected Activity Was a Motivating Factor In Midwest’s Decision to Discharge Him

Midwest does not dispute that Brown engaged in protected activity (including his extensive union activity and testimony before the Board), nor does Midwest dispute that it knew of his protected activity when it discharged him. As shown below, evidence of Midwest’s animus toward Brown’s protected activity is also extensive, consisting of statements of hostility towards his protected activity, prior unfair labor practices against Brown, the other unfair labor practices committed in the instant case, the timing of Brown’s discharge, and Midwest’s disparate treatment of Brown.

As an initial matter, Midwest does not challenge the Board’s finding (JA 107) that Leach was angry about both Local 1982 work stoppages over the aluminum, one of which had been spearheaded by Brown less than two months before he was discharged. Leach clearly expressed his antipathy toward the Union’s action when he told F. Victorian, “I’m about this far off your ass” during the first work stoppage. (JA108; JA227.) Further, Midwest discriminated against

Brown in 2008. Indeed, just six weeks before he was fired, Brown extensively testified against Midwest in the *Midwest I* unfair-labor-practice hearing leading to those discrimination findings. Those proceedings led to the Board finding (JA 108) that Leach lied to Brown as a pretext for discriminating against him. Moreover, Leach was so hostile to employee Lockett's protected activity, that Leach assaulted Lockett. Midwest has also failed to properly challenge any of the similar unfair-labor-practice findings—for union activity and participating in Board processes—that the Board found Midwest committed here against Hubbard (see below at pp. 53-54). Under the principles set forth above at pp. 43-44, this evidence amply supports the Board's finding (JA 107) that Midwest harbored unlawful animus against Brown's union activity and participation in Board processes.

The Board also reasonably found (JA 107) that although the above evidence “is more than sufficient,” animus is further shown in Midwest's harsher treatment of Brown compared to other employees. Indeed, almost all other discipline for damaging equipment—even when the employee was indisputably at fault, and caused more expensive damage than to that of the 3-Kawasaki—fell far short of discharge. In particular, Moody was reprimanded for causing damage over

\$28,000 and J. Victorian Sr. was suspended for causing damage over \$55,000.¹²

See above at p. 23.

C. Midwest Failed to Prove It Would Have Discharged Brown Even in the Absence of His Protected Activity

The Board also reasonably found (JA 108) that Midwest failed to meet its burden of establishing that it would have discharged Brown even in the absence of his protected activity. As the Board explained, Midwest's argument "stumbles at the outset" given the disparate treatment evidence discussed above. See *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007) (disparate treatment also undermines an employer's defense of employee misconduct). Further, as described below, Midwest's defense fails because its reason stated for his discharge was false and thus pretext for its unlawful motivation.

The bulk of Midwest's attempt (Br. 21-29) to undermine the Board's disparate treatment finding actually bolsters the Board's conclusion. Midwest's

¹² Midwest's observation (Br. 24) that some of the employees issued lesser discipline than Brown were also involved in the union does not negate the Board's finding. See *Clinton Electronics Corp.*, 332 NLRB No. 47 (2000) (discrimination not negated simply because the employer did not discriminate against all union supporters). Indeed, Midwest has not challenged the Board's finding (JA 107) that Brown was the "facility's leading union activist." Midwest also seems to quibble (Br. 24) with whether the comparator-employees were disciplined under Policy #3050 or #3000, but the relevant point is that both policies—which Midwest admits (Br. 24) were eventually combined into one policy—relate to equipment damage.

list of comparators (Br. 22-24) shows that almost all other listed employees received warnings or write-ups, and many were for offenses unrelated to equipment damage. Only J. Victorian Sr. was discharged for equipment damage.

Midwest's assertion that the Board ignored that Brown, like J. Victorian Sr., had been previously disciplined by Midwest, is without merit. The Board acknowledged Brown's prior discipline (JA103-104, n.26), but reasonably concluded that unlike in the case of J. Victorian Sr., Leach did not rely on Midwest's progressive discipline policy in discharging Brown. (*Compare* JA1336 to JA1045.) Indeed, Leach testified that he made the decision to discharge Brown based exclusively on Brown's operation of the 3-Kawasaki. (JA104 n.26; JA716.) The Board also recognized (JA 104 n.26; JA1228-1230) that Midwest's paperwork prepared for Brown's discharge makes no reference to any basis for his discharge other than the damaged equipment. Thus, Midwest has not provided grounds to disturb the Board's disparate treatment finding.

Substantial evidence also supports the Board's finding that Leach, who was already predisposed to discriminate against Brown, "seized on the damage to 3-Kawasaki as a pretext to rid the facility of the most active prounion employee in the ILA bargaining unit, without culpability for the damage." (JA 109.) Such a finding of pretext demonstrates that Midwest "fails by definition" to establish its affirmative defense that it would have discharged Brown even absent his protected

activity. (D&O 13). *See Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced*, 705 F.2d 799 (6th Cir. 1982); *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “dooms [the employer’s] defense”), *enforced mem.*, 255 F.App’x 527 (D.C. Cir. 2007).

As the Board reasonably found (JA 108), Leach discharged Brown, who had been valued and one of the most skilled employees, after leaping to the conclusion that Brown was responsible for the damage to the 3-Kawasaki even before Leach saw Groweg’s initial, one-page report. Moreover, it is telling that after learning that third-party contractor Groweg would inspect the machine—purportedly for Leach to avoid the appearance of discrimination—maintenance department employee Jones asked Groweg to include a statement about operator error in his report. Indeed, Groweg testified that he had never before been asked to include such a statement. Midwest’s silence on these findings (JA 108) is deafening.

In addition, as the Board found (JA 108), Midwest did not conduct a meaningful investigation of the damage. *See New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998), *enforced*, 201 F.3d 592 (5th Cir. 2000) (failure to conduct meaningful investigation and give the employee an opportunity to explain are clear indicia of discriminatory intent). As the Board aptly noted, Groweg’s initial report, prompted by Jones, only “summarily stat[ed] that improper use by the operator caused the damage,” and it did not state “that

such improper use occurred during the shift when Brown was operating the 3-Kawasaki, as opposed to a prior shift, or over multiple shifts, or during any movement of the end loader that may have occurred after Brown parked it.” (JA 108.) Moreover, Midwest wholly ignores the Board’s finding that Midwest “insisted upon continuing to rely” on Groweg’s vague initial assessment of operator error even “after Groweg’s more thorough inspection led him to report that the brake pressure switch and transmission disconnect mechanism had not been functioning and that the damage could have occurred without Brown’s knowledge.” (JA 108.) Midwest has utterly failed to demonstrate that it would have fired Brown over the initial report—let alone the later reports it ignored while his grievance was pending—had it not been for his protected activity.

The Board also found that other aspects of how Leach handled his inquiry into the damage to the 3-Kawasaki buttressed the conclusion that Midwest did not prove it would have discharged Brown absent his protected activity. Indeed, Leach did not interview the only two employees—Fussell and Moody—who observed Brown on the night in question. Brown also offered to give a statement at a meeting with Leach, but Leach never met with him and instead fired him, whereas Leach had afforded other employees facing discipline an opportunity to provide a

statement. (JA108; see above at pp. 20-21; JA1246-1247,1265,1305-1306,1319.)¹³ Midwest's suggestion (Br. 9, 35) that Brown purposely did not give Leach a statement flies in the face of Brown's testimony, which the judge credited over Leach's contrary testimony. (JA105, 105 n.29.) Specifically, the credited evidence shows that when Leach confronted Brown for the first time about the damage on (Friday) September 27, Brown told Leach that he would give Leach a statement when they met and Leach told Brown they would "probably meet on Monday," but made no attempt to do so before deciding to discharge Brown on Tuesday. This sequence of events also underscores Leach's rush to judgment in his decision to discharge Brown.

Midwest's primary challenge (Br. 30-33) to the Board's finding of unlawful motivation rests on misplaced arguments about how bad the 3-Kawaskai was damaged. But that argument fails to account for Midwest's burden of proof. Midwest had to show not only that Brown engaged in misconduct, "but that the nature of that behavior would have caused [his discharge] regardless of [his] protected conduct. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 84 (D.C. Cir. 2015). This it failed to do. Accordingly, the Board reasonably concluded that "even

¹³ Midwest notes (Br. 34) that although the Board stated that Midwest interviewed witnesses other than J. Victorian Sr. before firing him, Midwest only obtained J. Victorian Sr.'s own statement. This is of no moment. Not only was there no dispute over who or what caused the damage in the incident for which J. Victorian Sr. was fired—unlike Brown—but the record showed numerous other instances where Midwest obtained statements from witnesses. (JA1265,1305-1306,1319.)

assuming that Leach believed in good faith that, despite Brown's long history as [a] valued employee, he had a lapse in operating competence that caused the damage, the record indicates that Leach would have imposed discipline short of discharge, as he did for the vast majority of other employees, if not for the unlawful animus against Brown's protected union activities and participation in the Board's processes." (JA 109.)¹⁴

Finally, Midwest's assertions (Br. 36-37)—based improperly on non-record evidence—that Brown is not entitled to reinstatement and that his backpay should be cut off, are premature. The Supreme Court has "long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). Thus, this Court will "leav[e] until the compliance proceedings more specific calculations as to the [relief], if any, due." *Id.*; see *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 107 (D.C. Cir. 2003). This Court should do so here.

¹⁴ Midwest therefore does not advance its case by citing (Br. 25) to *Fort Dearborn Co.*, 827 F.3d at 1076, and *Sutter East Bay Hospitals v. NLRB*, 687 F.3d at 436 (D.C. Cir. 2012), suggesting that all it had to do was show that it had a good-faith belief that Brown engaged in misconduct to meet its *Wright Line* burden. To the contrary, the good-faith belief defense the Court articulated in *Sutter East Bay* is inapplicable where the employer's affirmative defense is pretextual or where it disparately treated the employee. See *Ozburn-Hessey*, 833 F.3d at 221; *Fort Dearborn*, 827 F.3d at 1070.

III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING ITS FINDINGS THAT MIDWEST VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING HUBBARD AND VIOLATED SECTIONS 8(a)(3), (4), (5), AND (1) OF THE ACT BY DENYING HUBBARD PAY

In its opening brief, Midwest has again improperly attempted to incorporate arguments from its earlier briefs to the Board and made cursory assertions of error (Br. 6, 38-39, 53) in lieu of properly presenting any developed argumentation regarding Hubbard, as required under the Court's pleading standards. *See* above at p. 32. This time, Midwest has not made even one independent argument. Because Midwest has waived any challenge to these findings, the Board is entitled to summary enforcement of the portions of its Order corresponding to them. *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).

In any event, the Board reasonably found (JA 75, 93-96) that Midwest committed multiple violations of the Act with regard to its treatment of Hubbard. 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 rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The Board reasonably found (JA 94-96) that under Section 8(a)(1), Blakely unlawfully threatened Local 1982 vice-president and steward Hubbard by telling him in response to an inquiry about the status of Hubbard's work-injury paperwork, “you know all these charges and stuff

that—you done filed grievances and charges. You done filed, I guess . . . with the NLRB against us. I just been too busy working on those.” (JA 94; Tr. 302-303.)

Given Blakely’s explicit statement regarding Hubbard’s protected activity immediately prior to Midwest’s unexplained failure to pay Hubbard for the hours he missed due to his work-related injury, the Board also reasonably found (JA 96) that Midwest’s failure to pay him for those hours was unlawfully motivated by his union activity (in violation of Section 8(a)(3)) and filing of Board charges (in violation of Section 8(a)(4)). *See* above at pp. 42-45. Finally, under the unilateral-change principles discussed above at pp. 29-30, Midwest’s failure to pay Hubbard for the hours he missed, in contravention of the collective-bargaining agreement and past practice, additionally violated Section 8(a)(5) of the Act. Midwest has provided no grounds to disturb these findings.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying Midwest's petition for review and enforcing the Board's Order in full.

Respectfully submitted

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July 2018

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

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MIDWEST TERMINALS OF TOLEDO)
INTERNATIONAL, INC.)
)
Petitioner/Cross-Respondent)
)
v.) Nos. 17-1238, 18-1094
)
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12, 033 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben
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Dated at Washington, DC
this 30th day of July 2018

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

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MIDWEST TERMINALS OF TOLEDO)	
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)	
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)	
)	Respondent/Cross-Petitioner
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I electronically filed the foregoing 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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Linda Dreeben
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Dated at Washington, DC
this 30th day of July 2018

ADDENDUM

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

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 17-1238 & 18-1094
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	08-CA-119493
)	08-CA-119535
Respondent/Cross-Petitioner)	

STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. § 157)2

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

Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....2

Section 8(a)(4) (29 U.S.C. § 158(a)(4)3

Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....3

Section 8(d) (29 U.S.C. § 158(d)).....3

Section 10(a) (29 U.S.C. § 160(a)5

Section 10(e) (29 U.S.C. § 160(e)5

Section 10(f) (29 U.S.C. § 160(f)6

Section 10(k) (29 U.S.C. § 160(k)6

**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;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(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.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [paragraph \(4\)\(D\) of section 158\(b\)](#) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such

charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.