

Nos. 18-1187 & 18-1217

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

KITSAP TENANT SUPPORT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE BROCK BROIDO
Supervisory Attorney

MILAKSHMI V. RAJAPAKSE
Attorney

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

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

DAVID HABENSTREIT

Assistant General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.)	
)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	19-CA-074715, et al.
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc. (“Kitsap”) was the Respondent before the Board in the underlying proceeding (Board Case Nos. 19-CA-074715 et al.). The Board’s General Counsel was a party before the Board. Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO, was the charging party before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Kitsap on May 31, 2018, and reported at 366 NLRB No. 98.

C. Related Cases

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

/s/ David Habenstreit

David Habenstreit

Assistant General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, D.C. 20570

Dated at Washington, D.C.
this 19th day of February 2019

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GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc.
FVRA	Federal Vacancies Reform Act (5 U.S.C. §§ 3345, et seq.)
JA	Joint Appendix
Kitsap	Kitsap Tenant Support Services, Inc.
SA	Supplemental Appendix
Union	Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Kitsap Tenant Support Services, Inc. to review, and the cross-application of the National Labor Relations

Board to enforce, a Board Decision and Order against Kitsap issued on May 31, 2018, and reported at 366 NLRB No. 98. (JA108-42.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties.² This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

Kitsap's petition for review and the Board's cross-application for enforcement were timely. The Act places no time limit on those filings.

ISSUE STATEMENT

1. Whether substantial evidence supports the Board's findings that Kitsap violated Section 8(a)(3) and (1) of the Act by retaliating against four pro-union employees and enforcing workplace rules more strictly because of union activity.

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

² The Board severed and retained allegations involving Kitsap's employee handbook that are factually and legally distinct from the violations adjudicated in the Decision and Order. (JA127,132.) The Board's retention of the severed allegations does not affect the finality of its Order. *See, e.g., Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1249-50 (D.C. Cir. 2012). Kitsap acknowledges the Order's finality. (Br.1.)

2. Whether substantial evidence supports the Board's finding that Kitsap violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union at reasonable times, refusing to provide or delaying information sought by the Union for collective bargaining, and engaging in overall bad-faith bargaining.

3. Whether Kitsap's challenge to the ratification of the underlying unfair-labor-practice complaint is properly before the Court.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint issued under Acting General Counsel Lafe Solomon's tenure on June 22, 2012. Before a hearing on the complaint allegations, Kitsap moved to dismiss, asserting that Solomon did not hold office consistent with the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) ("FVRA") when the complaint issued. An administrative law judge denied Kitsap's motion and, after a hearing, issued a decision and recommended order finding merit to some of the complaint allegations and dismissing others. The parties filed exceptions to his decision with the Board. (JA108&n.1,5-11;134-42.)

On March 21, 2017, while the case was pending before the Board, the Supreme Court issued *NLRB v. SW General, Inc.*, 137 S. Ct. 929, holding that, under FVRA, the Acting General Counsel could not have continued serving in his

position after President Obama nominated him to be General Counsel on January 5, 2011. On April 14, 2017, General Counsel Richard F. Griffin, Jr. issued a Notice ratifying the complaint and its continued prosecution. (JA108n.1.)

On May 31, 2018, the Board issued its Decision and Order finding that the ratified complaint allegations were properly before it, and rejecting as moot Kitsap's challenge to the validity of the complaint issued under Solomon. Addressing the merits, the Board affirmed the judge's findings of certain unfair labor practices, but found additional unfair labor practices based on the record discussed below. (JA108&n.1,109-29.)

II. THE BOARD'S FACT FINDINGS

A. The Union Campaign Begins; Kitsap Discharges Pro-Union Employee Minor When She Questions Kitsap's Labor Consultant

Kitsap provides residential living facilities and services to clients, individuals with varying degrees of developmental disability. In November 2011, the Union began a campaign to represent Kitsap's residential employees, including those designated as Heads of Household (HOH). (JA108;212,325,755-60,785-86,877.)

With the campaign, the Union conducted an organizing "blitz" in early December, visiting employee homes, soliciting signed authorization cards, and holding a December 4 meeting for interested employees. In response, Kitsap-

announced it would hold a mandatory employee meeting on December 7.

(JA117;186-89,192,633.)

Early that day, employee Bonnie Minor, who had attended the union meeting, received a call from Kitsap General Manager Alan Frey at the home where she worked. He chastised her for cancelling a customary multi-residence Christmas party—a step she had taken based on client feedback about the difficulty of back-to-back parties during the holiday season. Frey instructed her to schedule the party, which she promptly did. He said nothing about possible discipline for this incident. (JA117;193,214-15,243-46,249-51,259,284-86,813-14,818-19.)

After the call, Minor vented to clients in the vicinity that Frey had yelled at her and had been mean. A co-worker reported Minor's comments to Frey, who summoned Minor to his office, where he stated, in the presence of Human Resource Representative Kathy Grice, that Minor's behavior constituted inappropriate "triangulation." Frey said nothing about potential discipline. (JA117-18;252-53,738-39,819-22,884.)

Later that day, Minor attended Kitsap's mandatory meeting, which was conducted by an outside consultant who discussed the disadvantages of unionization. During the meeting, Minor raised her hand and asked the consultant "how much money [Kitsap] was paying him." Later that day, Grice informed Minor that she was discharged for "insubordination." Kitsap's subsequent

termination letter cited other purported infractions, including not following protocol concerning the holiday party and maintaining professional boundaries, and misrepresenting information to clients. (JA117-18;232,253-57,263-67,273-74,276,287-88,634-36,737-38.)

B. Kitsap Monitors Employee Performance More Closely; It Places Union Supporters Sale and Gates on Administrative Leave, Then Discharges Them

On December 14, the Union distributed a flyer identifying employee members of its organizing committee, including Alicia Sale, Hannah Gates, and Lisa Hennings. The flyer found its way to General Manager Frey in mid-December. Around the same time, Hennings directly told Frey that she was “pro union.” He said he “kind of figured that.” (JA117,120,124;198-200,212-13,736-37,789-91,1596.)

As the union campaign gained momentum, managers began visiting client residences more frequently and inspecting them more closely. For instance, Frey and another Kitsap official responded in person when Sale and Gates reported on December 20 that a client under their care had a scratch and bruise on his leg. After personally investigating, Frey concluded that the injuries were caused by his wheelchair, and instructed Sale and Gates to repair it. On hearing from the client that he had asked to see a doctor about an unrelated stomach ailment, Frey also

arranged for him to see a doctor. (JA120,128;423,430-31,443,458,484,638-39,740-47,797-804.)

That afternoon, the Board notified Frey that the Union had filed a petition to represent a unit of Kitsap employees including direct caregivers and HOHs. The following day, Frey revisited the residence where Sale and Gates worked. He re-inspected the wheelchair, found it had not yet been repaired, and decided to fix it himself. Frey then placed Sale and Gates on administrative leave “pending further investigation” for not repairing the wheelchair sooner and not honoring the client’s request for a doctor. Frey also referred the incident to the State of Washington for investigation. (JA120-21;492-93,725-26,805-06.)

Meanwhile, on January 4, the Board held a hearing on the Union’s representation petition, which Gates attended as a union supporter. (JA120,126;481-82.)

On January 31, a state investigator contacted Frey for an initial interview regarding his allegations about Sale and Gates. The next day, before the State could complete its investigation and announce any findings, Frey discharged Sale and Gates, citing their failure to repair the wheelchair and tend to the client’s request for a doctor. The State later closed its investigation, indicating “no violation was determined.” (JA121;166-68,492,1343,1384,1390.)

C. Employees Vote for Union Representation; Kitsap Continues To Police Residential Conditions More Closely and Disciplines Hennings

The Board conducted a representation election among Kitsap's direct caregivers and HOHs in early 2012. After tallying the ballots on March 15 and announcing that a majority favored representation, the Board certified the Union as the employees' collective-bargaining representative. (JA124,134;200-02,218-19,506.)

As the Union took up its new role, Kitsap maintained its more frequent and closer inspections of facilities where its now-unionized employees worked. Kitsap also began documenting infractions as never before. On April 12, for example, Kitsap issued Hennings a formal written warning for being seven minutes late to work, even though it had previously tolerated more egregious instances of lateness and absence. On the date in question, Hennings came directly to work after a union meeting where she and several other employees were chosen as members of the Union's bargaining committee. (JA124-26,128;208,325-26,328-30,1345.)

D. The Union Attempts To Schedule Bargaining Sessions and Requests Information; Kitsap Stalls, Provides Only Limited Information, Reserves Sweeping Powers for Itself in Contract Proposals, and Pretermits Two Bargaining Sessions

On April 23, Union Chief Negotiator Sarah Clifthorne proposed a series of initial bargaining dates, but Kitsap's chief negotiator, Gary Lofland, said nothing

for nearly a month, despite her repeated emails and telephone calls. Lofland finally responded on May 21, saying he could meet on June 5 or 6, and asking the Union to bring its written contract proposal. The next day, Clifthorne told Lofland the Union was available on both dates and noted that it had selected five employees, including Hennings, to serve on its bargaining team. Clifthorne added that they would be trained on June 4, in time for the first meeting.

(JA109;208,519,950-56.)

On June 1, the Union asked Kitsap to provide information about bargaining-unit employees and their terms and conditions of employment, to help inform upcoming negotiations. Lofland responded that Kitsap could not meet on June 5 or 6 after all. He blamed the Union for its one-day “delay in responding to the available dates,” claiming they were not “realistic.” He also alleged that the Union had failed to timely train its bargaining team, submit an information request, and develop a written proposal. (JA109;518-19,960-63.)

The Union trained its team on June 4, and the next day Clifthorne emailed Lofland again to schedule bargaining, proposing 26 possible dates between June and August. Lofland said he would schedule one date only, July 13. He refused to meet sooner. The Union accepted this date but continued to request additional ones. Lofland refused, but agreed to all-day bargaining sessions, from 9 a.m. to 5 p.m. (JA109-10&n.6;208,533,965-68.)

On June 11, Lofland partially responded to the Union's information request. Thereafter, the Union sent him its complete written proposal, per his request. (JA109-10;527-29.)

At the July 13 bargaining session, the Union explained its proposal. Kitsap asked no questions and made no proposals. Instead, it declared the parties "done for the day" well before noon and stayed only to schedule two additional bargaining sessions (August 6 and 15). (JA110;532-35,719-20,977-1049.)

A few days later, the Union made another information request seeking information about the HOH position, explaining that it needed the information because recent HOH job postings appeared to change the requirements for that position. (JA110;1051.)

At the next bargaining session on August 6, Kitsap discussed its contract proposal, which it had provided three days earlier. The proposal included a broad management-rights clause and a disciplinary procedure that gave management "sol[e]" discretion to determine "th[e] step to be utilized and the degree of discipline to be imposed." Regarding wages, Kitsap reserved the right to further reduce wage rates unilaterally, with 30-days' notice to the Union, based on changes to state-provided funding. Kitsap also proposed removing the HOH position from the bargaining unit entirely. (JA110&n8;220,536-43,547,1052-94.)

At noon, Kitsap prematurely called an end to negotiations. Before leaving, it agreed to one additional bargaining session (on September 17) beyond the upcoming August 15 session. (JA110;536-47.)

E. Kitsap Issues Hennings Two Letters of Direction and Abruptly Cancels the Parties' Third Bargaining Session

On August 10, a few days after the bargaining session where Hennings was on the union bargaining committee, Frey issued her a "letter of direction" based on observations he had made at the home where she worked. Frey's letter reprimanded her for purportedly writing down an assignment schedule, and "remind[ed]" her "that in sworn testimony" at the Board representation hearing HOHs "testified that they do not and have never scheduled staff." Frey did not cite any rule prohibiting HOHs from writing down a schedule, and at the representation hearing he testified that HOHs work "hand in hand" with Grice on scheduling. (JA125-26;333,915-17,1346.)

On August 13, Lofland said Kitsap could no longer meet for bargaining on August 15. He cited a state audit as his reason for the sudden cancellation. (JA110;220,1095.)

On August 15, Kitsap issued Hennings another letter of direction, this time for not completing monthly narratives about clients in her house, and not charting their medications. In the letter, Kitsap acknowledged that Hennings had completed three narratives that month but admonished her for not doing more. Kitsap also

asserted that the “trend” she set “seemed to...be followed by the rest of [her] Household as most of the narrative pages were empty for each of the clients.” Kitsap additionally admonished Hennings for two instances in which she purportedly failed to record the reason for a medication error. (JA125;1347-48.)

Kitsap did not issue letters of direction or other discipline to the direct caregivers in the household, even though they had primary responsibility for administering and recording medications. Nor did Kitsap pursue those employees for their noted failure to complete client narratives. (JA125;340-44,361,930.)

F. Kitsap Curtails and Delays Scheduling More Bargaining Sessions; It Responds to Some Information Requests, But Refuses To Provide Other Information, Broadens Its Proposed Management-Rights Clause, and Continues To Issue More Discipline

At the parties’ third bargaining session on September 17, the Union presented a modified proposal for discussion, but Kitsap refused to discuss certain items and again ended the session early, before noon. (JA110;548-50.)

Just before the parties’ October 16 bargaining session, Kitsap partially responded to the Union’s July information request regarding the HOH position. Kitsap also provided a modified contract proposal that included even more sweeping management-rights language that gave Kitsap unilateral control over changing employees’ “compensation,” including wages and benefits, based on

“fluctuations” in state funding levels. As under Kitsap’s previous proposal, the Union would “only” receive 30-days’ notice of changes. (JA111&n.11;1128-76.)

At the October 16 session, the parties discussed this and other aspects of Kitsap’s proposal, as well as employee access to personnel records. When the Union suggested employees should be able to review their records, Frey responded: “[i]f people wanted more write-ups, they could have them, starting then.” That day, Kitsap issued 10 written warnings to employees for failing to complete narratives. (JA111,128;551-54.)

Soon after, the Union tried to schedule additional sessions in November. Again, Lofland would not readily commit. On October 25, he told Clifthorne that he was “[d]ealing with a torn Achilles tendon” and would get back to her “soon.” On October 29, having heard nothing, she again requested November bargaining dates. The Union also requested additional information for bargaining purposes, including an accounting of “total ISS dollars [i.e., payments from the State] paid to bargaining-unit members per month, including overtime.” (JA111;1177-78.)

Nearly two weeks later, Kitsap said it could meet, but not until late-November. The parties ultimately agreed to meet on November 26 and December 18, although Kitsap flatly refused to provide information about payments from the State. (JA111-12;1179-81.)

At the November 26 session, Kitsap withdrew its proposal to remove HOHs from the bargaining unit. The parties signed a tentative agreement to include them in the unit. (JA111-12;564-65,1185.)

G. Kitsap Confronts Hennings About Union Activity; Lofland Cancels the Sole December Bargaining Session; Through Unresponsiveness and Unavailability, He Effectively Imposes a Three-Month Hiatus in Bargaining; Kitsap Places Hennings on Administrative Leave and Demotes Her

By mid-November, Kitsap had only met with the Union four times in the nearly eight months since its certification and cut three of those sessions short. To protest this foot-dragging, the Union organized a march to the home of Kitsap's owner in December. Although Hennings did not participate, Frey and Kitsap's owner confronted her about it. She denied involvement, but Frey said: "[y]ou're union, you're involved." (JA125,127;344-45,361.)

Lofland cancelled the December 18 bargaining session with one day's notice, saying he was "feeling ill." Although he promised to contact Clifthorne that week to reschedule, he never did so. On January 11, 2013, having heard nothing, Clifthorne told Lofland the Union was available for bargaining "every day" the last two weeks of January. Lofland responded—14 days later—that he could not meet until late February because of upcoming family surgeries and a Board hearing on unfair-labor-practice allegations against Kitsap. (JA112;1186-90.)

The Union agreed to meet in late February, as Lofland proposed, but also asked to meet sooner. Lofland refused, even after the unfair-labor-practice hearing was postponed. He also cancelled the planned late-February session, stating he “apparently [had] been summoned for jury duty during that period.” Eventually, Lofland said he could commit to February 21 and March 11-12. (JA112;1293-98.)

Meanwhile, on February 4, Kitsap placed Hennings on administrative leave, citing the various disciplines issued to her in 2012. Two days later, Kitsap demoted her. (JA125,127;1349-53.)

The parties subsequently met on March 11-12 and April 4-5, 2013.³ Although they reached tentative agreement on a number of issues, they remained far apart on significant issues, including compensation, benefits, leave, discipline, the grievance procedure, whether discharge would be at will or for cause, and the management-rights clause. Soon after the April 4 session, Kitsap reneged on its tentative agreement to include the HOH position in the unit, reverting to its proposal to eliminate the position. Kitsap offered to discuss the proposal all over again. (JA112;571,577-82,623,1300-41.)

³ Clifthorne cancelled the previously agreed-to February 21 session. (JA112;1299.)

The parties held additional bargaining sessions with a federal mediator. Nevertheless, by the end of 2013, they still had not reached a collective-bargaining agreement. (JA112;580-82,623.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Ring and Members Pearce and McFerran) found that Kitsap violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily discharging Minor; placing Sale and Gates on administrative leave and discharging them; taking a series of adverse actions against Hennings, culminating in her demotion; and enforcing work rules more strictly in response to union organizing. The Board further found that Kitsap violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to meet and bargain with the Union at reasonable times; refusing to furnish or delaying the provision of requested information; and engaging in overall bad-faith bargaining for the entire first year of the parties' collective-bargaining relationship. (JA108-22,124-29.)

The Board's Order requires Kitsap to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires Kitsap to: offer Minor, Sale, Gates, and Hennings full reinstatement to their former jobs or

substantially equivalent positions; make them whole for any lost earnings and benefits resulting from the discrimination against them; rescind, in writing, its practice of enforcing disciplinary rules more strictly in response to employees' union activities; within 15 days of the Union's request, meet and bargain with the Union in good faith and at reasonable times; upon the Union's request, meet for a minimum of 15 hours per week, or on an alternative schedule to which the Union agrees; submit written bargaining progress reports every 15 days to the Board's Regional Office; and post a remedial notice.⁴ (JA131-32.)

STANDARD OF REVIEW

This Court's review of Board decisions "is narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (internal quotation marks and citation omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). Accordingly, the

⁴ In light of Kitsap's bad-faith bargaining over the first year of the parties' relationship, the Board also granted a 12-month extension of the "certification year," in which the Union enjoys an irrebuttable presumption of continued majority support in the unit. (JA130&n.37.)

Court may not reject the Board's findings simply because other reasonable inferences may also be drawn. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016).

ARGUMENT SUMMARY

Substantial evidence supports the Board's findings that Kitsap discriminated against pro-union employees Minor, Sale, Gates, and Hennings. The suspicious timing of those actions, the lack of any consistently applied practice warranting such treatment, as well as Kitsap's disparately harsh treatment of pro-union employees, strongly support the Board's unlawful-motive finding. Moreover, Kitsap admittedly and unlawfully adopted a harsher overall approach to discipline—issuing many more disciplines than usual—in response to the union organizing campaign. The record therefore did not compel the Board to accept Kitsap's defenses that it would have taken the same actions against Minor, Sale, Gates, and Hennings regardless of their union activity.

Kitsap's attempt to escape its remedial obligation to those employees fails. Kitsap's actions cannot be deemed for-cause under the Act, given the Board's unassailable finding of Kitsap's unlawful motive and its failure to prove it would have taken the same actions regardless of union activity. Similarly, Kitsap cannot establish that the employees were unfit for service, given its retention of employees who engaged in worse conduct, including intentional client abuse.

Substantial evidence further supports the Board's findings that Kitsap failed to comply with its statutory obligation to meet with the Union and confer about a collective-bargaining agreement at reasonable times. Kitsap slowed bargaining by repeatedly withholding any response to the Union's meeting requests, claiming unavailability for long periods, and cutting scheduled sessions short. Meanwhile, it also hamstrung bargaining by refusing to provide or delaying information requested by the Union for bargaining purposes; indeed, Kitsap has waived any challenge to all but one of those violations. And it engaged in regressive tactics, such as tentatively agreeing to include HOHs in the bargaining unit, then renegeing months later.

Based on this conduct, the Board reasonably found that Kitsap acted in overall bad faith, without a sincere purpose to achieve a collective-bargaining agreement. Kitsap's substantive proposals only bolster the finding of bad faith, as Kitsap sought unilateral control over all critical aspects of the employment relationship, effectively relegating the Union to a minor role and leaving employees worse off than if they had no contract at all.

Given this egregious bargaining conduct, the Board acted well within its discretion in ordering Kitsap to bargain for 15 hours per week and to provide periodic progress reports. The Court lacks jurisdiction to address its baseless challenges to those remedies because Kitsap failed to raise them below. The Court

also lacks jurisdiction to consider Kitsap’s challenge to the General Counsel’s ratification of the unfair-labor-practice complaint and its continued prosecution, given Kitsap’s failure to raise its claim before the Board.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT KITSAP VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATING AGAINST FOUR PRO-UNION EMPLOYEES, AND BY MORE STRICTLY ENFORCING WORK RULES IN RESPONSE TO UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Retaliating Against Employees’ Union Activity

Section 7 of the Act guarantees to employees “the right to self-organization, to form, join, or assist labor organizations,” and to “bargain collectively through representatives of their own choosing....” 29 U.S.C. § 157. Section 8(a)(3) of the Act enforces these rights by making it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to...discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).⁵ Thus, an employer violates Section 8(a)(3) “by taking an adverse

⁵ A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act].” 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employment action, such as issuing a disciplinary warning, in order to discourage union activity.” *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983).

Shamrock Foods Co. v. NLRB, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003) (emphasis omitted). Consistent with that test, if substantial evidence supports the Board’s finding that protected activity was a “motivating factor” in the employer’s adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer’s affirmative defense that it would have taken the same action in the absence of protected conduct.⁶ *Transp. Mgmt.*, 462 U.S. at 401-03; *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993).

⁶ Kitsap quibbles about the “element[s]” of the General Counsel’s *Wright Line* burden before the Board, claiming he must specifically prove a “nexus” between protected activity and adverse action. (Br.20-21.) Kitsap’s assertions have no bearing on the question before the Court, which is whether substantial evidence supports the Board’s finding of unlawful motivation and its rejection of Kitsap’s affirmative defense. Accordingly, the Court need not address Kitsap’s claims. In any event, the General Counsel may meet his burden of proving unlawful motivation with circumstantial evidence, and *Wright Line* does not require him to “demonstrate some additional, undefined ‘nexus’ between the employee’s protected activity and the adverse action.” (JA118&n.25, quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 n.10 (2014), *enforced sub nom. AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).)

“As direct evidence of employer motivation is generally scarce,... ‘circumstantial evidence alone may establish unlawful motivation.’” *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer’s knowledge of and hostility toward protected activity, the timing of its action, and “‘the absence of any legitimate basis for an action’—i.e., the absence of a credible explanation from the employer” or its shifting reasons. *Southwest Merchandising*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)). Ultimately, because motive is a question of fact implicating the Board’s expertise, its finding of unlawful motivation is “entitled to substantial deference.” *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

B. Bonnie Minor

1. Minor’s union activity was a motivating factor in her sudden discharge

On December 7, 2011, Kitsap discharged Minor, a pro-union employee with no disciplinary record, just hours after she spoke up at an anti-union meeting conducted by Kitsap’s labor consultant. Substantial evidence supports the Board’s finding that her protected activity was a motivating factor in her sudden discharge.

Minor became active in the union campaign in early December. It is undisputed that during the mandatory meeting on December 7, she put the labor consultant on the spot by asking him how much Kitsap was paying him. Given

this undisputed evidence, the Board reasonably inferred that Kitsap would have known about Minor's pro-union stance before discharging her. (JA119;642.)

The highly suspicious timing of Minor's discharge also shows that her pro-union conduct at the mandatory meeting prompted Kitsap's swift reaction. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015) (“[t]iming alone may suggest antiunion animus” (internal quotation marks and citation omitted)). Thus, Kitsap discharged Minor within hours after she attempted to undermine its labor consultant. At the time, Minor had no prior history of discipline. (JA264.) Indeed, just one week before, she had received a strongly positive performance evaluation awarding her the highest possible rating in seven out of ten categories. (JA117&n.24;1355.) The Board reasonably found that Kitsap's precipitous discharge decision, soon after Minor openly challenged an anti-union speaker, and despite her recent positive evaluation and lack of any disciplinary record, showed that Kitsap's motive was to retaliate against her for supporting the Union. (JA119.)

As the Board further noted, its conclusion that Kitsap acted out of hostility towards Minor's union activity is only bolstered by its other conduct in this case. (JA119.) As shown below pp. 26-59, Kitsap amply demonstrated its animus in the months after Minor's discharge, by discharging or taking repeated adverse actions against other union supporters and engaging in bad-faith and dilatory bargaining

tactics. Contrary to Kitsap's claims (Br.27), the Board properly considered the entire record, including Kitsap's slew of subsequent unfair labor practices, in drawing an inference that Minor's discharge was unlawfully motivated. *See Continental Radiator Corp.*, 283 NLRB 234, 238 (1987) ("it would be fatuous to ignore" subsequent violations in assessing employer's motivation for discharge).

2. The record did not compel the Board to accept Kitsap's defense that it would have discharged Minor absent her union activity

Faced with this strong evidence of unlawful motive, it was incumbent on Kitsap to prove it would have discharged Minor even absent her union activity. Kitsap claims (Br.24-26), as it did below, that it discharged Minor for complaining to clients on the morning of December 7 that General Manager Frey had yelled at her about canceling a holiday party. The Board, however, was not compelled to accept Kitsap's claim. As the Board noted, although Frey and Human Resource Representative Grice told Minor right away that her complaints amounted to improper "triangulation," they "did not indicate any discipline would be forthcoming" or that it "was even being considered." (JA118.) Instead, it was not until after Minor spoke up at the anti-union meeting later that day that Frey and Grice hastily announced her discharge for "insubordination." (JA118.) This sequence of events seriously undermines Kitsap's assertion that "triangulation" was the real reason for its decision to discharge Minor.

As the Board also found, Kitsap failed to show it had a practice of immediately discharging employees for “counter-therapeutic” conduct, and it could not identify any instances of termination for such conduct. (JA119.) To the contrary, the record shows Kitsap tolerated even outright physical harm to clients by other employees, see below p. 28, making its position that it “had to” immediately discharge Minor for “triangulation” even more untenable.⁷ (JA119,121.) *See Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence that employer discharged other employees for similar conduct supported finding of unlawful discrimination).

At bottom, as the Board explained, Kitsap cannot escape a finding of unlawful discrimination by simply pointing to a possible non-discriminatory reason for its action. Rather, it had the burden of proving that it would have “discharged Minor for that reason even in the absence of [her] union activities.” (JA120.) The Board reasonably found that Kitsap failed to meet that burden, given the undisputed fact that initially it did not even mention the prospect of discipline and

⁷ This disparate-treatment evidence also negates Kitsap’s claim that it acted on a “good faith belief” that Minor’s misconduct warranted discharge. (Br.26.) *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it “parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred”).

only decided on discharge after Minor questioned its labor consultant, as well as its tolerance of outright physical abuse by other employees.

C. Alicia Sale and Hannah Gates

1. Their union activity was a motivating factor in Kitsap's placing them on administrative leave and discharging them

A few weeks after discharging Minor, and days after the Union petitioned to represent Kitsap's employees, Kitsap acted against two more prominent union supporters: Alicia Sale and Hannah Gates. Kitsap first placed them on administrative leave, allegedly for neglecting a client and failing to follow instructions. Kitsap soon discharged them, despite an ongoing state inquiry into whether they had in fact done anything wrong. Substantial evidence supports the Board's finding that these actions were motivated by their union activity.

Sale and Gates were members of the union organizing committee and specifically identified as such in a flyer that General Manager Frey admitted seeing in mid-December 2011. (JA120,789-92,848,1596.) Accordingly, contrary to Kitsap's claims (Br.31), there is no question that they were known union activists by the second half of December, when the events at issue unfolded.

Moreover, the swift and highly suspicious chain of events shows that Kitsap acted out of hostility towards their union activity. On December 20, after they reported a scratch and bruise on a client's leg, Frey personally appeared at their

facility to investigate. He believed that the client's wheelchair was the cause and directed Sale and Gates to repair it. He also determined the client had asked to see a doctor about an unrelated issue and arranged for a doctor's visit. That afternoon, Frey learned that the Union had filed its representation petition.

The following day, he reappeared at the house, noted the wheelchair was not yet repaired, and placed Sale and Gates on administrative leave on December 23, citing their failure to make immediate repairs and faulting them for not honoring the client's request for a doctor. (JA120.) As the Board aptly noted, Kitsap put them on administrative leave less than 2 weeks after they appeared on the union flyer, and just 2 days after Kitsap received notice that the Union had garnered enough support for an election petition. (JA121.)

On February 1, 2012, Kitsap discharged both employees, despite a still-open state investigation into their conduct. As the Board found, the timing of these discharges only lends further suspicion to Kitsap's already suspect actions. (JA121.) Kitsap had no pressing need to discharge them before the investigation concluded, while they were on administrative leave and no longer working with clients—unless it simply wanted to shed union activists as soon as possible. (JA121.) Had Kitsap waited, it would have learned that the State found no wrongdoing.

Kitsap also treated Sale and Gates more harshly than other employees who engaged in similar, if not more egregious, misconduct. In December 2011, for example, Kitsap learned that employee Jackie Cavanaugh had “yelled at a client, pulled the client by her arms, put her knee into the client’s side, and pushed the client’s chair” in an apparent effort to impose a “timeout.” (JA121;SA1-2.) As he did with Sale and Gates, Frey referred the matter to the State for investigation. But far from placing Cavanaugh on administrative leave and removing her from client contact, Frey kept her working, even with the very client she had apparently abused. Frey also did not discharge her prematurely before the State concluded its investigation.

Similarly, in August 2011 Kitsap learned that employee Gerry Goodman had “purposely injured a client’s ankle.” (JA121;SA3.) Kitsap responded by simply prohibiting him from interacting with that client alone, without taking further action, such as placing him on administrative leave or discharging him.

Thus, based on Kitsap’s own records, the Board reasonably concluded that it inexplicably “treated Sale and Gates more harshly than Cavanaugh and Goodman,” who engaged in “intentional abuse, including physical abuse.” (JA121.) This disparate treatment “strongly support[s] an inference of unlawful motivation.” (JA121.) *Accord Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264 (D.C. Cir. 1993). Further, there is no merit to Kitsap’s passing suggestion that

Cavanaugh and Goodman were not appropriate “comparators” because they cared for less vulnerable clients. (Br.34.) Kitsap has provided no support for its suggestion and, in any event, it is mistaken that a finding of disparate treatment requires an absolute identity of attributes among comparators and discriminatees. *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987); accord *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 788 (8th Cir. 2013) (the “similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone”) (internal quotation marks and citations omitted).

2. The Board was not compelled to accept Kitsap’s defense that it would have discharged Sale and Gates absent their union activity

As the Board aptly found, Kitsap offered no explanation for its disparately harsh treatment of Sale and Gates. (JA122.) Accordingly, Kitsap plainly failed to establish that it would have taken the same action even if they had not engaged in union activity.

In a misdirected effort to provide some justification for its actions, Kitsap now alleges that it had a “good faith belief that Sale and Gates engaged in misconduct.” (Br.32.) But the Board did not disbelieve Kitsap’s evidence that they engaged in the “neglect” attributed to them. (JA120.) On the contrary, it accepted that evidence as credited. (JA120.) Accordingly, it is irrelevant whether Kitsap believed the neglect occurred. *See Fort Dearborn Co. v. NLRB*, 827 F.3d

1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it “parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred”). In sum, Kitsap failed to meet its burden of proving that it would have placed Sale and Gates on administrative leave and discharged them absent their union activity, and the Board was not compelled to find otherwise.

D. Lisa Hennings

Undisputed evidence establishes that Hennings was a member of the union organizing committee and participated in collective bargaining on the Union’s behalf. Almost from the outset, her union activities were known to Kitsap. (Br.39.) Thus, in December 2011, her name appeared on a pro-union flyer that Frey received, and she directly told Frey she was “pro union,” to which he responded, “I kind of figured that.” (JA124,126.) Hennings was also present at the meeting where Board agents announced the vote tally.

Following Hennings’ open involvement with the Union and the Union’s successful bid to represent Kitsap’s employees, Kitsap took a series of disciplinary actions against her. Among other things, Kitsap gave her a written warning for being seven minutes late to work after a union meeting; issued her “letters of direction” for engaging in scheduling, and for not completing certain records; and

placed her on administrative leave and demoted her.⁸ As explained below, substantial evidence supports the Board’s findings that Kitsap took these actions against Hennings because of her union activity, and thus violated Section 8(a)(3) and (1) of the Act.

1. April 12 warning for lateness

Kitsap gave Hennings a written warning on April 12 for being seven minutes late to work. As the Board found, the timing of this warning in relation to her union activity supports a finding of unlawful motivation. Hennings received the warning the same day she attended the union meeting where nominations for its bargaining committee were considered. Indeed, the meeting was the reason for her being 7 minutes late.⁹ (JA126.)

⁸ Kitsap errs in citing its managers’ testimony that letters of direction “were not considered disciplinary.” (Br.40.) As a matter of law, documents relied upon in issuing further progressive discipline—whether called “directions,” “warnings” or “counselings”—constitute adverse employment actions, because they have the potential to affect the timing and severity of later discipline. *Altercare of Wadsworth Ctr. for Rehab. & Nursing Care, Inc.*, 355 NLRB 565, 565 (2010); *see also Bellagio, LLC v. NLRB*, 854 F.3d 703, 709 (D.C. Cir. 2017) (adverse actions “reduce a worker’s prospects for...continued employment, or worsen some legally cognizable term...of employment”). Here, Kitsap listed the letters as a basis for her demotion. (JA1558-1662.)

⁹ The Court lacks jurisdiction to consider Kitsap’s baseless claim, which it failed to raise below, that Hennings lost the protection of the Act because she chose to “linger at [a union meeting] despite the obligation to report for work.” (Br.41-42.) *See* below p. 55.

Kitsap's disparately harsh treatment of Hennings also supports the Board's finding of unlawful motive. Other employees escaped discipline despite multiple or serious instances of tardiness and worse. For example, Kitsap issued no discipline to Manuel Gipson, even though he did not appear for work or call in for 9 days in 2005, falsely claimed he had worked certain days, and "offered a false medical excuse." (JA126;SA6.) Likewise, Kitsap issued no discipline to HOH Shirley Gallauher, even though she was consistently late to work by 5-15 minutes, multiple days a week, in 2006; and issued no discipline to Janice Henry, even though she was late almost every day for two weeks in 2007. (JA126;SA4,7.) Nor did Kitsap discipline Andie Rood in 2008, when she abandoned her shift without notifying Kitsap or making alternative arrangements for client care. (JA126;SA5.)

Before the Board, "Kitsap offered no explanation for this disparate treatment or any other evidence to show that it would have issued the April 12 warning even in the absence of Hennings' union activities." (JA126.) The Board accordingly found that Kitsap violated the Act by warning her for being 7 minutes late. (JA126.)

On review, Kitsap makes no attempt to explain its disparate treatment of Hennings as compared to other employees who were tardy without consequence before the union campaign began. Instead, Kitsap argues that the disparate treatment should be disregarded because it is "too distant in time." (Br.42.) But

Kitsap does not explain why that matters, nor does it provide any justification for its apparent view that its previously lax treatment is irrelevant. Rather, Kitsap repeats its banal claim that comparators should be “similarly situated in all material aspects.” (Br.42.) *See* above p. 29.

Kitsap does not undermine the strong evidence of disparate treatment by pointing to an incident where it warned a pro-union employee (Johnnie Driskell) who was late to work after a union meeting. (Br.42-43.) This after-the-fact event does not help Kitsap establish that, when it warned Hennings, its consistent practice was to issue a warning regardless of union affiliation. In any event, as Kitsap acknowledges (Br.42), Driskell’s lateness caused Kitsap to incur overtime costs. By contrast, there is no evidence that Hennings’ seven-minute delay resulted in overtime costs.

2. August 10 letter of direction for scheduling

Substantial evidence likewise supports the Board’s finding that Kitsap unlawfully issued Hennings a letter of direction on August 10, 2012. Kitsap’s knowledge of her union activism is undisputed: she openly discussed it with Frey in December 2011, and in May 2012, the Union announced her membership on its bargaining committee.

It is also undisputed that just weeks after the parties’ first bargaining session in July 2012, Kitsap issued a letter of direction chastising her for engaging in

scheduling, even though Kitsap had no rule against it. Instead, the letter cited employees' representation hearing testimony as a basis for imposing discipline. Thus, on its face, the letter disciplined Hennings, not for violating rules, but for purportedly disregarding such testimony.

Below, Kitsap belatedly attempted to justify its letter of direction by asserting that it had a policy prohibiting HOHs from engaging in scheduling. (JA126.) However, the Board reasonably dismissed that assertion as false and therefore pretextual. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016) (stated reasons are pretextual if false or not in fact relied upon). As the Board noted, "Frey admitted [] at the representation hearing...that HOHs work 'hand in hand' with Manager Grice regarding employee scheduling." (JA126.) Thus, its claim of a policy against HOH scheduling conflicts with Frey's own testimony. Given this contradiction, it was entirely reasonable for the Board to infer that Kitsap's true motive for issuing the letter of direction was her persistent union activity. (JA126.) *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947 (D.C. Cir. 1999) (employer's faulty justification was "pretextual and intended to conceal [its] true [discriminatory] motive").

3. August 15 letter of direction for not completing narratives and charting

Days after issuing the unlawful August 10 letter, Kitsap issued Hennings another letter, this time for failing to write narratives about clients in her house and

to chart notes about their medications. In so doing, Kitsap again engaged in blatant disparate treatment. As Kitsap acknowledged in its letter, other employees in Hennings' house were also guilty of not completing narratives and medical charts. Yet Kitsap admittedly did not take any action against them. Given this obvious disparate treatment, which Kitsap did not attempt to explain or defend, the Board reasonably inferred that Kitsap singled Hennings out for disciplinary action because of its amply demonstrated hostility towards her union activity.

4. February 2013 administrative leave and demotion

In early February 2013, Kitsap placed Hennings on administrative leave and then demoted her, citing concerns about her work and expressly relying on the unlawful discipline discussed above. Consistent with settled law, the Board found that because Kitsap relied on its prior unlawful discipline of Hennings in issuing further discipline, its February 2013 administrative-leave and demotion decisions were likewise unlawful. (JA127, citing *Hays Corp.*, 334 NLRB 48, 50 (2001).) *Accord NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013).

Kitsap gains no ground by arguing it would have placed Hennings on administrative leave and demoted her regardless of her protected activity because she had a history of "poor performance and lack of judgment." (Br.35-38,43-44.) That history includes the unlawful disciplinary actions discussed above, where Kitsap inexplicably treated Hennings more harshly than other employees, and

incidents that overtly manifested Kitsap's hostility to her union activity. For example, General Manager Frey accused Hennings of having some role in an employee demonstration outside the home of Kitsap's owner, telling her that because she was "union," she was "involved." (JA127.) In sum, considering Kitsap's history of unlawful conduct towards Hennings and other pro-union employees, the Board reasonably rejected Kitsap's claim that it would have placed her on administrative leave and demoted her even if she had not engaged in union activity.

E. Stricter Enforcement of Work Rules

As the Board found and Kitsap does not dispute (Br.55-56), Kitsap's monitoring of employees, and the sheer number of disciplines it issued to them, increased dramatically after they began organizing. Thus, several employees testified that managers began showing up at their worksites more frequently after the Union's December 2011 organizing blitz and started inspecting their work and worksite more closely. (JA128;638-39.) Before the Union campaign, inspections were conducted mainly by coworkers, and focused on safety issues such as functioning smoke detectors; after the campaign, managers took over, and began delving into details such as the contents of logbooks and kitchen cabinets, "pull[ing] out every can and inspect[ing] every expiration date." (JA128;638-39,643-44.)

Predictably, management's closer and more frequent scrutiny led to the discovery of more "infractions." Kitsap, moreover, adopted a practice of punishing infractions that were not previously subject to discipline. For example, Kitsap began issuing written warnings when employees failed to complete narratives about their clients. Indeed, on the very day Frey warned the Union that if employees "wanted more write-ups, they could have them, starting [now]," Kitsap issued 10 such warnings, fulfilling his threat. (JA128.) More generally, Kitsap showed an inclination toward discipline unlike anything seen before the union campaign. Thus, in the first eight months after the Union's election, Kitsap issued 40 written disciplines *in addition to* the unlawful disciplines discussed above—admittedly "a sharp break from prior practice." (JA128.)

On review, Kitsap does not question this compelling evidence, nor does it challenge the settled principle that where "the pattern of discipline after the commencement of union activity deviate[s] from the [prior] pattern," a discriminatory motive is established. (JA128, quoting *Jennie-O Foods*, 301 NLRB 305, 311 (1991).) Accordingly, Kitsap waived any challenge to the Board's finding, based on the timing of Kitsap's tectonic shift in disciplinary approach, that it began "more strictly enforcing its disciplinary rules because its employees supported the Union and engaged in union activities." (JA128.) *See Corson &*

Gruman Co. v. NLRB, 899 F.2d 47, 50 (D.C. Cir. 1990) (arguments not raised in opening briefs are waived).

As the Board also found, Kitsap failed to establish any defense to this finding of discrimination. It never showed that “its increased discipline was motivated by considerations unrelated to its employees’ union activities.” (JA128, quoting *Jennie-O Foods*, 301 NLRB at 311.) On the contrary, Kitsap *admitted* in briefing below that there was little evidence of discipline before the Union arrived, and Frey acknowledged that Kitsap began documenting discipline because of the Union. (JA128;361-62.)

Trying to negate this admission, Kitsap claims that its change in disciplinary approach was motivated by concerns over a “possible” state audit. (Br.55.) But Kitsap fails to explain the highly suspicious timing of this supposed audit, which appears to coincide exactly with the union campaign. (JA128.) Likewise, Kitsap says nothing about the origin of its sudden concern about an audit, or why it would require an entirely new disciplinary approach. Kitsap, thus, provides no reason to disturb the Board’s well-supported finding that it adopted a harsher disciplinary approach in response to union organizing.

Contrary to Kitsap’s claim, the Board is not asking Kitsap to “disregard the employees’ failure to perform.” (Br.55.) The Board’s Order simply requires Kitsap to cease and desist from “[e]nforcing its disciplinary rules more strictly than

in the past in retaliation for its employees' union activities or support,” and to “rescind, in writing, its policy or practice of enforcing its disciplinary rules more strictly in retaliation” for such activities. (JA132.) Plainly, these remedial provisions allow Kitsap to address failures to perform on a non-discriminatory basis, just as it did before the Union entered the scene.

F. The Board Properly Exercised Its Discretion in Ordering Kitsap To Reinstatement the Discriminatees with Backpay

Intent on avoiding its remedial obligations to Minor, Sale, Gates, and Hennings, Kitsap misguidedly argues that it discharged or demoted them “for cause” under Section 10(c) of the Act, and that they should be denied reinstatement because they are “unfit” for further service. (Br.28-30,35,43-44.) Section 10(c) authorizes the Board to order “affirmative action” to remedy unfair labor practices, including “reinstatement of employees with...backpay.” 29 U.S.C. § 160(c). This is the conventional remedy for loss of employment caused by an unfair labor practice. *See Precoat Metals*, 341 NLRB 1137, 1138 (2004) (citing *Sheller-Globe Corp.*, 296 NLRB 116 (1989)); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). The Board’s award of that remedy here follows settled precedent. (JA131-32.)

The Court should reject Kitsap’s argument that this standard remedy would run counter to a caveat in Section 10(c), that the Board may not award reinstatement or backpay to those who have been suspended or discharged “for

cause.” 29 U.S.C. § 160(c). The argument disregards the Board’s court-approved interpretation of the statutory term “for cause,” which is entitled to judicial deference because the Board is interpreting an ambiguous provision of the statute it administers. *See Lechmere v. NLRB*, 502 U.S. 527, 536 (1992).

“[For] cause...effectively means the absence of a prohibited reason.” *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Malsters, Local Union No. 6 v. NLRB*, 303 F. App’x 899 (D.C. Cir. 2008). *See NLRB v. Local Union No. 1229, Int’l B’hd. Of Elec. Workers*, 346 U.S. 464, 474 (1953) (for-cause discharge is discharge for reasons “other...than [unlawful] intimidation and coercion”); *Taracorp*, 273 NLRB 221, 222 n.8 (1984) (employer may “discharge for good cause, bad cause, or no cause at all,” subject to “one specific, definite qualification; it may not discharge when the real motivating purpose is to do that which [the Act] forbids”) (internal quotation and citations omitted). Accordingly, Kitsap cannot evade its remedial obligations by citing “causes” for its adverse actions that the Board specifically rejected in finding those actions unlawfully motivated. *See also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) (“There is no indication...that [Section 10(c)] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.”).

There is no more merit to Kitsap's claim that Minor, Sale, Gates, and Hennings should be denied reinstatement because they are "unfit" for service. (Br.30-31,34-35,43-44.) Kitsap's claim rings hollow, given the evidence that it allowed other employees to keep their jobs even after they had committed more serious offenses like intentionally inflicting physical harm on clients. *See* p. 28 above. Although Kitsap notes the importance of "competent" healthcare professionals, it simply has not shown that, in its organization, the discriminatees' conduct automatically makes them incompetent and unworthy of continued employment. (Br.30,34,43-44, citing *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 460-62 (9th Cir. 1978) (remanding to resolve conflicting evidence involving employee's basic competence to perform medical laboratory work).)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT KITSAP VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO MEET THE UNION AT REASONABLE TIMES, REFUSING TO PROVIDE AND DELAYING REQUESTED INFORMATION, AND BARGAINING IN OVERALL BAD FAITH

A. The Statutory Duty To Bargain Requires the Employer To Meet at Reasonable Times, Provide Relevant Information, and Engage in Negotiations With a Sincere Interest in Reaching Agreement

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to “bargain collectively” with the representatives of its employees.¹⁰ 29 U.S.C. § 158(a)(5). In turn, Section 8(d) of the Act defines collective bargaining as “the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....” 29 U.S.C. § 158(d).

These provisions impose on the employer a “positive legal duty to meet and confer with the [u]nion at reasonable times and intervals.” *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998) (internal quotation marks and citation omitted). An employer that shirks or neglects this duty violates Section 8(a)(5) and (1) of the Act. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 182-83 (2d Cir. 1998); *see also Lancaster Nissan, Inc. v. NLRB*, 233 F. App’x 100, 102-05 (3d Cir.

¹⁰ A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

2007) (upholding Board finding of violation where employer limited bargaining sessions to once or twice per month in first year after union's certification).

The statutory duty to bargain also “includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative.” *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); accord *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Accordingly, an employer violates the Act by refusing to provide, or delaying providing, relevant information requested by its employees' union. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1251 (D.C. Cir. 2012).

At bottom, the statutory duty to bargain in good faith “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” *NLRB v. Ins. Agents' Union*, 361 U.S. 477, 485 (1960). Consequently, “the parties are obligated to do more than merely go through the formalities of negotiation.” *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 47-48 (2d Cir. 1974). They must “make a sincere, serious effort to adjust differences and to reach an acceptable common ground.” *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). As a corollary, “[t]o conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would of course violate [Section] 8(a)(5) and amount to ‘bad faith’ bargaining.” *Continental Ins.*, 495 F.2d at 48.

In assessing this issue, the Board considers “the totality of bargaining conduct.” *Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 F. App’x 444 (D.C. Cir. 2002). That inquiry encompasses conduct “away from the bargaining table and at the table, including the substance of the proposals on which [the employer] has insisted.” *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991). Ultimately, because “the drawing of inferences as to good or bad faith in the bargaining process is ‘largely a matter for the Board’s expertise’ brought to bear on the particular facts before it,” the Court is deferential in reviewing the Board’s assessment. *Int’l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 733-34 (D.C. Cir. 2015).

B. Kitsap Refused To Meet and Bargain at Reasonable Times

Substantial evidence supports the Board’s finding that Kitsap breached its statutory bargaining obligation by failing “to meet at reasonable times” with its employees’ chosen representative as Section 8(d) of the Act specifically requires. 29 U.S.C. § 158(d). To begin, although the Union proposed initial bargaining dates on April 23, 2012, Kitsap made no response for nearly one month, despite the Union’s repeated emails and telephone calls. Moreover, when Kitsap’s chief negotiator, Lofland, finally responded on May 21, he would only agree to meet on

one of the June dates proposed by the Union. He then rescinded his commitment just over a week later, for no legitimate reason.

Furthermore, as the Board found, Lofland sought to blame the Union for Kitsap's sudden cancelation, falsely claiming that the Union had "delay[ed] in responding to available dates." (JA112.) But plainly "[i]t was [Kitsap]—not the Union—that [had] waited almost one full month before agreeing to a date...which it then canceled." (JA112.) And although Lofland also tried to justify his cancelation by claiming the Union had not prepared its committee members for bargaining and had not submitted information requests and a complete written proposal, the Board reasonably found his assertions "baseless." As the Board explained, well before Lofland abruptly announced on June 1 that he was cancelling the June 5 session, the Union had confirmed that its bargaining committee would be trained beforehand. Moreover, contrary to Lofland's suggestion, the Union was not required to propound information requests and submit a complete written proposal before the first bargaining session.

Despite Kitsap's unreasonable refusal to meet as scheduled, the Union pressed on in its effort to schedule bargaining dates and acceded to Kitsap's demand for a proposal in advance of the first session. Although Kitsap eventually agreed to meet, it would not do so until July 13—almost three months from the Union's first scheduling request. Kitsap also rebuffed the Union's efforts to

schedule subsequent bargaining dates, rigidly adhering to its unreasonable refusal to schedule more than one date at a time.

Kitsap also hamstrung bargaining by repeatedly ending scheduled full-day sessions before noon and refusing to engage in substantive discussion of the Union's proposals. Indeed, at the very first bargaining session, Kitsap refused to discuss any aspect of the Union's proposal, even though the Union had provided it a week in advance, as Kitsap had requested.

Thanks to Kitsap's dilatory tactics, bargaining proceeded at a snail's pace through the fall of 2012, and consisted solely of once-a-month meetings, sometimes only for a half-day. In December 2012, Kitsap apparently tired of even this minimal routine and canceled its only scheduled bargaining session that month, with just one day's notice. And, as the Board found, "[a]lthough [Kitsap] promised that it would reach out to the Union to reschedule that session, it did not do so." (JA113.) "Only the Union made an effort to schedule additional sessions," but Kitsap successfully ignored its efforts until the end of January—"more than 5 weeks" after its last-minute cancelation of the December 18 session. Moreover, when Kitsap finally responded to the Union on January 25, it claimed inability to meet until February 21. Thus, "[b]ecause of [Kitsap's] continued dilatory conduct, almost 3 months elapsed between its proposed...session and the parties' previous meeting on November 26." (JA113.) In sum, given Kitsap's foot-dragging for

most of the first year after the Union’s certification, the Board reasonably found that Kitsap failed to discharge its obligation to meet “at reasonable times” with the Union. 29 U.S.C. § 158(d).

Kitsap attempts to excuse its delays by asserting that it had “legitimate reasons”—namely, Lofland’s other commitments and physical injury. (Br.49.) However, as shown above, Lofland often gave no reason for his delays; he was simply unresponsive. Further, to the extent there were competing claims on his time, they provide “no defense” to the Section 8(a)(5) violation, as the Board found. (JA113n.14.) “[A]n employer’s chosen negotiator is its agent for purposes of collective bargaining,” and “if the negotiator causes delays in the negotiating process, the employer must bear the consequences.” *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998).

C. The Court Should Summarily Enforce the Board’s Uncontested Information-Request Violations; the Only Challenged Finding—that Kitsap Unlawfully Refused To Furnish Wage-Related Information—Is Supported by Substantial Evidence

In its opening brief, Kitsap does not contest the Board’s finding (JA113-14) that it unlawfully delayed turning over certain information requested by the Union that was plainly relevant to fulfilling its duties as the employees’ collective-bargaining representative. Specifically, the Board found, and Kitsap does not

dispute, that it waited three months or more before complying with the Union's request for:

- Employee schedules, house name, and shift information;
- Employee transfers, promotions, and movement in and out of the bargaining unit since December 11, 2011;
- Job descriptions and memos about job expectations;
- Memos or written materials on policies and procedures, rules, and guidelines for employees;
- History of wages and raises for employees for a five-year period;
- Training programs and requirements for staff, including all training records since December 1, 2011; and
- The job description for the HOH position.

Kitsap similarly does not question the Board's finding (JA114) that it entirely failed to provide copies of memos and job postings concerning the HOH position.

By failing to contest these Section 8(a)(5) violations in its opening brief, Kitsap has effectively waived any challenge to them on review. *See, e.g., Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990). Moreover, the Board is entitled to summary enforcement of the portions of its order corresponding to the uncontested violations. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

Turning to the single contested finding, the record and relevant precedent amply establish that Kitsap unlawfully refused to give the Union information about Kitsap's receipt of state funds for employee wages and overtime. As the Board found, Kitsap made such funding an issue by stating, in proposed clauses on management rights and compensation, that it reserved the right to modify compensation, including benefits, based on "fluctuations" in state reimbursement rates. Understandably, the Union sought some context for Kitsap's position, as well as concrete information about how state funding affects wages and benefits. The Union, thus, asked Kitsap to provide the monthly reimbursement rate for each employee beginning in March 2012.

The Board reasonably found that the requested information was relevant and therefore should have been produced. As the Board explained, "[w]here an employer adopts bargaining positions that make certain financial information relevant, the union is entitled to that information in order 'to evaluate and verify the [employer's] assertions and develop its own bargaining positions.'" (JA114, quoting *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).) Here, the requested information about state reimbursement rates would not only have given context to Kitsap's asserted need to reserve the right to change wages and benefits; it also would have informed discussions about what wage rates should be at the outset. As the Board noted, the parties' differences over wage rates made information

about state reimbursement particularly relevant because it “would have aided the Union in determining whether [Kitsap] had any room for potential movement on wage rates—a crucially important bargaining subject—based on current appropriations” and the recent pattern of appropriations.¹¹ (JA114.)

D. The Board Reasonably Found that Kitsap Bargained in Overall Bad Faith

The record amply supports the Board’s finding that “the totality of [Kitsap’s] conduct during negotiations demonstrates that it engaged in bad-faith bargaining.” (JA114-15.) To begin, Kitsap “exhibited bad faith by engaging in dilatory tactics,” which, as shown above, “began almost immediately after the Union’s certification and persisted throughout negotiations.” (JA115.) Kitsap further demonstrated bad faith by “outright refus[ing] to provide information concerning State payments.” (JA115.) That refusal, in turn, undermined “the Union’s ability to meaningfully bargain over wages and benefits, perhaps the most critical of all mandatory subjects of bargaining.” (JA115.) Kitsap also hobbled negotiations, and again exhibited bad faith, by delaying provision of basic requested information “critical

¹¹ The fact that Kitsap did not assert “inability to pay” does not relieve its obligation to produce financial information plainly relevant to informed discussion of its bargaining proposals. (Br.52-54.) *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Likewise, there is no merit to Kitsap’s exaggerated claim that the Union’s request for targeted information about Kitsap’s use of state funding was tantamount to a request for a full financial audit. (Br.53-54.)

to the Union’s ability to formulate proposals and engage in meaningful bargaining.” (JA115.)

But Kitsap did not stop there. It also engaged in regressive bargaining that showed it “was not serious about coming to an agreement and would...walk back proposals so as to frustrate the Union and delay agreement.” (JA115.)

Specifically, after seeking removal of the HOH position from the bargaining unit, Kitsap tentatively agreed to keep it in, but then reversed course again without explanation, asserting that HOHs should be excluded. As the Board found, this whiplash of “unexplained conduct concerning an issue so critical to collective bargaining—the composition of the bargaining unit—is inconsistent with a sincere willingness to reach agreement.” (JA115.) *See Valley Central Emergency Veterinary Hosp.*, 349 NLRB 1126, 1127 (2007).

Given this compelling evidence, the Board reasonably concluded that “without more, [it] warrants a finding of overall bad-faith bargaining.” (JA115.) As the Board found, however, additional evidence demonstrates Kitsap’s bad faith—namely, its scorched-earth bargaining proposals, which effectively “exclude[ed] [the Union] from any participation in decisions affecting important conditions of employment,” and thus would have severely undercut the Union’s role as the employees’ representative. (JA115-16, quoting *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (internal quotations omitted),

enforced, 732 F.2d 872 (11th Cir. 1984).) Indeed, these proposals would have left employees and their union “with substantially fewer rights and less protections than provided by law without a contract.” (JA113, citing *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487-88 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003).)

Thus, in its October 2012 proposal, Kitsap reserved the right to unilaterally reduce “rates paid” to employees “if the [State]...reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur.” (JA116.) In its proposed management rights clause, Kitsap repeated this language and made clear that its reservation of rights extended to increases and decreases in wages and benefits. Under the proposal, moreover, the Union would only have been entitled to notice of the unilateral changes, not to bargaining. Kitsap, thus, sought to deprive the Union of any ongoing role in determining these crucial bargaining subjects.

Kitsap likewise sought to deprive the Union of any role in discipline and discharge. Thus, although Kitsap’s final proposal included a progressive disciplinary schedule, this was illusory because the proposal also insisted that Kitsap was not obliged to follow the schedule. Instead, Kitsap sought unilateral control over the disciplinary “step to be utilized and the degree of discipline to be imposed,” keeping that “solely within...[its] judgment and discretion.” (JA116.)

Kitsap’s final proposal also provided for “at will” employment, meaning there were “no limits on [its] right to discharge unit employees,” other than those imposed by law. (JA116.) Its proposed management-rights clause sought to expand Kitsap’s authority further, reserving for Kitsap the “sole[] and exclusive[]” right to “promote, demote, suspend, discipline, layoff, or discharge employees.” (JA116.)

Intensifying the sting of these proposals were others that sought to exclude the Union from its role in bargaining over work rules, and to eliminate any possibility of grievances if Kitsap invoked its extensive rights under the management-rights clause. As the Board found, Kitsap’s exclusion of so-called management rights from the grievance procedure was particularly indicative of bad faith, given the breadth of those stated rights. In effect, Kitsap left employees and the Union with “no avenue to challenge any of [its] decisions with regard to the nearly exhaustive list of rights reserved to [Kitsap].” (JA116.) *See, e.g., Regency Service Carts*, 345 NLRB 671, 722 (2005) (finding bad faith where employer’s “extremely broad” management-rights proposal exempted management rights from grievance and arbitration procedure).

On this record, the Board reasonably found that Kitsap’s proposals “taken as a whole” sought near obliteration of the Union’s representative role in the very areas where employees would normally seek its help—in regard to wages, benefits,

discipline, and discharge. (JA115.) As the Board explained, Kitap’s proposals ““would have so damaged the Union’s ability to function as the employees’ bargaining representative,” that Kitsap ““could not seriously have expected meaningful collective bargaining.”” (JA116, quoting *PSO*, 334 NLRB at 489.) In short, Kitsap’s proposals collectively support the Board’s finding that it bargained without any serious commitment to reaching agreement. (JA115,117.)

Contrary to Kitsap (Br.44-49), the Board fully recognized that its role is not to “evaluate whether particular proposals are acceptable or unacceptable.” (JA115.) Instead, the Board considered the proposals to determine whether, in the aggregate, they showed that Kitsap was not bargaining in good faith. The Board can consider the substance of employer proposals for that purpose; in doing so, it is not making pronouncements on the acceptability of particular proposals. *See NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187-88 (D.C. Cir. 1981) (“[i]n determining whether the company fulfilled [its] obligation [to bargain in good faith], the terms of its bargaining proposals may be examined”). Kitsap’s effort to defend its individual proposals misses the point: the question here is whether the proposals “in combination...evidence[d] an intent not to reach agreement.” (JA116.) The Board reasonably answered this question in the affirmative.

In focusing on its individual proposals, Kitsap also forgets that the Board’s finding of bad faith rests, not only on their combined effect, but also on Kitsap’s

other unlawful bargaining conduct—its dilatory tactics and regressive proposal, its failure to provide and delay in furnishing information needed for the Union to perform its representative function. *Accord PSO*, 334 NLRB at 489. Thus, ample evidence supports the Board’s finding that Kitsap violated the Act by refusing to bargain in good faith.

E. Kitsap’s Meritless Challenges to the Board’s Remedial Order Are Not Properly Before the Court

Kitsap contests the Board’s Order where it requires Kitsap to bargain with the Union “for a minimum of 15 hours per week,” or on an alternative schedule to which the Union agrees, and to submit written progress reports to the Board’s Regional Office every 15 days. (Br.57,JA131.) Because Kitsap did not challenge these remedies in a motion for reconsideration below, it cannot obtain judicial review of them here. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (Section 10(e) “bar[red]” argument that could have been raised in motion for reconsideration); *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same).

In any event, the Board acted well within its broad discretion in tailoring its remedies to Kitsap’s bargaining violations. *See Sure-Tan, Inc. v. NLRB*, 467 U.S.

883, 898-99 (1984) (Section 10(c) of the Act “vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review”). Thus, the Board ordered a regular schedule of bargaining and periodic progress reports because Kitsap failed to honor its statutory duty to meet with the Union at regular times and bargain in good faith. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (“the relation of remedy to policy is peculiarly a matter for administrative competence”). Kitsap cannot and does not show that such reasonable remedies keyed to the violations in this case constitute a “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

III. KITSAP’S CHALLENGE TO THE GENERAL COUNSEL’S RATIFICATION OF THE COMPLAINT IS NOT PROPERLY BEFORE THE COURT

In a final effort to avoid liability, Kitsap suggests that the underlying complaint was unauthorized and remains so despite its ratification by General Counsel Griffin. (Br.14-16.) By Kitsap’s own account, the question it would have the Court consider is “whether Griffin’s ratification was appropriate and cured” an acknowledged defect (*see* above pp. 3-4) in the underlying complaint. (Br.15.) But Kitsap never raised that question, as it should have, in a motion for reconsideration of the Board’s decision accepting the ratification and finding

Kitsap’s previous challenge to the complaint moot. *See* cases cited above p. 55.

The Court accordingly cannot consider Kitsap’s newfound argument. 29 U.S.C. § 160(e); *see Oncor Elec. Delivery Co. LLC v. NLRB*, 887 F.3d 488, 500-01 (D.C. Cir. 2017) (review of General Counsel Griffin’s ratification of complaint “blocked” by untimeliness of employer’s objection).

In any event, Kitsap’s cursory claims do not provide a basis for setting the ratification aside. Under this Court’s precedent, a ratification is valid where “a properly appointed official has the power to conduct an independent evaluation of the merits and does so.” *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotation marks and citations omitted). That is precisely what happened here. Following the Supreme Court’s decision in *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015), Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice stating that, “[a]fter appropriate review and consultation with [] staff,” he had “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.”

(JA108n.1.)¹²

¹² This Court recognized in *SW General* that the Board’s General Counsel is one of only several officers expressly exempted from the FVRA’s “void-ab-initio” and “no-ratification” provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e), and

Kitsap claims but does not prove, as it must, that the General Counsel “failed to make a detached and considered judgment,” and that it “suffered... ‘continuing prejudice from th[at] violation.’” *Wilkes-Barre*, 857 F.3d at 372 (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 708-09 (D.C. Cir. 1996)). See *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) (“strong presumption of regularity” applies to General Counsel’s action); *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App’x 129, 137 (3d Cir. 2017) (“clear evidence” of irregularity needed to overcome “presumption of regularity” that applies to public official’s action).

Accordingly, the Court should “take [the] ratification ‘at face value and treat it as an adequate remedy.’” *Wilkes-Barre*, 857 F.3d at 372 (quoting *Legi-Tech*, 75 F.3d at 709) (upholding Board ratification of the appointment of a regional director originally appointed when the Board lacked a quorum, finding that the ratification “remedied any defect arising from the quorum violation”). Indeed, taking that approach, the Third Circuit has rejected a similar challenge to General Counsel

assuming that Sec. 3348(e) “renders the actions of an improperly serving Acting General Counsel *voidable*, not void”) (original emphasis)). The Supreme Court acknowledged that proposition but did not address it because the issue was not presented, 137 S. Ct. at 938 n.2, and therefore it remains the law of this Circuit.

Griffin's ratification of a complaint issued initially by Acting General Counsel

Solomon. *See 1621 Route 22*, 725 F. App'x at 137.¹³

¹³ This Court is considering another complaint-ratification challenge in *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (argued Nov. 16, 2018).

CONCLUSION

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

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

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

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

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

February 2019

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

KITSAP TENANT SUPPORT SERVICES, INC.)	
)	
Petitioner/Cross Respondent)	Nos. 18-1187
)	and 18-1217
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 12,784 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 19th day of February 2019

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

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 19th day of February 2019

ADDENDUM

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

KITSAP TENANT SUPPORT SERVICES, INC.)	
)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	19-CA-074715, et al.
)	
Respondent/Cross-Petitioner)	

STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. § 157)	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	2
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	2
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Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et. seq.

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

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and 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 including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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

Section 3348. (a) In this section—

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

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

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

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

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

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

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

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

(1) the office shall remain vacant; and

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

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

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

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

(e) This section shall not apply to—

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

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

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

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

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