

Nos. 18-1155, 18-1244

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

INGREDION, INC.
d/b/a **PENFORD PRODUCTS CO.**
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**LOCAL 100G, BAKERY, CONFECTIONERY,
TOBACCO WORKERS & GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC**
Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

INGREDION, INC.)	
d/b/a PENFORD PRODUCTS CO.)	
Petitioner/Cross-Respondent)	Nos. 18-1155, 18-1244
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
Respondent/Cross-Petitioner)	18-CA-160654
)	18-CA-170682
and)	
)	
LOCAL 100G, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS & GRAIN MILLERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Intervenor

Ingredion, Inc. d/b/a Penford Products Co. (“Ingredion”) was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court. The Board’s General Counsel was a party before the Board in the unfair-labor-practice proceeding. The Board is the Respondent/Cross-Petitioner before the Court. Local 100G, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union (“the Union”) was the charging party before the Board, and is the Intervenor in this court proceeding.

B. Rulings Under Review

This case is before the Court on Ingredion's petition for review and the Board's cross-application for enforcement of an unfair-labor-practice Decision and Order of the Board, issued on May 1, 2018, and reported at 366 NLRB No. 74. The Board seeks full enforcement of that Order.

C. Related Cases

The case on review was not previously before this Court or any other court. Ingredion filed an initial petition for review of the Board's Decision and Order docketed at D.C. Cir. No. 18-1126, which was later voluntarily dismissed and refiled as docketed at D.C. Cir. No. 18-1244. Board counsel is unaware of any related cases currently pending in this Court or any other court.

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Dated at Washington, D.C.
this 2nd day of April, 2019

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INTERNATIONAL UNION, AFL-CIO, CLC
Intervenor**

**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**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ingredion, Inc., d/b/a Penford Products Co. (“Ingredion”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and

Order issued against Ingredion on May 1, 2018, and reported at 366 NLRB No. 74. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. Local 100G, Bakery, Confectionery, Tobacco Workers & Grain Millers International Union (“the Union”) intervened in support of the Board.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that Ingredion violated Section 8(a)(5) and (1) of the Act by dealing directly with bargaining-unit employees, unreasonably delaying its provision of bargaining-related information, threatening employees with job loss in the event of a bargaining-related strike, and denigrating the Union by misrepresenting its bargaining positions.
2. Whether substantial evidence supports the Board’s finding that Ingredion violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last offer without having reached a valid impasse in bargaining with the Union.
3. Whether the Board acted within its broad discretion in ordering a notice-reading remedy.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; Ingredion's Director of Human Resources Visits the Facility

Ingredion is a multinational corporation that manufactures and sells various products for food and industrial uses. (A.2191; A.1966.)¹ In March 2015, Ingredion purchased Penford Products Co. and its corn-milling facility located in Cedar Rapids, Iowa. (A.2191; A.1966.) The Union represents a bargaining unit of 165 production and maintenance employees at the Cedar Rapids facility, and has represented the unit since 1948. (A.2191; A.2022-23.) At the time of its purchase by Ingredion, Penford Products was party to a collective-bargaining agreement with the Union that was set to expire in August 2015. (A.2191; A.425-517.) Ingredion recognized the Union and continued to operate the facility under the terms of the existing agreement. (A.2191; A.2092.)

On April 6, 2015, Ingredion's Director of Human Resources, Ken Meadows, visited the Cedar Rapids facility. (A.2191.) As part of his visit, Meadows met

¹ "A." refers to the deferred appendix filed by Ingredion. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Ingredion's opening brief.

with the Union's local officers. (A.2191-92.) During the meeting, another manager mentioned the employees' existing health-insurance coverage and pension benefits. (A.2191-92; A.1973, 1987-88.) In response to both topics, Meadows waved his hand and said "bye-bye." (A.2192; A.1794, 1973, 1987-88.) Meadows mentioned that there were going to be radical changes in the next contract, that he had been through many negotiations and knew how they worked, and that if the Union chose to strike then Ingredion could replace the employees. (A.2192; A.1794, 1973, 1987-88.)

After leaving his meeting with the union officials, Meadows toured the facility with two managers and spoke to several bargaining-unit employees on the shop floor. (A.2193; A.1967.) Speaking to employees in the ethanol control room, Meadows introduced himself and explained that he would be negotiating the next contract for Ingredion. (A.2193; A.1960-62, 1964-65.) Meadows then asked the employees what they would be looking for in a contract. (A.2193; A.1960-62, 1964-65.) For the next twenty-five minutes, Meadows discussed a variety of substantive proposals with the employees, including retiree health insurance, wage increases, vacation scheduling, staffing levels, rotating shift scheduling, and seniority-based vacation benefits. (A.2193; A.1960-62, 1964-65, 2027-29.) Meadows told the employees that the existing health-insurance plan was subject to a "Cadillac tax," that the employees would have Ingredion's insurance plan

instead, and that the employees' pensions were a thing of the past and would be going away. (A.2193; A.1960-62, 1964-65.)

Meadows and the two managers accompanying him also spoke to an employee in the dry-starch department, who was informed that Meadows was going to be the chief negotiator for Ingredion and who was asked what he would like to see in the next contract. (A.2193-94; A.1956-57.) The employee suggested that he would like to see a \$5 raise in his pension multiplier, to which Meadows replied that he did not think the employee was going to see that. (A.2193-94; A.1956-57.) When the employee raised the issue of retiree health insurance, Meadows responded that the employee did not need such insurance unless he planned to retire soon. (A.2194; A.1956-57.)

B. Ingredion Initiates Bargaining; the Union Requests Benefits-Related Information

On May 11, Ingredion provided the Union with formal notice of its intent to terminate the expiring collective-bargaining agreement. (A.2194; A.1774.) The Union sent a letter to Ingredion on May 13 requesting a variety of information in anticipation of bargaining, including: the total dollar costs and accounting method for the costs of fringe benefits for the previous year; the cents-per-hour individual cost for each dollar increase to the defined-benefit pension multiplier; and the cents-per-hour individual cost for each 1% increase in the direct-contribution plan. (A.2195; A.2099.)

C. The Parties Begin Bargaining in June and Exchange Initial Proposals; the Union Renews Its Previous Information Request

Ingredion and the Union commenced bargaining in June. (A.2195; A.1625-27.) Meadows served as the chief negotiator for Ingredion. (A.2191; A.1627.) The Union's chief negotiators were international vice president Jethro Head and local president Christopher Eby. (A.2191; A.1627.)

On June 1, the parties met briefly to exchange initial bargaining proposals. (A.2195; A.1990-91, 2098.) The Union's proposals were based on the expiring agreement at the Cedar Rapids facility. (A.2195; A.312-16, 425-517.) Ingredion's proposal set forth an entirely new contract in both form and substance, and bore no resemblance to the existing agreement. (A.2195; A.2-38.) Meadows indicated that his goal was ultimately to get a contract, but that Ingredion was not Penford Products and that his proposal contained radical changes. (A.2195; A.1713, 1750, 1991.) Meadows read from a document stating that Ingredion was requesting that "the entirety of the parties' collective-bargaining agreement, and all of its Articles and Sections, be reopened and renegotiated," and that there were no provisions that Ingredion proposed "to remain unchanged." (A.2195; A.1817.)

On June 29, the parties met for a four-hour bargaining session. (A.2196; A.1991-94.) At the start of the session, Head presented a letter renewing the Union's earlier request for information regarding fringe benefits and pension costs. (A.2196; A.1770.) In response, Meadows stated that he did not intend to provide

pension-related information because Ingridion's proposed agreement did not contain a pension provision. (A.2196; A.1991.) Meadows also went through each of the Union's initial proposals, in less than ten minutes, and stated that he was "not interested" in the majority of them. (A.2196; A.1715-16, 1979-80, 1992.) Meadows did not explain further. (A.2196; A.1992, 2048.) The Union later presented additional non-economic proposals. (A.2196; A.318-21.)

On June 30, the parties met for approximately one hour and twenty minutes. (A.2196; A.1994-95.) Ingridion provided the Union with a second proposed agreement making several changes to its initial proposal. (A.2196; A.40-77.)² Near the start of the session, Head stated that the parties needed to come up with an "agreed-upon process" so that they could "actually have negotiations," rather than simply saying "not interested." (A.2196; A.1718, 1753, 1994.) Meadows stated that he was not coming off his proposed agreement, that he was willing to put together a last, best, and final offer, and that the Union would see work going on in the Cedar Rapids facility related to that. (A.2196; A.1719, 1753, 1976, 1994.) Subsequent to the meeting, the Union created a list of the many concessions that Ingridion was proposing relative to the expiring agreement. (A.2197; A.1782-85.)

² The changes between Ingridion's initial proposal, its subsequent offers, and its last, best, and final offer are summarized in a chart at A.1807-08.

D. **Ingredion’s Managers State That Employees Might Lose Their Jobs if They Strike and That They Should Convince the Union to Start Bargaining over Improved Benefits**

In mid-July, as the expiration date of the existing agreement approached, a group of employees on the shop floor began discussing the ongoing negotiations and the possibility of a bargaining-related strike. (A.2206; A.1957-58.) They were approached by Facility Manager David Vislisel, who told the employees that they “might want to think long and hard about walking out on these people,” because Ingredion had “deep pockets and lots of plants that make the same thing you do.” (A.2206; A.1957-58.) Vislisel warned that employees “may not get back in the door if you go out.” (A.2206; A.1957-58.)

Also in mid-July, two employees who were considering retiring by the end of the month were separately approached by Operations Manager David Roseberry, who explained that he had been instructed to speak with them by Meadows. (A.2205; A.2041-42, 2044-45.) Roseberry told the employees that they should wait to retire because Ingredion was seeking improved retirement benefits. (A.2205; A.2041-42, 2044-45.) Roseberry told the employees to convince the Union to start negotiating over Ingredion’s proposals. (A.2205; A.2042, 2045.)

E. The Parties Continue Bargaining in July and Make Slow Progress; the Union Again Renews Its Information Request

The parties did not meet again until July 27, when they met across three and a half hours with a federal mediator present. (A.2197; A.1995-96.) During the meeting, Meadows told the Union that he had already addressed their proposals, and that the provisions of the expiring contract did not allow Ingredion to “grow.” (A.2197; A.1720, 1996.) When Head asked how they did not allow Ingredion to grow, Meadows did not answer. (A.2197; A.1996.)

On July 28, the bargaining session lasted approximately twelve hours. (A.2197-98; A.1996-2001.) Ingredion presented a revised proposed agreement that contained retiree health insurance, which was discussed for the first time, as well as a wage proposal establishing a permanent two-tier wage scale. (A.2197-98; A.79-116, 1722-24, 1996-98.) The only explanation that Meadows offered for the permanent two-tier wage scale was that Ingredion required “economic adjustment.” (A.2198; A.1902, 2049-50.) Beginning in its July 28 offer, Ingredion began including a provision granting it the authority to switch the normal workday from eight hours to twelve hours “if at least 65% of the classification votes to go to a 12 hour shift.” (A.92 art.X.)

On July 29, the parties met across approximately eight hours. (A.2198-99; A.2002-04.) Meadows gave the Union another proposed agreement including several changes. (A.2198; A.118-55, 569-71, 1807-08.) After the Union presented

its list of the concessions that Ingridion was seeking relative to the expiring agreement, the parties had productive discussions on various issues. (A.2198-99; A.1725-30, 1782-85, 2003-04.)

On July 30, the parties met for approximately five hours. (A.2199; A.2006-08.) The Union provided Ingridion with a new written information request seeking, among other things, the three items previously requested in June and May. (A.2199; A.1111-12.) The parties also discussed a revised proposal from Ingridion that included several further changes. (A.2199; A.157-94, 2007.)

On July 31, the parties met for six and a half hours. (A.2199-2200; A.2008-09.) Ingridion presented a revised proposal that, for the first time, included language on regular medical insurance. (A.2199; A.196-232.) The parties also engaged in substantive discussions for the first time regarding proposed changes to the defined-benefit pension plan in the expiring agreement. (A.2199; A.323, 1732-33.) Given that the existing contract was set to expire the following day, Head suggested that he was willing to take an offer from Ingridion to employees for a vote. (A.2200; A.2009.) After a caucus, Ingridion presented a “final offer” that improved its proposed wage increase. (A.2200; A.234-70.) During this bargaining session, Ingridion finally provided the Union with all of the previously requested information. (A.2200; A.2009.)

F. The Parties Continue Bargaining in August After the Employees Overwhelmingly Reject Ingredion's Offer; Ingredion Declares Impasse in Mid-August

The parties' existing agreement expired on August 1. (A.2200; A.511.) On the same day, the Union presented Ingredion's "final offer" to the bargaining-unit employees, with approximately 95% voting against it. (A.2200; A.2010.)

The parties next met for six hours on August 17. (A.2200-01; A.2010-12.) At the start of the session, Head reiterated that most of the bargaining unit had voted down Ingredion's offer, and he suggested that Ingredion present its proposals in the form of the expiring agreement. (A.2200; A.1734.) Meadows replied that Ingredion would take a hard look at the issues and prepare a proposal. (A.2201; A.1735.) Head emphasized that the Union was willing to move on substantive issues and reiterated that the parties needed a better process for negotiating over proposals. (A.2201; A.2011-12.)

On August 18, the parties met for nearly eight hours. (A.2201-02; A.2012-16.) The meeting began with Meadows declaring that he had reviewed the Union's earlier proposals and that the parties were at impasse. (A.2201; A.1736.) Meadows then presented the Union with a newly revised offer labeled "last, best, and final offer." (A.2201; A.272-310.) After a caucus, the Union presented its own economic and non-economic proposals. (A.2201; A.325-38.) Meadows stated that he would consider particular proposals that the Union wanted to

address, and that Ingredion was willing to continue making changes based on its last offer. (A.2201-02; A.1737-39.)

G. The Parties Meet in September and the Union Makes Significant Concessions; Ingredion Nonetheless Implements Its Last Contract Offer; Ingredion Later Polls Employees About Changing Their Work Schedules Without Consulting the Union

The parties did not meet again until September 9, and that meeting only lasted three minutes with no substantive discussions. (A.2202; A.1625, 2016-17.)

On September 10, the parties met across twelve hours. (A.2202; A.2017-19.) Meadows stated that he was going to keep an “open mind” about the Union’s proposals and that he was potentially willing to modify Ingredion’s last, best, and final offer. (A.2202; A.1741.) After a caucus, the Union presented an “offer of settlement” that made concessions on numerous significant issues and withdrew or modified a number of proposals to match Ingredion’s offer, such as eliminating the longstanding labor-relations committee, modifying the grievance-arbitration procedure, and eliminating various letters of understanding attached to the expiring agreement. (A.2202; A.340-423.)

On September 11, the parties met briefly and Meadows stated that Ingredion was not interested in the Union’s offer of settlement. (A.2202; A.2019-20.) The Union suggested that the parties continue bargaining and proposed additional bargaining dates. (A.2202; A.2020.) The Union reiterated in a September 13 letter

that it did not consider the parties to be at impasse and that it wanted to pursue further bargaining. (A.2202; A.1792.)

On September 14, Ingredion implemented its last, best, and final offer and put into effect significant changes to employees' terms of employment. (A.2202; A.272-308, 2020.) In October, subsequent to the implementation of its last offer, Ingredion polled maintenance employees about switching to a combination of eight-hour and twelve-hour shifts. (A.2218-19; A.1798-1805, 2035-37.)

H. The Union Files Charges with the Board; an Administrative Law Judge Issues a Recommended Decision

The Union filed an unfair-labor-practice charge with the Board on September 24, and an amended charge on December 29, alleging that Ingredion violated the Act through its bargaining-related conduct. (A.2190; A.1630-31.) The Board's General Counsel issued an unfair-labor-practice complaint in January 2016. (A.2190; A.1632-44.) On April 16, 2016, the Board's General Counsel amended the complaint to allege several additional violations. (A.2190; A.1659-62.) An administrative law judge held an evidentiary hearing over six days between April 18 and April 28, 2016. (A.2190.) The judge issued a recommended decision and order finding that Ingredion violated the Act in numerous ways. (A.2190-2223.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 1, 2018, the Board (Members Pearce, McFerran, and Emanuel) affirmed the judge in relevant part and found that Ingredion violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last offer without reaching a valid bargaining impasse; dealing directly with employees; and unreasonably delaying its provision of relevant information requested by the Union. (A.2187.) The Board found that Ingredion also violated Section 8(a)(1) by threatening employees with job loss if they went on strike; and denigrating the Union by falsely telling employees that the Union was unwilling to negotiate over improved terms. (A.2187.) The Board found it unnecessary to pass on several additional unfair-labor-practice allegations deemed meritorious by the judge, because they would not materially affect the remedy. (A.2186-87 nn.1-3.)

The Board's Order requires Ingredion 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 the rights guaranteed by the Act. (A.2187-88.) Affirmatively, the Board's Order requires Ingredion to, on request, bargain in good faith with the Union and rescind the changes unilaterally implemented on September 14; put into effect all terms of employment established by the expired agreement and maintain those terms until the parties have bargained to an agreement or a valid impasse; make whole employees for any losses; make

contributions established under the expired agreement; make whole employees discharged, suspended, or denied work as a result of the unilateral implementation; and post a remedial notice. (A.2187-88.) The Board's Order also requires Ingreption to convene employees for a public notice reading by Meadows, or by a Board agent with Meadows and other management officials present. (A.2188.)

SUMMARY OF ARGUMENT

Ingreption committed numerous violations of the Act during bargaining with the Union over a new contract. Substantial evidence supports the Board's findings that, almost immediately after the parties began discussing the prospect of bargaining, Ingreption engaged in a series of unlawful actions undermining the Union, including: dealing directly with bargaining-unit employees about the contents of the next contract, refusing to provide important bargaining-related information to the Union for several months, threatening employees that they might lose their jobs if they went on strike in support of the Union, and falsely informing employees that the Union was unwilling to negotiate over improved benefits. Ingreption has failed to establish that any of these unfair-labor-practice findings are unsupported by record evidence, are procedurally infirm, or are otherwise not entitled to deference.

The primary unfair labor practice at issue is Ingreption's decision to unilaterally implement new terms of employment while still engaged in fruitful

bargaining. This violation turns on the Board’s finding that the parties had not yet reached a genuine overall bargaining impasse, which is a complex question of fact uniquely within the Board’s expertise and entitled to particular deference by the Court. Here, Ingredion insisted that the parties bargain from scratch over an entirely new contract. Despite the difficulties inherent in such an undertaking, both parties softened their positions on certain issues over time and the parties were making slow progress toward a potential negotiated agreement. Nonetheless, at just the tenth bargaining session, Ingredion declared impasse and presented the Union with a final offer. Only three meetings after that—despite having *continued* to engage in productive bargaining with the Union—Ingredion decided to implement its offer.

The Board’s finding that Ingredion failed to show that the parties had reached valid impasse is well supported by the record. The Board first found that, even assuming that Ingredion had been bargaining entirely in good faith, the evidence did not show that the parties were deadlocked, or that they had fully explored all possible paths towards a negotiated agreement. Thus, for example, Ingredion continued to productively bargain with the Union even after having nominally declared “impasse” in mid-August, and the Union demonstrated a genuine willingness to continue bargaining by making significant concessions on important issues just days before Ingredion implemented its last offer.

The Board further found that valid impasse was precluded by Ingredion's failure to approach bargaining in good faith. Although Ingredion changed its positions on certain issues over time and demonstrated the possibility of further progress toward a negotiated agreement, Ingredion also impeded negotiations by approaching bargaining without an open mind toward the Union's proposals, and without fully explaining the reasoning behind its own proposals so as to facilitate informed bargaining. Moreover, Ingredion engaged in a variety of unfair labor practices that undermined the Union's position, and its implemented offer was tainted by the inclusion of a provision allowing Ingredion to cut the Union out of discussions with bargaining-unit employees over changes to their work schedules.

In its brief to the Court, Ingredion does not squarely grapple with the Board's detailed analysis, and instead seeks to substitute its own misleading characterizations of the bargaining and of the record evidence—including self-serving testimony from its chief negotiator, which the Board chose not to fully credit. Ingredion has failed to establish that the Board's findings were not based on substantial evidence, or that they are not entitled to affirmance by the Court. Finally, Ingredion has also failed to establish that a notice-reading remedy was outside the Board's broad remedial discretion.

ARGUMENT

I. Ingression Violated Section 8(a)(5) and (1) of the Act by Dealing Directly with Bargaining-Unit Employees, Unreasonably Delaying Its Provision of Bargaining-Related Information, Threatening Employees with Job Loss in the Event of a Bargaining-Related Strike, and Denigrating the Union by Misrepresenting Its Bargaining Positions

A. Applicable Principles and Standard of Review

Section 7 of the Act guarantees employees the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining.” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1). Section 8(a)(5) makes it a separate unfair labor practice for an employer to “refuse to bargain collectively with the representative of [its] employees.” 29 U.S.C. § 158(a)(5). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

The Board’s findings are conclusive if supported by substantial evidence on the record as a whole, even if the Court might justifiably have reached a different conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). The Court affords a “very high degree” of deference to the Board, and will affirm its

findings unless “no reasonable factfinder” could find as the Board did. *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016).

B. Ingression Violated Section 8(a)(5) and (1) by Dealing Directly with Employees About Changes in the Next Contract

The Board first found that Ingression violated the Act on April 6 when Meadows, its chief negotiator in the upcoming bargaining, toured the Cedar Rapids facility and, after soliciting bargaining-related proposals from employees, told employees what would or would not be acceptable in the next contract. (A.2194.) An employer violates Section 8(a)(5) and (1) and undermines “the essential principle of collective bargaining” when it circumvents its employees’ exclusive representative in order to discuss bargaining-related issues directly with individual employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684-85 (1944); *see Allied-Signal, Inc.*, 307 NLRB 752, 753-54 (1992) (observing that an employer’s decision to seek input directly from employees “plainly erodes the position of the designated representative”).

Shortly after leaving a meeting with local union officials, Meadows approached several employees on the shop floor and began discussing the next contract. (A.1956-57, 1960-62, 1964-65.) Meadows not only solicited individual employees’ positions on specific issues, but he also informed employees what they were going to get in the next contract—before negotiations with the Union had even begun. *E.g., Armored Transp., Inc.*, 339 NLRB 374, 376 (2003) (finding

violation where employer presented bargaining proposals to employees prior to union). Moreover, Meadows addressed substantive issues that he knew were of concern to the Union and would likely be raised during bargaining, and yet he told employees that certain terms in the existing contract negotiated by the Union were undesirable or would be going away. *E.g., Obie Pac., Inc.*, 196 NLRB 458, 458-59 (1972) (finding violation where employer discussed existing terms with employees to weaken position of union).

Contrary to *Ingredion* (Br.36-40), the bargaining-related discussions at issue were unequivocally initiated by Meadows, who introduced himself as *Ingredion's* chief negotiator for the next contract before *asking* employees what they wanted to see in that contract, and thus Meadows was not simply responding to “employee questions.” Nor were the discussions “brief and general” (Br.38), given that Meadows spoke with employees in the ethanol control room for twenty-five minutes about specific policies, and at least one additional employee in a separate conversation involving detailed proposals. To the extent that Meadows had an established “practice” (Br.40) of soliciting input from union-represented employees shortly before commencing bargaining, it would merely suggest that Meadows had a practice of routinely violating the Act.

C. Ingression Violated Section 8(a)(5) and (1) by Unreasonably Delaying the Provision of Bargaining-Related Information

The Board found that Ingression violated the Act between early May and the end of July when it unreasonably delayed furnishing important bargaining-related information requested by the Union. (A.2186 n.1, 2207-08.) The duty to bargain in good faith includes the “general obligation to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 565, 568 (1967). Thus, an employer violates Section 8(a)(5) and (1) by failing to reasonably respond to requests for presumptively relevant information, such as information related to wages and benefits. *See Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191-92 (D.C. Cir. 2000). An employer violates the Act not only by refusing to provide requested information, but also by unreasonably delaying its response. *Brewers & Maltsters*, 414 F.3d at 45; *Woodland Clinic*, 331 NLRB 735, 736-37 (2000).

On May 13, after Ingression provided notice of its intent to terminate the existing agreement and bargain over a new contract, the Union submitted a written information request seeking, among other things: (i) the total cost and cents-per-hour cost and accounting method for each fringe benefit during the previous year; (ii) the cents-per-hour cost for each dollar increase in the defined-benefit pension multiplier; and (iii) the cents-per-hour cost for each 1% increase in the direct-contribution pension plan. (A.2099.) Given Meadows’ earlier statements, the

Union had reason to expect that Ingredion would try to radically change such benefits during the upcoming bargaining. Ingredion no longer disputes (Br.46-50) that the requested information was relevant and that it was legally obligated to provide it. Nonetheless, Ingredion inexplicably refused to provide all of the requested information until July 31. (A.1114-15.)

As the Board found, Ingredion offered no contemporaneous explanation to the Union regarding any difficulties it may have experienced in retrieving the specific information at issue. (A.2208.) To the contrary, Ingredion repeatedly indicated, both internally and to the Union, that it did not intend to provide certain information because a pension increase did not fit Ingredion's own bargaining proposals. (A.542, 1796, 1970, 1991.) Although some of the information may have originally been held by a third party, Ingredion failed to show that the information in question was complex to assemble or difficult to retrieve. Given these facts, substantial evidence supports the Board's finding that Ingredion's eleven-week delay in providing the information was unreasonable. *See, e.g., Woodland Clinic*, 331 NLRB at 737 (finding seven-week delay in providing information until shortly before declaring impasse to be unlawful); *Bundy Corp.*, 292 NLRB 671, 671-72 (1989) (finding ten-week delay in providing benefits-related information during bargaining to be unlawful).

Ingredion attempts (Br.46-50) to obfuscate its unlawful conduct by focusing on ancillary information requested by the Union or provided by Ingredion, rather than the three specific items that are the subjects of the Board's unfair-labor-practice finding. The fact that Ingredion selectively complied with its legal obligations and timely provided a "substantial amount" (Br.47) of other information is immaterial. As a result, much of the testimony cited by Ingredion (Br.47-50) regarding its overall efforts is simply irrelevant, and, moreover, Ingredion misleadingly cites testimony dealing with entirely separate information requests to falsely imply that Meadows told the Union it would take "several months" to retrieve the three items at issue.

D. Ingredion Violated Section 8(a)(1) by Threatening Employees That They Would Lose Their Jobs If They Went Out on Strike

The Board next found that Ingredion violated the Act in July when its facility manager, David Vislisel, addressed the possibility of a strike and warned employees to "think long and hard about walking out on these people," because Ingredion had "deep pockets" and many other facilities making the same product. (A.2206; A.1957-58.) Vislisel further warned that employees might "not get back in the door" if they ever went out on strike. (A.2206; A.1957-58.) An employer violates Section 8(a)(1) by coercively threatening its employees that they would risk unconditional job loss in the event of a strike. *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 360-61 (D.C. Cir. 2016); *Baddour, Inc.*, 303 NLRB

275, 275 (1991). Substantial evidence supports the Board’s finding that Vislisel’s remarks, which came from an upper-level manager at the facility, threatened employees that if they went on strike in support of the Union’s position in the ongoing bargaining then they might lose their jobs.

Contrary to *Ingredion* (Br.45-46), Vislisel’s comments were not mere predictions as to probable economic consequences “beyond [Ingredion’s] control,” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Instead, Ingredion’s manager relayed a straightforward threat of reprisal to be taken “solely on [Ingredion’s] own volition,” *id.* at 619, which included the coercive implication that Ingredion might respond to a strike by shifting production to its other facilities and eliminating jobs at the newly acquired Cedar Rapids facility. As has long been recognized, employees are “particularly sensitive” to rumors of plant closings or job loss, and reasonably “take such hints as coercive threats rather than honest forecasts.” *Id.* at 619-20; *e.g.*, *Care One*, 832 F.3d at 361 (reiterating that Court would not second-guess Board’s reasonable finding as to unlawful coercive effect of employer pamphlet warning that strike could “jeopardize” employees’ jobs).

Ingredion’s claim that the Board “never addressed” this violation (Br.44) is frivolous. The Board affirmed the administrative law judge’s “rulings, findings, and conclusions”—with several enumerated exceptions—and adopted the judge’s recommended order as modified. (A.2186.) The Board’s Order expressly includes

the finding that Ingredion unlawfully “threaten[ed] employees that they might lose their jobs if they went on strike.” (A.2187, 2189.) It is a routine principle of agency procedure that the affirmed findings of an administrative law judge become the findings of the Board, whether or not the Board itself provides additional analysis. *E.g., StaffCo of Brooklyn, LLC v. NLRB*, 888 F.3d 1297, 1304 (D.C. Cir. 2018).

Equally meritless are Ingredion’s attempts (Br.44-46, 50-53) to avoid liability by claiming that the Board’s finding was procedurally barred, or that it violated Ingredion’s due process rights. Under Section 10(b) of the Act, the allegations in an unfair-labor-practice complaint must be based on charges filed within six months of the events in question or “closely related” to timely filed charges. *See* 29 U.S.C. § 160(b); *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 (D.C. Cir. 1999). Here, both the September 2015 original charge and December 2015 amended charge specifically alleged that Ingredion had threatened employees with replacement. (A.1630-31.) Thus, the allegation in the amended complaint that Vislisel threatened employees in July 2015 was encompassed by a timely filed charge. (A.2190.) Ingredion has likewise failed to establish a due process violation or to show the requisite prejudice where it received notice of the amendment before the hearing had opened, and where the issue was fully litigated during the hearing. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C.

Cir. 1993). Ingreption cross-examined the employee testifying about Vislisel's remarks and did not seek to recall him before the hearing closed ten days later, and it subsequently called Vislisel as a defense witness. (A.2206.) *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122-23 (D.C. Cir. 2001) (noting lack of prejudice where employer "had a full opportunity to cross-examine the General Counsel's witness about the circumstances surrounding [alleged] threats").

E. Ingreption Violated Section 8(a)(1) by Denigrating the Union to Employees and Falsely Suggesting That the Union Was Unwilling to Negotiate Over Improved Benefits

The Board found that Ingreption again violated the Act in July when its operations manager, David Roseberry, contacted employees at Meadows' direction and denigrated the Union by falsely portraying the Union's conduct in the ongoing bargaining. (A.2186 n.1, 2205-06.) An employer violates Section 8(a)(1) by suggesting to employees that their chosen bargaining representative "stands as an impediment to an increase in wages or benefits." *Faro Screen Process, Inc.*, 362 NLRB No. 84, 2015 WL 1956203, at *2 (Apr. 30, 2015). Thus, for example, an employer unlawfully denigrates its employees' union when it misrepresents the union's bargaining positions and blames the union for preventing employees from receiving benefits. *Miller Waste Mills, Inc.*, 334 NLRB 466, 467 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003); *see, e.g., Am. Meat Packing Corp.*, 301 NLRB 835, 839 (1991) (finding that employers violate the Act by misrepresenting a union's

bargaining position and creating “the impression that the employer rather than the union is the true protector of the employees’ interests”).

In mid-July, Meadows instructed Roseberry to talk to senior employees who had expressed interest in retiring. (A.2041-42, 2045.) After asking another manager about retirement benefits, two employees were separately approached by Roseberry and informed that they should wait to retire because Ingredion was seeking better contractual terms. (A.2041-42, 2044-45.) Roseberry told one employee not to “let a few people in the union body” affect his retirement decision. (A.2042.) Roseberry told the other employee that he needed to convince the Union “to go in an negotiate” regarding the employer’s more generous terms, and that he needed to “call [his union representatives] and have them get a hold of the company and start negotiating.” (A.2045.) Because of these remarks, employees began discussing whether the Union was telling them everything about the ongoing bargaining, and whether Ingredion had “a lot to give” employees that the Union was not negotiating over. (A.2045.) Substantial evidence thus supports the Board’s finding that Ingredion denigrated the Union by falsely suggesting that the Union was unwilling to negotiate over improved retirement benefits or other terms. *See, e.g., Nat’l Med. Assocs., Inc.*, 318 NLRB 1020, 1030-31 (1995) (finding unlawful denigration where employer drove wedge between union and employees by posting letter suggesting that union prevented wage increase).

In its opening brief (Br.42-44), Ingridion ignores parts of the credited testimony relied upon by the Board, such as one employee's recollection that Roseberry told him to try to convince the Union to "start" negotiating over the terms offered by Ingridion (A.2045). Nor was Roseberry merely expressing a negative "opinion" (Br.42) by making materially false statements about the Union being unwilling to negotiate. *See, e.g., Gissel Packing*, 395 U.S. at 618 (distinguishing statements of opinion from unlawful statements designed to "mislead" employees); *cf. Children's Ctr. for Behavioral Dev.*, 347 NLRB 35, 35-36 (2006) (finding statements that union was costing employer money to be lawful where they were not materially false and did not accuse union of harming employees directly).

Ingridion is also wrong to claim that the unfair-labor-practice complaint was defective (Br.43) or that its due process rights were violated (Br.50-51) by the Board finding that Roseberry's comments were unlawful. The complaint clearly alleged that Roseberry violated Section 8(a)(1) and unlawfully denigrated the Union by his comments to employees about retirement benefits. (A.1634-35, 1640, 1662.) The Board's General Counsel does not need to plead the exact contents of testimony that will be elicited at the hearing, and, in any event, here the unfair-labor-practice finding was closely connected to the original complaint, Ingridion received fair notice of the unlawful-denigration theory, and the issue was

fully litigated. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199-1200 (D.C. Cir. 2003); *Davis Supermarkets*, 2 F.3d at 1169.

F. Ingression Violated Section 8(a)(5) and (1) by Dealing Directly with Employees About Changes to Their Work Schedules

Although occurring after Ingression unilaterally implemented its last offer and thus not affecting the Board's analysis regarding the lack of impasse, *infra* pp. 49-51, the Board found that Ingression separately violated the Act in October by directly polling maintenance employees about changing to a combination of eight-hour and twelve-hour shifts. (A.2218-19.) An employer violates Section 8(a)(5) and (1) when it circumvents its employees' designated bargaining representative and polls employees directly about changes to their working conditions. *Harris-Teeter Super Mkts., Inc.*, 293 NLRB 743, 744-45 (1989) (finding unlawful direct dealing where employer polled employees about switching from five-day to four-day workweek), *enforced*, 905 F.2d 1530 (4th Cir. 1990). Substantial evidence supports the Board's finding here: it is undisputed that Ingression polled employees about changing their schedules without first consulting the Union, and, as the Board found, Ingression's ability to do so was "never sanctioned by the union representing the employees." (A.2219.)

Once again, Ingression's claim that the Board did not address this violation (Br.40-41) is without merit. The Board affirmed the administrative law judge's findings, except where it specified otherwise, and conformed its Order to the

standard remedial language for unlawful direct dealing concerning “wages, hours and working conditions.” (A.2186-87.) In this case, that generic language encompassed two separate instances of unlawful direct dealing.

Moreover, contrary to its claims (Br.41), Ingredion violated the Act in this respect regardless of whether the parties had reached valid impasse. Although an employer is entitled to implement certain changes following impasse, “the existence of impasse does not permit an employer to cease recognizing the union as the employees’ exclusive representative” or to implement a provision allowing it to deal directly with employees. *Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990); *see Hotel Bel-Air v. NLRB*, 637 F. App’x 4 (D.C. Cir. 2016). The lone case cited by Ingredion (Br.41) is inapposite, because there, unlike here, the employer’s right to poll employees had been sanctioned in a collective-bargaining agreement executed by the employees’ union. *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005).

II. Ingredion Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing Its Last Offer Without Having Reached a Valid Impasse in Bargaining with the Union

A. Applicable Principles and Standard of Review

An employer violates Section 8(a)(5) and (1) of the Act by making changes to union-represented employees’ terms and conditions of employment without first reaching final agreement or bargaining to valid impasse. *Litton Fin. Printing Div.*

v. NLRB, 501 U.S. 190, 198 (1991); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). Genuine impasse exists only when “good-faith negotiations have exhausted the prospects of concluding an agreement,” and there is “no realistic possibility” that continued bargaining would be fruitful. *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012). Overall impasse has not been reached unless there has been a legitimate breakdown “in the entire negotiations,” as opposed to impasse on one or more discrete issues. *Wayneview Care*, 664 F.3d at 349-50. The existence of a valid bargaining impasse is an affirmative defense, and thus the burden of proving impasse rests with the party asserting it. *Monmouth Care*, 672 F.3d at 1089.

The Board evaluates impasse based on its “accumulated expertise in the area,” and it does not have a “fixed definition” of impasse “which can be applied mechanically to all factual situations.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991). The Board considers a variety of factors to determine whether the parties had, in fact, reached valid impasse, including: the parties’ bargaining history, the good faith of the parties during the negotiations, the length of the negotiations, the importance of the issues as to which there was disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Monmouth Care*, 672 F.3d at 1088-89 (citing *Taft Broad. Co.*,

163 NLRB 475, 478 (1967), *affirmed sub nom. Am. Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)).

The Court's review is "particularly" limited with respect to the Board's findings as to the existence of a valid bargaining impasse, which is a question of fact. *Monmouth Care*, 672 F.3d at 1089. The Court has consistently observed that, "in the whole complex of industrial relations," few issues are "*less* suited" to judicial appraisal than the evaluation of a bargaining impasse, or "*better* suited to the expert experience of a board which deals constantly with such problems." *Wayneview Care*, 664 F.3d at 348 (emphases added); *e.g.*, *Dallas Gen. Drivers, Warehousemen & Helpers, Local Union No. 745 v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966); *accord Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990).

B. The Parties Had Not Yet Exhausted the Possibility of Reaching an Agreement, and the Board Reasonably Found That Ingredient Failed to Prove Further Negotiations Would Have Been Futile

The Board found that the parties had not yet fully explored all possible paths toward a negotiated agreement when Ingredient declared impasse or when it implemented its final offer, and that Ingredient therefore failed to establish the existence of valid impasse. (A.2186-87.) Thus, even setting aside the indicia of a lack of good faith discussed further below, *infra* pp. 43-54, the Board found that Ingredient violated the Act by unilaterally implementing its final offer.

1. The parties lacked an established bargaining relationship and their negotiations lasted a short period of time given that Ingredion sought an entirely new agreement

The first and third traditional factors for evaluating impasse concern “the parties’ bargaining history” and “the length of the negotiations.” *Monmouth Care*, 672 F.3d at 1088-19. The Board has long recognized that bargaining presents “special problems” when the parties do not have an established bargaining relationship and have not executed previous contracts together. *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71-72 (1965). A reasonable period of bargaining in such situations will tend to be longer, because “difficulties [are] often encountered in hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices.” *Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399, 403 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002). The Board also considers whether a party is seeking a “wide range of drastic cuts” such that good-faith negotiations would reasonably tend to be “difficult and potentially protracted.” *Newcor Bay City Div.*, 345 NLRB 1229, 1239 (2005).

As the Board noted, Ingredion and the Union had no prior bargaining history. (A.2214.) Ingredion acquired Penford Products and the Cedar Rapids facility in March, and its chief negotiator, Meadows, met with local union officials for the first time in April. When actual bargaining commenced in early June, Meadows made clear that management from the Cedar Rapids facility would have

very little input on the negotiations. (A.1713, 1750, 1991.) As the negotiations progressed, the Union repeatedly commented that the parties needed to establish basic procedures for bargaining rather than simply stating that they were not interested in each other's proposals. (A.2011-12.) Moreover, as the Board emphasized, the parties were effectively bargaining from scratch over an entirely new contract due to Ingredion's insistence on renegotiating every single term in the expiring agreement. (A.2214.)

Despite the arduous task of adjusting to a new bargaining relationship while negotiating over an entirely new replacement agreement, there were only ten bargaining sessions between June 1, when the parties first met briefly to exchange initial proposals, and August 18, when Ingredion declared impasse. As the Board found, this was a "relatively low number of meetings" given the scope of the bargaining. (A.2214.) Several of these bargaining sessions lasted only a few hours, including caucuses. There was also only one bargaining session between the date on which the Union finally received important benefits-related information and Ingredion's declaration of impasse. After declaring impasse, there were only three additional meetings—including one that lasted three minutes—before Ingredion unilaterally implemented its last offer.

Ingredion's anomalous claim (Br.12-13) that there were "dozens" of bargaining sessions—evidently based on counting multiple "sessions" per day—is

false. Meanwhile, all but one of the cases cited by Ingredion (Br.13) involved parties that had an established bargaining relationship and were bargaining over discrete changes to a predecessor agreement. Although *Erie Brush* involved first-contract negotiations and only eight formal bargaining sessions, in that case the parties were engaged in bargaining for over ten months before impasse, and they had been able to reach agreement “on all noneconomic issues except two,” which were the subjects of the impasse. *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 19, 21 (D.C. Cir. 2012). In any event, the limited number of bargaining sessions that took place here was plainly insufficient for the parties to reach agreement on replacing every single term of an expiring contract rooted in seventy years of bargaining history. The Union had proposed beginning negotiations earlier than June (A.1772, 1987), but Ingredion refused that request and then proceeded to prematurely declare impasse shortly after the existing contract expired.

2. The parties had not yet meaningfully discussed important issues and they were continuing to show movement

The fourth traditional impasse factor is “the importance of the issue or issues as to which there was disagreement.” *Monmouth Care*, 672 F.3d at 1089. The parties generally will not have reached valid impasse if important issues were only discussed late in the course of bargaining. *Atlas Refinery, Inc.*, 354 NLRB 1056, 1071 (2010), *incorporated by reference*, 357 NLRB 1798 (2011), *enforced*, 620 F. App’x 99 (3d Cir. 2015); *cf. Sanders House v. NLRB*, 719 F.2d 683, 687 (3d

Cir. 1983) (noting that “movement on one important issue may support a finding that an impasse did not exist even though other key issues remain unresolved,” because “a willingness to move toward an agreement on an important issue in dispute might trigger other concessions on related questions”).

As the Board explained, when Ingredion declared impasse the parties had not yet meaningfully negotiated over key issues affecting employees’ terms and conditions of employment. (A.2214.) For example, Ingredion had only made one wage proposal prior to declaring impasse, and the Union had not yet presented any specific wage proposal in advance of the bargaining session at which impasse was nominally declared. Ingredion raised the issue of wages for the first time on July 28 and proposed a permanent two-tier wage system with little supporting explanation. Only three bargaining sessions after that Ingredion presented its “last, best, and final offer” while declaring impasse. There was likewise little opportunity for the parties to discuss pension and healthcare benefits. The Union did not present a proposal regarding pension benefits and the parties did not discuss pension or healthcare benefits until July 31. The Union did not even receive all of the information it requested regarding pension and healthcare benefits until that same bargaining session. *See, e.g., Atlas Refinery*, 354 NLRB at 1071 (finding no impasse where “important economic issues were only discussed during the last three sessions”).

Although the parties disagreed over the format of their contract proposals—with the Union basing its proposals on the expiring agreement, and Ingridion basing its proposals on an entirely new agreement—the evidence supports the Board’s finding that this was not an impediment to further bargaining. (A.2214-15.) To the contrary, both parties repeatedly showed movement on substantive terms and responded to proposals from the other party. Thus, for example, the Union incorporated language from Ingridion’s initial offer in its June 29 non-economic proposals with respect to in-house space for union elections, calculating seniority, and paid time off. (A.318-20 art.II, art.V, art.VIII.) Ingridion did the same thing in its July 28 and July 29 offers by adding language from the expiring agreement regarding retiree health insurance and paid leave. (A.110 art.XX, A.135-38 art.XI.) The Union made numerous major concessions in its September 10 offer of settlement, and incorporated language from Ingridion on issues such as dues checkoff, the entire grievance-arbitration procedure, and retiree health insurance. (A.342-43 art.I, A.343-46 art.II, A.383-86 art.X.) In general, both parties exchanged summaries of their positions relative to the format of the other side’s proposals (A.1782-85, 1787), and bargaining was never impeded as a result of the format of the proposals alone.

Based on the foregoing facts, the Board reasonably inferred that further bargaining over substantive terms “may very well have resulted in the parties

compromising with respect to the format and language of a new agreement.”

(A.2215.) Moreover, even assuming, *arguendo*, that the parties would *not* have reached agreement on the form of the contract, the relevant inquiry in the present case is whether Ingredion’s declaration of impasse was unlawfully premature. The parties clearly still had room to negotiate over wages, benefits, and other important issues that might have affected the contents of Ingredion’s implemented terms or led to an agreement. Ingredion failed to meet its burden of proving that there was “no realistic possibility” that continued bargaining would have been fruitful.

Monmouth Care, 672 F.3d at 1088.

Given the concrete evidence that the parties showed movement on substantive terms and incorporated each other’s proposals, the Court should also disregard Ingredion’s suggestion (Br.21) that the format of the proposals was a “critical issue” preventing any further progress. There is a special doctrine in Board law under which a single issue may be of such importance that “there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (discussing three-factor test). That doctrine is an exception to the general rule. *Wayneview Care*, 664 F.3d at 349-50. Ingredion does not cite any case in which the format of parties’ proposals at the bargaining table was itself deemed a “critical issue,” and Ingredion fails to explain why or how such disagreement would have prevented

further negotiations over substantive terms. Indeed, the format of the contract proposals did *not* prevent further bargaining over substantive terms in this case, and it was far from “rank speculation” (Br.20) for the Board to infer that continued bargaining may have been fruitful. *See Sanders House*, 719 F.2d at 687; *Hayward Dodge, Inc.*, 292 NLRB 434, 468 (1989) (explaining that there is “reason to believe that further bargaining might produce additional movement” after a party makes nontrivial concessions, even if a “wide gap between the parties remains”).

3. The contemporaneous actions of the parties demonstrated their understanding that they were not deadlocked

In order to find impasse, the Board also traditionally considers “the contemporaneous understanding of the parties as to the state of negotiations.” *Monmouth Care*, 672 F.3d at 1089. Establishing genuine impasse requires a showing that *both* parties were unwilling to compromise further, such that continued bargaining would have been futile. *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 585-86 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). Where one or both parties demonstrated a sincere willingness to continue making concessions or to consider alternative proposals, then there was no valid impasse. *Teamsters*, 924 F.2d at 1084 (noting that either party’s willingness “to move further toward an agreement” is of “central importance” to the impasse inquiry); *e.g., Prime Healthcare Centinela, LLC*, 363 NLRB No. 44, 2015 WL 7568337, at *2 (Nov. 24, 2015).

The Board found that the Union remained open to further bargaining prior to Ingedion's premature declaration of impasse. (A.2215.) On August 17, just one day before Ingedion declared impasse, the Union expressly clarified that it was still willing to move on substantive issues. At the following bargaining session, the Union presented a revised counteroffer that adopted language from Ingedion's proposed agreement and compromised on numerous issues. During the same session, the Union made compromises on wages and related provisions. The Union's willingness to continue negotiating was further confirmed by its September 10 "offer of settlement," in which it acquiesced on a number of significant proposals contained in Ingedion's last offer. The Union agreed to drop many of the improved terms that it had been seeking relative to the expiring agreement, including reinstating cost-of-living adjustments, increasing the defined-benefit pensions multiplier, extending medical insurance and death benefits, establishing a full-time paid union officer, and adding a variety of other employee benefits. (A.1742.)³ The Union also agreed to eliminate the contractual joint labor-relations committee and modify the longstanding grievance procedure by adopting Ingedion's proposed language, to soften its demands as to pension and insurance benefits, and to eliminate a raft of letters of understandings attached

³ The numerous proposals that the Union dropped are indicated by check marks on the list of initial proposals in the record at A.312-16.

to the expiring agreement. (A.343-46 art.II, A.383-86 art.X, A.390-423 art.XIII.)

Just before Ingedion implemented its final offer, the Union again forcefully reiterated in a September 13 letter that it did not consider the parties to be at impasse and that it wanted to pursue further bargaining. (A.1792.)

Although the Union's demonstrated willingness to continue compromising and moving toward an agreement is by itself sufficient to preclude genuine impasse, *Teamsters*, 924 F.2d at 1084, the Board found that Ingedion's conduct also demonstrated that the parties never reached impasse. (A.2186-87.) Meadows declared that the parties were at impasse at the beginning of the parties' August 18 bargaining session. Despite Meadows having invoked the word "impasse," Ingedion then presented the Union with a revised proposal changing numerous provisions, and the parties resumed bargaining. Moreover, Ingedion subsequently *continued* to negotiate with the Union over the next four weeks while demanding and receiving further concessions on substantive issues. In a September 11 letter to employees, Ingedion indicated that the parties would continue without a contract "until such time as the Union agrees to the terms contained in [Ingedion's] last, best, and final offer." (A.1789-90.) Given these facts, the Board reasonably found that the parties were not truly deadlocked when Ingedion implemented its offer, and that they had not yet fully explored all paths toward reaching a negotiated agreement. (A.2186-87.)

Tellingly, Ingredion largely ignores the major concessions that the Union continued to make prior to implementation, and it instead falsely asserts (Br.15) that the only proposal that the Union withdrew was a request for “tea and stirrer sticks.” Ingredion also focuses (Br.22-23) on isolated statements that in no way negated the Union’s demonstrated desire to continue making progress toward a negotiated agreement. In *Mike-Sell’s Potato Chip Co. v. NLRB*, the Court recognized that valid impasse does not “require” that the union consent to impasse or that both parties agree about the state of negotiations. 807 F.3d 318, 323 (D.C. Cir. 2015) (quoting *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001)). Thus, as the Court has explained, it is not enough for a party to make “vague request[s]” about further bargaining or to simply assert that it remains flexible in an attempt to stave off impasse. *TruServ*, 254 F.3d at 1117. Here, however, the Union clearly demonstrated by its actual conduct and revised offers that it was “ready to move,” *id.*, on significant issues including wages, benefits, and the grievance procedure. That concrete movement was sufficient to preclude any claim of impasse. *Teamsters*, 924 F.2d at 1084.

The Court lacks jurisdiction to entertain Ingredion’s new argument that the Board “improperly relied on post-impasse conduct” when it took into account Ingredion’s actions in early September to find that those actions belied any claim that Ingredion understood negotiations to be deadlocked. (Br.27, 34-35.) Such

argument was never presented to the Board. 29 U.S.C. § 160(e); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 543, 550-51 (D.C. Cir. 2016). In any event, Ingredion misreads this Court’s precedent by claiming that its actions immediately after nominally declaring impasse on August 18 cannot be considered in evaluating whether the declaration of impasse was legitimate. The Court has merely suggested that the Board cannot rely exclusively on post-impasse conduct if the balance of the evidence suggests that the parties had reached a genuine deadlock. *Erie Brush*, 700 F.3d at 22 (citing *Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1375 (D.C. Cir. 2012)); see *Teamsters*, 924 F.2d at 1084 n.6. The expansive reading of precedent urged by Ingredion would illogically and impermissibly bar the Board from ever considering a broad category of evidence that might show that a party’s initial invocation of the word “impasse” was not in fact genuine. Moreover, the ultimate question in the present case is whether Ingredion’s otherwise unlawful implementation of its last offer on September 14 was justified by the existence of impasse “at the time of the unilateral action.” *Francis J. Fisher, Inc.*, 289 NLRB 815, 815 n.1 (1987).

C. Ingredion’s Bargaining Conduct Supports the Board’s Finding That the Parties Had Not Reached Valid Impasse

As explained above, the Board primarily found that there was no valid impasse because the parties had not yet exhausted the possibility of reaching agreement. Thus, “even assuming that both parties had been bargaining in good

faith,” Ingredion’s premature declaration of impasse and implementation of its last offer violated Section 8(a)(5) and (1). (A.2186-87.) However, the Board also found, in further support of its finding that genuine impasse had not occurred, that Ingredion demonstrated a lack of good faith and that valid impasse was otherwise precluded by Ingredion’s conduct. (A.2214-16.)

1. Ingredion did not approach the bargaining in good faith

The remaining traditional factor in evaluating impasse is “the good faith of the parties during the negotiations.” *Monmouth Care*, 672 F.3d at 1088-89. The Board found that Ingredion’s overall bargaining conduct in the present case “demonstrated a lack of good faith.” (A.2208-11, 2214.)⁴ A lack of good faith can be indicated by a party entering bargaining with a “closed mind” or a desire to only reach final agreement on its own terms. *Hardesty Co.*, 336 NLRB 258, 259-60 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002). Another indication is a party’s failure to adequately explain its bargaining proposals—particularly where significant changes are proposed—which impairs the ability of the other party to respond and frustrates informed bargaining. *Sparks Nugget, Inc.*, 298 NLRB 524, 527 (1990), *enforced in relevant part*, 968 F.2d 991 (9th Cir. 1992).

⁴ The Board found it unnecessary to pass on whether Ingredion’s conduct during bargaining constituted an independent violation of the Act, as such a finding would not materially affect the remedy. (A.2187 n.3.)

The Board found that, even before bargaining had begun, and thus before Ingredion had heard the Union's position on any issue, Ingredion's conduct indicated an unwillingness to seriously consider proposals from the Union.

(A.2209.) When first meeting with the local union officers on April 6, Meadows dismissively indicated that existing pension and healthcare benefits would be going away. On the same day, Meadows directly spoke with employees about bargaining and made clear that Ingredion had already decided that the next contract would, inter alia, only include a wage increase up to 2.5%, that the existing health insurance would be replaced by Ingredion's plan, and that there would be no increase in the pension multiplier. In early June, Meadows told the Union that he was "basically giving [the Union] a new contract" with Ingredion's proposed agreement, and that he was "fine with going to impasse." (A.1713, 1750-51, 1817, 1991, 2098.)

Once bargaining began, Ingredion continued to demonstrate that it was not approaching negotiations in good faith. At the June 30 bargaining session, after only two previous sessions lasting a total of six hours, Meadows suggested that Ingredion was preparing to give the Union a last, best, and final offer. (A.2209-10.) More specifically, Meadows offered the Union a second proposed agreement (A.40-77) and stated that Ingredion's contract "was [its] proposal" and that it "[was] not coming off it" (A.1718, 1753, 1994). Meadows then stated that

Ingredion “was willing to put together [a last, best, and final offer]” and that the Union “would see work or activity going on in the plant directly related to that.” (A.1719, 1753, 1976, 1994.)

The Board also emphasized that throughout bargaining Ingredion refused to provide the Union with legitimate explanations for its bargaining positions, many of which sought major cuts to benefits under the expiring contract. (A.2209-10.) For example, Ingredion eventually proposed a permanent two-tier wage system that would dramatically alter terms of employment at the facility, with only a vague assertion that the change was necessary for an overall “economic adjustment.” (A.1902, 2049-50.) In general, Meadows claimed that the expiring contract’s terms were unacceptable because they would not allow Ingredion to “grow,” without articulating any basis for that claim in response to the Union’s questions. (A.1996, 1720.) Indeed, Ingredion never adequately explained why it insisted on bargaining over an entirely new contract, despite the expiring contract being the product of nearly seventy years of labor-management relations at the Cedar Rapids facility. (*E.g.*, A.1713, 1750, 1991, 1994, 2002-03, 2007-08, 2011.)

Ingredion was similarly evasive in rejecting many of the Union’s specific counterproposals. At the June 29 bargaining session, for example, Meadows went through all of the Union’s proposals in less than ten minutes, summarily indicating that Ingredion was “not interested” in the majority of them and that other proposals

were inconsistent with Ingedion's proposed agreement. (*E.g.*, A.1715-17, 1777-80, 1979-80, 1992-93, 2048.) Meadows did not explain the basis for Ingedion's disagreement, and he did not give the Union room to negotiate or a basis for adjusting its proposals through the normal give-and-take of bargaining. Meadows also stated that he was not going to provide pension-related information because the pension plan was not part of Ingedion's proposed agreement. As further evidence of Ingedion's intransigent approach to bargaining, the Board observed that after unfair-labor-practice charges were filed in the present case, Meadows told the Union that even if the Board ruled against Ingedion, "he would come back to the table and do the exact same thing and get to impasse." (A.2209; A.2021.)

Thus, substantial evidence supports the Board's findings that Ingedion did not approach the bargaining in good faith, which impaired the parties' ability to fully explore all possible paths toward a negotiated agreement prior to Ingedion's premature implementation of its last offer, and which reinforces the Board's ultimate finding that the parties had not yet reached genuine impasse. (A.2214.)

Ingedion ignores much of the above analysis (Br.25-31) and instead responds to a strawman by focusing on one aspect of the bargaining—its decision to bargain from entirely new terms—and then attempting to characterize the "tenor" of the Board's analysis as involving a substantive disagreement with Ingedion's bargaining position. To the contrary, the Board did not pass judgment

on the merits of either party's bargaining positions, but instead found a lack of good faith based on Ingedion's failure to *explain* to the Union the basis for the radical changes it proposed. Ingedion's assertion that it "explained from the get-go" (Br.29) the reasons for bargaining from scratch is incorrect—the only justification ever offered to the Union during bargaining was a vague contention that Ingedion needed to "grow," with no further explanation when the Union raised questions. It was not until the unfair-labor-practice hearing that Meadows indicated, once again vaguely and cursorily, that an entirely new agreement was necessary to maintain "consistency." (A.2057.) As the Board found, even this post hoc explanation did not provide "meaningful" reasoning in support of the significant changes at issue. (A.2210.) *Sparks Nugget*, 298 NLRB at 527 (finding lack of good faith where only explanations are "conclusory statements that this is what the party wants"). In general, Ingedion's brief relies heavily on self-serving and largely irrelevant testimony from Meadows (*e.g.*, Br.16-17), who the Board did not find to be a credible witness (A.2194-95). *Monmouth Care*, 672 F.3d at 1091-92 (noting that Court will not reverse the Board's witness credibility determinations unless "hopelessly incredible" or "patently unsupportable").

2. The declaration of impasse was invalid due to the presence of contemporaneous unfair labor practices

The Board also noted that the bargaining took place alongside numerous unremedied violations of the Act. (A.2214.) The Board has recognized that impasse may be invalid due to “serious unremedied unfair labor practices that affect[ed] the negotiations.” *Great S. Fire Prot., Inc.*, 325 NLRB 9, 9 n.1 (1997). Contemporaneous unfair labor practices can preclude a valid impasse by unduly increasing “friction at the bargaining table.” *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999). In the present case, the Board found that Ingredion’s numerous unremedied unfair labor practices contributed to its overall lack of good faith in the bargaining, thereby further reinforcing the finding that there was no genuine impasse. (A.2213-14.)

As previously discussed, *supra* pp. 19-28, Ingredion undermined the Union by dealing directly with employees about bargaining proposals, threatening employees in order to suppress their willingness to go on strike, and denigrating the Union while misrepresenting its bargaining conduct—unlawful actions which could reasonably be expected to impair the Union’s leverage at the bargaining table. *Anderson Enters.*, 329 NLRB 760, 761-64 (1999) (finding no impasse where employer dealt directly with employees over bargaining topics and disparaged union), *enforced*, 2 F. App’x 1 (D.C. Cir. 2001); *cf. NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1186 n.79 (D.C. Cir. 1981) (“Of course, an employer

who purports to bargain in good faith but who is engaged in efforts to denigrate and undermine the union is not fulfilling its obligations under federal labor law.”).

Furthermore, during much of the bargaining Ingredion was separately violating Section 8(a)(5) and (1) by refusing to provide important bargaining-related information repeatedly requested by the Union, *supra* pp. 21-23. (A.2214.) Genuine impasse typically will not exist where an employer failed to satisfy its statutory obligations by unlawfully delaying the provision of relevant information going to issues separating the parties. *Castle Hill Health Care Ctr.*, 355 NLRB 1156, 1188-89 (2010); *see E.I. du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1314-16 (D.C. Cir. 2007) (affirming principle that employer’s failure to provide relevant information can preclude impasse). Thus, even when an employer ultimately provides all of the requested information, there is no genuine impasse if there was insufficient time between the provision of the information and the employer’s declaration of impasse. *Anderson Enters.*, 329 NLRB at 763 & n.14. Here, Ingredion unlawfully delayed providing important information regarding the costs of pension benefits for two and a half months, even as the parties offered significantly divergent proposals on that issue and Ingredion sought to freeze pensions. (A.32 art.XIX, A.302-03 art.XX, A.313.) The Union did not receive all of the requested information until July 31, and did not have time to present a revised offer—which, among other things, dropped its proposal for an increase to

the pension multiplier (A.383 art.X)—until after impasse had already been declared and shortly before Ingredion unilaterally implemented its own terms.

Contrary to Ingredion’s implications (Br.30-31), there does not need to be “but for” causation for a party’s unremedied unfair labor practices to preclude valid impasse, as long as they affected the bargaining and therefore demonstrated that the party was not fulfilling its bargaining obligations under the Act. *See E.I. du Pont*, 489 F.3d at 1314-15.

3. The declaration of impasse was invalid due to the inclusion of a permissive subject of bargaining in Ingredion’s offers

As an additional and independent basis for concluding that Ingredion failed to establish the existence of valid impasse, the Board found that the bargaining was tainted by Ingredion’s inclusion of a permissive subject of bargaining in its final offer to the Union. (A.2215-16.) Permissive, or nonmandatory, subjects are those over which a party has no obligation to bargain. *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988). Under Board law, an alleged bargaining impasse is not valid if it was created, even in part, by a party’s insistence on bargaining about a permissive subject. *Retlaw Broad. Co.*, 324 NLRB 138, 143 (1997), *enforced*, 172 F.3d 660 (9th Cir. 1999).

Beginning in its July 28 proposed agreement, Ingredion put forward a series of package proposals all containing a provision granting it the authority to switch from an eight-hour to a twelve-hour workday “if at least 65% of [a] classification

votes to go to a 12 hour shift.” (A.92 art.X.) No role was contemplated for the Union before such a major change to employees’ working conditions would be made, and instead the provision permitted Ingredion to deal directly with bargaining-unit employees to the exclusion of the Union. Contrary to Ingredion (Br.32-33), it is well established that provisions granting employers the discretionary right to directly consult employees about changes to their working conditions constitute permissive subjects of bargaining. *E.g., ServiceNet, Inc.*, 340 NLRB 1245, 1246 (2003) (finding that provision permitting employer to circumvent union and deal directly with employees was permissive); *see Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990) (holding that provision granting employer discretion to offer changed benefits to employees would deprive union of “its central statutory role as representative”).

After July 28, Ingredion included the twelve-hour-shift voting provision in every one of its package offers. (A.131 art.X, A.171 art.X, A.210 art.XI, A.247-48 art.XI.) On August 18, as one of several counterproposals to Ingredion, the Union sought to maintain language defining the normal workday as eight hours. (A.329 art.III.) During this same bargaining session, Meadows stated that Ingredion was not going to move on any of its proposals and that the parties were at impasse. Ingredion then presented a “last, best, and final offer” containing the voting provision. (A.285 art.XI.) When the parties met in early September, the Union

presented an “offer of settlement” that again implicitly rejected Ingredion’s proposal regarding voting on twelve-hour shifts and instead proposed language keeping eight-hour shifts as the employees’ normal workday. (A.346 art.III.) In addition, the Union proposed maintaining a letter of understanding specifically requiring Ingredion to consult the Union before introducing “new work schedules.” (A.411-12.) Meadows reviewed the Union’s settlement offer and stated that Ingredion was not interested in any of the Union’s proposals.

Ingredion presented its offers as package proposals and there was no contemporaneous indication that it was willing to entertain an agreement without that provision. To the contrary, Ingredion repeatedly renewed the provision in all of its offers after July 28, and it summarily rejected the Union’s counteroffers containing divergent language. Meanwhile, language guaranteeing an eight-hour normal workday was one of the handful of proposals that the Union focused on in its August 18 counteroffer just before the purported impasse (A.329), and even in the Union’s initial proposals on June 1, the very first item listed was that all employees should maintain a contractual eight-hour workday (A.312). Substantial evidence thus supports the Board’s finding that the voting provision contributed to Ingredion’s unlawful declaration of impasse. (A.2215-16.)

Ingredion cites two inapposite court cases (Br.33-34) in which the issue was whether a party’s insistence on bargaining “over” a permissive subject was itself

an independent violation of the Act—as opposed to the issue here, which is whether Ingredion’s unilateral implementation was unlawful due to the lack of valid impasse. Meanwhile, in *ACF Industries*, the Board merely reaffirmed that the inclusion of a permissive subject must have contributed to the declared impasse in “[some] discernable way” for impasse to be invalidated. 347 NLRB 1040, 1042 (2006). The permissive subject at issue in that case, involving the expiration dates of insurance and pension agreements, did not contribute to the parties’ impasse because the union never objected to the modified dates and, in fact, the employer’s implemented terms were consistent with the union’s own bargaining proposals. *Id.* at 1058-59. The Board was careful to clarify that a party’s failure to expressly object to a permissive subject is not determinative in assessing whether that subject’s inclusion contributed to impasse. *See id.* at 1042. Here, as noted, the maintenance of a contractual eight-hour workday was important to the Union, the Union implicitly rejected the proposed permissive term on multiple occasions, and Ingredion stated that it was not interested in the Union’s counteroffers that excluded the permissive term. There was more than sufficient evidence for the Board to reasonably find that the permissive subject contributed, at least “in part,” to the declared impasse. *Retlaw Broad.*, 324 NLRB at 143.

* * *

For all of the foregoing reasons, substantial evidence supports the Board's finding that Ingredion failed to carry its burden of proving that the parties had reached a valid impasse. As a result, Ingredion violated Section 8(a)(5) and (1) when it unilaterally implemented its last offer on September 14.

III. The Board Acted Within Its Broad Discretion in Ordering a Notice-Reading Remedy

Finally, Ingredion raises a perfunctory challenge (Br.53-54) to the notice-reading remedy in the Board's Order. However, such remedy was well within the Board's statutory discretion.

Section 10(c) of the Act grants the Board the power to remedy unfair labor practices by ordering a respondent to "take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Board has "broad discretionary" authority to fashion remedies based on its administrative expertise and the "enlightenment gained from experience." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); see *Gissel Packing*, 395 U.S. at 612 n.32 (recognizing that the Board "draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts"). Courts must enforce the Board's chosen remedies unless shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper*, 379 U.S. at 216.

As the Board has explained, based on its long experience remedying similar violations of the Act, a public notice reading is sometimes necessary as “an effective but moderate way” to provide employees “with some assurance that their rights under the Act will be respected in the future.” *Auto Nation, Inc.*, 360 NLRB 1298, 1298 n.2 (2014), *enforced*, 801 F.3d 767 (7th Cir. 2015). This Court has repeatedly affirmed that a public notice reading is an appropriate remedy where, for example, “upper management has been directly involved in multiple violations of the Act.” *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018) (citing cases); *see, e.g., Auto Nation*, 360 NLRB at 1298-99 & n.2 (ordering notice reading where high-ranking officials were personally involved with unfair labor practices); *McAllister Towing & Transp. Co.*, 341 NLRB 394, 400 (2004) (same), *enforced*, 156 F. App’x 386 (2d Cir. 2005).

In the present case, the unfair labor practices were serious and widespread insofar as they ultimately affected the entire bargaining unit and the Union’s status as bargaining representative. Meadows was the director of human resources and chief labor negotiator for the multinational corporation that had recently acquired the Cedar Rapids facility. He was also responsible for many of the unfair labor practices found by the Board, including undermining the status of the Union and engaging in a course of conduct during bargaining that led to the unlawful implementation of a last offer radically changing terms of employment for every

bargaining-unit employee. Other unfair labor practices were committed by upper-level managers at the local facility, including Roseberry and Vislisel, with the latter manager threatening employees with permanent job loss. Based on these facts, the Board reasonably found that a public notice reading is necessary to ameliorate the impact of Ingredion's unlawful conduct, and to ensure that the Board's other remedies are fully effective. (A.2186 n.2, 2221.)

Ingredion's attempt to substitute its own judgement for that of the Board by asserting that a notice posting would be "sufficient" in this case (Br.54), and by attempting to limit notice-reading remedies to parties with a "history" of violating the Act (Br.53), disregards the applicable standard of review. The Court has long recognized that a public notice reading is an appropriate remedy designed to effectuate the policies of the Act, and Ingredion has failed to demonstrate that the inclusion of that remedy here was a "clear abuse of discretion." *Hosp. of Barstow, Inc. v. NLRB*, 897 F.3d 280, 290 (D.C. Cir. 2018). With respect to Ingredion's misleading assertion that the Board's Order requires Meadows' appearance "when he no longer works for [Ingredion]" (Br.54), the Board expressly clarified in a supplemental order that, "[i]f Meadows is no longer available," then Ingredion and

the Board's General Counsel "can negotiate (and if necessary litigate) the best possible notice-reading alternative in compliance [proceedings]" (A.2225 n.4).⁵

⁵ Ingredion's challenge (Br.51-52) to the portion of the Board's Order requiring the rescission of disciplinary actions resulting from the unlawful implementation is also without merit. The Board's General Counsel did not "change theories in midstream" on April 21 by merely introducing documentary evidence of post-implementation discipline into the record. The complaint included standard language requesting that the Board direct Ingredion to rescind its unlawfully implemented terms, to make-whole affected employees, and to grant any further appropriate relief. (A.1640.) Requiring employers to rescind resultant discipline is a normal remedy for such violations. *E.g., EIS Brake Parts*, 331 NLRB 1466, 1466 n.2 (2000). Even assuming there was a due process issue, Ingredion cannot establish prejudice where it was able to litigate the issue at the hearing and then fully brief the appropriateness of such a remedy before the Board.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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April 2019

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

INGREDION, INC.)	
d/b/a PENFORD PRODUCTS CO.)	
Petitioner/Cross-Respondent)	Nos. 18-1155, 18-1244
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
Respondent/Cross-Petitioner)	18-CA-160654
)	18-CA-170682
and)	
)	
LOCAL 100G, BAKERY, CONFECTIONERY,)	
TOBACCO WORKERS & GRAIN MILLERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,895 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

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Dated at Washington, D.C.
this 2nd day of April, 2019

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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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ADDENDUM

STATUTORY ADDENDUM

Federal Statutes

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National Labor Relations Act, as amended
(29 U.S.C. §§ 151 *et seq.*)

Section 7 (29 U.S.C. § 157)	i
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	i
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	i
Section 10(a) (29 U.S.C. § 160(a))	ii
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29 U.S.C. § 157

Sec. 7. 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 of 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).

29 U.S.C. § 158(a)(1)

[Sec. 8. (a) 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;

29 U.S.C. § 158(a)(5)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

29 U.S.C. § 160(a)

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) 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 or has received a construction inconsistent therewith.

29 U.S.C. § 160(b)

[Sec. 10.] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

29 U.S.C. § 160(c)

[Sec. 10.] (c) 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: 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), 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.

29 U.S.C. § 160(e)

[Sec. 10.] (e) 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. 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.

29 U.S.C. § 160(f)

[Sec. 10.] (f) 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. 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.