

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

**FIRSTENERGY GENERATION, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT REGARDING ORAL ARGUMENT**

This case involves the application of settled law to well-supported factual findings. Nevertheless, oral argument may assist the Court in understanding the Board's position and the lack of support for the Company's arguments.

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

---

**Nos. 18-1654, 18-1782**

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**FIRSTENERGY GENERATION, LLC  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of FirstEnergy Generation, LLC (Company) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Company. In this unfair-labor-practice case, the Board found that the Company violated the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, by committing three separate violations of its duty to bargain with the International Brotherhood of Electrical Workers, Local

272, AFL-CIO (Union). The Board’s Decision and Order issued on May 16, 2018, and is reported at 366 NLRB No. 87. (A.1-21.)<sup>1</sup> The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. *See* 29 U.S.C. § 160(e) and (f). Venue is proper because the Company has facilities in Ohio. *Id.* The Company filed its petition for review on June 7, 2018. The Board filed its cross-application for enforcement on July 11, 2018. Both filings were timely because the Act places no limit on the time for filing actions to review or enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing terms and

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<sup>1</sup> “A.” refers to the Appendix filed by the Company, and “Br.” refers to the Company’s opening brief. References before a semicolon are to the Board’s findings; those following are to the supporting evidence.

conditions of employment that were inconsistent with the Company's final pre-impasse offer?

2. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) by unilaterally subcontracting out periodic maintenance work on a generator, which unit personnel had historically performed?

3. Is the Board entitled to summary enforcement of the uncontested portion of its Order finding that the Company failed to furnish the Union with requested information regarding subcontracting?

### **STATEMENT OF THE CASE**

The Act prohibits an employer from refusing to bargain with the duly certified bargaining representative of an appropriate unit of its employees; that refusal may take many forms. As applicable here, it is well settled that the Act forbids an employer from acting unilaterally with respect to any mandatory subject of bargaining, *NLRB v. Katz*, 369 U.S. 736, 743 (1962), including certain terms of an employer's final bargaining proposal after the parties have reached an impasse in their negotiations, *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1326 (6th Cir. 1995), as well as subcontracting the work of unit employees without providing the union notice and an opportunity to bargain, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964), and failing to provide information

requested by the union that is relevant and necessary to its bargaining obligations, *Kellogg Co. v. NLRB*, 840 F.3d 322, 333 (6th Cir. 2016).

Here, acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a) (5) and (1), by committing violations of its bargaining duty. After a hearing, an administrative law judge issued a decision and recommended order, finding that the Company violated the Act by unilaterally and selectively implementing some terms of its final, pre-impasse offer to the Union proposed during the parties' negotiations for a successor collective-bargaining agreement that were "inextricably intertwined" with the wage provisions it did not implement. The judge further found that the Company unilaterally subcontracted bargaining-unit work associated with periodic generator maintenance in March 2016, without providing the Union notice and an opportunity to bargain. Lastly, the judge determined that the Company refused to provide the Union with relevant and necessary subcontracting information that it requested.

On review, the Board affirmed the judge's rulings, findings, and conclusions, with some modification.

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

### **A. The Parties**

The Company operates power generation plants, including the Bruce Mansfield plant in Shippingport, Pennsylvania, where the Union represents a bargaining unit of 230 production and maintenance employees. The unit is comprised of all production and maintenance employees, including control room operators and employees in the stores, electrical, maintenance, operations, results, and yard departments; it excludes technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act. The parties' most recent collective-bargaining agreement was effective from December 5, 2009, to February 15, 2013. On August 16, 2012, the parties extended the agreement to February 15, 2014. (A.69-70; A.407-08.)

### **B. Facts Surrounding Partial Implementation of the Pre-Impasse Offer**

#### **1. The parties begin negotiations for a new agreement in December 2013; "In-the-box" retiree health benefits and pay parity are important issues to the Company and Union, respectively**

In December 2013, the parties began negotiations over a successor agreement where the Company prioritized, among other issues, elimination of retiree health benefits. The parties' agreement allowed current employees who retired during the term of the agreement to continue participation in their chosen

health benefit plan until the agreement's expiration, with the Company paying a portion of their coverage. The parties refer to these employees as "in-the-box" retirees because the Company's payment on their behalf is set forth in a box chart in the agreement. When the agreement expires, these retirees come out of the box and are eligible to enroll in a different, higher-cost company health care plan. For its part, the Union prioritized, among other matters, wage parity between the Bruce Mansfield plant and the Sammis facility, another Company power plant in Stratton, Ohio. The parties referred to proposals addressing wage parity as equity adjustments. (A.70,72-73; A.163,168,173-75,235,237-39,262,567.)

**2. In September 2014, the Company proposes a Comprehensive Offer of Settlement; on December 8, the Company links elimination of retiree health benefits to wage increases**

On September 25, 2014, the Company provided the Union with a Comprehensive Offer of Settlement, including:

- Elimination of health benefits for in-the-box retirees effective December 31, 2014;
- General Wage Increases (GWIs) – 1.5% effective upon employee ratification of the contract and 1% annually for years two and three of the agreement; and
- Increasing shift differentials for hours worked during the afternoon and evening shifts and Sundays.

(A.70-71; A.706-07,733-35.) The parties met on December 8, 2014. Union President, Herman Marshman, urged the Company to provide additional

compensation to address the proposed elimination of retiree health care subsidies and voiced concern over the lack of wage parity between Sammis and Bruce Mansfield. Charles Cookson, Executive Director of Labor Relations and Safety, then verbally modified the Company's September 25, 2014 offer in response to Marshman's concerns and offered two different sets of increased wages depending on the Union's agreement to terminate retiree health benefits. (A.71-72; A.261-62,590,592,594-95,598.) Specifically, the Company made the following verbal proposal:

- Upon termination of retiree health benefits, the Company would annually contribute \$500 toward employees' health savings accounts (HSAs) for those with individual health care coverage and \$1000 for those with employee/spouse, employee/child, and family coverage. The Company would contribute the same amount annually to employees' 401(k) accounts for employees who do not have HSAs.
- If the Union agreed to end in-the-box retiree health benefits by December 13, 2014, the Company proposed GWI increases of 3% at ratification (the effective date of agreement) and 2.5% at the one and two-year anniversaries of the effective date and an equity adjustment of \$0.75 per hour to all job classifications upon ratification.
- Alternatively, if the Union agreed to end in-the-box retiree health benefits by December 31, 2015, the Company proposed GWIs increases of 2.5% at ratification (effective date of agreement) and 2% at the one and two-year anniversaries of the effective date and an equity adjustment of \$0.75 per hour to all job classifications upon ratification.

(A.71-72; A.262-63,592-93.) The Union rejected the offer. (A.72; A.164.)

**3. In July 2015, the parties restart contract negotiations and exchange proposals, including proposals to offset termination of retiree health benefits**

In the spring of 2015, Cookson suggested to Marshman that they explore resuming negotiations because the parties had not met since December 2014. On July 7, 2015, Cookson and Marshman met, and Cookson gave Marshman a written summary of the Company's December 8, 2014 verbal offer and certain portions of its September 25, 2014 Comprehensive Offer of Settlement. With respect to the December 8, 2014 modifications, the summary outlined the Company's previous verbal proposal and the items offered in exchange for the Union's agreement to eliminate in-the-box retiree health benefits. The summary, however, omitted the proposal regarding termination of retiree health benefits by the end of 2014, because that deadline had passed. It therefore only included the proposal to terminate benefits by December 31, 2015. Cookson noted that its proposal to maintain the current pension plan for existing employees but establish a cash-balance retirement savings account for new hires was a carry-over from the September 25, 2014 Comprehensive Offer of Settlement. (A.73; A.265-67,567.)

Marshman countered that the Company maintain retiree health benefits until the end of 2017, increase wages by 12% (as an equity adjustment), and provide a 3% GWI upon ratification. Marshman rejected the cash-balance retirement plans proposal. Cookson responded that the Company could not extend retiree health

benefits beyond 2015, the Union's equity adjustment was too aggressive, and the Company needed cash-balance retirement plans for new hires. Cookson also told Marshman to expect expanded resource sharing (a procedure that permits the Company to send Bruce Mansfield employees to other facilities to perform work) and mobile maintenance proposals. Mobile maintenance is a department of company employees who travel to the company's facilities to perform maintenance work. These employees are not unit personnel, have similar knowledge and skills as the maintenance employees, but perform the work at a lower cost. (A.73; A.268-71.)

On July 21, Marshman and Cookson met again. The Company revised its September 25, 2014 and December 8, 2014 proposals and offered:

- Elimination of the in-the-box retiree health benefits on October 31, 2015;
- Equity adjustment of \$1 per hour for each job classification effective upon ratification; and
- GWIs – 5.5% effective upon ratification and 2% at the first-year anniversary of the agreement.

(A.73-74; A.940.) The Company maintained its earlier proposals regarding HSA and 401(k) contributions and new hires being placed in a cash-balance plan and revised its resource sharing and mobile maintenance proposals. Cookson, in response to Marshman's complaints about the Company's failure to offer more robust offsets in exchange for terminating retiree health benefits, explained that the

Company's combined equity adjustment and GWIs amounted to an overall 8.5% increase in wages. Marshman pressed again for a December 2017 termination for retiree health benefits and larger compensation for termination of those benefits; rejected the cash-balance plan; and voiced concerns over the resource sharing and mobile maintenance proposals. (A.73-74; A.275-76,572,940.)

**4. The parties fail to reach agreement; the Company declares impasse and implements only elimination of the retiree health benefits and contributions to HSAs or 401(k)s**

On August 20, Marshman and Cookson met again. Cookson recapped where they had left off at the July 21 meeting and indicated that the Company had flexibility on the agreement duration and wages. Marshman reiterated the monetary value of retiree health care and his insistence that the Company share the savings with employees. Cookson pushed back, saying that he had done all he could do for retiree health benefits. Marshman then asked how the parties could “get around this,” to which Cookson replied that the Company had offered “other things—like an initial 8.5% wage increase.” The two discussed the Company's resource sharing and mobile maintenance department proposals, but did not agree, and decided to return to the bargaining table with the committees. (A.74; A.569-71.)

On September 17 and 18, the parties' committees held bargaining sessions, wherein the Company provided the Union with its Second Comprehensive Offer of

Settlement containing the Company's revisions already presented to Marshman without substantive revision. The Union's response remained the same. The parties ended the September 18 session without agreement on wages, retiree health care, cash-balance pension plans, mobile maintenance, or resource sharing. They scheduled another bargaining session for October 19, which the Union later canceled due to Marshman's health. The Company requested alternate dates, but the Union did not provide any. (A.75; A.280-83,1207-64.)

On October 27, the Company notified the Union that the parties were at impasse and that it would implement certain terms from its Second Comprehensive Offer of Settlement.<sup>2</sup> The Company indicated that it would: end health subsidies for all in-the-box retirees by December 31, 2015; make annual contributions for current employees of \$500 or \$1000 depending on health insurance coverage towards HSAs (or 401(k)s) beginning January 1, 2016; and enroll new hires in a cash-balance retirement plan as of January 1, 2016. The Company decided it would not implement its wage increases (GWI and equity adjustment) or shift differentials proposals, which had not changed from September 17. The Union filed an unfair practice challenging the Company's piecemeal implementation of its last offer. (A.75-76; A.286-88,1268-1348.)

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<sup>2</sup> The parties did not dispute impasse. (A.70; A.115-16.)

**C. Facts Giving Rise to the Unilateral Decision to Subcontract the March 2016 Outage Work**

**1. Background on outage work at the Bruce Mansfield facility and the 2016 outage; Subcontracting under the parties' agreement and practice**

The Bruce Mansfield facility has three identical power generating units, referred to as Units 1, 2 and 3. Each unit operates as an integrated system and consists of a turbine, a generator, a boiler, valves, and auxiliary equipment. For “scheduled outages,” the Company shuts down a single unit for periodic maintenance. A larger scale outage, referred to as a “full-train overhaul,” includes opening and disassembling the turbine-generator unit, inspecting and cleaning its parts, and then reassembling and closing the unit (referred to as “open, close, and clean work”). The Company conducts a full-train overhaul about every nine years on a single unit. (A.69,76; A.127-28,140,145,148.)

The outage work on Unit 1 scheduled for spring 2016 was referred to as “M116.” The M referenced the Bruce Mansfield facility; 1 referenced Unit 1; and 16 referenced the project year. (A.76; A.141.)

The bargaining-unit employees at Bruce Mansfield have historically performed all the open, clean, and close work during all outages. The Company has, however, contracted out certain specialized work involved in those outages, such as engineering, sandblasting, coating, painting, insulation, pipefitting, and

non-destructive testing. (A.76; A.147-48,168-84,198-202,297,301.) The parties' collective-bargaining agreement provided that:

It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

(A.78; A.1144.) The Company transmits reports to the Union every Friday identifying the work the Company has assigned or may assign to outside contractors. The parties then discuss any issues the following Wednesday at a contractors' meeting. (A.78; A.307-08.)

**2. In January 2015, the Company starts planning the M116 outage; the Company decides against using bargaining-unit personnel; GE submits a bid**

In January 2015, the Company began planning for the 2016 full-train overhaul of Unit 1. The outage work involved over 600 discrete tasks, of which bargaining unit personnel had previously performed about 150. The Company determined that the entire project would take 56 days and began discussing three workforce options: bargaining-unit employees, the mobile maintenance department, or outside contractors. (A.77 &n.20; A.136-39,170-71,302,304,454-549.)

The Company decided that there were insufficient bargaining-unit employees to perform the outage work while also performing the daily maintenance work on the other two units. On the advice of the Company's labor relations department, the Company decided against using its mobile maintenance department. The Company therefore focused on subcontracting the work. The Company's discussions in this regard never involved the Union. (A.77; A.143-44,147,167,301,357,359,601-03.)

In February 2015, the Company received a bid for the work from General Electric (GE); the Company had contacted GE because it was the original manufacturer of the turbine-generator units and had previously provided technical direction during outages. GE's bid included a two-year warranty on any work performed, a practice that was consistent with outage work it had previously performed for the Company. Representatives from the Company and GE continued to discuss the bid over the next few months. (A.77; A.139-40,304-06,631-43.)

Around this same time, the Company began sending periodic Friday reports to the Union concerning work to be contracted out.<sup>3</sup> The reports were not unique to contract work on the Unit 1 outage and included other notifications of proposed

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<sup>3</sup> The Company transmitted at least ten notices to the Union in 2015, with the first notice dated February 6, and the final notice dated November 20. (A.78; A.965-86.)

contract work. The June 5, 2015 report identified, for the first time, work on the Unit 1 turbine. (A.78; A.310,965-86.) Specifically, the report notified the Union that a Company consultant was requesting a contractor to perform a job described as “Turbine Area General NDE M116.” (A.78; A.967.) “NDE” refers to non-destructive examination, which involves ultrasonic testing of the disassembled turbine to inspect for cracks and erosion. Contractors, and not bargaining-unit employees, have previously performed this work. The notice did not provide other information about the nature or scope of the project, when it would be performed, or what entity would perform it. (A.78; A.312-13,341-42,967.)

**3. In June 2015, the Company generally notifies employees of the upcoming outage work; the Company contracts with GE, continues negotiations, and executes a purchase order**

On June 15, the Company held an “all hands” meeting for the maintenance department employees regarding the Unit 1 outage. The Company gave a power-point presentation that generally addressed the planned 2016 outage, but did not disclose who would perform any of the particular work during the outage, including who would perform the open, clean, and close work. (A.78; A.362,371,1002-1133.)

On September 10, the Company affirmatively decided to contract with GE to perform all the outage work on Unit 1 and obtained approval for that contract.

Representatives from the Company and GE continued to modify the subcontracting proposals over the next few weeks. (A.77; A.304.)

On November 6, the Company transmitted a report to the Union that showed that a company consultant had requested a contractor for the Unit 1 outage described as “Generator labor M116.” Like the earlier June 5 report, this entry did not provide any information concerning the nature or scope of the project, when it would be performed, or what entity would perform it. On November 13, the Company entered into a purchase order to have GE perform the outage work on Unit 1, including the open, clean, and close work previously performed by bargaining-unit employees. (A.77-78; A.304,341-42,644-704,983-84.)

**4. In January 2016, the Company holds a managers’ meeting to plan the upcoming outage and a month later, the Company notifies the Union, over its objection, that GE will perform the open, clean, and close outage work**

On January 11, 2016, the Company held a managerial meeting with its outage planners. No union representative or bargaining-unit employee was present. (A.78; A.135-37,477-549.) One slide of the power-point presentation stated that: “Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO.” (A.78-79; A.513.)

On February 10, Paul Rundt, Maintenance Superintendent, and Christopher Cox, Maintenance Manager, notified union secretary David Bloom and union steward Frank Snyder that the Company had contracted out to GE the open, clean, and close work. Rundt also said that GE may perform the boiler feed pump work, which is not turbine-generator work. Bloom and Snyder pushed back, responding that the unit's mechanical maintenance employees had always performed the outage work in the past and they should continue to receive that work. Rundt replied that GE would perform the outage work, but that he would look into the boiler work. Later, Rundt notified the Union that the Company would use bargaining-unit employees to perform the boiler feed pump work, but GE would perform the outage work historically performed by the bargaining unit. (A.79; A.165,255,264-65,378-80,385.)

**5. The Union requests information regarding subcontracting; the Company does not fully respond; GE performs the open, clean, and close work associated with the M116 outage**

That same day, Marshman, upon hearing about the meeting from Bloom, sent the Company an information request seeking the following information with respect to any contractor working at the Bruce Mansfield Plant: name, number of employees, estimated work hours, wages, and material costs. The information request specified that it covered the Unit 1 outage work. (A.79-80; A.556-57.)

On March 14, Cox sent the Union a chart containing the work order number for the Unit 1 contract job, the contractor name, a short description of the work, and the estimated hours to perform the work described. The Company did not provide contractor wages or material costs as requested, nor did it explain why it was not providing that information. Later, Marshman explained to Cox that the Union needed the requested wage and material cost information so that it could adequately negotiate the work to be performed. The Company continued its refusal to provide the information or provide an explanation for its refusal. (A.80; A.224-25,346-48,558-66).

On March 20, work on the Unit 1 scheduled outage began and ended on May 14. Consistent with the agreed-upon terms of the purchase order, GE performed the open, clean, and close work on the turbine-generator unit. No bargaining-unit employees performed any turbine overhaul work; some bargaining-unit employees performed the boiler feed pump work. During the scheduled outage period, all available bargaining-unit employees worked, including voluntary and involuntary overtime. Some unit employees declined overtime offers. (A.80; A.301,327,329,340-42.)

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

On May 16, 2018, the Board (Members Pearce, McFerran, and Emanuel) issued its Decision and Order finding that the Company violated Section 8(a)(5)

and (1) of the Act by: (1) unilaterally implementing provisions from its September 17, 2015 Second Comprehensive Offer of Settlement that were inconsistent with that final, pre-impasse offer by eliminating in-the-box retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials; (2) refusing to bargain with the Union by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining-unit employees, including the subcontracting of bargaining-unit work associated with the 2016 Outage; and (3) by refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative. (A.1-2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (A2.) Affirmatively, the Board's Order requires the Company to bargain with the Union before implementing changes and, at the Union's option and request and retroactive to the date the Company eliminated the in-the-box retiree health benefits, either reinstitute the benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments. (A.2.) The Order also

requires the Company to make current and former employees whole for losses incurred due to either the elimination of in-the-box retiree health benefits or the failure to implement GWIs, equity adjustments, and shift differentials and for the unilateral subcontracting of bargaining-unit work associated with the March 2016 outage. (A2.) The Order further requires the Company to provide the information sought in the Union's February 10, 2016 information request, and to post a remedial notice. (A2.)

### **SUMMARY OF THE ARGUMENT**

1. The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing only parts of its pre-impasse, final offer is fully supported by substantial evidence and consistent with settled law. The Board relied on the parties' bargaining history, which established that the Company made certain wage proposals, including GWIs, an equity adjustment, and shift differentials, as an incentive for the Union's agreement to terminate retiree health benefits. The elimination of retiree health benefits therefore became "inextricably intertwined" with the wage proposals, and the Company was not entitled to pick and choose among the proposals in its final, pre-impasse offer. In making this determination, the Board reasonably relied on *Plainville Ready Mix Concrete Co.*, 309 NLRB 581(1992), *enforced*, 44 F.3d 1320 (6th Cir. 1995), which outlines the circumstances under which an employer unlawfully implements only parts of quid-

pro-quo proposals, and the Company's attempts to distinguish that case are unavailing. The Company's remaining arguments unsuccessfully challenge the Board's factual findings and raise concerns that would not result in a different outcome.

2. Substantial evidence likewise supports the Board's finding that the Company violated Section 8(a)(5) and (1) by subcontracting unit work without bargaining with the Union. The uncontested facts establish that the Company engaged in a year-long campaign to contract out the open, clean, and close work associated with the March 2016 outage. At no point before cementing the decision to contract with GE did the Company involve the Union or even hint at the possibility that the work historically performed by unit personnel would be performed by an outside contractor. Rather, the Company kept those dealings secret from the Union, and on February 10, 2016, when the Company finally notified the Union of its intent to use GE in one month's time for all the open, clean, and close work, that decision was a *fait accompli*. The Company's attempts to twist the facts to show that the Union was on notice before February 10, 2016, are unpersuasive.

3. Relatedly, assuming that the Court upholds the Board's finding that the Company's unilateral subcontracting out of the open, clean, and close work violated the Act, the Board is entitled to summary enforcement of its uncontested

finding that the Company likewise refused to furnish the Union with necessary and relevant information concerning the subcontracting work. The Company did not independently challenge that finding in its opening brief to the Court, which entitles the Board to summary enforcement of that part of its Order.

### **STANDARD OF REVIEW**

The Board's findings of fact, and application of law to the facts, are conclusive if supported by substantial evidence in the record considered as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006). The Board's "[f]actual findings are supported by substantial evidence if a reasonable mind might accept the evidence as 'adequate to support a conclusion.'" *Vanguard*, 468 F.3d at 957 (quoting *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003)). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488; *accord NLRB v. Galicks, Inc.*, 671 F.3d 602, 607 (6th Cir. 2012).

Further, as the Court has recognized, "the facts and complexities of the bargaining process are 'particularly amenable to the expertise of the Board as factfinder,' and 'few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a

Board [that] deals constantly with such problems.’” *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1326 (6th Cir. 1995) (quoting *Bolton-Emerson, Inc. v. NLRB*, 899 F.2d 104, 108 (1st Cir.1990)); *see also NLRB v. Hospitality Motor Inn, Inc.*, 667 F.2d 562, 563 (6th Cir. 1982).

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY IMPLEMENTING TERMS AND CONDITIONS OF EMPLOYMENT THAT WERE INCONSISTENT WITH THE COMPANY’S FINAL PRE-IMPASSE OFFER**

#### **A. Applicable Principles**

Section 8(a)(5) of the Act requires employers to bargain with their employees’ unions over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964); *Plainville Ready Mix*, 44 F.3d at 1325. Section 8(d) of the Act establishes “the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. The Act thus forbids an employer from acting unilaterally with respect to any mandatory subject of bargaining because doing so circumvents “the duty to negotiate which frustrates the objective of [S]ection 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (footnote omitted); *accord NLRB v. Allied Prods.*

*Corp.*, 548 F.2d 644, 652 (6th Cir. 1977). Importantly, as the Court has explained, the collective-bargaining process is predicated on proper notice and an opportunity to bargain about proposed changes, and an employer that changes terms or conditions without first affording the union an opportunity for adequate consultation “minimizes the influence of organized bargaining,” and emphasizes to the employees “that there is no necessity for a collective bargaining agent.” *Plainville Ready Mix*, 44 F.3d at 1325 (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

An employer therefore violates Section 8(a)(5) and (1) if it unilaterally changes existing terms or conditions of employment prior to bargaining to impasse. *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 866 (6th Cir. 1992); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 365 (6th Cir. 1984).<sup>4</sup> After the parties have bargained to impasse, however, an employer may lawfully make unilateral changes that are “‘reasonably comprehended within [its] pre-impasse proposals,’ *United Paperworkers*, 981 F.2d at 866, and are consistent with the offers the Union has rejected. *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273 (9th Cir. 1988).” *Plainville Ready Mix*, 44 F.3d at 1326. Therefore, the

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<sup>4</sup> An employer that violates Section 8(a)(5) also commits a “derivative” violation of Section 8(a)(1), which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act. 29 U.S.C. § 158(a)(1); see *Galicks*, 671 F.3d at 608 n.2.

Board does not permit an employer to implement changes that are “substantially different” from anything the employer proposed during its negotiations. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225 (1949). As the Court has observed, “implementing changes significantly different from those proposed to and rejected by the collective bargaining representative is tantamount to implementing changes without notifying the Union of the proposed changes.” *Plainville Ready Mix*, 44 F.3d at 1326 (citing *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (implemented terms cannot be “significantly different” than those proposed to and rejected by the union), *modified on other grounds*, 575 F.2d 1107 (5th Cir. 1978)).

The Board does not require an employer to implement all aspects of a final pre-impasse offer. *See, e.g., Presto Casting Co.*, 262 NLRB 346, 354 (1982) (employer allowed to implement benefits other than wage proposals), *enforced in relevant part*, 708 F.2d 495 (9th Cir. 1983); *Edie’s Chop House, Inc.*, 165 NLRB 861, 863 (1967) (implementation of bonus proposal not significantly different from pre-impasse proposal), *enforced on other grounds sub nom. Truck Drivers & Helpers Local No. 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968). However, the Board has found an employer’s selective implementation of proposals that are “inextricably intertwined” with unimplemented proposals violates the Act.

*Plainville Ready Mix*, 309 NLRB at 588; *Cleveland Cinemas Mgmt. Co.*, 346 NLRB 785 (2006).

**B. *Plainville Ready Mix* Establishes the Parameters for “Inextricably Intertwined” Proposals that Are Not Subject to Partial Implementation Post-Impasse**

Prior to evaluating the factual circumstances giving rise to the Company’s partial implementation in this case, the Board examined (A.81-82) *Plainville Ready Mix*, a case that controls where exceptions to an employer’s right to implement proposals upon impasse are in issue. There, the employer proposed lower fixed hourly wage rates combined with supplements to gain sharing and incentive pay plans designed to offset the difference. *Plainville Ready Mix*, 309 NLRB at 584. In its final, pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans entirely and, instead, pay a higher fixed hourly wage rate. *Id.* Post-impasse, the employer shifted gears, however, and simply implemented the lower fixed hourly wage rates rather than either the higher hourly wage rate or the gain sharing and incentive pay plans combined with the lower wage rates.<sup>5</sup> *Id.*

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<sup>5</sup> By adopting the administrative law judge’s recommended decision and rationale (A.1), the Board’s decision includes a discussion of case law outlining these principles and disposes of the Company’s demonstrably false assertion that the Board cited only a “sole case” (Br.20). *See* A.81 (citing cases).

The Board found that the employer violated the Act because the lower wage rates alone were not “reasonably comprehended” in the final offer and had therefore not been presented as a stand-alone proposal, but, rather, as part of a package with the gain sharing and the incentive pay plans. *Id.* at 586. The Board focused on the fact that the lower wage rates were always presented together with the gain sharing and incentive pay plans. The employer’s decision to implement the lower wage rates without the attendant gain sharing and incentive plans amounted to implementation of a proposal that was different from anything presented to the union, and the employer therefore deprived the union of notice or an opportunity to respond. *Id.*

The Court fully enforced the Board’s decision. *See NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320 (6th Cir. 1995). Like the Board, the Court focused on whether the employer “treated the increase in the fixed hourly wage rate as quid pro quo for the elimination of gain sharing and incentive pay plans” and “put forth these two components . . . as a comprehensive, integrated wage offer.” *Id.* at 1328. On review, the Court considered that the employer “consistently linked” the proposed fixed wage rate to whether the rate would be supplemented by gain sharing and incentive pay and presented as a total package deal with examples of how the plan would operate. *Id.* Further, the Court noted that the employer never discussed dropping the gain sharing and incentive pay

plans in the absence of a lower fixed hourly rate. *Id.* Based on the foregoing, the Court concluded that substantial evidence supported the Board’s finding that the employer’s “fragmented implementation [] was inconsistent with its final pre-impasse offer to the [u]nion,” *id.* 1329, and thus unlawful.

**C. The Board’s Finding that the Company Violated the Act by Implementing Only Part of Its Final, Pre-impasse Offer Is Fully Supported by Substantial Evidence**

Having considered the principles in *Plainville Ready Mix*, 309 NLRB at 584-86, the Board determined that they “readily apply and support a violation here.” (A.1 n.1.) In making that determination, the Board undertook a detailed analysis of the nature of the Company’s proposals. The Board first examined (A.82) the genesis of the proposal linking wage increases and the elimination of retiree health benefits, finding that the Union’s complaints about insufficient incentive to terminate retiree health benefits directly precipitated the Company’s December 8, 2014 verbal offer. For the first time, and only after the Union’s expressed concern, the Company offered wage increases “as part of an overall package to compensate the Union for the elimination of ‘in-the-box’ retiree health benefits.” (A.82.)

In finding that the December 8, 2014 verbal offer “directly tied” increased wages to the elimination of retiree health benefits, the Board relied on (A.82) the testimony from company bargaining representative Cookson who explicitly

identified the link: “So at that time, what we said was, ‘you can have more wages if [retiree health benefits] end[] right now at the end of this year [2014], or you can have lesser wages at the end of 2015.’” (A.262.) Additionally, the Board observed (A.82) that, in response to the Union’s concern that the Company was not sharing enough of the savings from the elimination of retiree health benefits, Cookson informed the Union that the Company’s overall December 8, 2014 verbal proposal with wage increases amounted to returning 80% of the savings to employees. This response, which expressly weighs elimination of retiree health benefits against all wage increases, amply demonstrates the clear link between retiree health benefits and *all* components of the wage increases—GWIs, equity adjustment, and shift differentials. Accordingly, and in light of the undisputed foregoing facts, it cannot be gainsaid that “provision of these employment benefits [i.e., the wage increases] was *explicitly contemplated* as a way for the [Company] to help employees offset the increased costs employees would face upon the termination of ‘in-the-box’ health benefits, and to allow employees to share in some of the cost savings brought about by the elimination of the benefits.” (A.1 n.1, emphasis added.)

The Board found (A.82) that the Company never changed course after December 8, 2014, and continued to tie wage increases to the elimination of retiree health benefits. The Company’s July 7, 2015 proposal, for instance, simply reduced its December 8, 2014 verbal proposal to writing without severing the tie

between elimination of retiree health benefits and wage increases. The Board found further (A.83) that the Company's July 21, 2015 proposal, which increased the hourly equity adjustment and GWIs, merely continued the quid-quo-pro approach. Once again, the Board relied, in part, on (A.83) Cookson's statements. In explaining the July 21, 2015 proposal, which sought to address concerns about insufficient compensation for the loss of retiree health benefits, Cookson emphasized to the Union that it increased wages overall by 8.5% when both GWI and equity adjustment were considered. Cookson's explanation again identified the link between termination of retiree health benefits and increased wages.

The Board found (A.83) that the Company's quid-pro-quo position persisted at the August 20, 2015 meeting. According to the uncontested record evidence, when the Union pressed the Company to do more in exchange for terminating retiree health benefits, Cookson underscored to the Union that the Company was offering an 8.5 % increase in wages to address this concern. Likewise, the Board found (A.83) that the Company, not having modified its proposals during the final September 2015 bargaining sessions, continued its quid-pro-quo approach through impasse. The Board also considered (A.83) the Company's silence throughout bargaining that it would eliminate retiree health benefits without implementing any wage increases. Based on these uncontested facts, the Board reasonably found that the Company "consistently proposed tying and offsetting the elimination of

employees’ ‘in-the-box’ retiree health benefits with annual contributions to employees’ [HSAs] or 401(k) accounts, general wage increases, equity adjustments, and shift differentials.” (A.1 n.1.)

The similarities between the Company’s conduct in this case and the employer’s conduct in *Plainville Ready Mix* are striking. The Board found (A.1 n.1, 82 & n.27, 83) in both cases that:

- The employers *consistently* linked distinct bargaining components into a comprehensive, integrated whole;
- Both employers led unions reasonably to understand that the proposals were tied to one another—the employer in *Plainville Ready Mix* used repeated pay comparisons to convey the linked relationship, whereas the Company here repeatedly emphasized to the Union that the wage increases were designed to offset the elimination of retiree health benefits and to share with employees the savings flowing from elimination of those benefits;
- Both employers cherry-picked those portions of their pre-impasse offers that were most beneficial to the themselves; and
- Neither employer ever discussed with the union partial implementation of its pre-impasse offer.

Given the remarkable parallels between the two cases, the Board was eminently reasonable in relying on *Plainville Ready Mix*.

The Company’s vague challenge (Br.20-21) to that the Board’s application of *Plainville Ready Mix* to the facts of this case is unavailing. The Company appears to suggest (Br.21) that the employer’s violation in *Plainville Ready Mix* hinged on the inclusion of the phrase “in lieu of” in a written document. Nothing

in the Board's or Court's decision, however, supports that exceedingly narrow (and self-serving) reading.<sup>6</sup> Rather, in *Plainville Ready Mix*, a full evaluation of the parties' bargaining history, the employer's conduct, and the union's reasonable understanding of the employer's conduct formed the basis for finding that the employer's partial implementation was unlawful. The Court must reject the Company's overly simplistic notion that *Plainville Ready Mix* requires an employer to invoke the magic words "in lieu of" to find a violation based on proposals that are inextricably intertwined.<sup>7</sup> The Court must likewise dismiss the Company's attempt to offer its own view, completely untethered to case law, on the "full meaning" of "inextricably intertwined." (Br.21.)

In sum, "the strong record evidence," which is largely uncontested, readily provides ample evidence to support the Board's finding that the Company's September 17, 2015 Second Comprehensive Offer of Settlement represented an integrated proposal with termination of retiree health benefits linked to wage increases (including GWIs, equity adjustment, and shift differentials). And as noted above, these types of factual findings are particularly suited to the Board's

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<sup>6</sup> The Board's prior remand directive in *Plainville Ready Mix* makes clear that the Board was concerned with more than specific terminology such as "in lieu of"; it directed the judge to decide whether the employer's proposals "were put forth as separate items or as a comprehensive, integrated whole." 309 NLRB at 582.

<sup>7</sup> The Company makes an equally unpersuasive assertion regarding similar wording in *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006). See Br.21 n.8.

expertise. *See Plainville Ready Mix*, 44 F.3d at 1326. As such, the Company was not privileged to pick and choose among the related provisions and implement only those parts of the multi-pronged proposal that benefitted its bottom line. The Board therefore reasonably concluded that the Company violated Section 8(a)(5) and (1) of the Act when it “selectively implemented collective-bargaining proposals that were ‘inextricably intertwined’ with other unimplemented proposals.” (A 1 n.1.)

**D. The Company’s Remaining Contentions Are Meritless**

Contrary to the Company’s assertion, the Board’s application of precedent is hardly “profoundly mistaken.” (Br.18.) As discussed in more detail above (pp. 26-27), the Board’s decision accurately outlines the relevant law, and the Board’s stated legal standards mirror the “controlling case law” urged by the Company. *Compare* A.81 (listing cases and applicable principles) *and* Br.18-19 (listing similar cases and same applicable principles).<sup>8</sup> The Board fully articulated and

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<sup>8</sup> In a related vein, the Board agrees with the Company’s summary of *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990), *see* Br.19, and *Presto Casting*, 262 NLRB at 346, *see* Br.19-20. The Company cites these cases for the basic, settled proposition that, under appropriate circumstances, an employer may lawfully engage in partial implementation after impasse. The Board applied this principle with equal force here, and concluded that, based on the factual differences, the unimplemented portions of the Company’s proposals here were—as opposed to the situations in *Emhart* and *Presto Casting*—comprehended within the final offer. Accordingly, here, the Board followed applicable law, but the facts required a different result.

reasonably adhered to the applicable legal principles presented by the facts of this case; the Company simply disagrees with the Board's ultimate determination.

The Company wrongly claims (Br.21-22) that the Board misapplied precedent because, according to the Company, this case "was not prosecuted" under a theory of unlawful implementation based on inextricably intertwined proposals. The complaint in this case, which is the operative document, specifically alleges, in relevant part: "On October 27, 2015, [the Company] failed to implement the wage adjustments and shift differential proposals contained in its Comprehensive Proposal Number Two notwithstanding that it implemented the remaining terms of that proposal."<sup>9</sup> (A.440.) There is no dispute that elimination of retiree health benefits was a remaining term of the proposal that the Company, in fact, implemented. Further, the record, which is replete with uncontested testimony and documentary evidence concerning the quid pro quo for elimination of retiree health benefits, flatly refutes the Company's bizarre claim (Br.21) that the "long procedural history" lacks reference to retiree health benefits. And given the express complaint allegation and the underlying record, the Company likewise

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<sup>9</sup> Because the complaint is the operative document, the Company's references (Br.21-22) to the charges and a pre-complaint regional office dismissal letter are entirely beside the point. Equally irrelevant is the Company's attempt (Br.22 & n.9) to assign nefarious motives to the General Counsel's decision to re-evaluate the prior dismissal of a charge and instead issue complaint. The *General Counsel's* pre-trial prosecutorial consideration of the allegation has no bearing on this Court's review of the *Board's* ultimate finding of a violation.

errs in claiming (Br.22) that the General Counsel raised the relevant theory for the first time in his brief to the administrative law judge.

The Company unconvincingly posits (Br.24-25) that the Union's focus on pay parity between the Bruce Mansfield and Sammis plant undermines a finding that the wage increases were quid pro quo for an agreement to eliminate retiree health benefits. The Board roundly rejected this contention as "contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals . . . [that] directly tied the wage proposals to the elimination of the 'in-the-box' retiree health benefits." (A.83.) As the Board found, the equity adjustment represented only "one aspect of its overall quid pro quo proposal." (A.83.) The Board rejected the claim, too, because "[t]he fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities," (A.83), does not alter the conclusion that the Company offered wage increases as a quid pro quo for termination of retiree health benefits. The Board reasonably explained that "a proposed wage increase certainly can, and in this case did, serve two objectives." (A.83.) In short, the equity adjustment was a *part of*, not mutually exclusive of or an alternative to, the wage increase that was offered to offset the elimination of retiree health benefits. For the same reasons, the Company's related claim (Br.25) that the Board should have drawn an adverse inference based on the lack of testimony from union president Marshman

concerning the Union’s focus on pay parity fails.<sup>10</sup> Any such adverse inference would have absolutely no effect on the Board’s rationale.

The Company’s remaining contentions—long on hyperbole, but short on merit—amount to nothing more than claims that the facts are not as the Board found them. For example, the Company’s assertion that its wage proposal, rather than being a quid pro quo for retiree health benefits as the Board found, was simply a “cash package as a signing bonus,” (Br.21), finds no support in the record. There is no testimony or document that suggests that the Company presented the wage proposal as some sort of signing bonus; rather, the wage increases were always tied to elimination of the retiree health benefits and the procedural requirement of ratification does not negate that link. Likewise lacking in record support are the Company’s claims (Br.24) that it withdrew its proposal to eliminate retiree health benefits and the proposal was “severed” at the end of 2014; to the contrary, and as outlined above (pp.28-31), the Company continued to link termination of retiree health benefits with wage increases in 2015. And, in the face of “strong record evidence” supporting the Board’s findings, the Company must do more than baldly characterize the critical finding concerning the relationship between the wage increases and the retiree health benefits as “unreasonable and

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<sup>10</sup> The Court should decline the invitation to engage in the Company’s suspect insinuation (Br.25) that Marshman is an inherently incredible witness based on his testimony in a different case before a different judge.

unfounded.” (Br.23.) *See Pa. Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 224 n.2 (D.C. Cir. 2001) (“We ask not whether [the employer’s] view of the facts supports its version of what happened, but whether the Board’s interpretation of the facts is reasonably defensible.”).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY SUBCONTRACTING OUT PERIODIC MAINTENANCE ON A GENERATOR, WHICH UNIT PERSONNEL HAD HISTORICALLY PERFORMED**

### **A. Applicable Principles**

As outlined in greater detail above, Section 8(a)(5) of the Act obligates employers to bargain with the exclusive representative over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard*, 379 U.S. at 209-10; *Plainville Ready Mix*, 44 F.3d at 1325. Section 8(d) of the Act requires the parties to bargain in good faith. 29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. At a minimum, good-faith bargaining requires timely notice and a meaningful opportunity to bargain over the proposed change. *See First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

It is well-established that a decision to subcontract unit work constitutes a mandatory subject of bargaining if contract employees merely replace unit employees and perform the same work under similar working conditions. *Fibreboard*, 379 U.S. at 215. In *Torrington Industries, Inc.*, the Board, applying

*Fibreboard*, held that employers must bargain over subcontracting decisions when “virtually all that is changed through the subcontracting is the identity of the employees doing the work” because such decisions are not “at the core of entrepreneurial control.” 307 NLRB 809, 811 (1992); *see also Mi Pueblo Foods*, 360 NLRB 1097 (2014); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467-69 (2004) (“[S]ubcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise.”), *enforced*, 414 F.3d 158 (1st Cir. 2005); *Torrington*, 307 NLRB at 810-11. An employer violates Section 8(a)(5) if it unilaterally changes existing terms or conditions of employment without notice and an opportunity to bargain. *United Paperworkers*, 981 F.2d at 866; *Peabody Coal*, 725 F.2d at 365.

**B. The Company’s Decision To Subcontract the Turbine Work Associated with the Unit 1 Outage Was a Mandatory Subject of Bargaining**

There is little dispute over the facts surrounding the subcontracting work. The Board found (A.87), and the parties agree, that turbine work associated with an outage has historically been performed by unit employees. When asked whether unit employees have completed the open, clean, and close work before, Maintenance Manager Cox was unequivocal: “Absolutely. The bargaining unit

employees have completed our turbine generator open and clean and inspect for all of the years that I have been at the facility . . . .” (A.359.) Company consultant Thomas Cowher was equally categorical: “I would say that [unit employees] performed the open—what’s called open, cleaning and closed labor every time . . . . I would say that they did that work 100 percent of the time to my knowledge.” (A.148.)

The Board found, and the parties agree, that in March 2016, GE workers, and non-unit personnel, performed all open, clean, and close work associated with turbine. When asked whether any bargaining unit employees worked on the turbine rebuild in 2016, Maintenance Manager Cox responded without qualification: “No, sir.” (A.301.) The record also contains a company document that identifies 167 discrete jobs that GE contract workers performed with regard to the M116 outage work. (A.454-76.) Mechanics David Bloom and Joseph Bergles testified that these jobs had all previously been performed by unit employees. (A.170-77, 200-06.)

The foregoing facts definitively establish that the Company’s decision to subcontract to GE changed nothing about the performance of the work or the working conditions. *See Fibreboard*, 379 U.S. at 215. GE contractors seamlessly replaced the unit employees and performed the same work in the same way as the bargaining unit. These facts illustrate the precise situation contemplated by

*Fibreboard* where the change constitutes a mandatory subject of bargaining: the work and its performance remain static, only the identity of those who performed it changed. Accordingly, the Company had an obligation to bargain with the Union before it subcontracted the open, clean, and close turbine work to GE. Its failure to do so violated Section 8(a)(5) and (1) of the Act.

The Company's argument (Br.27-31) that its subcontracting decision fell outside the duty to bargain is meritless.<sup>11</sup> The Company wrongly contends (Br.29-30) that it had no duty to bargain because GE's two-year warranty and considerations other than labor costs—namely, insufficient unit employees—motivated its decision to subcontract the open, clean, and close turbine work. First, the Board dismissed (A.89) the Company's reliance (Br.29) on GE's warranty because the record lacked any such evidence and the Company did not cite any caselaw. The record does not establish "the extent or scope" of the warranty, and GE appears to have "warranted other work in the past, including when unit employees performed the outage work," (A.89), which undermines the Company's

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<sup>11</sup> In advancing this argument, the Company exaggerates (Br.27) the Board's holding in this case by positing that the Board has now held that subcontracting is a mandatory subject of bargaining in any case where contract workers replace bargaining-unit employees. The Board's finding here has no such broad application; rather, the Board found that on this record, the Company had a duty to bargain in these circumstances with respect to the specific work at issue. A more expansive reading is unwarranted.

reliance on a similar warranty in this instance where unit employees did not perform the open, clean, and close work. Second, it bears noting that the Board found, contrary to the Company's claim (Br.29), that "the decision to subcontract was based, at least in part, on labor costs." (A.87, emphasis added.) And the Board questioned (A.77 n.21) the Company's assertion (Br.29) that labor costs were higher with GE because it failed to introduce evidence providing any context for that claim.

In any event, the Board here reasonably rejected, as a matter of law, the contention that an employer need not bargain over subcontracting not motivated by labor costs. It stated that non-labor costs do "not authorize [the Company's] unilateral action—the Board still imposes a duty to bargain in those situations." (A.88.) Indeed, *Torrington* and its progeny explicitly hold that "whether subcontracting is a mandatory subject of bargaining (*Fibreboard* subcontracting) does not depend on whether the [employer's] decision to replace [unit employees] with nonunit personnel was motivated by labor costs in the strictest sense of that term." *O.G.S. Techs., Inc.*, 356 NLRB 642, 646 (2011) (citing *Torrington*, 307 NLRB at 811). In the wake of *Fibreboard*, the Board has routinely denied employer attempts to skirt bargaining obligations for subcontracting decisions based on purported practical considerations, i.e., concerns other than labor costs. *See, e.g., O.G.S.*, 356 NLRB at 646 (rejecting employer defense to unilateral

implementation of subcontracting based on speed of work performance); *Torrington*, 307 NLRB at 811 (rejecting defense of inadequate equipment and the incapacity of its employees); *Mi Pueblo Foods*, 360 NLRB at 1098 (rejecting defense of increased efficiency and reduced congestion in the warehouse); *Sociedad Espanola*, 342 NLRB at 469 (rejecting defense of recruiting and hiring difficulties). The Company has not shown, nor could it, how its defense for subcontracting unilaterally is sufficiently distinct from the long line of rejected defenses. Its actions fall squarely within the *Fibreboard* and *Torrington* line of cases; accordingly, the Company had an obligation to bargain prior to implementation and failed to do so.

In subcontracting cases, the Board recognizes a bargaining obligation, not based on the showing of an immediate adverse effect on the unit as the Company contends (Br.30-31), but, rather, based on safeguarding against both diminution of the unit and dilution of the union's strength. While these effects may not immediately materialize or be readily discernible, here, the Board found that they "are not hypothetical concerns." (A.88.) The unit had, in fact, shrunk by 25% over the last five years (from around 300 to 230 employees), and the Company expected continued reduction through attrition of another 40-50 employees.<sup>12</sup>

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<sup>12</sup> Additional evidence in the record indicated that in 2008, the unit included 360 employees. (A.572.)

(A.290,571-72.) The Company also indicated during bargaining that lowering labor costs, including reducing the size of the unit, was necessary, and proposed an increased use of (non-unit) mobile maintenance employees to perform unit work. Therefore, the Board reasonably found that “the continued diminution of the size and strength of the unit [was] an adverse effect, particularly when [the Company’s] stated reason for subcontracting to GE was there were not enough unit employees to do the work.” (A.89.) This finding is unaffected, contrary to the Company’s contention (Br.30-31), by overtime opportunities for individual employees. That is to say, the unit has suffered for the reasons explained, and the hours worked or overtime earned by some employees does not negate that harm.

The Company argues (Br.29-30) that the Board should not have relied on *Mi Pueblo Foods*, which rejected an employer’s attempt to avoid a bargaining obligation over subcontracting based on “practical” considerations. The Company unpersuasively attempts to distinguish that case because it claims here there was no adverse effect on union strength or unit scope, the work was of short duration, and overtime opportunities were available to unit employees. The Board has repeatedly held that subcontracting, as a matter of unassailable fact, adversely affects the bargaining unit. *See, e.g., Mi Pueblo Foods*, 360 NLRB at 1099 (“Board has held that when bargaining unit work is assigned to outside contractors rather than bargaining unit employees, the bargaining unit is adversely affected”);

*Overnight Transp. Co.*, 330 NLRB 1275, 1276 (2014) (“We think it plain that the bargaining unit is adversely affected *whenever* bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.”) (emphasis added), *enforced in relevant part mem.*, 248 F.3d 1131 (3d Cir. 2000). Those concerns were borne out here where, as described above, the subcontracting affected an already diminished unit. The Company also claims (Br.29) that the subcontracted work by GE here was, unlike in *Mi Pueblo Foods*, not complete and permanent, but does not explain or cite any case to show how that difference affects the analysis. The fact remains that the Company subcontracted unit work without bargaining with the Union; whether that work was partial or complete does not affect the basic calculus.

The Company insists (Br.31) that it “had no choice” but to subcontract to GE because there was too much work and unit employees could not have done the outage work while attending to their other duties. The subtext, if not explicit position of that claim, is that bargaining would not have changed the outcome, to which the Supreme Court has offered the following rejoinder under similar circumstances: “The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant

subjecting such issues to the process of collective negotiation.” *Fibreboard*, 379 U.S. at 214. And the Company does not challenge the Board’s finding (A.87-88) that negotiations over the outage work could have encompassed expansion of the bargaining unit. *See, e.g., Mi Pueblo Foods*, 360 NLRB at 1099 (parties could have bargained over “modifying the schedules of unit employees, providing overtime opportunities, or expanding the unit”); *Spurlino Materials, LLC*, 353 NLRB 1198, 1218-19 (2009), *affirmed*, 355 NLRB 409 (2010), *enforced*, 645 F.3d 870 (7th Cir. 2011) (in the absence of subcontracting, employer might have hired additional unit employees). In short, the sheer size or unprecedented amount of work to be done does not excuse the Company’s failure to bargain; the Board and the courts do not forbid contracting out unit work, only the failure to do so without first bargaining with the Union.

In sum, the Board found, based both on substantial record evidence and the application of well-established precedent, such as the *Fibreboard* and *Torrington* line of cases, that the Company had an obligation to bargain over subcontracting the unit work associated with the turbine rebuild before making changes. There is no question that it did not fulfill this obligation. Accordingly, the Company has violated Section 8(a)(5) and (1) of the Act.

**C. The Union Did Not Waive Bargaining Because the Company's Announced Change Was a Fait Accompli**

An employer must provide notice sufficiently in advance of implementation at least to afford “a reasonable opportunity for counter arguments or proposals.” *NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992); *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (timing must allow for “reasonable scope of bargaining”). Notice of a change given too close in time to implementation amounts to a fait accompli because genuine bargaining is impossible “where [the] decision has already been made and implemented.” *Id.* (quoting *Town & Country Mfg. Co.*, 136 NLRB 1022, 1030 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963); *see also Centra*, 954 F.2d at 372 (“If a policy is implemented too quickly after notice is given, or an employer has no intention of changing its mind, the notice constitutes nothing more than informing the union of a fait accompli.”); *Toma Metals, Inc.*, 342 NLRB 787, 799 (2004) (“notice [that] is provided too shortly prior to implementation . . . is nothing more than a fait accompli”).

Any change presented as a fait accompli forecloses a finding that a union has waived its right to bargain. As the Court has recognized, “[n]otice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.” *Centra*, 954 F.2d at 372. Here, the Company eliminated the

possibility of good-faith bargaining because its actions had already determined the outcome, and it cannot, therefore, invoke a waiver defense.

**1. The Company gave notice to the Union of the change on February 10, 2016**

The Board found (A.90) that the Company first gave notice to the Union that it was going to subcontract the outage work to GE at the February 10, 2016 meeting between Maintenance Supervisor Paul Rundt, and union representatives Bloom and Snyder. The Board's finding is fully supported by substantial evidence including testimony from company and union witnesses alike. When asked directly whether February 10 "was the first time that the union representatives heard about" GE doing "all most [sic] all of the work on the turbine for that outage coming up," Rundt replied straightforwardly, "That is correct." (A.351.) Union representative Bloom corroborated that date, testifying that during the February 10 meeting, the Company, for the first time, "showed [the Union] the jobs that were being given away, and then [Rundt] walked through them job-by-job and notified us what the job was and who the contractor was that would get the job." (A.164.) Bloom also offered uncontested testimony that the Union had *no* prior knowledge of this information. (A.167.) Based on the foregoing uncontested evidence, the Board's finding that the Company notified the Union of the subcontracting decision on February 10, 2016, is supported by substantial evidence.

The Company unconvincingly disputes (Br.36-37) the notice date of February 10, 2016, citing to various earlier events—none of which constitutes notice of the subcontracting decision. First, the Company looks a year earlier in directing (Br.36) the Court to a February 6, 2015 notification to the Union that lists a series of jobs for which the Company was requesting a contractor. The Board, in rejecting this argument, pointed out the Company’s failure “to differentiate between work associated with the outage and *bargaining unit* work associated with the outage.” (A.89, emphasis in original.) Nowhere does the notification provide critical information regarding the open, clean, and close work or GE as the contractor.<sup>13</sup> (A.965-66.) The Company has historically contracted out certain types of work during outages, including work involving specialized equipment, so this notification would not alert the Union that this contracting was unusual or otherwise remarkable in that it involved specialized work.<sup>14</sup> The document is simply a routine notification to the Union concerning the Company’s use of

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<sup>13</sup> For the same reason—the absence of critical information—the Company does not advance its claim (Br.36) by relying on Cox’s unspecific testimony (A.324). One cannot equate, as Cox does, general knowledge that contractors will perform some work during an outage with knowledge that contractors will perform, for the first time, a massive amount of work historically reserved to the bargaining unit.

<sup>14</sup> Indeed, the normalcy of the notification is evident by the type of job identified: “Turbine Area General NDE M116.” (A.965.) Outside contractors historically performed this specialized work during outages, not unit employees. Given the Company’s established practice of using contractors for specialized work, the notification alerted the Union to nothing atypical.

contractors, not specific notice of the Company's decision to use GE to perform historically bargaining unit work on the turbine rebuild in March 2016. The other weekly notifications in the record are no different and equally unconvincing.

Next, the Company's contention (Br.37) that the June 15, 2015 all-employee meeting provided notice to the Union ignores case law holding that notice to *employees* is insufficient notice to the *union*. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharms. Div.*, 264 NLRB 1013, 1017 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983). Furthermore, as the Board found (A.89-90), the meeting did nothing more than notify employees that an outage would occur in 2016. Company representative Devin Miller, who ran the meeting, admitted that he did not inform employees when the outage would occur, only that it would be in calendar year 2016; who would be performing the outage work, including the open, clean, and close work; or what any of that particular work would entail. (A.371.) By no measure is this barebones announcement specific notice of the change at issue in this case, and for the Company to suggest otherwise is not credible.

**2. The notice came too late to allow for meaningful bargaining, and so the Company's subcontracting decision was a fait accompli**

Having fully considered the facts and events leading up to the Company's February 10, 2016 announcement to the Union regarding its decision to use GE to

perform the open, clean, and close work beginning in March 2016, the Board found (A.1 n.1, 90) that the Company presented the change as a fait accompli. The Company waited until it had finalized the GE subcontracting, which was a year in the making, and just one month before work began to notify the Union that the work would be performed by non-unit personnel; its actions obviated meaningful bargaining. Substantial evidence in the record thoroughly supports this finding.

In assessing whether an employer has presented a union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *See Bell Atl. Corp.*, 336 NLRB 1076, 1087 (2001). Here, the Board considered (A.90) the evidence showing that the Company planned the subcontracting decision for over a year and long before February 10, 2016. Specifically, the Board considered the following uncontested evidence, which comes from company witnesses and documents:

- The Company's subcontracting negotiations with GE began in February 2015 and continued for months.
- On September 10, 2015, the Company "finally got approval that [it] can move forward with General Electric," and that for "the next several months" the Company negotiated with GE. (A.304.)
- On November 13, 2015, the Company entered into a \$4M formal purchase order with GE to perform the Unit 1 outage work. (A.304,644-704.)
- During the January 11, 2016 outage readiness meeting among managers a power point presentation slide stated: "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close

the main turbine, turbine valves, and generator under the alliance contract.” (A.513.)

- On February 10, 2016, Rundt told the Union that GE would perform the outage work, walked the representatives through *each* job being lost to GE, and then repeated the certitude of GE’s role as subcontractor. As the Board found, “[t]here was nothing tentative about that in what he said.” (A.90.)

This evidence establishes that the Company worked with GE for over a year to plan the subcontracting work, which included work historically performed by the unit; that GE and the Company negotiated terms and executed a purchase order months before the Company ever notified the Union; and that the Company shared this information among management well before it ever informed the Union. This laundry list of objective evidence also proves false the Company’s contention that the Board’s finding of a *fait accompli* “rested almost entirely” (Br.39) on the November 13, 2015 purchase order. On the basis of this overwhelming, evidence, the Board reasonably found that the Company’s decision to subcontract the outage work to GE was a *fait accompli* when the Company notified the Union on February 10, 2016.

The Company counters (Br.39) the Board’s well-supported finding that the subcontracting decision was a *fait accompli* by noting that it remained flexible with respect to the unit’s ability to perform non-turbine work on the boiler feed pump. The Company’s argument implies, without evidentiary support, that flexibility with respect to one small component of the subcontracted work translates into flexibility

with respect to the entire scope of subcontracted work. And use of unit employees to perform the boiler feed pump work does not negate the Company's earlier failure to bargain over the subcontracted work.

The cases cited by the Company (Br.40) are readily distinguishable based on a shared characteristic: in each of the cases, the rejection of the fait accompli argument turned on the union's subjective belief, without additional evidence, as to the employer's willingness to change its mind. *See The Boeing Co.*, 337 NLRB 758, 763 (2002) (rejecting fait accompli argument because union "may have thought [the employer's] mind was made up," there was "no evidence" that the employer was unamenable to alterations); *The Emporium*, 221 NLRB 1211, 1214 (1975) (rejecting fait accompli argument because union's "state of mind" was insufficient and "no evidence" showing that employer's decision was irrevocable); *KGTV*, 355 NLRB 1283, 1285 (2010) ("subjective belief [of the union president] that the [employer's] notice foreclosed decision bargaining, unsupported by objective evidence, was insufficient to excuse the Union's failure to request bargaining"). Here, as shown above (pp.50-51), the Board's fait accompli finding does not rest on the Union's subjective belief. Rather, the Company's cemented position is borne out by the formidable record evidence showing statements, conduct, and documents of the Company's year-long campaign to secure subcontracting work from GE for the 2016 outage.

Lastly, the Company, having implemented a long-planned and final decision to subcontract with GE to perform the March 2016 outage work, is precluded from arguing that the Union waived its right to bargain. Again, as shown above (p.46), the Court recognizes that “[n]otice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.” *Centra*, 954 F.2d at 372. For this reason, the Company’s reliance (Br.35-36,38) on *Ohio Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017), is entirely misplaced as that case does not involve union waiver in the context of a fait accompli. Accordingly, the Company’s arguments purporting to find fault with the Union must fail.

**D. The Court Is Barred from Considering the Company’s Untimely Claim that the Parties’ Agreement and Past Practice Privileged Its Unilateral Decision To Subcontract**

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); see *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). A party must present its arguments “in a procedurally valid way.” *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008). Further, “[t]here may be circumstances in which a motion for reconsideration may be “the first opportunity a party has to raise objections—where, for example, the Board sua sponte decides an issue not

expressly presented to it by the parties or addressed by the [administrative law judge].” *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011); *see Woelke*, 456 U.S. at 666. In these cases, “the objections will be preserved by a timely motion to reconsider.” *Spectrum Health*, 647 F.3d at 349 (footnote omitted).

On exceptions before the Board, the Company argued that the parties’ collective-bargaining agreement and past practice authorized it to act unilaterally in subcontracting out unit work related to the outage. The Board rejected the Company’s argument “raised for the first time on exceptions,” deeming it to be “untimely raised and thus waived, as it was not argued before the judge.” (A.1 n.1, internal citations omitted.) The Company did not file a motion for reconsideration to challenge the Board’s conclusion that its argument was untimely.

Before the Court, the Company now argues (Br.32) that, in fact, its defense was raised during the administrative proceedings. The Company’s failure, however, to file a motion for reconsideration has stripped the Board of the opportunity to consider and decide in the first instance whether the Company, in fact, sufficiently raised this defense before the judge. Accordingly, under well-established precedent, the Court lacks jurisdiction to consider the Company’s claim that the parties’ agreement and past practice permitted it to act unilaterally. *See Woelke*, 456 U.S. at 665-66.

In any event, the Board reasonably found that the Company's newly minted defense—that contract and practice permitted it to act unilaterally—was untimely because the Company never presented it to the administrative law judge. Notably, the Company does not cite to any part of the brief submitted to the judge after the hearing that shows that the Company pressed this claim. The reason for the omission is obvious: the brief to the judge contains no argument resembling the Company's new defense. The Company likewise does not cite to any portion of the judge's decision that analyzes, discusses, or even fleetingly mentions the Company's claim.<sup>15</sup> Again, the reason for the omission is obvious: such a passage from the judge's decision simply does not exist. Nor can the Company defeat the Board's untimeliness finding based on its citation (Br.32) to extra-record material (such as the position statement it submitted to the regional office during the investigation phase), or self-serving speculation as to its motive for introducing certain evidence during the hearing about hours worked and overtime declined.

Further, the collective-bargaining agreement plainly does not support the Company's position. While the first sentence of Article IV addresses contracting out in the context of layoffs and reduction of hours, the second sentence requires

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<sup>15</sup> While the Company correctly notes (Br.32) that the judge's decision quotes the contract provision, the Company fails to make clear that the provision is cited only in the factual background section of the decision. *See* A.78. There is no reference to the contract provision in the analysis.

that the parties meet and discuss all contracting work, except in emergencies, regardless of layoffs, demotions, or hours of work. The Company conveniently ignores the second sentence, which defeats its claim that the contract privileged it to act unilaterally in this case, a non-emergency situation. (Br.32.)

**III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTION OF ITS ORDER FINDING THAT THE COMPANY FAILED TO FURNISH THE UNION WITH REQUESTED INFORMATION REGARDING SUBCONTRACTING**

Assuming that the Court upholds the Board's Order finding that the Company had a duty to bargain over subcontracting and failed to do so, the Board is entitled to summary enforcement of the uncontested portion of its Order finding that the Company also violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.<sup>16</sup> In its opening brief, the Company chose not to challenge the information-request violation and has therefore waived any defense to that finding. *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 240-41 (6th Cir.

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<sup>16</sup> An obligation to provide information exists where there is an obligation to bargain over the subject matter. *See, e.g., W. Mass. Elec. Co.*, 228 NLRB 607, 624-25 (1977) (finding no obligation to provide contractor cost information where bargaining demand was unrelated to information request), *enforced in relevant part*, 573 F.2d 101 (1st Cir. 1978). Here, the Union justified its information request on the need to bargain over the subcontracting of outage work. If the Court disagrees that subcontracting was subject to mandatory bargaining, then the Union's stated need for the information would no longer be relevant.

1983) (“By failing to address or take issue with the Board’s findings and conclusions with regard to [certain violations], the company has effectively abandoned the right to object to those determinations.”). The Board is therefore entitled to summary enforcement of that portion of its Order remedying this finding. *See Kellogg Co.*, 840 F.3d at 333.

## CONCLUSION

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

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December 2018

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

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| FIRSTENERGY GENERATION, LLC    | ) |                        |
|                                | ) |                        |
| Petitioner/Cross-Respondent    | ) |                        |
|                                | ) |                        |
| v.                             | ) |                        |
|                                | ) | Nos. 18-1654 & 18-1782 |
| NATIONAL LABOR RELATIONS BOARD | ) |                        |
|                                | ) |                        |
| Respondent/Cross-Petitioner    | ) |                        |
|                                | ) |                        |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this motion contains 12,947 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/David Habenstreit  
David Habenstreit  
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Dated at Washington, DC  
this 12th day of December 2018

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

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FIRSTENERGY GENERATION, LLC )

Petitioner/Cross-Respondent )

v. )

NATIONAL LABOR RELATIONS BOARD )

Respondent/Cross-Petitioner )

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Nos. 18-1654 & 18-1782

**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit

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Dated at Washington, DC  
this 12th day of December 2018