

Case Nos. 17-1239 & 18-1093

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT****(Agency Decision in 08–CA–135971 and 08–CA–136613
Reported at 365 No. 159)**

**MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.
Petitioner/Cross Respondent****vs.****THE 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**

**REPLY BRIEF OF PETITIONER/CROSS RESPONDENT
MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.**

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SUMMARY OF ARGUMENT

The National Labor Relations Board's (the "Board") Brief does not sufficiently rebut the overwhelming record evidence cited by Petitioner, Midwest Terminals of Toledo International, Inc. ("Midwest" or Company") that the totality of the record evidence establishes that the Board's rulings, findings and conclusions are irrational, arbitrary, not substantially supported by the record evidence and contrary to Board precedent.

1. § 8(a)(5) and (1) violations related to skilled list (8-CA-135971)

The Board relies upon "past practice" to purportedly establish that the Midwest and the union annually meet and confer (bargain) over the placement of individuals on the skilled list. However, nothing in the record evidence, even the Company's April 27, 2013 correspondence, establishes that Midwest bargains with the union over the Order of Call or the placement of individuals on the skilled list. Noticeably absent from the Board's decision or its brief is any acknowledgment of the findings in 365 NLRB No. 157 (Case Nos. 18-1017 and 18-1049; "*Midwest I*") wherein the ALJ found (and the Board did not disagree) that Midwest is solely responsible for determining when employees have sufficient skills to be added to the skilled list and Midwest alone prepares the Order of Call list and submits it to the union in April of each year. The Board's version of "past practice" is fiction and not substantially supported by the record evidence.

Further, the record illustrates that Midwest did not change the criteria for placement on the skilled list. As the express language of the CBA indicates, employees must be qualified in four or more of the following of classifications: crane operator, checker, power operator, signal man, and hatch leader.” (JA 845). Midwest did not stray from those criteria.

2. § 8(a)(1) and (3) violations regarding F. Victorian, Jr. (8-CA-135871)

The Board failed to give adequate consideration to Midwest’s *Wright Line* defense, and the finding that Midwest’s reason for not placing F. Victorian, Jr. on the skilled list is pretextual is not supported by substantial evidence. Midwest put forth substantial evidence establishing that its reason for not placing F. Victorian Jr. on the skilled list (not qualified per the contract) was not pretextual. There is no dispute that F. Victorian Jr. failed the National Certification for Crane Operator’s (“NCCCO”) signalmen test. At that moment, per Occupational Safety and Health Administration Regulations (“OSHA”), F. Victorian was disqualified from signaling and thus not qualified for the skilled list. Faced with this conundrum, the Board brushes the OSHA regulations to the side and argues that Midwest does not and/or need not follow OSHA regulations. Rather Midwest should only follow the criteria testified to by Blakely *and* turn a blind eye to the failed tests.

3. Adverse Inference

The Board's determination not to draw an adverse inference against the General Counsel for failing to call the union trustees who met with company officials in 2012 to discuss the order of call was arbitrary, irrational and contrary to both the Board's and this Court's precedent. The Board, in large part supported its fictional, "meet and confer" past practice finding based upon the discussions in the 2012 meetings. Nonetheless, General Counsel did not present a single union official who participated in those meetings. As noted below, Board's decision not to draw an adverse inference substantially prejudiced Midwest. It is clear why the General Counsel made the conscious decision not to call the union trustees and conceal the Board affidavit noted immediately below.

4. Evidence Purposely Concealed by the Board

The Board purposely withheld exculpatory evidence (Andre Joseph Affidavit ["7.25.12 Joseph Affidavit"]) which established the true past practice is that Midwest, and Midwest alone prepares the order of call and submits this information to the union (order of call) to the union in April of each year. Because the Board does not permit discovery, Midwest was not aware of this buried evidence until approximately six months later in a subsequent, unrelated administrative proceeding between the parties. Soon thereafter, Midwest filed a motion to include the newly discovered 7.25.12 affidavit into the record. The

ALJ denied the request (affirmed by the Board) maintaining that Midwest had the opportunity to call Joseph to testify during the Hearing. The Board's ruling is arbitrary and erroneous because the Board knows full well if Midwest subpoenaed Joseph to testify, it is still not permitted to review his affidavits for impeachment purposes. Further, the Board erred in applying the law to the facts of this case. See, *West Motor Freight of Pennsylvania*, 331 NLRB 831, 835 (2000) (witness availability "is not to be determined from his mere physical presence at trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case")

ARGUMENT

I. MIDWEST'S PETITION FOR REVIEW SHOULD BE GRANTED AND THE BOARD'S CROSS APPLICATION FOR ENFORCEMENT SHOULD BE DENIED BECAUSE THE BOARD'S ORDER IS INADEQUATE, IRRATIONAL, ARBITRARY, NOT SUBSTANTIALLY SUPPORTED BY THE RECORD EVIDENCE AND CONTRARY TO BOARD PRECEDENT

A. Midwest Did Not Unilaterally Change the Selection Criteria or the Procedure for Adding Employees to the Skilled List

The expired collective bargaining agreement first requires an employee to be qualified in four or more of the following of classifications: crane operator,

checker, power operator, signal man, and hatch leader.” (JA 845) If the qualifications and abilities of two employees are equal, seniority controls. (JA 849) Midwest did not stray from this criterion. Further, Midwest used the same procedure in 2014 to add Canales and Joe Victorian, Jr. to the skilled list that it did in 2011 when it added Otis Brown to the skilled list; Leach handed the individuals letters stating that they were added to the skilled list and Leach also gave a copy of the letter to the union steward. The Board’s past practice of “meet and confer” is a fabrication which necessitated the concealment of evidence. Even when the plainly relevant evidence came to light, the Board disregarded it so as not to interfere with its results driven findings and conclusions.

1. Midwest does not meet and confer with the union before adding individuals to the skilled list.

The Board maintains that Midwest departed from its established past practice of meeting and conferring with the union before adding individuals to the list. To manufacture its past practice of meet and confer the Board relies upon four items: (1) an October 2012 grievance memorandum from Blakely to the union; (2) Leach’s testimony elicited during *Midwest I*; (3) 2012 meetings with the union trustees; and (4) Otis Brown’s understanding and experience related to past practice. (Brief, pp. 22-23)

a. October 2012 grievance memorandum

Midwest readily admits that Blakely's October 2012 correspondence to the union states that the past practice when seeking to fill vacancies on the skilled list is to seek the union's input prior to filling vacancies on the skilled list. (JA 893) Notwithstanding, the record evidence detailed below indicates that Blakely's statement is not put into practice.

b. Leach's testimony during *Midwest I*

The Board maintains that Leach "grudgingly admitted that Midwest's past practice is to first discuss skilled-list additions with the Union after the General Counsel confronted him from prior testimony to that effect from *Midwest I*." First, that is unequivocally not what Leach testified to in *Midwest I*. Leach specifically testified as follows:

MS. FRATERNALI: Your Honor, may I read the question and answer? It does not relate specifically to Mr. Fussell at all.

JUDGE BOGAS: At this point I'll permit you to read it into the record.

Q. Question: "Okay, you would agree" -- or Question: "Okay, you would agree, however, that -- can you describe for the court what the levels of employees that are on the list of the skilled list, the regular list, can you just describe the list of employees that you all maintain for the core?"

Answer: "Well, it's called a -- it's an order of call that has to be jointly agreed upon at the beginning of the shipping season between the union and management, and that core list consists of skilled list

employees that have the skill set qualifications or the certifications that are required[.]”

(JA 109-109). The General Counsel next references another portion of Leach’s testimony (line 18, page 779 through 780). (JA 110-111) Leach’s testified as follows:

Q. Okay. And what is the difference between the skilled list and the regular list?

A. Well, the skilled list is a core group of guys that actually have certain qualifications, like crane operators, end loader operators, forklift operators, signal hatch leaders, checkers.

Q. And do the men on the regular list have any qualifications -- or, is there -- excuse me. Strike that. Are the men on the regular list required to have any qualifications?

A. No.

Q. And how do the men -- how do certain men end up on the skilled list?

A. Well, the Company and the Union get together, if there’s an opening on the skilled list, and then we’ll discuss exactly, you know, the need.

And normally it’s a crane operator that we’re looking for. But we’ll discuss with the Union exactly the need to fulfill that position.

See, *Midwest I*, JA 269-270. Based upon the totality of the record evidence in *Midwest I*, including Leach’s testimony (relied upon by the Board to manufacture a meet and confer past practice) the ALJ determined:

The record establishes that the Respondent determines when employees have sufficient skills to be added to the skilled employee

list. According to section 6.1 of the expired contract, seniority on all three lists is determined based on the hours worked in the preceding year. The record establishes that in practice the seniority of regular and casual employees is determined by this method. However, Terry Leach, the Respondent's director of operations since 2007 testified, without contradiction, that the practice has been that employees on the skilled list are ranked in seniority by their original hire date (Tr. 908, 911-912). ***The practice between the parties has been that the Respondent prepares the order of call list with employees ranked in their seniority order in each classification and submits it to Local 1982 in April of each year.***

See, *Midwest Terminals of Toledo International, Inc.*, 2013 NLRB LEXIS 699, *19-20, (emphasis added), aff'd 2017 NLRB LEXIS 610. Not surprisingly, the Board does not even attempt to address this finding in its brief.

c. 2012 meetings with union trustees

Blakely testified that he prepares the Order of Call prior to the start of each shipping season. (JA 122, 266-269, 284, 326-327, 616-617) Notwithstanding, given the unique circumstances of the trusteeship, Blakely did meet with and engage in correspondence with the trustees regarding seniority, the Order of Call and the possible placement of John Murphy on the skilled list. Blakely did so because the union trustees (Joseph and Baker, Jr.) had no records of who was and who was not in the union; they had no intimate knowledge of the men or how the Order of Call operated. (JA 119-120, 343-344) Blakely's testimony was corroborated by the 7.25.12 Joseph Affidavit which was purposely concealed

during the Hearing and, when it was discovered, the Board arbitrarily prohibited the affidavit testimony to be made part of the record.

Similarly, the discussions surrounding Murphy centered on the status of his union membership and whether he should even be placed on the Order of Call. (JA 346-347) Specifically, Murphy paid union dues but his health insurance was provided through the Company and his hours were not generating accruals into the Health and Welfare Fund. (Ibid.) The Trustees wanted to resolve the issues surrounding his health care and pension. (Ibid.) The resolution was to place Murphy in abeyance but he was included on the Order of Call. The discussions surrounding Murphy centered on the status of his union membership and whether he should even be placed on the Order of Call. This was a one-off occurrence acknowledged as such by the ALJ – “Murphy was a special case because it was unclear whether he was a bargaining unit employee.” (JA 7). One-time events are not the equivalent of establishing a past practice. See, *American Electric Power*, 2015 NLRB LEXIS 387, *76 (2015). See also, *Blue Circle Cement Co., Inc.*, 319 NLRB 661, 667 (1995) (one-time occurrence not sufficient to indicate a past practice); and *Piggly Wiggly Midwest, LLC*, 2012 NLRB LEXIS 287, *116 (2012) (one-time event does not constitute evidence of an established past practice.)

d. Otis Brown testimony and 2011 placement on the skilled list

Brown testified that his understanding of past practice was that Midwest and the union would meet and discuss the matter. However, Brown offered no details and even admitted he participated in no such meetings. (JA 224-225). Furthermore, when Midwest placed Brown on the skilled list in 2011, the ALJ acknowledged that Midwest only sought the union's assistance in persuading Brown to join the skilled list. (JA 7)

The Board notes in its Brief that it “considered the ‘unusual wrinkles’ in those two examples [Murphy and Brown] and reasonably found that they did ‘not detract from the compelling evidence that, prior to April 2014, [Midwest] had a practice of meeting with the Union to seek its input prior to selecting employees to add to the skilled list.’” (Brief, p. 30, citing JA 7). Removing Murphy and Brown from the equation leaves the Board only with Leach's testimony and Blakely's 2012 grievance memorandum to the Board. As noted above, the Board in *Midwest I*, already considered Leach's testimony and concluded that Midwest determines when employees have sufficient skills to be added to the skilled employee list. Accordingly, all that is left is Blakely's October 30, 2012 memorandum. While the words in Blakely's memorandum declare that the past practice is to meet and confer with the union when filling vacancies on the skilled list, Midwest's actions set forth in the record evidence markedly detracts from the weight of the singular

remaining piece of evidence supporting the Board's conclusion as Blakely's words were never put into practice.

2. Qualifications of Canales, J. Victorian, Jr., Russell and F. Victorian, Jr.

There is no dispute that Canales had the requisite skills/qualifications to be placed on the skilled list. However, the parties disagree whether Russell, J. Victorian, Jr. and F. Victorian Jr. possess the requisite skills/qualifications for inclusion on the skilled list.

a. Russell and F. Victorian, Jr.'s qualifications

Midwest maintains that Russell is not a qualified hatch leader or signalmen. Midwest maintains that F. Victorian, Jr is not a qualified signalmen. The Board asserts otherwise.

1. hatch leader

Leach testified that merely working the position of hatch leader does not equate to a qualified hatch leader. (JA 360, 384-385) Leach further testified that Russell was not a qualified hatch leader. (JA 361-362) Russell acknowledged that Leach only hired him as a hatch leader a single time; six years earlier in 2009. (JA 147) Russell further acknowledged he had not been a hatch leader since that time. Notwithstanding, the Board determined that Russell was a qualified hatch leader merely because Russell and Brown testified that he was. The Board's determination that Russell is a qualified hatch leader is not defensible.

First, in August 2013, Brown, the union's President, provided an affidavit to the Board arguing that F. Victorian Jr. and Canales should be on the skilled list. (JA 251-252.) Brown did not assert that Russell should be on the skilled list. (JA 254-255) Brown was aware that Russell had failed his NCCCO exam just like F. Victorian, Jr. (JA 256) Both F. Victorian, Jr. and Russell had the same signalmen skills in 2013 as they had in 2014. (Tr. 260-261) Yet, Brown maintained that F. Victorian Jr. was qualified to be placed on the skilled list in 2013 and Russell was not. The 2013 and 2014 Order of Calls (JA 496-504) plainly establish that Russell's qualifications were the same in 2013 as they were in 2014. Accordingly, despite his testimony to the contrary, Brown's affidavit confirms that Russell was not a qualified hatch leader.

Second, the ALJ had already determined that Russell was anything but credible. (JA 5, 733) The Board notes that Midwest spent "many pages" arguing that the Board erred in crediting Russell's testimony that he was hatch leader. (Brief, p. 27) The Board is correct. It is not often when an Employer needs four full pages of a brief to outline all the instances where a union witness lied under oath only to have the ALJ credit his testimony. Especially when the same ALJ previously determined that the witness in question is anything but reliable. To argue that Leach's testimony is self-serving but Russell's was not is irrational and hopelessly incredible and self-contradictory.

2. signalmen

Russell and F. Victorian, Jr. were not qualified signalmen because they failed the NCCCO signalmen test. There is no dispute that that both men failed the test. The dispute is whether a failed test disqualifies a person from being a signalmen, thus dropping both Russell and F. Victorian, Jr. from consideration for the skilled list.

Both Russell and F. Victorian, Jr. participated in June 2011 NCCCO signalmen training. (JA 619-629). Russell failed both the written and practical exam. (JA 618) F. Victorian, Jr. failed the written test, but did pass the practical test. (Ibid.) Prior to the failed tests, both Russell and F. Victorian, Jr. were permitted/qualified to signal the old Lucas Cranes (Big and Little). (JA 393-395) However, once Russell and F. Victorian, Jr. failed the NCCCO tests, they were no longer qualified to signal, hence the additional training needed citation (lower case “sg”) on the order of calls. (JA 393-395, 494-504) Specifically, Leach testified as follows:

Q. Now, you indicated that individuals can lose their qualifications with respect to the order of call?

A. Correct.

Q. And people can lose their qualifications for the skilled list?

A. Correct.

Q. Did Mr. Fred Victorian, Jr. lose any qualifications for the skilled list?

A. Well, if you take a look at the order of call, you know, you'll see small -- that S for signal, little SG, big SG. It depends on -- what we try to do is get formal training for the men who want to get the training, and he took the actual signal training on two occasions[.]

But he failed numerous times, and so it's one of those things with OSHA -- I mean, if something happens on -- you know, an accident happens or anything else like that, the first thing they're going to ask me is where the training records are, and for me to put somebody in there that's had multiple failures on any type of training, especially as critical as signal is, you know, you're not going to be qualified as a signal person because OSHA -- I mean they'll shut us down, there's no way.

Q. And did Mr. Fred Victorian, Jr. fail the NCCCO test for signalman?

A. Yes, he did.

Q. And subsequent to that failure, did you use Mr. Victorian, Jr. as a signalman?

A. No.

Q. Did Mr. Russell fail the NCCCO test for signalman?

A. Yes, he did.

Q. Subsequent to that failure, did the company use Mr. Russell to signal?

A. No.

Q. As a result of those failures, were either Mr. Fred Victorian, Jr. or Mr. Russell qualified to be placed on the skilled list?

A. No.

(JA 392-395). Once Russell and F. Victorian, Jr. failed the NCCCO signalmen test 29 C.F.R. § 1926.1428(b) prevented Midwest from using them as signalmen, thus disqualifying them from skilled list placement consideration. 29 C.F.R. § 1926.1428(b) states:

If subsequent actions by the signal person indicate that the individual does not meet the Qualification Requirements (*see* paragraph (c) of this section [oral and written test]), the employer must not allow the individual to continue working as a signal person until re-training is provided and a re-assessment is made in accordance with paragraph (a) of this section [third party evaluator] that confirms that the individual meets the Qualification Requirements.

The Board's argument remarkably dismisses the OSHA regulations as meaningless. The Board stated in its Brief, that "the question here is not whether OSHA considers an employee qualified to signal; rather, the question is whether Midwest considers an employee qualified for the skilled list." (Brief, p. 26, FN 12) Leach answered the Board's question. Employees who fail a signalmen test are not qualified for the skilled list because the OSHA regulations plainly state that those employees are prohibited from signaling. The Board's continued failure to comprehend this logic is alarming.

The Board marginalized Leach's testimony and instead relied upon Blakely's testimony to support its finding that persons with lower case "sg" designations are qualified signalmen for purposed of meeting the skilled list

contractual selection criteria. (JA 339-340) Blakely's testimony is both correct and incorrect as later explained by Leach. Leach testified that persons who are qualified to signal the old Lucas cranes are lowercase "sg" and qualified signalmen for skilled list purposes. However, if said person takes and fails the NCCCO signalmen test, they are no longer a qualified signal person for skilled list purposes because the OSHA regulations prohibit the employer from allowing said person to work as a signalmen. (JA 393-396) Also, the Board conveniently omits Blakely's testimony wherein he acknowledges that although his understanding is that a lower case "sg" means you meet the qualification, he is not certain because (1) he is not an operations person and (2) he does not determine who is and is not qualified to be on the skilled list. (JA 315, 348) Leach, Midwest's Operations Manager, determines qualifications. (JA 353-354.)

b. Joe Victorian, Jr.'s qualifications

Both Leach and Blakely (the same Blakely whom the Board regularly credits as credible witness) testified that J. Victorian, Jr. possessed the requisite amount of qualifications to be placed on the skilled list because he is a qualified hatch leader, power operator and can operate and signal for the old Lucas Cranes. (JA 317 and 381) Furthermore, he was on the skilled list once before, prior to his break in service. (JA 381) Unlike, Russell and F. Victorian, Jr., J. Victorian, Jr. was a

qualified signalmen for skilled list placement purposes because he had failed the NCCCO signalmen test. (JA 395)

3. Midwest Did Not Discriminate Against Fred Victorian, Jr. in Denying Him Placement on the Skilled List

Midwest has remained steadfast in its reasoning as to why F. Victorian Jr. was not eligible for skilled list placement – he is not a qualified signalmen. This is the reason he was not placed on the skilled list in 2012, 2013 and 2014. Furthermore, he was not treated differently than others in his situation. Both Russell and F. Victorian failed the NCCCO signalmen test and both were deemed non-qualified signalmen and thus denied placement on the skilled list. The Board's argument would have merit if J. Victorian, Jr. failed the NCCCO signalmen test, but was still placed on the skilled list. However, that is not what occurred. All that Midwest is required to do in order to rebut the *Wright Line* inference is establish by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. See, *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). Midwest did so by repeatedly and consistently instructing F. Victorian, Jr. and the union that he was not a qualified signalperson because he failed the NCCCO test, both before and after Leach's purported June 2013 antiunion animus statement directed at F.

Victorian, Jr.¹ Only one other person is in the same situation as F. Victorian, Jr. e.g., Russell, and he too was denied placement on the skilled list. The Board's finding is irrational, arbitrary, not substantially supported by the evidence and a misapplication of the law to the facts.

4. The Board Erred In Not Finding An Adverse Inference That The Union Trustees' Testimony Would Not Have Supported and/or Would Have Contradicted Brown's Proffered Version Of What Transpired During Midwest's Meetings With The Union Trustees

The Board argued that Midwest failed to show how the union trustees' testimony would be relevant and significant to the Board's finding regarding past practice for skilled list additions. (Brief, p. 32). However, both the General Counsel and the Board pointed to these meetings as further evidence that Midwest and the union bargain over the placement of individuals on the skilled list. Nonetheless, not a single union official who participated in these meetings testified about what transpired during meetings. This was not merely cumulative evidence as is suggested by the Board. Rather, this was the strongest evidence available to the General Counsel to prove its case and presumably would have only strengthened its case. Accordingly, the Board acted arbitrarily and went against Board precedent in failing to draw and adverse inference. See, *Int'l Union, United*

¹ Notably, said allegation was the subject of a ULP filed by F. Victorian, Jr. on September 20, 2013. After the Region investigated the charge, F. Victorian, Jr. withdrew the charge in November 2013. See, <https://www.nlr.gov/case/08-CA-113775>.

Auto., etc. v. NLRB, 429 F.2d 1329, 1336 (D.C. Cir. 1972) (“If evidence within the party’s control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.”) See also, See, *Int’l Automated Machines*, 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (“[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.”).

This Court does not owe any deference to the Board’s decision because the Board failed to explain its rationale as to why it did not draw an adverse inference. See, *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2011) (no deference is warranted “where the Board fails to adequately explain its reasoning, where the Board leaves critical gaps in its reasoning or where the Board erred in applying the law to the facts.”) The Board’s argument that it need not specifically address this issue because the legal issue raised was insubstantial is misguided.² “It is an

² In *Human Dev. Ass’n v. NLRB*, 937 F.2d 657, 669 (D.C. Cir. 1991) this Court determined that the Board did not act arbitrarily “merely because the Board did not recite in full only to reject once again, less than 18 months after rejecting it in *Flatbush Manor*, a threshold objection to a doctrine applied without interruption for nearly *fifty years*.” (Emphasis added.) Hence this Court’s conclusion that the Board need not address an exception to the decision of the ALJ where there is no apparent conflict in earlier agency cases. The Board’s actions and this Court’s

elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them. Here the agency obviously has not followed the numerous precedents which seem to require use of the adverse inference rule.” See, *Int’l Union, United Auto., etc., v. NLRB*, at 1341.

Based upon the information set forth in the subsequently discovered 7.25.12 Joseph Affidavit, it becomes clear why the General Counsel did not call the union trustees to testify. Accordingly, a reversal of the Board’s finding is justified because Midwest was undeniably prejudiced by the failure to draw the inference. See, *Id.* at 1337, FN 44.

5. The Board Erred In Granting The General Counsel’s Motion To Strike Thereby Disregarding The Relevant Testimony Set Forth In Joseph’s Board Affidavit

As noted by the Board, evidentiary rulings are within the discretion of the administrative law judge. (Brief, pp. 31-32) Accordingly, Midwest did not have to provide any authority which would allow the ALJ to consider testimony Midwest did not even discover until after the hearing and after the deadline for briefs had passed, but before the ALJ issued his decision. The Board is essentially arguing that it can purposely conceal evidence and, if later discovered, the ALJ is prohibited from considering the newly discovered evidence if the record is closed.

ruling in *Human Dev. Ass’n* do not excuse their failure to address Midwest’s adverse inference claim herein.

Further, the Board argues that Midwest could have called Joseph to testify at the Hearing. The fact that Midwest could have subpoenaed Joseph to testify is of no consequence as Midwest could not have relied upon Joseph's objectivity. See, *Int'l Automated Machines*, at 1122–1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988). See also, *West Motor Freight of Pennsylvania*, 331 NLRB 831, 835 (2000) (witness availability “is not to be determined from his mere physical presence at trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case”).

Midwest's calling Joseph as a witness, would not have cured the prejudice that Midwest suffered in this matter. Midwest still would not have had access to Joseph's Board affidavits for impeachment purposes. Further, there is no discovery in the Board's administrative process. The Board's suggestion that all Midwest had to do is call Joseph as a witness is impudent. Joseph was union trustee. He was not a friendly witness to Midwest. The Board's solution is akin to asking a witness questions on cross examinations that the examiner does not know the answers too. Had Joseph lied under oath (something he did in *Midwest I*)

Midwest would have been stuck with whatever testimony Joseph provided without any recourse.

Admitting Joseph's affidavit testimony would not have prejudiced the Board in any way (other than the fact that it wrecks its meet and confer theory and corroborates Midwest's testimony to the contrary). All of the cases cited by the Board to deny admission of the 7.25.12 Joseph Affidavit testimony in its Decision rely upon the premise that the evidence must be submitted during the hearing so it can be substantiated, and consideration of such evidence would deny the parties the opportunity for *voir dire* cross examination. Here, Joseph's testimony was substantiated by Leach, Blakely and the findings and conclusions of the ALJ in *Midwest I*. More importantly, the only reason Joseph's testimony and his affidavit(s) are not a part of this record is because the General Counsel chose not to call Joseph for the sole purpose of hiding testimony which directly conflicted its theory of the case and contradicted the testimony of the witness it did choose to testify (Brown), a witnesses who admitted he was not a party to the 2012 meetings with Midwest.

The Board should have considered the 7.25.12 Joseph Affidavit when making its determinations after Midwest brought it the Board's attention. It was an abuse of discretion for the ALJ to grant the General Counsel's Motion to Strike thereby ignoring the supplemental authority/evidence because Joseph's testimony

would compel a contrary result. See, *Reno Hilton Resort* at 1285, FN 10 (court will find abuse of discretion when it “clearly appears that the new evidence would compel or persuade to a contrary result”) citing, *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988). Joseph’s testimony undeniably validates Midwest’s defense that it alone decides when employees have the sufficient skills to be added to the skilled list and that Midwest prepares the Order of Call and submits the same to the union at the beginning of each shipping season, all of which is accomplished without meeting and conferring with the union.

6. The Union’s Charge Regarding the Placement of Individuals on the Skilled List is Barred by Section 10(b) of the Act

The ALJ determined that Midwest did not depart from its contractual criteria until April 27, 2014 (placement of Canales and Joe Victorian, Jr. on the skilled list) and, as such, its September 5, 2014 charge was within the 6 month period. (JA 12-13, FN 24-25) The Board’s findings are arbitrary, irrational and not substantially supported by the record evidence. Further, the Board erred in applying established law and its Order related to this violation should not be enforced. The Board maintains that Midwest’s 10(b) defense contradicts Midwest’s “consistent position even at the time of the trial, that it *did not* change the selection criteria.” (Brief, p. 36, citing JA 13, FN 24 (emphasis in original).) This argument is misguided.

Midwest maintains that it did not change the selection criteria and that it does not meet and confer with the union over the placement of individuals on the skilled list. Conversely, the union maintains that Midwest violated long established past practice concerning the selection criteria and meeting and conferring regarding the qualifications and placement of individuals on the skilled list. Assuming that the union's fictional, long established past practice was reality, then the union was indeed on notice that that it's perceived past practice had changed. For instance, the union had actual or constructive notice of a purported violation of its self-professed past practice on the following dates:

- October 2012 when F. Victorian, Jr., and the union first began participating in grievance meetings regarding F. Victorian, Jr.'s qualifications, or lack thereof, to be considered for placement on the skilled list. (JA 891-905).
- November 7, 2012 in two separate grievance meetings wherein Leach instructed the union that F. Victorian Jr. was not qualified for the skilled list because he was not an NCCCO certified signalman, having twice failed the test. (JA 896, 904). In one meeting the union insisted he was qualified and in the other meeting the union insisted that Midwest was using the failed exams to "single him out" and that it's "not fair" and is "discriminatory." (Ibid.)

- April 2013 when Midwest submitted the Order of Call to the union and F. Victorian, Jr. was not included on the skilled list. Under the General Counsel's theory of the case this was another violation because Midwest failed to bargain over the skilled list before submitting the Order of Call.
- April 18, 2013 when Midwest again informed F. Victorian, Jr. that he does not possess the necessary qualifications (as noted on the Order of Call) to be considered for the skilled list. (JA 542)
- August 2013 when union President, Otis Brown, provided an affidavit to the Board arguing that F. Victorian, Jr. and Canales should be on the skilled list. (JA 251-252)
- September 10, 2013 when the union sent a letter to Blakely seeking to fill the vacant positions on the skilled list. (JA 286, 545) Blakely responded on September 16, 2013 and alerted the union that the only individual on the regular list who was currently qualified to be placed on the skilled list was Canales, and he was not interested. (JA 287-288, 551). Blakely also instructed the union that Joe Victorian, Jr., a former member of the skilled list, did possess the necessary qualifications. (Ibid.) However, since he broke service in 2008 he is only an apprentice longshoreman. (Ibid.) Should Joe Victorian, Jr. regain journeyman status, he would qualify for skilled list placement. (Ibid.)

The union was on continual notice (actual and constructive) from October 2012 (F. Victorian, Jr.'s grievances) through September 2013 that certain persons should not be on the skilled list and that certain persons were qualified and could be considered for placement on the skilled list. Blakely's letter directly contradicts Brown's August 2013 allegations. Nonetheless, the union did not file the charge at issue herein until September 5, 2014 and as such, is time barred.

7. The Union Waived Its Right to Bargain Over the Placement of Individuals on the Skilled List

In June 2012 the union believed that F. Victorian, Jr. was qualified for and should have been placed on the skilled list. (JA 537-542, 891-905) Notwithstanding, the union did not request to bargain over his placement on the skilled list. Both prior to and subsequent to receiving the seniority hours and draft Order of Call for the 2013 shipping season the union did not request to meet and bargain with the Company over the qualifications and placement of F. Victorian, Jr. on the skilled list.

In August 2013, the union continued to maintain that that F. Victorian Jr., should be on the skilled list, as well as Canales. Again, the union failed to request that the Company meet and bargain over the qualifications of F. Victorian, Jr. and Canales prior to or subsequent to April 2014 when Blakely sent the seniority hours and draft Order of Call to the union.

A waiver of statutory bargaining rights must be clear and unmistakable. See, *American Diamond Tool, Inc.*, 306 NLRB 570 (1992). Failure of a union to request bargaining after proper notice waives its right to bargain. See, *NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513, 518 (D.C. Cir. 1998). Formal notice is not needed so long as the union has actual notice. *Ibid.*, citing *W.W. Granger v. NLRB*, 860 F.2d 244, 248 (7th Cir. 1988). The Board's conclusion that the union did not waive its right to bargain over the placement of individuals on the skilled list is arbitrary, irrational and not substantially supported by the record evidence. Further, the Board erred in applying established law and its Order related to this violation should not be enforced.

II. CONCLUSION

For all the reasons outlined above, Midwest respectfully requests that this Court grant its Petition for review and Deny the NLRB's cross-application for enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief 6,324 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been was filed on this 12th day of September, 2018. Notice of this filing will be sent via the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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