
Nos. 18-2013, 18-2105

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2013, 18-2105

COUNTY CONCRETE CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Intervenor

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

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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The Board is filing this fifth-step reply brief pursuant to the Court's August 1, 2018 scheduling order to address the limited matters raised by the Company in its fourth-step reply brief filed on December 4, 2018. At the outset, the Company

misstates the issue before the Court by asserting (Rep. Br. 1) that “[t]his case involves the fundamental issue of when a union can assess and collect dues from bargaining unit employees.” Rather, as set forth in the Board’s opening brief (Bd. Br. 2), the issue before the Court is whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the effective date of the dues-checkoff provisions contained in agreed-upon collective-bargaining agreements with the Union, and by failing to collect and remit authorized dues to the Union in January and February 2016. Indeed, the Company’s opening brief (Br. 1-2) recognized that the issue before the Court was whether the Board properly found that the Company acted unlawfully by failing to collect and remit dues to the Union. In these circumstances, the Company is in no position to now assert (Rep. Br. 1) that the Board has “attempt[ed] to sidestep” the actual issue in this case.

Regarding the merits, the Company’s assertion (Rep. Br. 4-5) that the unit employees did not ratify a company offer that that included a dues-checkoff provision is misleading at best.¹ The Company has never disputed the Board’s

¹ After having asserted in its opening brief (Br. 19) that *Local 32B-J, SEIU*, 266 NLRB 137 (1983) “is controlling” the Company now offers the baffling claim (Rep. Br. 5) that the Board’s “reliance” on that case in its brief is “misplaced.” The Board’s decision (A. 30) and brief (Bd. Br. 21-25) simply set forth why the Company’s reliance on that case is misplaced and does not require a different result.

finding (A. 23, Bd. Br. 4-5) that the parties resolved a number of issues, including dues-checkoff, by agreeing to use, as a template, a collective-bargaining agreement between the Company and a prior union that had contained a dues-checkoff provision. Nor does the Company dispute that on November 8, 2015, the unit employees ratified a “final” company offer based on that template (A. 24, 29, Bd. Br. 5, 19), or that, after the Union’s ratification of that offer, the Company agreed to draft each of the five specific collective-bargaining agreements “with an effective date of November 8, 2015 and a date for dues deductions and remittances to commence on January 1, 2016” (A. 29, Bd. Br. 19). In these circumstances, the Board was fully warranted to find that “the parties reached a meeting of the minds on all substantive issues and material terms in November 2015.” (A. 21 n.1, Bd. Br. 20.) Indeed, the Company’s attorney proceeded to draft the agreements with the effective date of November 8, 2015, and that set January 1, 2016, as the date that the Company was to begin remitting union dues.

The Company also claims for the first time (Rep. Br. 11-12) that it had no obligation to remit dues in January 2016 because the Union “never assessed dues in January 2016.” By not raising the issue in its opening brief, the Company has abandoned the argument and may not raise it in the reply brief. *See McLendon v. Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990) (issue raised for first time in a reply brief “is generally waived”); *Torrington Extend-A-Care Employees*

Ass'n v. NLRB, 17 F.3d 580, 593 (2d Cir. 1994) (arguments are waived if not raised until the reply brief). In any event, the Company has never disputed that, as of January 2016, the Union had informed it of the applicable formula to remit dues for employees, or that it had submitted signed dues-checkoff authorizations from 125 unit employees. (A. 26, Bd. Br. 8.)

The Company's remaining arguments that address the Board's findings simply copy portions of its opening brief to the Court. Because the Board has fully addressed those arguments the Company's arguments merit no response here.²

² The Company has repeated verbatim the following arguments. The Company's reference to the operative date of its obligation to remit union dues in the context of a union-security clause rather than a dues check-off provision (Rep. Br. 2-4) simply copies from its opening brief (pp. 18-19, 22) and was fully addressed by the Board (A. 1. n.1, Bd. Br. 21-25). Likewise, the Company's claim (Rep. Br. 6-7) that it had no obligation to remit dues until it signed the bargaining agreements copies portions of its opening brief (Br. 23-24) and was fully addressed by the Board (A. 30, Bd. Br. 26-27 and n.4). And the Company's claim (Rep. Br. 7-8) that it could not remit dues prior to the Union notifying unit employees of certain rights copies portions of its opening brief (Br. 26-27) and was fully addressed by the Board (A. 1 n.1, 30, Bd. Br. 27-30).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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December 2018

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)	
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In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David Seid certifies that he is a member in good standing of the State Bar of Maryland. He is not required to be a member of this Court’s bar, as he is representing the federal government in this case.

s/David Seid
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Dated at Washington, DC
this 14th day of December 2018

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	*
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	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 970 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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