

**No. 18-60474**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**DENTON COUNTY ELECTRICAL COOPERATIVE, INC.  
D/B/A COSERV ELECTRIC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**USHA DHEENAN**  
*Supervisory Attorney*

**DAVID CASSERLY**  
*Attorney*  
**National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2948  
(202) 273-0247**

**PETER B. ROBB**  
*General Counsel*

**JOHN W. KYLE**  
*Deputy General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

## **ORAL ARGUMENT STATEMENT**

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants CoServ's request for oral argument, the Board requests the opportunity to participate.

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of Denton County Electrical Cooperative, Inc. d/b/a CoServ Electric (CoServ) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against CoServ on June 12, 2018, reported at 366 NLRB No. 103. (ROA.1795-1810.)

The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(e) and (f) because the unfair labor practices occurred in Texas. CoServ's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to enforce or review Board orders.

### **ISSUES PRESENTED**

(1) Does substantial evidence support the Board's finding that CoServ unilaterally suspended wage-range increases and blamed the International Brotherhood of Electrical Workers, Local 220 (the Union) for withholding employee raises?

(2) Does substantial evidence support the Board's findings that CoServ violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain with it based on an antiunion petition tainted by CoServ's unfair labor practices and by subsequently failing to provide relevant unit information and unilaterally changing unit employees' wages?

(3) Do the Board's ordered remedies fit within its broad remedial discretion?

## **STATEMENT OF THE CASE**

After the Union filed a charge, the Board's General Counsel issued a complaint alleging that CoServ violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §158(a)(5) and (1), by withdrawing recognition from the Union and by subsequently unilaterally changing employees' wages and refusing to provide the Union with information. (ROA.788-95.) The complaint also included allegations the Board later severed, which are not at issue in this appeal. (ROA.1795 n.1.)

After a hearing, an administrative law judge found that CoServ had violated the Act as alleged. (ROA.1801-10.) After considering exceptions CoServ filed to that decision, the Board issued a Decision and Order adopting the judge's decision as modified. (ROA.1795-1801.)

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background; CoServ's Operations and Wage Practices**

CoServ is an electric utility. In 2012, the Union organized a bargaining unit of CoServ's linemen, power quality technicians, and system operators. It won a Board-supervised election in that unit and was certified as the unit's bargaining representative. The Union and CoServ began bargaining for an initial contract but did not reach agreement. In 2013, after the initial year of the Union's certification had elapsed, some unit employees petitioned the Board to decertify and oust the

Union. In October 2013, the Board held a decertification election, which the Union won. (ROA.1801; 194-95, 387, 846.)<sup>1</sup>

In the fourth quarter of each year, CoServ contracted with an outside consulting firm to provide an annual compensation survey called the Mercer study and to recommend annual wage-range adjustments based on the Mercer study's results. For at least 5 years before 2014, CoServ increased its wage floors and ceilings for all employees in each classification by the amount the Mercer study recommended. During that same period, CoServ evaluated all employees on their anniversary dates and gave them annual raises following those evaluations. Those annual wage increases brought the employees' wages within the new ranges set by the Mercer study recommendations. An employee's total wage increase averaged about the amount of the Mercer study recommendation, but individual raises could deviate from the amount of the wage-range increase based on the employee's merit and evaluation. (ROA.1802, 1802 n.9; 43, 120-22, 332-33, 352-61.)

CoServ's linemen, but not its system operators or power quality technicians, have another component to their compensation, called the Employee Development Program (EDP). Employees in the EDP have a system of steps through which they progress. They receive step raises each time they move up a step in that program.

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<sup>1</sup> References before a semicolon are to the Board's findings; those following are to supporting evidence. "Br." refers to CoServ's opening brief.

Before 2014, CoServ increased the wage ranges for each step by the amount recommended by the Mercer study each year, just as it similarly increased wage ranges for positions outside the EDP. In addition to their step raises, employees in the EDP, like other employees, received annual evaluations with merit raises incorporating the applicable wage-range increases. (ROA.1802; 197-98, 352-61.)

**B. CoServ Unilaterally Discontinues Wage-Range Raises and Eliminates Annual Raises in 2014 for Unit Employees**

In the fourth quarter of 2013, CoServ initiated the Mercer study as usual. The study recommended average wage increases of 2.3%, which CoServ implemented for non-bargaining-unit employees in the first quarter of 2014. CoServ did not increase wage scales for any bargaining unit employees, and no unit employees received annual raises in 2014. CoServ continued to give step raises to employees who progressed in the EDP. As a result, no power-quality technicians or system operators received raises in 2014. CoServ did not notify the Union that it intended to suspend the Mercer study pay-range increases. (ROA.1802; 357-58, 370-71, 708-09, 1427-29.)

In February 2014, after finding out that some employees were not receiving annual raises in 2014, the Union asked CoServ to investigate why. CoServ replied that it did not intend to give wage-range increases or raises to individual employees and that it did not believe it was under any obligation to do so. CoServ did not make any proposal to the Union to discontinue wage increases and instead told the

Union that it would not consider any interim wage agreement because the parties were still bargaining over a first contract. (ROA.1805; 210-13, 708, 840-41, 1427-29.)

### **C. CoServ Blames the Union for the Lack of Raises**

In 2014, CoServ continued to give employees annual evaluations. In late January, employee Robert Shelby met with supervisor Kevin Vincent for his annual evaluation. Vincent gave Shelby a positive evaluation but told him “there will not be a raise” because CoServ “was waiting for the [U]nion” and that employees would have received raises if they had not “signed the f-ing union cards and petitioned to get the [U]nion in.” (ROA.1802, 1805; 124, 826-29.)

On April 16, Vincent met with employee Derek Wolzen for his annual evaluation. After giving Wolzen a positive evaluation, Vincent told him that he would not receive a wage increase because such increases were “tied up in union and CoServ negotiations” and CoServ would have to tell everybody else the same thing. (ROA.1802; 50.) Vincent also told Wolzen that the Union had “rejected a contract offer that would have enabled [employees] to get more money.”

(ROA.1802; 51.) Also in April, Vincent evaluated another employee, Chad Beck, and told Beck that “the reason” he was “not going to get a raise is because of the [U]nion.” (ROA.1802; 336.)

**D. The Board and CoServ Reach a Settlement Regarding CoServ's Failure to Continue Wage Increases and Blaming the Union**

Between April and September 2014, the Union filed unfair-labor-practice charges against CoServ alleging, in relevant part, that the suspension of wage-rate raises violated Section 8(a)(5) and blaming the lack of raises on the Union violated Section 8(a)(1). (ROA.1801, 1430-52.) The Board and CoServ reached a settlement agreement regarding those allegations, along with an additional failure-to-promote allegation not at issue here, on November 4. The agreement required CoServ to implement wage increases, pay backpay to a list of employees, and post a remedial notice for 60 days after final approval of the agreement. CoServ also had to make whole the listed employees within 14 days of the agreement's final approval date, which was November 21. The agreement included a non-admissions clause stating that CoServ "does not admit that it has violated the National Labor Relations Act." (ROA.1801, 842-47.)

**E. Employees Sign a Decertification Petition, CoServ Ends Negotiations, Withdraws Recognition from the Union, Refuses To Provide It with Information, and Later Unilaterally Changes Employee Wages**

By early November 2014, some unit employees circulated a petition to decertify the Union as their collective-bargaining representative. By November 5, 23 out of 32 unit employees had signed the petition. Five more employees signed the petition in the coming weeks. A unit employee filed the petition with the

Board on November 19 and delivered a copy to CoServ at some point thereafter. (ROA.1802; 392-95, 1461-67.)

On November 25, the parties met for what would be their final bargaining session. The parties reached agreement on several issues but did not finalize a deal on wages. (ROA.1804; 713.) That same day, CoServ's bargaining team received a copy of the decertification petition. The next day, CoServ announced that it was withdrawing recognition from the Union and it would no longer bargain with the Union as the unit's representative. (ROA.1803; 716-17, 917.)

On November 27, the Union rejected CoServ's withdrawal of recognition and requested a list of employees with current wages. CoServ did not provide the requested information or otherwise respond to the Union. In 2015, CoServ returned to its practice of adjusting employee pay scales by the amount recommended in the Mercer study and gave unit employees raises after their annual evaluations. (ROA.1803; 235-36, 650, 918.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Members Pearce and McFerran, Chairman Ring dissenting in part) agreed with the judge that CoServ violated Section 8(a)(5) of the Act by unilaterally changing its past practice of increasing employees' wage ranges annually and Section 8(a)(1) by blaming the Union for employees' lack of raises. (ROA.1795-96.) Although the Board found those actions unlawful, it did not

impose liability for that conduct because CoServ previously settled those allegations. (ROA.1796.) Evaluating the settled conduct only for its effect on the decertification petition and withdrawal of recognition, the Board found that the settled violations tainted the decertification petition such that CoServ could not rely on it to establish that the Union had lost a majority of the unit employees' support. (ROA.1796-97.) For that reason, the Board found that CoServ's withdrawal of recognition violated Section 8(a)(5).<sup>2</sup> In doing so, the Board severed allegations that several of CoServ's work rules violated Section 8(a)(1) and did not rely on those allegations in finding the withdrawal unlawful. (ROA.1795 n.4.) Further, the Board found that the post-withdrawal changes to employee compensation and refusal to provide relevant information about unit employees violated Section 8(a)(5). (ROA.1798.)

To remedy the unlawful withdrawal of recognition and post-withdrawal unfair labor practices, the Board ordered CoServ to cease-and-desist from refusing to bargain with the Union, changing employment terms without notifying and bargaining with the Union, refusing to provide relevant unit information to the Union, and in any like or related manner interfering with, restraining, or coercing

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<sup>2</sup> The Board found it unnecessary to pass on the General Counsel's allegation that the withdrawal of recognition was unlawful for two additional reasons: because the parties had reached a contract on November 25, 2014, and because the settlement agreement required CoServ to bargain with the Union for a reasonable period. (ROA.1797 n.3.)

employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (ROA.1799.) The Board also ordered CoServ to recognize the Union, bargain with it for a reasonable period; rescind any unilateral changes implemented since it withdrew recognition, on request of the Union; furnish the Union with the requested information in a timely manner; and post a remedial notice. (ROA.1798-99.) Finally, the Board ordered CoServ to schedule a meeting during working time, at which its president and CEO or its senior vice president of employment relations would read the notice to employees in the presence of a Board agent and an agent of the Union, or at which a Board agent would read the notice in the presence of either CoServ officer and a union agent. (ROA.1795 n.3.)<sup>3</sup>

### **SUMMARY OF ARGUMENT**

The primary issue in this case is whether CoServ's previously settled unfair-labor practices, which were unremedied at the time of the decertification petition, tainted that petition such that CoServ could not lawfully rely on it in withdrawing recognition from the Union. Although those two violations have been settled and the Board did not order any remedies pertaining to them, they remain relevant because, as explained below, they render CoServ's withdrawal of recognition unlawful. As to the finding that CoServ blamed the Union for freezing wages, CoServ's only challenge is waived because it improperly incorporates previous

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<sup>3</sup> Chairman Ring stated that he would not order the notice-reading remedy.

arguments. Substantial evidence also supports the Board's finding that CoServ unilaterally changed its practice of increasing employee wage-ranges annually. CoServ had a 5-year practice of following the Mercer study recommendations, and its suspension of that practice in 2014 without notifying or bargaining with the Union constituted a unilateral change to unit employees' terms and conditions of employment.

Substantial evidence also supports the Board's finding that those unfair labor practices tended to contribute to the Union's loss of majority support. CoServ's practice was to raise wage ranges annually and give each employee a raise around the employee's anniversary date that took the new wage ranges into account. When it suspended the wage-range increase in 2014, employees received no such anniversary-date raises. Moreover, supervisor Vincent repeatedly blamed the Union for employees' lack of raises. Because the wage-rate change was implemented throughout the year, employees were reminded of their lack of an annual raise each time they received a paycheck. Given that unilateral changes that undermine the Union's ability to negotiate bread-and-butter issues such as wages can erode union support, the Board reasonably found that the unfair labor practices tended to undermine the Union's support so as to render the decertification petition an invalid expression of employee choice. In doing so, the Board did not abuse its discretion by disregarding evidence about employees'

subjective reasons for signing the petition, as they are not relevant under the Board's objective test.

The Board appropriately exercised its broad remedial discretion by ordering CoServ to bargain with the Union and to read the remedial notice aloud. Those remedies cover only the unlawful withdrawal of recognition, and do not implicitly or otherwise impose liability for the settled unfair labor practices, which the Board did not mention in its Order or the remedy section of its opinion. The Board followed its longstanding practice by ordering CoServ to bargain with the Union, and CoServ has not raised any reason for why the Board should have departed from that practice. Moreover, regardless of whether it was required to do so, the Board reasonably explained how a bargaining order is appropriate in this particular case. Finally, ordering CoServ to read the remedial notice aloud serves as an important reminder to employees who have been deprived of their bargaining representative that CoServ will respect their rights. The Board therefore did not abuse its discretion in so ordering.

### **STANDARD OF REVIEW**

“The standard of review of the Board’s findings of fact and application of the law is deferential.” *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). Courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ . . . even if the issue ‘with nearly equal reason

[might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (internal citation omitted) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)). In particular, the Board’s choice of remedy is “given special respect by reviewing courts.” *NLRB v. Kaiser Agric. Chem.*, 473 F.2d 374, 382 (5th Cir. 1973) (internal citation and quotation omitted).

The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is “such relevant evidence that a reasonable mind would accept to support a conclusion.” *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (internal quotation marks and citation omitted). Thus, the Court will not disturb the Board’s findings “simply because the evidence may also reasonably support other inferences or because [the Court] might well have reached a different result had the matter come before [it] de novo.” *NLRB v. Universal Packing & Gasket Co.*, 379 F.2d 269, 270 (5th Cir. 1967).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT COSERV UNILATERALLY SUSPENDED WAGE-RANGE INCREASES AND BLAMED THE UNION FOR WITHHOLDING EMPLOYEE RAISES**

#### **A. Introduction**

The primary issue in this case is whether CoServ's previous unfair labor practices tainted the decertification petition such that CoServ could not rely on that petition to withdraw recognition from the Union. Although the Board and CoServ have settled allegations that CoServ unlawfully suspended wage-range increases without notifying or bargaining with the Union and that supervisor Vincent unlawfully blamed employees' lack of raises on the Union, those allegations remain relevant in determining the validity of the decertification petition. The Board did not order a separate remedy for the settled allegations but considered them only as they affected the subsequent withdrawal of recognition.

CoServ withdrew recognition from the Union only 3 weeks after settling the unfair-labor practice charges and 5 days after the Board's Regional Director approved the settlement. It is undisputed that CoServ had not yet remedied those unfair-labor practices when it withdrew recognition. Thus, the only open issues are whether the settled but unremedied unfair labor practices occurred and whether they collectively affected the petition such that CoServ's withdrawal of recognition was unlawful. As shown below, the record supports the Board's findings both that

the unfair labor practices occurred and that they tainted the decertification petition under extant case law.

**B. CoServ Has Waived any Challenge to the Board's Finding that It Unlawfully Blamed the Union for Its Wage Freeze**

CoServ does not raise any argument challenging the Board's findings that Vincent blamed the Union for CoServ's wage freeze on three occasions and that doing so violated Section 8(a)(1) of the Act. Instead, in a footnote (Br. 27-28 n.5), CoServ attempts to incorporate arguments it raised to the Board in its exceptions to the judge's decision and brief in support of exceptions. Arguments that do not follow Federal Rule of Appellate Procedure 28(a)(4)'s requirement that they include citation to the authorities, statutes, and parts of the record relied on are considered waived. *See Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990). 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). *Yohey v. Collins*, 985 F. 2d 222, 225 (5th Cir. 1993). Accordingly, CoServ's bare contention that Vincent's comments did not violate Section 8(a)(1) for the reasons given in its exceptions to the Board should be disregarded. In any event, it is well-established that attributing a lack of wage increases to a union violates Section 8(a)(1). *See, e.g., Twin City Concrete, Inc.*, 317 NLRB 1313, 1318 (1995)

(statement that employer would withhold expected wage increases because of union's election violated the Act).

**C. CoServ Denied Employees a Wage-Range Increase that Was Otherwise Due and Therefore Violated Section 8(a)(5) and (1)**

**1. Unilaterally Discontinuing Regularly Scheduled Wage Increases Violates Section 8(a)(5) and (1)**

Section 8(a)(5) of the Act requires employers to bargain with the collective-bargaining representative of their employees' unions over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). Section 8(d) defines those mandatory subjects as "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. "[A]n employer who violates Section 8(a)(5) also commits a 'derivative' violation of Section 8(a)(1)," which bans employer interference with, coercion, or restraint of employees' rights under the Act. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 427 n.3 (5th Cir. 2008). An employer thus violates Section 8(a)(5) and (1) if it unilaterally changes its employees' terms or conditions of employment without bargaining to impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)).

An employer's compensation system, including merit-increase programs, is a term of employment and thus a mandatory subject of bargaining. *See, e.g., NLRB*

*v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1161 (D.C. Cir. 1992). Where an employer has a system or past practice of merit wage increases granted by “fixed criteria,” denying an increase that would ordinarily be due under that system violates Section 8(a)(5) even if some aspects of the system are discretionary. *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 (D.C. Cir. 1996); *see also NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (in “the unlawful refusal to increase situation . . . the employer has changed the existing conditions of employment” and therefore violates Section 8(a)(5)). Thus, this Court views both unusually generous and unusually stingy wage increases “with a skeptic’s eye during the tensions of organization, recognition and bargaining.” *Dothan Eagle*, 434 F.2d at 98.

**2. CoServ’s departure from its past practice of increasing wage ranges annually violated Section 8(a)(5) and (1)**

As the Board found, undisputed record evidence establishes that CoServ had a “past practice of increasing wage ranges . . . as dictated by the Mercer study.” (ROA.1805.) CoServ had increased the wage ranges for all unit employees by the amount recommended by the Mercer study every year for 5 years. There is no record evidence that CoServ ever departed from that practice in the past. Moreover, in 2014, CoServ implemented the 2.3-percent increase recommended by the study for all employees *except* unit employees. In such circumstances, the Mercer-study wage-range increases were a term or condition of employment that

employees could expect to continue receiving. Therefore, CoServ could not lawfully terminate the wage-range increase for unit employees in 2014 without notifying and, on request, bargaining with the Union.

There is no record evidence that CoServ notified the Union that it had discontinued wage-range increases. Indeed, the Union only found out months later when it approached CoServ after employees complained about not receiving raises. CoServ's subsequent belated communications with the Union about wage-scale raises "occurred when th[e] subject was a fait accompli." (ROA.1805.) As such, CoServ did not allow the Union an adequate opportunity to bargain before implementing the wage-range change. *See, e.g., Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1391 (5th Cir. 1983) (it is "well established that a union cannot be held to have waived bargaining over a change that is presented to it as a fait accompli").

CoServ argues (Br. 27 n.5) that increasing wage ranges in 2013 did not obligate it to do so in 2014 and that the Union could have requested bargaining or proposed a raise if wanted one. But the Board relied not only on the 2013 increases, but also the 2009, 2010, 2011, and 2012 increases to establish that the Mercer study raises were a condition of employment. CoServ cites no case where the Board or a court has found that an employer can unilaterally discontinue regular wage increases that depended on objective factors (here, the Mercer

recommendation) and had been established for at least 5 years. Moreover, CoServ deprived the Union of the opportunity to request bargaining or propose a raise amount when it failed to notify the Union that it intended to change its past practice. CoServ bore the burden of approaching the Union *before* making any changes. And CoServ's attorney told the Union that even if the Union requested to bargain over the issue, CoServ "believe[d] that an interim agreement is not appropriate." (ROA.1427.) Any request from the Union to undo the unilateral change would therefore have been futile. Thus, where CoServ's change to past practice occurred without any notification, there was no way for the Union to request bargaining or propose anything.

CoServ also claims (Br. 27 n.5) that increasing wage ranges in 2014 would have constituted an unlawful unilateral change as it could not increase wages without bargaining. In *Dothan Eagle*, however, this Court confronted and rejected a similar claim that Section 8(a)(5) required the employer to withhold a wage increase during bargaining. There, the employer had a practice of regularly increasing wages of certain workers by 10 or 15 cents per hour every 6 months, but it discontinued that practice during a union organizing campaign and subsequent collective-bargaining period. 434 F.2d at 96. This Court agreed with the Board that the failure to grant the wage increases violated the Act and rejected an employer's claim that giving a wage increase would have violated Section 8(a)(5)

as a unilateral change. Instead, the Court found that the wage increases were “part of the established scheme of compensation and could not be deviated from . . . without union consultation during the collective-bargaining period.” *Id.* at 99. Here, CoServ’s established compensation plan included increasing wage ranges for all positions by the amount recommended in the Mercer study at the beginning of each year. It could not deviate from that practice without notifying the Union and giving it an opportunity to bargain. Therefore, substantial evidence supports the Board’s finding that CoServ’s unilateral cessation of wage-range increases in 2014 violated Section 8(a)(5).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT COSERV UNLAWFULLY WITHDREW RECOGNITION FROM THE UNION BASED ON EMPLOYEES’ ANTIUNION PETITION TAINTED BY ITS UNFAIR LABOR PRACTICES AND SUBSEQUENTLY FAILED TO PROVIDE INFORMATION AND UNILATERALLY CHANGED WAGES**

**A. Withdrawing Recognition from a Union Based on an Employee Petition Tainted by an Employer’s Unfair Labor Practices Violates Section 8(a)(5) and (1)**

Once a majority of employees select a union to represent them, the Board presumes that the union continues to enjoy majority support. *Levitz Furniture Co.*, 333 NLRB 717, 723-24 (2001). That presumption furthers fundamental objectives of federal labor policy by “protect[ing] the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and [by] prevent[ing] an employer from impairing that right,” while also “promot[ing]

continuity in bargaining relationships.” *Id.* at 723 (quotation omitted). An employer may rebut the presumption and withdraw recognition from its employees’ chosen representative only if it establishes that the union in fact lacks majority support. *Id.* at 725. Otherwise, the withdrawal constitutes a refusal to bargain in violation of Section 8(a)(5) and (1). *Id.* Contrary to CoServ’s contention (Br. 25 n.4) that withdrawal-of-recognition cases involve legal conclusions to which the Board is not entitled any deference, this Court has applied the deferential substantial-evidence standard in such cases. *See United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 552 (5th Cir. 1989). In applying that standard, “[t]he burden is on the employer to prove its good faith belief with ‘objectively verifiable evidence,’ and this burden is a heavy one.” *Id.* (quoting *NLRB v. A.W. Thompson*, 651 F.2d 1141, 1143 (5th Cir. 1981)).

In establishing that the union has lost majority support, an employer cannot “rely on a union’s loss of majority support caused by the employer’s own unfair labor practices.” *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993); *accord NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 279 (5th Cir. 1997). Thus, “an employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that reasonably tended to contribute to employee disaffection from the union.” *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 464 (6th Cir. 1992).

To determine whether unfair labor practices have affected employee dissatisfaction, “[d]irect evidence of causation is not required.” *Hi-Tech Cable*, 128 F.3d at 279. The test is objective; the Board and this Court consider whether the unfair labor practices at issue “could have contributed to employee disaffection.” *Id.* (quoting *NLRB v. Powell Electrical Mfg. Co.*, 906 F.2d 1007, 1015 (5th Cir. 1990)). Thus, the Board assesses whether unfair labor practices tended to contribute to employee disaffection by applying the factors set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984): (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of detrimental or lasting effect on employees; (3) any possible tendency of the violations to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

**B. CoServ’s Cessation of Wage-Scale Increases and Blaming Wage Freeze on the Union Tended To Contribute to the Union’s Loss of Majority Support**

The record fully supports the Board’s finding that CoServ’s unlawful unilateral change to its practice of annually increasing employee wage ranges seriously affected employee wages and tended to undermine the Union.

Ordinarily, CoServ raised the wage ranges for all employees’ positions each year by the amount the Mercer study recommended, which was 2.3% in 2014.

(ROA.1802.) It then incorporated that wage-range increase into an annual raise that it gave each employee on the employee's anniversary date, which were based on the Mercer study amount but could vary depending on employee merit per the annual evaluation. But in 2014, CoServ did not raise wage ranges, which resulted in many "employees' wages effectively being frozen." (ROA.1802.) Some bargaining-unit employees received separate raises when they moved to the next step of the EDP, but because the wage-ranges were frozen, those employees still earned 2.3% less than they would have if CoServ had followed its past practice. But no employees received their customary annual raises. (ROA.351-52, 356-57.)

We discuss below the individual factors that led the Board to conclude that CoServ's unfair labor practices tainted the decertification petition. But first, we briefly address CoServ's attempts (Br. 33-38) to downplay the significance of the wage-range increases and therefore their overall effect on employees. CoServ claims that the annual wage-range increases are "a step removed" from individual employees' annual raises. (Br. 33.) But the distinction between the two is immaterial. CoServ typically gave employees annual raises that averaged the amount of the wage-range increase. (ROA.1802, 1802 n.9; 352-61.) In 2014, CoServ unilaterally departed from its practice of following the Mercer study recommendations and did not increase wage-ranges by the recommended 2.3%. A necessary effect of that change was that individual employees, whose wage ranges

had not increased at all, did not receive an annual raise, even though CoServ otherwise followed its practice of evaluating employees. Even employees in the EDP who received step increases were negatively affected by the lack of wage-range increases because the pay range for their new steps was 2.3% lower than it would have been absent CoServ's unilateral change. Thus, the Board appropriately took employees' lack of annual raises into consideration in determining the effect of CoServ's unilateral change.

It is undisputed that CoServ's unfair labor practices were unremedied at the time the petition circulated. (ROA.1805.) The parties agree, therefore, that the *Master Slack* factors are the appropriate test for determining whether those unremedied unfair labor practices tainted the decertification petition. (Br. 27-28.) Applying the objective test required by both its own and this Circuit's precedent, the Board reasonably found that the *Master Slack* factors indicate that CoServ's unfair labor practices tended to contribute to employee dissatisfaction.

**1. CoServ's unfair labor practices happened close enough in time to the petition's circulation to taint the petition**

As the Board found, the first *Master Slack* factor supports a finding of causation because the violations occurred close in time to the petition's circulation. In addition, the failure to grant the wage-increases had a lasting effect on employees "each time the employees received a paycheck without an annual raise[.]" (ROA.1797.)

Significantly, employees did not receive wage increases automatically as soon as the Mercer study wage-range changes came into effect. Instead, their raises were “implemented throughout the year” on each employee’s anniversary date, which is when CoServ gave merit increases that took the new pay range into account. (ROA.1805.) In other words, an employee whose anniversary date was in October would not have experienced the effects of the unilateral change until that employee was refused a wage increase in October 2014, within a month of the petition’s circulation. In such circumstances where the denial of the wage increases had a rolling effect with employee anniversary dates, substantial evidence supports the Board’s finding that CoServ’s unlawful unilateral change occurred and was implemented 0 to 10 months from the time the petition circulated.

Likewise, Vincent’s comments blaming the Union for the lack of raises also occurred close enough to the petition’s circulation to render the petition an unreliable indicator of uncoerced employee sentiment. Although his unlawful statements to various employees occurred between 7 and 11 months earlier, those comments involved employee wages, the same subject of CoServ’s continuing unilateral cessation of wage-rate increases. Moreover, as discussed below (p. 34), those comments were widely disseminated throughout the unit. Where an employer’s later or continuing unfair labor practices remind employees of its

previous unlawful actions, the Board considers all of the violations together in assessing taint. *See Mesker Door, Inc.*, 357 NLRB 591, 597 (2011) (when employer’s recent unfair labor practice reminded employees of previous violation, “7-month passage of time did not dissipate the earlier unlawful conduct’s causal effects on the withdrawal of recognition”) (citing cases). Here, employees with anniversary dates later in the year who sought an explanation for why they did not receive their customary annual raises would be reminded of Vincent’s unlawful statements attributing the lack of raises to the Union. Similarly, the three employees to whom Vincent commented would be reminded of those comments any time they heard of another employee not receiving an annual raise or they received their own paycheck that did not include the raise. Accordingly, the record supports the Board’s finding that the unremedied violations regarding wage-range increases and blaming the Union for their absence would remain in the minds of employees within the time range found to taint disaffection petitions, as in the cases the Board cited (ROA.1797 n.9.) *See Beverly Health & Rehab. Serv.*, 346 NLRB 1319, 1328-29 (6 to 8 months between unfair labor practices and unlawful withdrawal of recognition); *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004) (9 months).

There is no merit to CoServ’s challenge (Br. 31) to the finding that the lack of wage-range increases was an ongoing violation—resulting in no time lag

between the unfair labor practice and petition—because employees were unaware of the wage ranges. As described above, employees typically received annual wage raises on their anniversary dates. (ROA.1805; 119.) Employees would notice the lack of a raise on their anniversary date and thereafter, even if they did not know the details of the Mercer study recommendation and how the raise was calculated. Thus, employees who received no annual wage increase did not have to know *why* they did not receive that increase for its absence, especially in the context of first-contract negotiations, to have a detrimental effect on their morale and support for the Union. And by explicitly blaming the Union for the lack of raises, CoServ removed any uncertainty employees would have had about the exact cause for the elimination of their raises.

CoServ further argues that enough time elapsed between the unfair labor practices and the employee decertification petition to eliminate any taint. (Br. 28-31.) But that argument requires ignoring the Board’s finding that the wage-range unilateral change was implemented on employees’ anniversary dates throughout the year and rejecting the Board’s finding that the change was a continuous violation that affected employees with each paycheck. Even if CoServ were correct that the time lapse between its unfair labor practices and the petition should be viewed as 7 to 11 months instead of the 0 to 11 months the Board considered,

the Board has consistently found that similar gaps support causation when the unfair labor practices involve changes to wages.

In *Tenneco Automotive, Inc. v. NLRB*, on which CoServ heavily relies (Br. 28-29), along with the cases cited therein, the D.C. Circuit disagreed with the Board that the unfair labor practices at issue were “detrimental or lasting” such that employees would remember them 10 months later. *Tenneco*, 716 F.3d 640, 649 (D.C. Cir. 2013). But the court then acknowledged that the types of unfair labor practices that it considered to be sufficiently detrimental or lasting included “withholding benefits” and unilateral changes that “involve the issues that lead employees to seek union representation, particularly employee earnings.” *Id.* at 650 (internal citation and quotation marks omitted). By contrast, the cases cited in *Tenneco* and in CoServ’s brief (Br. 28) to argue that only short time lapses can show taint involved comparatively minor violations of Section 8(a)(5) that did not affect employee earnings. *See Garden Ridge Mgmt.*, 347 NLRB 131, 132 (2006) (refusal to schedule enough bargaining sessions), *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004) (unilateral transfer of a single employee).

When an employer commits unfair labor practices that employees tend to remember, such as unlawful discharges or changes to compensation, the Board and courts have found the first factor met if violations occur “within one year of the decertifying petition.” *See Columbia Portland*, 979 F.2d at 465 (contrasting 1-year

period with 8 to 9 years that elapsed in *Master Slack*); *see also Ardsley Bus Corp.*, 357 NLRB 1009, 1012 (7-month period between assault of shop steward and decertification petition supports causation); *Hi-Tech Cable*, 128 F.3d at 279 n.36 (approving of *Columbia Portland*'s discussion of 1-year period). Indeed, this Court has found that “cards solicited during a remedial notice posting period are not reliable indicators of employee sentiment” even when the notice in question involved violations of the Act that occurred 2 years earlier. *Id.* at 279 n.35. Given the likelihood that employees would remember changes to their wages that continue to affect them, the Board reasonably concluded that the timing at issue here supports finding causation.

**2. Withholding scheduled wage-rate increases has a lasting, detrimental effect and tends to cause disaffection**

Substantial evidence supports the Board's finding that the second and third *Master Slack* factors—the nature of the violation and the tendency to cause disaffection—demonstrate that CoServ's unfair labor practices tended to taint the decertification petition. As the Board found, citing *Mesker Door*, 357 NLRB at 597, wage increases are bread-and-butter issues of collective bargaining, and threatening to withhold them during first-contract negotiations can have a lasting effect on the union. (ROA.1797, 1806.) Similarly, blaming the absence of raises on the union can cause employees to question the union's ability to deliver on central collective-bargaining issues. Indeed, in finding that blaming a missing

wage increase on a union tends to cause disaffection, the Board has held that “[i]t is not surprising that employees would become alienated from a [u]nion which they believed had prevented a wage increase.” *RTP Co.*, 334 NLRB 466, 467 (2001).

Here, the entire unit was affected by the suspension of the pay-range increases. And the Board reasonably found that Vincent’s comments blaming the lack of raises on the Union were disseminated among the unit because they helped explain the contemporaneous “actual cessation of Mercer study raises,” “concerned core issues (i.e. the Union and money),” and “were made to multiple employees in a small workplace.” (ROA.1805 n.17.) It stands to reason that employees who did not receive raises would want to know why and would discuss the issue with other employees.

In addition to widely affecting the whole unit, CoServ’s unilateral change to employee wage ranges tended to “have a lasting effect on employees.” (ROA.1797.) Employees were “reminded of the Union’s ineffectiveness in preserving [annual] raises” each time they received a paycheck. (ROA.1797.) And as the Board found, quoting *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001), and CoServ acknowledges (Br. 32), “‘the possibility of a detrimental or long-lasting effect on employee support for the union is clear’ where the employer’s unlawful unilateral conduct, like here, suggests to ‘employees that their

union is irrelevant in preserving or increasing their wages.’’ (ROA.1797.) The Board and courts have consistently supported that notion, finding that such unilateral changes to employee wages suggest to employees that the union is irrelevant and have a lasting effect on the bargaining unit. *See Broadway Volkswagen*, 343 NLRB 1244, 1247 (2004), *enforced sub nom.*, *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007) (unilateral wage increase ‘‘involved the important, bread-and-butter issues for which employees seek and gain union representation’’ and ‘‘particularly where the [u]nion is bargaining for a first contract, can have a lasting effect on employees’’); *accord Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000) (reasoning that second and third *Master Slack* factors were met because ‘‘the unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees’ chosen collective-bargaining agent’’).

CoServ’s attempts (Br. 37-38) to argue that the unfair labor practices here were not serious enough to cause taint and to distinguish *Penn Tank*, 336 NLRB at 1067 and *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006), *enforced*, 525 F.3d 1117 (11th Cir. 2008), ignore the purposes for which the Board cited those cases and the import of the violations here. In both cases, the Board found that unilateral changes to employees’ wages tended to cause disaffection within the meaning of the *Master Slack* test and the Board did not require any additional

evidence beyond the nature of the unilateral changes themselves. Although both cases also involved unlawful discharges, the Board's language clearly reveals that the unilateral changes, on their own, met the *Master Slack* causation test. See *Penn Tank*, 336 NLRB at 1067 (finding possibility of long-lasting effect on union support when employer conduct suggests that the union "is irrelevant in preserving or increasing their wages"); *Goya Foods*, 347 NLRB at 1122 (unilateral changes that "vitaly impacted employee earnings . . . would reasonably tend to coerce employees into abandoning support for the [u]nion"). Here, CoServ's elimination of the Mercer study increases impacted employee earnings just as the changes to drivers' routes impacted their earnings in *Goya Foods*. The Board therefore reasonably relied on its case law in finding that CoServ's unfair labor practices tended to sow disaffection.

CoServ's contention (Br. 36-37, 36 n.13) that the Board ignored wage increases it gave to many unit employees is irrelevant; simply because some employees were not denied all components of their wage increases does not mean that denying them some components had no impact. The only unit employees who received 2014 raises did so per the EDP steps, not the wage-range increase at issue here. As the Board accurately noted, employees in the EDP received raises in 2014 only when "they moved up a salary step." (ROA.1805.) Those employees would ordinarily have received an annual raise in *addition* to any EDP step

increase, but did not in 2014. There is no support in the record for the proposition (Br. 36-37) that the step raise was greater than employees were entitled to as part of the EDP or that it otherwise mitigated their lack of an annual raise. The opposite is true: employees in the EDP would have received larger step raises reflecting the new wage rates if CoServ had followed the Mercer study recommendation in 2014. In other words, when employees moved to a new step, they started at a rate 2.3% lower in the new step than they would have if CoServ had followed its past practice of raising wage ranges by the Mercer study recommendations. The Board therefore reasonably found that the lack of annual raises tended to cause broad disaffection among the entire bargaining unit.

CoServ contends (Br. 36 n.12) that substantial evidence does not support the Board's rejection of the judge's statement that employees were unaware of the unfair labor practices, which diminished their effect. It, however, relies on far too technical a reading of the record. Employees testified that they knew there were unfair-labor-practice charges filed, that they did not know the exact contents of those charges, and that they did not receive annual wage increases that they had come to expect. (ROA.119, 490-91, 591-92.) That employees did not know the exact content of the *charges* when they testified at the hearing 2 years later does not mean that they also did not know of the CoServ's *actions* that constituted unfair labor practices. Indeed, CoServ does not cite any example of employees

testifying that they were unaware of what raises they received. It is not necessary for employees to know that the lack of raises constituted an unfair labor practice; it is enough that the lack of raises could affect employees' union support. *See Wire Prod. Mfg. Corp.*, 326 NLRB 625, 627 n.13 (1998) (“In assessing the tendency of unlawful action to cause employee disaffection . . . actual knowledge by the employees of the unfair labor practices need not be shown.”) Similarly, the credited testimony does not support CoServ’s assertion (Br. 34-35) that only five employees who did not work with anybody else knew of Vincent’s comments. The record reveals that *at least* five system operators knew of them, that system operators knew the other unit employees and interacted with them regularly as part of their job duties, and that system operators discussed the lack of wage raises with employees in other classifications. (ROA.44-46, 51-52, 124-25.)

Finally, contrary to CoServ’s argument (Br. 47), the Board appropriately analyzed how Vincent’s comments tended to cause disaffection in tandem with the lack of wage increases. None of the Board’s or the judge’s analysis relied on the judge’s “inadvertent misstatement” that Vincent threatened employees.

(ROA.1797 n.7.) Other than that inadvertent mistake, the judge consistently referred to Vincent’s comments as “blaming the Union” for lack of raises or for wage freezes. (ROA.1805.) Indeed, the Board’s reasoning that Vincent’s statements concerned core issues and explained the cessation of raises only makes

sense if Vincent's comments are viewed as blaming the Union and not as threats. (ROA.1805 n.17.) Finally, the Board appropriately analyzed the facts at issue by finding that Vincent blamed the Union for the lack of raises and citing to *RTP*, 334 NLRB at 467, for the proposition that doing so during first-contract negotiations can have a lasting, negative effect on employees' union support. CoServ has not given any reason to doubt that well-settled, commonsense principle.

### **3. The unfair labor practices affected employees' morale and support for the Union**

The record also fully supports the Board's finding that the final *Master Slack* factor weighs against allowing the withdrawal of recognition. As the Board found, the Union lost significant support after CoServ's unfair labor practices; it "went from winning a decertification election . . . to almost unanimously losing support in the petition only a short year later." (ROA.1806.) CoServ's unfair labor practices started just 2 months after the decertification election and continued throughout 2014. In such circumstances, the Board reasonably found that the "dramatic swing in support . . . is circumstantial, but very strong, evidence of effect; this is afforded controlling weight." (ROA.1806.)

CoServ does not challenge the Board's finding that employee morale cratered after its unfair labor practices or that employees became disaffected from the Union in 2014. Instead, it claims (Br. 40-45) that employees testified or were prevented from testifying that the lack of wage increases did not cause their

disaffection. But as the Board pointed out, *Master Slack* is an objective test. (ROA.1797 n.10.) Thus, “[t]he relevant inquiry at the hearing does not ask employees *why* they chose to reject the Union.” *St. Gobain Abrasives*, 342 NLRB 434, 434 n.2 (2000); *accord SFO Good-Nite Inn, LLC*, 357 NLRB 79, 83 (2011) (Board and courts “have long recognized the inherent unreliability” of employee testimony “about their reasons for supporting decertification”), *enforced*, 700 F.3d 1 (D.C. Cir. 2012). Nor does it matter that employees gave a different reason for their disaffection; if the *Master Slack* test is met, there is no need to analyze additional independent causes of disaffection. *See Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 254 (2d Cir. 2000) (rejecting employer’s proffer of an independent cause of employees’ loss of union support because *Master Slack* factors demonstrated that unfair labor practices tended to cause disaffection). Similarly, this Court has characterized the test as objective in examining the “reasonable likelihood the unfair labor practices have a continuing impact upon the employees” from which the Board may draw an inference that the decertification petition does not reflect uncoerced employee sentiment. *United Supermarkets*, 862 F.2d at 553. CoServ does not contend that it sought to adduce testimony about anything other than employees’ subjective impressions of why they signed the decertification petition or why they were unhappy with the Union. The Board thus reasonably declined to rely on employees’ testimony about the reasons for their

disaffection and refused to burden the record with repeated testimony that is legally irrelevant.

None of the cases CoServ cites are to the contrary. In *Tenneco Automotive*, the D.C. Circuit acknowledged the potential unreliability of employees' testimony about their reasons for signing a decertification petition but faulted the Board for failing to give a reason why it ignored that testimony after the administrative law judge credited it and relied on it. 716 F.3d at 651-52. Here, the Board explained why it did not rely on employee testimony, finding it irrelevant under Board law. (ROA.1797 n.10.) *Lexus of Concord, Inc.* is not to the contrary; there, the Board relied on employee testimony as to the *timing* of the loss of disaffection, not employees' subjective reasons for why they no longer supported the Union. 343 NLRB at 853. Here, as explained above (p. 35), there is no record evidence that employees became disaffected with the Union before the unfair labor practices began. The Board's explanation for rejecting employee testimony about why they signed the decertification petition therefore fits well within the guidelines of its precedent and does not constitute an abuse of discretion. *See Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 253-54 (5th Cir. 1983) (evaluating Board's rejection of evidence for lack of relevance under abuse-of-discretion standard).

**C. Because CoServ's Withdrawal of Recognition Was Unlawful, Its Post-Withdrawal Refusal to Provide Relevant Information and Unilateral Changes Violated Section 8(a)(5) and (1)**

As discussed above (p. 16), an employer's duty to bargain includes the duty to refrain from changing unit employees' terms and conditions of employment without notifying or bargaining with the union. Similarly, the duty to bargain includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). After withdrawing recognition from the Union, CoServ refused to answer the Union's request for information about employee wages and gave raises to employees in 2015 without notifying or bargaining with the Union. (ROA.1806.) CoServ does not dispute that it refused to provide the Union with relevant information or that it unilaterally changed employees' wages in 2015. It solely claims (Br. 48-49) that it had no duty to bargain because its withdrawal of recognition was lawful. Therefore, should this Court agree with the Board that the withdrawal of recognition was unlawful, the Board is entitled to enforcement of the portions of its Order pertaining to the refusal to provide information and unilateral wage change.

### **III. THE BOARD’S ORDERED REMEDIES FIT WITHIN ITS BROAD REMEDIAL DISCRETION**

#### **A. The Board Has Broad Discretion in Ordering Remedies Under the Act**

Section 10(c) of the Act, 29 U.S.C. § 160(c), grants the Board the power to remedy unfair labor practices, including by ordering a violator of the Act “to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of” the Act. The Board’s remedial power under Section 10(c) is “a broad discretionary one, subject to limited judicial review.” *Fibreboard*, 379 U.S. at 216 (citation omitted). Accordingly, courts must enforce the Board’s chosen remedy “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 537 (5th Cir. 1969).

As shown below, the Board’s ordered remedies fit well within its broad discretion. Unlawfully depriving employees of their chosen representative by relying on discontent caused by an employer’s own unfair labor practices has a severe and pervasive effect on the bargaining unit. The Board’s remedies appropriately take into consideration the seriousness of CoServ’s withdrawal of recognition and subsequent violations. CoServ’s challenges downplay the effect of its conduct and rely on out-of-circuit precedent that is incompatible with the

Board's and this Court's jurisprudence. Extant Board and this Court's precedent, as well as basic logic, show the reasonableness of the Board's ordered remedies.

**B. The Board Reasonably Ordered a Remedy for CoServ's Unlawful Withdrawal of Recognition**

To remedy the unlawful withdrawal of recognition, the Board ordered CoServ to cease-and-desist from withdrawing recognition from the Union and to recognize and bargain with it. (ROA.1799.) Those remedies fit well within Section 10(c)'s mandate, which states that when the Board determines that a person has engaged in an unfair labor practice, the Board "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. § 160(c). The Board's order to cease withdrawing recognition and to bargain with the Union is thus the standard remedy for an employer's unlawful withdrawal of recognition. *See, e.g., Anderson Lumber Co.*, 360 NLRB 538, 538-39 (2014) (ordering employer to cease and desist from withdrawing recognition and to bargain with the union from which it unlawfully withdrew recognition), *enforced*, 801 F.3d 321 (D.C. Cir. 2015).

CoServ contends (Br. 49-50) that the Board should have ordered no remedy at all for the unlawful withdrawal of recognition because doing so would in fact constitute a remedy for the settled unfair labor practices, as there would have been no unlawful withdrawal of recognition absent those unfair labor practices. That

reasoning makes no sense. Imposing liability for later unlawful conduct that happened because of CoServ's settled conduct does not constitute a remedy for the settled conduct itself. Simply because CoServ settled certain unfair labor practices does not mean that it has remedied the separate unfair labor practices—the withdrawal of recognition, subsequent refusal to provide information, and 2015 unilateral wage changes—that flowed from the settled conduct.

To be clear, the Board did not order CoServ to cease-and-desist from unilaterally discontinuing its wage-rate raises or from blaming the Union for the lack of raises. Nor did the Board order CoServ to reimburse employees for lost wages due to the discontinued wage-rate increases. The Board ordered CoServ to recognize the Union and bargain with it and to follow its other collective-bargaining responsibilities. That remedy does not address the settled unfair labor practices; it attends to only the withdrawal of recognition and subsequent failure to notify and bargain with the Union before changing employees' terms and conditions of employment and to provide the Union with relevant requested information.

**C. The Board's Bargaining Order Is Well Within Its Discretion Under this Court's Jurisprudence**

Incumbent unions enjoy a presumption of majority status. *Levitz Furniture*, 333 NLRB at 723-24. As such, when an employer unlawfully refuses to bargain with an incumbent union, the Board orders the employer to bargain with the union

for a reasonable period during which the employer may not withdraw recognition and does not view that order as an extraordinary or special remedy. *Caterair Int'l*, 322 NLRB 64, 68 (1996). The D.C. Circuit has added a requirement that the Board justify a bargaining order in each case, based on the specific circumstances of that case. *Vincent Industrial Plastics*, 209 F.3d at 738-40 (setting forth factors the Board must analyze to justify a bargaining order).

This Court has not adopted the *Vincent* requirements, and CoServ cites no case where this Court has denied enforcement of a bargaining order after an employer unlawfully withdrew recognition from a union. Nor does CoServ bring any argument why the Court should do so. It simply assumes (Br. 50-51) that *Vincent* applies in this circuit. It made the same assumption before the Board; as the Board's Chairman noted, no party requested that the Board overrule *Caterair*. (ROA.1798 n.12.) In *Caterair*, the Board explained at length why it does not follow the D.C. Circuit's precedent and how an order to bargain with an incumbent union is different from the extraordinary remedy of ordering bargaining with a union that the Board has never certified, as in *NLRB v. Gissel Packing Co.*, 395 U.S. 675, 613-14 (1969). *Caterair*, 322 NLRB at 65-68. CoServ's brief does not address the Board's reasoning in *Caterair*, and this Court need not supply that missing reasoning.

In any event, the Board specifically justified its bargaining order *at length* under the facts of this case as required by the D.C. Circuit. (ROA.1798-99.) CoServ’s only argument that the Board’s justification is insufficient is a bare statement that “[a] reasoned analysis of the evidence in the record shows that CoServ’s alleged conduct falls noticeably short of the ‘outrageous and pervasive’ ULPs that justify this extraordinary remedy.” (Br. 51.) CoServ does not supply that reasoned analysis. It cites *Gissel* as authority for its claim that a bargaining order is an extraordinary remedy, but this Court has indicated that it does *not* view orders to bargain with an incumbent union—as opposed to a union that has never represented the unit as in *Gissel*—as an extraordinary remedy. *Air Exp. Intern. Corp. v. NLRB*, 659 F.2d 610, 617 n. 10 (5th Cir. 1981) (“in a *Gissel* case the issue is whether an extraordinary remedy is warranted while in this non-*Gissel* case the issue is simply whether the certification is to be given continued effect”), *modified*, 670 F.2d 512 (5th Cir. 1982).

But the Board did provide that analysis: it noted that CoServ had denied employees the benefit of collective bargaining, that CoServ withdrew recognition just 5 days after the Board approved a settlement wherein CoServ agreed to the bargain with the Union, which is the very remedy at issue here, and that a bargaining order would give employees time to “fairly assess the Union’s effectiveness as a bargaining representative in an atmosphere free of [CoServ’s]

unlawful conduct.” (ROA.1798.) The Board further found that an affirmative bargaining order would remove CoServ’s “incentive to delay bargaining in the hope of further discouraging support for the Union” and ensure that the Union would not simply accept whatever CoServ offers in the hope of avoiding decertification. (ROA.1798.) Finally, the Board reasoned that allowing another decertification petition without a reasonable period of time for bargaining would deny the Union an opportunity to reestablish ties with the bargaining unit and would allow CoServ “to profit from its own unlawful conduct.” (ROA.1799.) Thus, even under the D.C. Circuit’s more stringent standard, the Board’s careful, reasoned analysis adequately explains the appropriateness of the bargaining order at issue.

**D. The Board Did Not Abuse Its Discretion by Ordering CoServ To Read Aloud the Remedial Notice to Employees**

In some circumstances, such as when an employer’s unfair labor practices affect an entire bargaining unit and undermine the Union, the Board can order a responsible management official or a Board agent in the presence of such an official to read aloud the remedial notice. *See, e.g., Carey Salt Co.*, 360 NLRB 201, 201–02 (2014) (finding notice reading appropriate where the employer threatened to withhold, then withheld, a wage increase and failed to bargain in good faith with the Union). As this Court explained, public notice reading can counter pervasive unfair labor practices by ensuring “that the important

information set forth in the notice is disseminated to all employees, including those who do not consult the [employer's] bulletin boards.” *UNF West, Inc. v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016) (quoting *Excel Case Ready*, 334 NLRB 4, 5 (2001) (alteration in original)). Where “conduct has created a chill atmosphere of fear . . . the reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance.” *J.P. Stevens & Co.*, 417 F.2d at 540.

The Board has ordered notice-reading when an employer's unfair labor practices are serious and widespread even if the employer is not a repeat offender. *See Bozzuto's Inc.*, 365 NLRB No. 146, slip op. at 5 (2017) (notice reading appropriate where employer unlawfully increased entire unit's wages during organizing campaign), *petition for review pending*, Case 18-125 (2d Cir., filed Jan. 12, 2018); *Auto Nation, Inc.*, 360 NLRB 1298, 1298 n.2 (2014) (unlawful discharge of single employee, three unlawful threats, and an unlawful implied promise to increase employees' wages supported a notice-reading remedy even though the employer was not a repeat offender), *enforced*, 801 F.3d 767 (7th Cir. 2015); *see also Conair v. NLRB*, 721 F.2d 1355, 1361-65, 1386-87 (D.C. Cir. 1983) (notice reading appropriate where non-recidivist employer threatened to close plant and discharge employees, threatened losses of benefits if union was elected, pre-emptively offered new benefits, and refused to reinstate striking

employees). Here, CoServ's withdrawal of recognition was pervasive; its unlawful action deprived the entire bargaining unit of their choice of representative. Doing so "undermined the confidence of unit employees in the Union's ability to represent their interests in bargaining." (ROA.1795 n.3.) Its subsequent failure to provide the Union with information and unilateral changes to employees' wages further undermined the Union and contributed to the "serious and widespread impact on the unit." (ROA.1795 n.3.) The Board thus sought to assure that employees heard and understood the contents of the notice, which is particularly important when an employer "has acted so as to undermine employees' decisions regarding unionization." (ROA.1795 n.3.)

Employees hearing the notice reading would understand that, contrary to CoServ's actions, the Union can adequately represent them. In that way, the notice reading would dissipate the "lingering effect of [CoServ's] actions and enable employees to exercise their Sec[ti]on 7 rights free of coercion." (ROA.1795 n.3.) That rationale is particularly apt here, where CoServ's unlawful withdrawal of recognition has prevented the Union from being able to remind employees of their rights in the workplace. In such circumstances, employees need the assurance "that the employer understands the Board's order and is committed to complying with the Act in the future[.]" (ROA.1795.) *See Print Fulfillment Serv., LLC*, 361 NLRB 1243, 1248-49 (2014).

CoServ’s attempt (Br. 54-55) to downplay the seriousness of its withdrawal of recognition does not survive scrutiny. That its high-level managers did not circulate the decertification petition is not relevant; the Board did not find that the petition was unlawfully circulated. Instead, the Board found that the withdrawal of recognition and post-withdrawal conduct was unlawful, and CoServ does not contend that its higher management was not involved in that decision.

CoServ similarly downplays the record evidence when it states (Br. 55) that there is “simply no evidence about the effect of the withdrawal itself” on the unit. Unlawfully withdrawing recognition *always* deprives employees of their most central collective-bargaining right—free choice of bargaining representative. Simply because some cases might have involved more egregious conduct does not mean that a notice-reading remedy is not appropriate here. CoServ points to no case where this Court or the Board found that a notice reading was not an appropriate remedy for an unlawful withdrawal of recognition.

Finally, the notice-reading remedy here does not implicate (Br. 53-54) the D.C. Circuit’s concerns about the Board requiring a named perpetrator to read the notice aloud. *See HTH Corp. v. NLRB*, 823 F.3d 668, 676-78 (D.C. Cir. 2016) (enforcing requirement that the named perpetrator read the notice aloud in light of alternative of having a Board agent do so in the presence of that perpetrator). The Board has given CoServ three options for who can read the notice: CoServ’s CEO

and president, its senior vice president of employee relations, or a Board agent. (ROA.1799-1800.) The Board's remedy thus requires that an official with authority over its labor relations reads the notice or, if CoServ prefers, a Board agent do so. The remedy simply ensures that employees will understand that CoServ will not unlawfully withdraw recognition from the Union, refuse to provide it with relevant unit information, or unilaterally change employees' working conditions in the future.

## CONCLUSION

Without notifying or bargaining with the Union, CoServ jettisoned its past practice of increasing wage ranges, resulting in no customary annual raises for unit employees. It then blamed the lack of raises on the Union. Those actions undermined the Union and caused it to lose the support of the bargaining unit. The Board appropriately acted to prevent CoServ from reaping benefits from its unlawful actions, and therefore respectfully requests that this Court enforce its Order in full.

Respectfully submitted,

/s/ Usha Dheenan  
USHA DHEENAN  
*Supervisory Attorney*

/s/ David Casserly  
DAVID CASSERLY  
*Attorney*  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2948  
(202) 273-0247

PETER B. ROBB  
*General Counsel*  
JOHN W. KYLE  
*Deputy General Counsel*  
LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board  
November 2018

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

DENTON COUNTY ELECTRICAL	:
COOPERATIVE, INC. D/B/A COSERV	:
ELECTRIC	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 18-60474
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 16-CA-149330
	:
Respondent/Cross-Respondent	:

**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties' counsel of record through the CM/ECF system.

s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, D.C.  
this 9th day November 2018

**UNITED STATES COURT OF APPEALS  
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	:
NATIONAL LABOR RELATIONS BOARD	:
	:
Respondent/Cross-Respondent	:

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,932 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016, the PDF file submitted to the Court has been scanned for viruses using Antimalware Client Version 4.13.17134.320.

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

Dated at Washington, DC  
this 9th day of November 2018