

Nos. 18-73097 & 18-73305

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

DELTA SANDBLASTING COMPANY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**DISTRICT COUNCIL 16 OF THE INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES**

Intervenor for Respondent/Cross-Petitioner

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

USHA DHEENAN
Supervisory Attorney

GREGOIRE SAUTER
Attorney

**National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2948
(202) 273-1714**

PETER B. ROBB
General Counsel

ALICE B. STOCK
Associate General Counsel

DAVID HABENSTREIT
Acting Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page
Jurisdictional statement.....	1
Issue presented	2
Relevant statutory provisions.....	2
Statement of the case.....	3
I. Statement of relevant findings of fact	3
II. Procedural history	8
III. The Board’s conclusion and Order	8
Summary of argument.....	10
Argument.....	13
Substantial evidence supports the Board’s finding that Delta violated the Act by unilaterally lowering the rate of its pension contributions	13
A. Standard of review for Board Orders	13
B. An employer violates the Act if it unilaterally changes its employees’ terms and conditions of employment without giving their union notice and an opportunity to bargain.....	16
C. Schedule A incorporated rehabilitation rates into the parties’ collective bargaining agreement; therefore, Delta was required to continue paying those rates in order to maintain the status quo after the Contract expired.....	18
1. Applicable principles	19

TABLE OF CONTENTS

Headings	Page
2. Schedule A was fully integrated into the parties' Contract.....	20
3. Delta's counterargument lack any merit.....	23
D. Delta failed to prove its defense that it was not required to pay rehabilitation rates because they were allegedly unlawful under the LMRA	30
1. The Contract satisfies Section 302(c)(5)(B)'s requirements for a written agreement.....	31
2. Section 302(c)(5)(B) does not require a separate written agreement to implement rehabilitation rates	34
3. Delta's remaining arguments are meritless	40
Conclusion	43
Statement of related cases	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Advocate South Suburban Hospital v. NLRB</i> , 468 F.3d 1038 (7th Cir. 2006)	29
<i>Alaska Trowel Trades Pension Fund v. Lopshire</i> , 103 F.3d 881 (9th Cir. 1996)	31
<i>Alfred M. Lewis, Inc. v. NLRB</i> , 587 F.2d 403 (9th Cir. 1978)	30
<i>American Distributing Co. v. NLRB</i> , 715 F.2d 446 (9th Cir. 1983)	17, 18
<i>American Federation of Musicians of U.S. & Canada v. Paramount Pictures Corp.</i> , 903 F.3d 968 (9th Cir. 2018).....	42
<i>Arroyo v. United States</i> , 359 U.S. 419 (1959).....	35
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997).....	14-15
<i>BASF Wyandotte Corp.</i> , 274 NLRB 978 (1985), <i>enforced</i> , 798 F.2d 849 (5th Cir. 1986)	15
<i>Bricklayers, Masons & Plasterers International Union of America, Local Union No. 15 v. Stuart Plastering Co.</i> , 512 F.2d 1017 (5th Cir. 1975).....	26, 34, 36
<i>Carter v. CMTA-Molders & Allied Workers Health & Welfare Trust</i> , 563 F. Supp. 244 (N.D. Cal. 1983)	26
<i>Cibao Meat Products, Inc. v. NLRB</i> , 547 F.3d 336 (2d Cir. 2008).....	31
<i>Furwa v. Operating Engineers Local 324 Health Care Plan</i> , 354 F. Supp. 3d 775 (E.D. Mich. 2018).....	36

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Glendale Associates, Ltd. v. NLRB</i> , 347 F.3d 1145 (9th Cir. 2003)	13
<i>Griffith Co. v. NLRB</i> , 545 F.2d 1194 (9th Cir. 1976)	2
<i>Guthart v. White</i> , 263 F.3d 1099 (9th Cir. 2001)	38
<i>Hinson d/b/a Red Hen House Market No. 3 v. NLRB</i> , 428 F.2d 133, 139 (8th Cir. 1970).....	35, 36, 40-41
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	14, 16
<i>Intermountain Rural Electric Association v. NLRB</i> , 984 F.2d 1562 (10th Cir. 1993)	19
<i>International Brotherhood of Electrical Workers, Local 387 v. NLRB</i> , 788 F.2d 1412 (9th Cir. 1986)	20, 26, 31
<i>International Union of Painter & Allied Trades, Dist. 15, Local 159 v. NLRB</i> , 656 F.3d 860 (9th Cir. 2011)	15
<i>Jimenez v. Quarterman</i> , 555 U.S. 113 (2009).....	34
<i>Kean v. Commissioner</i> , 469 F.2d 1183 (9th Cir. 1972)	29
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400, ___ U.S. ___ (2019).....	15-16
<i>Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.</i> , 779 F.2d 497 (9th Cir. 1985)	17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.</i> , 484 U.S. 539 (1988)	17
<i>Lehman v. Nelson</i> , 862 F.3d 1203 (9th Cir. 2017)	32
<i>Lincoln Lutheran of Racine</i> , 362 NLRB 1655 (2015)	17, 31
<i>Litton Financial Printing Division v. NLRB</i> , 501 U.S. 190 (1991).....	16, 17, 19, 23
<i>Local Joint Executive Board of Las Vegas v. NLRB</i> , 515 F.3d 942 (9th Cir. 2008)	14
<i>Local Joint Executive Board of Las Vegas v. NLRB</i> , 540 F.3d 1072 (9th Cir. 2008)	16
<i>M&G Polymers USA, LLC v. Tackett</i> , 135 S. Ct. 926 (2015).....	42
<i>Martinez-Serrano v. INS</i> , 94 F.3d 1256 (9th Cir. 1996)	22
<i>Merrimen v. Paul F. Rost Electric, Inc.</i> , 861 F.2d 135 (6th Cir. 1988)	35
<i>Midwest Power Systems, Inc.</i> , 335 NLRB 237 (2001)	39
<i>Mining Specialists, Inc.</i> , 314 NLRB 268 (1994)	20, 26, 31
<i>Moglia v. Geoghegan</i> , 403 F.2d 110 (2d Cir. 1968).....	26, 39, 41

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	33
<i>NLRB v. Carilli</i> , 648 F.2d 1206 (9th Cir. 1981)	16, 17, 19, 31
<i>NLRB v. Carson Cable TV</i> , 795 F.2d 879 (9th Cir. 1986)	14
<i>NLRB v. District Council of Iron Workers of the State of California</i> , 124 F.3d 1094 (9th Cir. 1997)	14
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	17
<i>NLRB v. Trident Seafoods Corp.</i> , 642 F.2d 1148 (9th Cir. 1981)	9
<i>NLRB v. Unbelievable, Inc.</i> , 71 F.3d 1434 (9th Cir. 1995)	19
<i>Peerless Roofing Co. v. NLRB</i> , 641 F.2d 734 (9th Cir. 1981)	31
<i>Queen Mary Restaurants Corp. v. NLRB</i> , 560 F.2d 403 (9th Cir. 1977)	17
<i>Recon Refractory & Construction Inc. v. NLRB</i> , 424 F.3d 980 (9th Cir. 2005)	13
<i>Resco Products, Inc.</i> , 331 NLRB 1546 (2000)	19
<i>Retlaw Broadcasting Co. v. NLRB</i> , 53 F.3d 1002 (9th Cir. 1995)	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Rinard v. Eastern Co.</i> , 978 F.2d 265 (6th Cir. 1992)	39
<i>R.V. Cloud Co. v. Western Conference of Teamsters Pension Trust Fund</i> , 566 F. Supp. 1426 (N.D. Cal. 1983)	26, 39
<i>Samson v. U.S. Department of Labor</i> , 732 F. App'x 444 (7th Cir. 2018)	28
<i>Stone Boat Yard v. NLRB</i> , 715 F.2d 441 (9th Cir. 1983)	17, 23
<i>Thurber v. Western Conference of Teamsters Pension Plan</i> , 542 F.2d 1106 (9th Cir. 1976)	38
<i>Underwriters Laboratories Inc. v. NLRB</i> , 147 F.3d 1048, 1054 (9th Cir. 1998)	28
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	13, 14
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	15

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended	
Section 7 (29 U.S.C. § 157)	10, 16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 8, 9, 16, 23
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 8, 9, 16, 17, 23
Section 8(a)(d) (29 U.S.C. § 158(d))	16
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 13, 15
Section 10(f) (29 U.S.C. § 160(f)).....	2
Employee Retirement Income Security Act (ERISA)	
29 U.S.C. § 1344(d)(1).....	39
Labor Management Relations Act (LMRA)	
29 U.S.C. § 186(a)(3).....	30
29 U.S.C. § 186(c)(5).....	15, 34
29 U.S.C. § 186(c)(5)(A)	34
29 U.S.C. § 186(c)(5)(B)	9, 12, 13, 15, 30-34, 36, 39-41
Pension Protection Act of 2006 (PPA)	
29 U.S.C. § 1085(a)(2)(A)	32
29 U.S.C. § 1085(e)(1)(B)	38
29 U.S.C. § 1085(e)(3)(A)(i)	32
29 U.S.C. § 1085(e)(3)(C)(i).....	33, 38
Rules and regulations	
Federal Rule of Appellate Procedure 28(a)(8)(A).....	22
Restatements and Treatises	
11 Richard A. Lord, <i>Williston on Contracts</i> § 30:6 (4th ed. 2012)	42

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

Nos. 18-73097 & 18-73305

DELTA SANDBLASTING COMPANY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**DISTRICT COUNCIL 16 OF THE INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES**

Intervenor for Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Delta Sandblasting Company, Inc. (“Delta”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Decision and Order against Delta.

District Council 16 of the International Union of Painters and Allied Trades has intervened on the Board's behalf. The Board's Decision and Order, reported at 367 NLRB No. 17 (Oct. 16, 2018), is final. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 151 et seq., § 160(a), which authorizes the Board to prevent unfair labor practices affecting interstate commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act, *id.* § 160(e), (f), and venue is proper because the unfair labor practices occurred in California. Delta's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limit on such filings. *See Griffith Co. v. NLRB*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976).

ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that Delta violated the Act by unilaterally decreasing pension contributions without giving the Union notice and an opportunity to bargain.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and other statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Delta violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally decreasing pension contributions for its employees represented by Auto, Marine & Specialty Painters Local Union No. 1176 (“Local 1176”).¹ Delta does not dispute that it was obligated to continue making pension contributions, or that it unilaterally reduced the rate of its contributions without giving the Union notice and an opportunity to bargain. Instead, Delta argues that it was not required to continue paying the higher contribution rates that were levied in order to resolve some unfunded pension liabilities. The Board’s findings are summarized below.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

Delta provides sandblasting and painting services in the San Francisco Bay area to BAE, a general contractor in the ship-repair industry. (ER 35, 39-40; ER 278 at ¶ 2(a), 287-88, 325, SER 5 at ¶ 2(a), 49.)² James Sanders, Sr. was

¹ Local 1176 is an affiliate of District Council 16 of the International Union of Painters and Allied Trades (“the District”), which brought the charges in the underlying Board case and has intervened in this proceeding. (ER 40; SER 22, 23-24.) Unless otherwise noted, this brief refers to both entities jointly as “the Union.”

² Citations are to the Excerpts of Record (“ER”) filed with Delta’s opening brief and Supplemental Excerpts of Record (“SER”) filed with this brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Delta’s opening brief.

Delta's owner and president until his death in May 2016. (ER 40; ER 290, SER 50-51.) For many years, Local 1176 has represented a unit of Delta's sandblasting employees. (ER 40; ER 279 at ¶ 6(b), 289.) During the relevant period, Director of Services José Santana was the Union's business representative responsible for dealing with Delta. (ER 40; ER 287.)

Although Delta and the Union have a decades-old bargaining relationship, historically contract negotiations between them have been minimal. Instead, they wait until the District and BAE settle on a new contract, at which point the Union inquires whether Delta will agree to the same terms, and Delta typically assents. (ER 40; ER 290-91.)

For a number of years, Delta paid higher wages than those agreed to between the District and BAE. During that period, rather than ask Delta to sign a successor agreement, the Union let their prior, expired contract roll over from year to year. That changed in 2014, when the District and BAE signed a new agreement ("the BAE contract") that provided for higher wages than Delta's. At that point, Santana asked Sanders to sign a successor contract that would match Delta's wages and benefits to the BAE contract. Sanders agreed, and the two men decided to meet on December 1. (ER 40; ER 291-92.)

Ahead of the meeting, Santana prepared a new contract for Sanders to sign. From the parties' expired agreement, he removed three pages of tables listing all

the different rates for wages, health and welfare, and pension benefits applicable to the various trades covered by the agreement (“the 2007-2008 Schedule A”).³ In its place, Sanders inserted a single page with just one table copied from the BAE contract (“Schedule A” or “the 2014-2015 Schedule A”).⁴ This new Schedule A was dated from July 1, 2014 until August 31, 2015, and contained only the wage and fringe-benefit rates applicable to Delta’s employees represented by Local 1176. (ER 35 n.6; ER 140, 265, SER 29-30.)

At the December 1 meeting, Santana explained the substitution to Sanders, who noticed that the new Schedule A was retroactive to July 1, 2014. At Sanders’s request, Santana changed the start date to December 1, 2014, whereupon Sanders signed the Contract. (ER 35, 40; SER 25-29.) Later, Sanders gave the 2014-2015 Schedule A to his wife Joyce, who is Delta’s secretary and treasurer. When Mr. Sanders handed her the rate sheet, it was not attached to the Contract. Mrs. Sanders referred to that document, which she called the “rate sheet,” to determine

³ An example of the complete Schedule A can be seen in the BAE contract. (ER 264-66.) It includes rates applicable to employees represented by various unions.

⁴ (*Compare* ER 265-66 (Schedule A from BAE contract, with table applicable to employees represented by Local 1176 at the bottom, and notice about upcoming pension-rate increase on following page), *with* ER 140 (Schedule A that Santana inserted into the updated contract he presented to Sanders).)

wages and Delta's fringe-benefit contributions. (ER 35 n.6; ER 315-16, SER 41-42, 54-55.)

Article 18.1 of the Contract provides as follows:

The Employer will pay the following Health & Welfare and Pension contributions to the applicable jointly administered Trusts (i.e. Health & Welfare – Pacific Coast Shipyards Metal Trades Trust Fund and Pension – Pacific Coast Shipyards Pension Fund) for all actual hours worked during the term of this Agreement.

Health & Welfare
See Wage Schedule "A"

Pension
See Wage Schedule "A"

(ER 35, 40; ER 119.) In addition, Article 18.4 requires the parties to "instruct the Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability that currently exists or . . . that develops during the terms of this Agreement as soon as practical." (ER 35, 40; ER 119.)

Since at least 2007, Delta contributed to the Pacific Coast Shipyards Pension Fund ("the Fund") at the rate of \$1.95 per employee and per hour worked. (ER 35, 40; ER 319.) Sometime in 2008, however, the Fund was designated as underfunded, meaning that it did not have sufficient assets to cover its liabilities. To resolve the problem, and as provided by Article 18.4, the Trustees adopted a rehabilitation plan that reduced some employee benefits while increasing employer contribution rates. (ER 35, 40; ER 48-55, 305-06.) The plan laid out a schedule of rate hikes, beginning with an \$0.80 surcharge on January 1, 2009, and with annual increases until all unfunded liabilities were resolved. (ER 53.) The Trustees also

issued annual updates to the plan, adjusting benefits and contribution rates as necessary based on each year's progress. (ER 56-103, ER 306-07, SER 39.)

Pursuant to this plan, Delta was required to pay rehabilitation rates of \$8.18 in 2014, and \$9.78 in 2015. It is undisputed that from April to December 2014, Delta contributed at the rehabilitation rate of \$8.18, which is also the rate listed on Schedule A.⁵ In January 2015, Delta increased its contribution rate to \$9.78, also consistent with Schedule A. (ER 35; ER 140, 275.) Delta continued to make payments at that rate after the Contract expired on August 31. (ER 35, 40; ER 275, 313, 327, SER 31.) In January 2016, Delta raised its contributions to \$11.38 per hour, consistent with the requirements of the rehabilitation plan.⁶ (ER 35 & n.7, 40; ER 275, 313, 327.) Delta made one more payment at that rate in February, but in March it abruptly reduced its contribution rate to \$1.95. (ER 35 & n.7, 41; ER 275, 314, SER 16, 52-53.) Along with its March contribution, Delta sent the Fund a message stating: "We do not have the money at this time to pay the mandatory (critical status) amount due." (ER 35; ER 314, SER 21.) Delta did not

⁵ There is no record of Delta's contributions between January 2009 and March 2014.

⁶ The plan's 2015 update contains a list of cumulative rate increases since the plan's inception. (ER 101.) Delta's rehabilitation rate for a given year is obtained by adding \$1.95—the rate Delta paid before the rehabilitation plan went into effect—to the cumulative increase for that year. Thus, the 2014 rehabilitation rate was $\$1.95 + \$6.23 = \$8.18$, the 2015 rate was $\$1.95 + \$7.83 = \$9.78$, and the 2016 rate was $\$1.95 + \$9.43 = \$11.38$.

give the Union advance notice or an opportunity to bargain over the reduction. (ER 35, 41.)

After the Contract expired on August 31, 2015, the Union and Delta discussed, but never executed, a new agreement. In 2016, after the District and BAE signed a new collective-bargaining agreement, Santana met with Sanders to discuss a similar deal with Delta. Ultimately, Delta never signed a successor agreement. (ER 40-41; ER 301, SER 32-36, 38.)

II. PROCEDURAL HISTORY

On October 27, 2016, after investigating two unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that Delta violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally decreasing its pension contributions without giving the Union notice and an opportunity to bargain. (SER 1-14.) On September 15, 2017, Administrative Law Judge Mara-Louise Anzalone issued a decision finding that Delta violated the Act by unilaterally decreasing pension contributions. (ER 39-46.) The case was then transferred to the Board, where Delta and the Union filed exceptions to the judge's decision. (ER 34.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On October 16, 2018, the Board (Chairman Ring, Members McFerran and Kaplan) issued a Decision and Order finding, in agreement with the judge, that

Delta violated the Act by unilaterally decreasing its pension contributions.⁷ (ER 34-37.) The Board found that Schedule A incorporated rehabilitation rates into the parties' Contract, and that Delta paid those rates from at least April 2014, while the Contract was in force, and until February 2016, after it expired. (ER 35.) Therefore, the Board concluded that Delta was required to continue paying rehabilitation rates, or at a minimum the \$9.78 rate that prevailed when the Contract expired.⁸ (ER 37.) The Board further found (ER 36-37) that the rehabilitation rates did not violate Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), which requires "a written agreement" specifying "the detailed basis" for employer fringe-benefit contributions. 29 U.S.C. § 186(c)(5)(B). The Board also noted that a contrary ruling would run against Congress's intent, as expressed in the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780, to allow pension funds to impose rehabilitation plans in circumstances like this one. (ER 36-37.)

⁷ The General Counsel's complaint also alleged that Delta violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute a complete successor collective-bargaining agreement with the Union. (SER 7-8.) The judge dismissed that claim (ER 42-43), and the Board affirmed (ER 34 & n.4).

⁸ Rather than decide whether Delta was required to continue paying rehabilitation rates after the Contract expired, the Board (ER 37) reserved that issue for determination during subsequent agency compliance proceedings. *See NLRB v. Trident Seafoods Corp.*, 642 F.2d 1148, 1150 (9th Cir. 1981) (explaining bifurcated nature of Board unfair-labor-practice proceedings).

The Board's Order requires Delta 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, 29 U.S.C. § 157. (ER 37.) The Order affirmatively requires Delta to rescind its unlawful change, make up all unpaid pension contributions since March 2016, and continue such payments until negotiations with the Union result in an agreement or a lawful impasse. The Order further requires Delta to make unit employees whole, with interest, for any expenses resulting from its failure to make the required pension contributions. (ER 37.) Finally, the Order requires Delta to post paper copies of a remedial notice and to distribute that notice electronically to employees, if Delta customarily communicates with them by such means. (ER 38.)

SUMMARY OF ARGUMENT

Under Board law, a collective-bargaining agreement continues to define the status quo for employee wages and working conditions after it expires. Delta does not dispute that it was obligated to continue making pension contributions after the parties' Contract expired. However, Delta contends that it was only required to pay the original \$1.95 rate, not the increased rates prescribed by the statutorily mandated rehabilitation plan to address underfunding. The Board disagreed and found that in order to maintain the status quo, Delta was obligated to continue

paying rehabilitation rates, or at least the \$9.78 rate that applied when the Contract expired.

Delta's defense against the Board's determination is two-pronged. First, Delta argues the Board erred in finding that rehabilitation rates were incorporated into the parties' Contract. However, the contractual language, the parties' bargaining history, and Delta's past practice all support the Board's finding that rehabilitation rates were the status quo. Article 18.1 requires Delta to "pay the following [pension] contributions," citing to "Wage Schedule 'A'" for additional information. Delta claims this is a reference to the old 2007-2008 Schedule A, but Santana testified without contradiction that when he prepared the new Contract for Sanders's signature, he took the parties' expired agreement and replaced the 2007-2008 Schedule A with a copy of the 2014-2015 version that he obtained from the BAE contract. Santana then explained the switch to Sanders, who asked Santana to adjust the start date on the new Schedule A before he signed the Contract. Afterwards, Sanders gave the 2014-2015 Schedule A to his wife, who used it to calculate Delta's fringe-benefit contributions. Finally, it is undisputed that from at least April 2014 until February 2016, Delta followed the rehabilitation plan in making its pension contributions.

Delta levies several challenges to the Board's rationale, none of which has merit. First, that Schedule A was not separately signed is inconsequential, given

the undisputed fact that Sanders reviewed it before signing the Contract. Second, the Board may rightly consider Delta's adherence to Schedule A in determining whether the parties intended to incorporate that document into their agreement. Finally, the Court is barred from hearing Delta's adverse-inference argument because Delta failed to raise it below.

The second flank of Delta's defense contests the legality of rehabilitation rates under Section 302(c)(5)(B) of the LMRA. Specifically, Delta contends that pension-contribution rates cannot be increased without a written agreement specifying the detailed basis for the raise. The Board reasonably found that the Contract satisfies Section 302(c)(5)(B) because it requires the parties to resolve underfunded liabilities and incorporates the rehabilitation rates that were implemented for that purpose. Moreover, the Board reasonably found that requiring employers to sign a new agreement in order to implement rehabilitation rates would impair the functioning of another federal statute, the PPA.

Delta's argument is unsupported by Section 302(c)(5)(B), which does not expressly require a separate agreement to raise fringe-benefit contribution rates, or by its legislative history, which shows that such a requirement is unnecessary to fulfill the purpose that Congress intended the LMRA to serve. Moreover, there is no dispute that Delta's ongoing pension contributions at the \$1.95 rate are pursuant to an agreement that satisfies Section 302(c)(5)(B); otherwise, even they would be

unlawful. Thus, all the law requires is a written agreement like the one that already exists here, not a separate signed agreement to support every rate hike.

Finally, even if Section 302(c)(5)(B) actually required a separate writing to implement rehabilitation rates, the parties' Contract would satisfy that requirement because it incorporates those rates via Article 18.4's "appropriate action" mandate. The same goes for the rehabilitation plan, which explains the rationale behind the rate increases and is undoubtedly "appropriate action" under Article 18.4.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DELTA VIOLATED THE ACT BY UNILATERALLY LOWERING THE RATE OF ITS PENSION CONTRIBUTIONS

A. Standard of Review for Board Orders

This Court upholds the Board's orders if the Board "correctly applied the law and its factual findings are supported by substantial evidence." *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (citations omitted); *see also* 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980, 986 (9th Cir. 2005). Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it

de novo.” *Universal Camera*, 340 U.S. at 488; *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008).

Given the Board’s “special expertise” in the field of labor relations, the Court will defer to “reasonable derivative inferences drawn by the Board from the credited evidence.” *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986) (internal quotation marks and citation omitted). The Court also accords “considerable deference” to the Board’s interpretation of the Act “as long as it is rational and consistent with the statute.” *Local Joint Exec. Bd.*, 515 F.3d at 945 (internal quotation marks and citation omitted). However, the Court does not defer to the Board’s interpretation of other statutes, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002), or collective-bargaining agreements, *NLRB v. Dist. Council of Iron Workers of the State of Cal.*, 124 F.3d 1094, 1098 (9th Cir. 1997). Lastly, the Court will uphold the Board’s credibility determinations unless they are “inherently incredible or patently unreasonable.” *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

The Court should ignore Delta’s claim (Br. 15) that the Board’s decision “amounts to unauthorized rule-making . . . illustrative of the perils of according *Auer v. Robbins*, 519 U.S. 452 (1997) deference to administrative agencies’ interpretations,” as well as its request to hold this case in abeyance pending reconsideration of *Auer* by the Supreme Court. First, this Court cannot hear

Delta's *Auer* arguments because they were not raised below. *See* 29 U.S.C. § 160(e).⁹ Second, on June 26, 2019 the Supreme Court issued its decision in *Kisor v. Wilkie*, which upheld the *Auer* doctrine. 139 S. Ct. 2400, 2408, ___ U.S. ___ (2019). Third, *Auer* stands for the general principle that courts must defer to agencies' reasonable interpretations of their own ambiguous regulations. *Id.* But the Board did not interpret *any* regulation in this case.¹⁰ What the Board did find is that Section 302(c)(5)(B) of the LMRA—a federal statute—does not support Delta's defense for reducing its pension contributions. And while the Board may consider arguments related to Section 302 "to the extent they support, or raise a possible defense to, unfair labor practice allegations," *BASF Wyandotte Corp.*, 274 NLRB 978, 978 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986), the

⁹ Section 10(e) of the Act specifies 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). As recognized by this Court, Section 10(e) creates a jurisdictional bar that precludes appellate courts from considering objections raised for the first time on appeal by parties who failed to raise them to the Board in the first instance. *See Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. NLRB*, 656 F.3d 860, 867 (9th Cir. 2011) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). This rule applies with equal force in cases where the Board acts *sua sponte* and the respondent fails to seek reconsideration of its decision. *See Woelke*, 456 U.S. at 666; *Int'l Union of Painter & Allied Trades*, 656 F.3d at 867.

¹⁰ Indeed, Delta's opening brief does not cite a single regulation (Br. v-viii), and neither does this one. Delta apparently recognizes its argument is a stretch, asserting that "the Board's application of Section 302(c)(5) amounts to unauthorized rule-making. . . ." (Br. 15 (emphasis added).)

Board’s interpretations of statutes other than the Act are not entitled to any judicial deference. *See Hoffman Plastic*, 535 U.S. at 144. Therefore, to the extent that *Kisor* involves (a) agency deference, and (b) regulatory interpretation, it is doubly inapposite.

B. An Employer Violates the Act If It Unilaterally Changes Its Employees’ Terms and Conditions of Employment Without Giving their Union Notice and an Opportunity to Bargain

“Sections 8(a)(5) and 8(d) of the [Act] . . . require an employer to bargain ‘in good faith with respect to wages, hours, and other terms and conditions of employment’” with the union representing its employees. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (quoting 29 U.S.C. § 158(d)). Thus, it follows that an employer who makes unilateral changes to those mandatory subjects of bargaining, without giving the union notice and an opportunity to bargain, violates Section 8(a)(5) and (1) of the Act.¹¹ *Id.*; accord *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Indeed, the Supreme Court has held that such unilateral changes constitute “a circumvention of the duty to negotiate which frustrates the

¹¹ Section 8(a)(5) makes it unlawful “for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it unlawful “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” *id.* § 158(a)(1), which includes employees’ “right . . . to bargain collectively through representatives of their own choosing,” *id.* § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1078 n.8 (9th Cir. 2008).

objectives of [Section] 8(a)(5) much as does a flat refusal [to bargain].” *NLRB v. Katz*, 369 U.S. 736, 743 (1962); accord *Queen Mary Rests. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977).

When a collective-bargaining agreement expires, its terms remain in effect by operation of law, *Litton*, 501 U.S. at 206-07, and continue to define the status quo as to wages and working conditions, *Carilli*, 648 F.2d at 1214. Therefore, the employer’s duty to maintain the status quo remains unchanged until the parties either agree on a new contract or reach a good-faith impasse. *Litton*, 501 U.S. at 198; accord *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983).

Delta does not dispute that “contributions to an employee pension trust fund constitute a mandatory bargaining subject.” *Am. Distrib. Co. v. NLRB*, 715 F.2d 446, 449 (9th Cir. 1983); see also *Laborers Health & Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985) (“[A]ny unilateral change by [an] employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice.” (citation omitted)), *affirmed*, 484 U.S. 539, 544 n.6 (1988). Nor does Delta contest that it had an obligation to maintain pension contributions as part of the post-expiration status quo. See *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1659 (2015) (citing *Laborers Health & Welfare Tr. Fund*, 484 U.S. at 544 n.6). Lastly, Delta admits

that it reduced its pension contributions without giving the Union notice or an opportunity to bargain. (Br. 11.)

In its defense, Delta argues it was only required to pay the \$1.95 rate that existed before the rehabilitation plan came into effect because rehabilitation rates were never incorporated into the parties' Contract. Delta also claims that it was not required to pay rehabilitation rates in order to maintain the post-expiration status quo because those rates violated the Labor Management Relations Act. As shown below, Delta's defenses lack merit, and therefore the Court should enforce the Board's Order. *Am. Distrib.*, 715 F.2d at 448.

C. Schedule A Incorporated Rehabilitation Rates into the Parties' Collective Bargaining Agreement; Therefore, Delta Was Required to Continue Paying Those Rates in Order to Maintain the Status Quo After the Contract Expired

The Board found that the increased rates implemented by the rehabilitation plan represented the status quo that Delta was obligated to maintain after the parties' Contract expired. Specifically, the Board found that rehabilitation rates were incorporated into the Contract by way of Schedule A, which lists the rates applicable to Delta's pension contributions.¹² (ER 35; ER 140.) The Board found further that Delta paid those rates consistently until it suddenly stopped, and even then, Delta did not claim that they were not required, only that it could not afford

¹² As explained above, the pension-contribution rates listed in Schedule A match those defined by the rehabilitation plan. *See supra* note 6.

to pay them. (SER 21.) Therefore, the Board concluded that Delta was required to continue paying rehabilitation rates as part of the post-expiration status quo, or at least the \$9.78 rate that applied when the Contract expired. (ER 37.) As we now show, substantial evidence supports the Board's determination.

1. Applicable principles

The parties' expired Contract defines the status quo regarding employees' terms and conditions of employment. *See Litton*, 501 U.S. at 206, *Carilli*, 648 F.2d at 1214. The determination of the status quo and whether a unilateral change occurred is a question of fact, which is reviewed for substantial evidence in the record considered as a whole. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1440 (9th Cir. 1995) (Board's finding that employer made unilateral changes to pension plan supported by substantial evidence); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993) ("Because the determination of the status quo is a question of fact, we review for substantial evidence in the record considered as a whole.").

When interpreting a collective-bargaining agreement, the Board gives controlling weight to "the parties' intent underlying the contract language." *Resco Prods., Inc.*, 331 NLRB 1546, 1548 (2000). To determine that intent, the Board considers not only the contractual language itself, but also any relevant extrinsic evidence, such as "past practice of the parties in regard to the effectuation or

implementation of the contract provision in question, or the bargaining history of the provision itself.” *Mining Specialists, Inc.*, 314 NLRB 268, 268-69 (1994) (footnote omitted); *accord Int’l Bhd. of Elec. Workers, Local 387 v. NLRB*, 788 F.2d 1412, 1414 (9th Cir. 1986) (aside from contractual language, Board may consider bargaining history, context of negotiations, parties’ interpretation of contract, and conduct bearing upon its meaning). Applying those principles, the Board found, and substantial evidence supports, that Schedule A was incorporated into the parties’ Contract. (ER 35.)

2. Schedule A was fully integrated into the parties’ Contract

On its own, the language of the Contract supports the Board’s finding. Article 18.1 instructs Delta to “pay *the following* Health & Welfare and Pension contributions” (ER 119 (emphasis added)), and directs the reader to “See Wage Schedule ‘A’” for additional information (*id.* (emphasis omitted)). Undeniably, therefore, the Contract is meant to include an additional document with instructions for paying those fringe-benefit contributions. Moreover, in response to a Board subpoena seeking collective-bargaining agreements and attachments, Delta produced a table—the 2014-2015 Schedule A—that lists the applicable rates for said contributions. (ER 140; ER 295-96, SER 44-47.) That table, while not individually labeled “Schedule A,” was one of—and copied from—a list of similar tables in the BAE contract, collectively labeled “SCHEDULE A – HOURLY

WAGES, HEALTH & WELFARE AND PENSION RATES.” (ER 264-66 (emphasis omitted).) Additionally, that table applied to the period from December 1, 2014, when the Contract was signed, until its scheduled expiration date of August 31, 2015. (ER 140.) Finally, Delta never offered an alternative Schedule A covering the same period. In sum, the contractual language overwhelmingly supports the Board’s finding that Schedule A was integrated into the Contract and represented the post-expiration status quo for applicable pension-contribution rates.

The parties’ bargaining history also confirms that they intended Schedule A to be an intrinsic component of their agreement. Santana testified without contradiction that he removed the three-page, 2007-2008 Schedule A from their expired contract, and that he replaced it with a single table copied from the recently signed BAE contract. (ER 35 n.6; SER 29-30.) That new 2014-2015 Schedule A reflected the increased pension-contribution rates promulgated by the rehabilitation plan. Santana testified further, and again without contradiction, that he explained the substitution to Sanders, and that Sanders signed the Contract after Santana changed Schedule A’s start date to December 1, 2014, per Sanders’s request. (SER 26-29.) And Delta does not dispute the testimony of its own witness, Joyce Sanders, who stated that her husband handed Schedule A directly to her, and that it contained “the different amounts that . . . [Delta was] required to pay” pursuant to

the Contract.¹³ (ER 35 n.6; ER 316.) Thus, it is undeniable that Delta viewed Schedule A “as part of its collective-bargaining agreement with the Union.” (ER 35 n.6.)

Finally, the fact that Delta paid the contribution rates listed in Schedule A and prescribed by the rehabilitation plan, and that it continued to pay rehabilitation rates after the Contract expired, further bolsters the Board’s conclusion that the parties understood rehabilitation rates to be the status quo for pension contributions. It is undisputed that Delta had been paying rehabilitation rates for several months—at least—before Sanders even signed the Contract. Indeed, from April to December 2014, Delta was already paying \$8.18, the rate mandated by the rehabilitation plan. Then, in January 2015, Delta increased its contribution rate to \$9.78, as prescribed by the plan and Schedule A. (ER 140, ER 275.) Moving forward, Delta maintained the \$9.78 rehabilitation rate without objection after the Contract expired in August 2015, and in January 2016, Delta once again followed the plan in raising its contribution rate to \$11.38. (ER 275.) Lastly, in its letter informing the Fund that it would no longer pay the plan’s “critical status” rates, Delta admitted that those rates were “mandatory.” (ER 35; ER 314, SER 21.)

¹³ Because Delta did not contest the Board’s decision to credit Mrs. Sanders’s testimony in its opening brief, it has waived any such challenge. *See* Fed. R. App. P. 28(a)(8)(A); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“an issue . . . not discussed in the body of the opening brief is deemed waived,” and cannot be raised for the first time in reply brief).

Delta's course of conduct establishes not only that it viewed Schedule A as an integral part of the Contract, but also its recognition that rehabilitation rates were incorporated into that agreement.

In sum, the contractual language and bargaining history, combined with Delta's consistent adherence to the Schedule A for its pension contributions, support the Board's finding that the parties not only intended to integrate Schedule A into the Contract, but also that they treated it as a constituent piece of their agreement. Moreover, because it is undisputed that Schedule A incorporated the rehabilitation plan's escalating rates, and because Delta continued to apply those rates even after the Contract expired, it follows that rehabilitation rates were also incorporated into the Contract, and that they represented the status quo Delta was obligated to maintain after the Contract expired. *Litton*, 501 U.S. at 198; *Stone Boat Yard*, 715 F.2d at 444. Thus, by unilaterally reducing its pension contributions without giving the Union notice or an opportunity to bargain, Delta violated Section 8(a)(5) and (1) of the Act.

3. Delta's counterarguments lack any merit

Delta does not challenge the Board's finding that the pension-contribution rates in Schedule A are the same as those prescribed by the rehabilitation plan. Nor does Delta dispute that, per Schedule A, the prevailing contribution rate when the parties' Contract expired was \$9.78. Instead, Delta contends that Schedule A

was never incorporated into, or even referenced by, the parties' Contract. (Br. 20, 21, 22, 24, 26-27.) At first blush, that seems counterintuitive given that Article 18.1 unambiguously refers to "Wage Schedule 'A.'" (ER 119.) However, Delta's actual argument appears to be that although the Contract does incorporate a Schedule A, the Board erred in finding that it was the 2014-2015 Schedule A. (Br. 7, 22-23, 35.) As shown below, there is no record support for that claim.¹⁴

To begin, there is no evidence to suggest that Sanders objected to including the 2014-2015 Schedule A in the Contract, quite to the contrary. For instance, although Delta points to the fact that Schedule A was not separately "signed," "ratified" or "adopted" (Br. 29, 35), it does not challenge Santana's testimony that Sanders signed the Contract as a whole, in his presence, and only after making Santana change the start date of Schedule A.¹⁵ (SER 26-29.) Moreover, not only did Sanders give Schedule A to his wife, who was charged with making fringe-benefit payments, but she then proceeded to inform the Fund by letter that "[a] new contract was agreed upon effective 12/1/14" and that Delta's contribution rate had increased as a result. (SER 15, 40, 48, 55.) This evidence shows that Delta, by

¹⁴ Delta's related argument that Schedule A is not a written agreement that satisfies the LMRA is addressed in subsection D., below.

¹⁵ Nor has Delta provided any evidence that the old 2007-2008 Schedule A, which Delta claims is the only such document that was "included and agreed upon" in the parties' Contract (*see infra* pp. 27), was separately signed or ratified.

Sanders, signed the Contract with the understanding that it incorporated Schedule A, and that Delta immediately considered itself bound by those terms, including Schedule A's increased pension-contribution rates. On this record, the fact that Schedule A was not separately signed does nothing to disprove the Board's finding.

Delta also harps on the fact that Schedule A was not "included in or attached to" the Contract (Br. 12, 19, 23, 27, 29), as though that were some kind of smoking gun. But to the extent that Schedule A's physical location has any probative value, it is thoroughly eclipsed by the fact that Delta consistently treated it as part and parcel of the Contract. Indeed, there is no dispute that Delta scrupulously followed Schedule A while the Contract was in effect, or that it continued to pay rehabilitation rates after the Contract expired. As the Board found, that bolsters the conclusion that Delta considered Schedule A to be just as binding as any other contractual provision. (ER 35 n.6.)

Delta contends further that the Board erred in relying on Delta's conduct to find that the parties intended to integrate Schedule A into their Contract. (Br. 32-34.) In support, Delta cites a number of cases, all of which stand for the proposition that courts may not circumvent the LMRA's requirement of a written

agreement by finding an implied contract based only on course of dealing.¹⁶ But the question here is whether Delta violated its duty to maintain the status quo after the Contract expired by unilaterally reducing its pension contributions. To do so, the Board must first determine the precise nature of the status quo for those contributions, and it is well established that past practice is one of the factors the Board may consider for that purpose. *See Mining Specialists*, 314 NLRB at 268-69; *Int'l Bhd. of Elec. Workers*, 788 F.2d at 1414. Delta's history of paying rehabilitation rates soundly demonstrates that those rates were the status quo that Delta needed to maintain after the Contract expired.

Unable to overcome the Board's factual findings and legal analysis, Delta resorts to insinuations and outright deceit. First, Delta implies something nefarious (Br. 24, 30) from the Board's finding that Schedule A "could be" inserted into the Contract (ER 35 n.6), and from Santana's admission that he did not remember how Schedule A was delivered to Delta (ER 304). Not only are those conjectures

¹⁶ *See Moglia v. Geoghegan*, 403 F.2d 110, 118 (2d Cir. 1968) (employer's past practice of paying trust-fund contributions not tantamount to signing written agreement requiring such contributions); *accord Bricklayers, Masons & Plasterers Int'l Union of Am., Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1029 (5th Cir. 1975) (past practice does not "supply the element of definiteness that Congress prescribed."); *Carter v. CMTA-Molders & Allied Workers Health & Welfare Tr.*, 563 F. Supp. 244, 247 (N.D. Cal. 1983) (agreement implied from course of dealing would not satisfy LMRA); *R.V. Cloud Co. v. W. Conference of Teamsters Pension Tr. Fund*, 566 F. Supp. 1426, 1429-30 (N.D. Cal. 1983) (past practice irrelevant absent contract between employer and union).

preposterous, but they are disproved by Delta's own witness, Mrs. Sanders, who unequivocally testified that her husband simply "handed [Schedule A] to me," and that she used it as the applicable rate sheet. (ER 316.) Then, Delta misleadingly suggests that an *older* Schedule A, which was attached to the parties' 2007-2008 contract, was actually "included, and agreed upon . . . in the 2008-2015 Collective Bargaining Agreement." (Br. 7, 22-23 (citing ER 220-23).) That is a flagrant misrepresentation of the record. Indeed, it is undisputed that pursuant to the General Counsel's subpoena, Delta produced a copy of the parties' Contract, which was missing three pages where Schedule A should have been, and a stand-alone copy of the 2014-2015 Schedule A. (ER 140, ER 296, SER 44-45.) Moreover, Sanders's son, Robert Jr., admitted that the 2007-2008 Schedule A was *not* included in the new Contract.¹⁷ In addition, Delta bizarrely claims that Santana "admitted that no contract was signed in 2014" (Br. 10), when in fact he testified to the exact opposite (ER 290, SER 28-29). Thus, to accept Delta's position, the Court would have to believe the illogical notion that the parties purposely meant to incorporate into the 2014 Contract the old 2007-2008 rate sheet, despite the

¹⁷ Sanders, Jr. testified that Delta received the Contract by e-mail, and that certain "rate schedules [were] pulled out of there." (ER 322-23.) On further examination, he testified that by "rate schedules," he meant the 2007-2008 Schedule A (which he referred to as Respondent's exhibit 2). (ER 323-24.) Thus, Delta clearly understood that the obsolete Schedule A was not part of the new Contract.

undisputed facts that in 2008 the Fund had entered critical status, and that Delta consistently paid the rehabilitation rates, which it described as “mandatory.”

Delta’s adverse-inference argument is equally without merit. Santana testified that after he replaced the old Schedule A in the Contract with the 2014-2015 version, his administrative assistant forgot to correct the agreement’s pagination, leaving the new Schedule A unnumbered and a three-page gap where the older version had been. (ER 298.) Now, Delta claims the Board should have drawn an adverse inference from the General Counsel’s failure to call the administrative assistant to verify Santana’s testimony. (Br. 30-31.) But Delta never asked the Board to draw an adverse inference from those facts, so the Court cannot hear that challenge now.¹⁸

In any event, “the decision to draw an adverse inference lies within the sound discretion of the [Board],” and this Court has “never suggested that the [Board] is required to draw an adverse inference against a party that fails to call a certain witness.” *Underwriters Labs. Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). Given that Delta never requested an adverse inference in the first place, it was hardly an abuse of discretion for the Board not to draw one. *See Samson v. U.S. Dep’t of Labor*, 732 F. App’x 444, 447 (7th Cir. 2018). And Delta

¹⁸ *See supra* note 9. Before the Board, Delta directly challenged Santana’s credibility, but merely noted the assistant’s failure to testify. (SER 57, 65, 77.)

fails to explain why, if the administrative assistant's testimony was so damning, it did not subpoena her itself. *See Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006) (noting respondent's ability to subpoena a witness the General Counsel did not call). Moreover, given Santana's un rebutted testimony that Sanders reviewed and acquiesced to Schedule A before signing the Contract, the General Counsel had no need to present additional testimony on that issue. As the Seventh Circuit observed, there is no need to draw an adverse inference where a party simply opts not to present testimony that would be "essentially cumulative." *Id.*; *see also Kean v. Comm'r*, 469 F.2d 1183, 1188 (9th Cir. 1972) ("[T]o justify the inference drawn from the failure to call a witness, the testimony of the uncalled witness must not be cumulative or inferior to the evidence already presented." (citation omitted)).

Finally, Delta's claim that it only paid rehabilitation rates out of a "mistaken belief" that they were required (Br. 11, 13, 18, 33) is simply not credible, and lacks merit regardless. Delta claims that Mrs. Sanders "did not realize the increases were unlawful and . . . did not consult with an attorney on the subject until March 2016," whereupon Delta reduced its contribution rate to \$1.95. (Br. 11.) But Delta fails to explain why its first reduced contribution included a message stating, "We do not have the money at this time to pay the mandatory (critical status) amount due." (ER 35; ER 314, SER 21.) This shows that at the time of the

events, and even after consultation with its attorney, Delta continued to recognize its obligation to pay rehabilitation rates. Only later did Delta start to claim its contributions were mistaken and unlawful. Thus, the record does not support the notion that Delta was sincerely mistaken about paying rehabilitation rates. Moreover, and in any event, Delta's intent in paying—or refusing to pay—rehabilitation rates is irrelevant to whether it unlawfully departed from the status quo. *See Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 411 (9th Cir. 1978) (employer intentions, “be they good or bad, are irrelevant” to legality of unilateral change in mandatory subjects of bargaining).

D. Delta Failed to Prove Its Defense That It Was Not Required to Pay Rehabilitation Rates Because They Were Allegedly Unlawful Under the LMRA

Delta contends that it was not required to pay rehabilitation rates in order to maintain the contractual status quo because those rates violated the Labor Management Relations Act. The LMRA makes it unlawful for employers to contribute anything of value to any representative of their employees. 29 U.S.C. § 186(a)(3). However, Section 302(c)(5)(B) of the LMRA authorizes payments to trust funds established for the employees' sole and exclusive benefit, provided, *inter alia*, that “the detailed basis on which such payments are to be made is specified in a written agreement with the employer.” 29 U.S.C. § 186(c)(5)(B). Delta claims that rehabilitation rates were unlawful because they were not

implemented pursuant to a written agreement satisfying with Section 302(c)(5)(B). The Board, however, found that the parties' Contract met the requirements of Section 302(c)(5)(B) because it establishes their obligation to resolve any underfunded pension liabilities and incorporates the rehabilitation plan's increased contribution rates. (ER 36.)

It is well established that an expired collective-bargaining agreement can satisfy the requirements of Section 302(c)(5)(B). *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 341 (2d Cir. 2008) (citing cases); *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996). Likewise, the law is clear that several different documents, such as a collective-bargaining agreement that establishes fringe-benefit payments, together with the underlying trust agreements, can satisfy Section 302(c)(5)(B)'s written-agreement requirement. *Lincoln Lutheran*, 362 NLRB at 1659; *accord, e.g., Carilli*, 648 F.2d at 1213-14; *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

1. The Contract Satisfies Section 302(c)(5)(B)'s Requirements for a Written Agreement

Once again, the Board's analysis gives controlling weight to the parties' intent, as expressed in the contractual language and their past practice. *See Mining Specialists*, 314 NLRB at 268-69; *Int'l Bhd. of Elec. Workers*, 788 F.2d at 1414. First, the Board found that Schedule A, which is part and parcel of the parties' Contract (*see* subsection C.2., above), incorporates the rehabilitation plan's

increased contribution rates. Second, the Board found that the Contract's Article 18.4 also incorporates rehabilitation rates through its mandate to promptly resolve any underfunded pension liabilities. (ER 36; ER 119.) Finally, the Board noted that Delta willingly paid those rates for at least 2 years. The Board found that together, the contractual language and Delta's course of conduct evidenced an intent to incorporate rehabilitation rates into the parties' agreement. Therefore, the Board concluded, "by recognizing the parties' obligation to eliminate underfunding and by incorporating the plan's rates in Schedule A, [the Contract] satisfies Section 302(c)(5)(B)'s requirement for a "detailed basis . . . specified in a written agreement." (ER 36.)

The Board's finding is further supported by the fact that holding otherwise would render ineffective another federal statute, namely, the Pension Protection Act. The PPA was enacted to help severely underfunded pension funds recover and return to financial stability. *Lehman v. Nelson*, 862 F.3d 1203, 1207 (9th Cir. 2017). If a pension fund enters what the PPA defines as "critical status," its trustees are required to "'adopt and implement a rehabilitation plan' formulated 'to enable the [fund] to cease to be in critical status by the end of the rehabilitation period.'" *Id.* (quoting 29 U.S.C. § 1085(a)(2)(A), (e)(3)(A)(i)). Of particular significance here, the PPA provides that if the "bargaining parties"—*i.e.*, contributing employers and their union counterparts—cannot agree on a

rehabilitation plan, the pension fund’s trustees must implement one unilaterally.¹⁹ 29 U.S.C. § 1085(e)(3)(C)(i). The obvious purpose is to enable trustees to take action if the bargaining parties will not do it themselves. But as the Board observed, that statutory authority would be “wholly illusory” if it were made contingent on employers ratifying a separate written agreement to submit to the trustees’ plan. (ER 36-37.) Accordingly, the Board reasonably declined to read into the LMRA a requirement that would create an otherwise avoidable conflict with the PPA. (ER 36-37 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).)

Before turning to Delta’s arguments, it is worth noting that by continuing to pay into the Fund—albeit at the \$1.95 rate that prevailed before the rehabilitation plan went into effect—Delta effectively concedes that its pension contributions are pursuant to a written agreement that specifies their detailed basis, consistent with the language of Section 302(c)(5)(B). (Br. 6, 11.) In other words, Delta does not claim that the LMRA forbids *all* contributions to the Fund, only that it precludes

¹⁹ In this case, the Trustees’ rehabilitation plan actually contained two options: a “default” option that increased employer contributions and reduced pension benefits, and an “alternative” option that only raised employer contributions. (ER 48, 53-55.) The plan further provided that if the bargaining parties could not agree over which option to implement, the default option would become effective on January 1, 2009. (ER 50.) The plan’s annual updates contained similar language. (ER 57, 65, 73, 81, 89, 97.) The record is silent on whether the bargaining parties agreed to implement the default option or if the Trustees did so unilaterally. In any event, the rehabilitation rates contained in Schedule A are drawn from the default option’s rate schedule.

paying rehabilitation rates. The crux of Delta’s argument is that the Fund cannot increase contributions rates without its express consent, as manifested by a *separate* signed, written agreement setting forth the detailed basis for the raised amounts. (Br. 22, 23-24, 27, 29, 31.) Neither the statutory language, its legislative history, nor its judicial interpretation support Delta’s position.

2. Section 302(c)(5)(B) Does Not Require a Separate Written Agreement to Implement Rehabilitation Rates

“As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute.” *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citation omitted). Section 302(c)(5) lays down basic rules for the formation and operation of employee trust funds, not the details of their administration over time. In addition to requiring a written agreement, Section 302(c)(5) requires holding funds in trust solely for employees’ benefit, annual trust-fund audits, equal representation of employers and unions among trustees, and mandatory arbitration in case of deadlock over the fund’s administration. *Bricklayers, Masons & Plasterers Int’l Union of Am., Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1026 (5th Cir. 1975) (citing 29 U.S.C. § 186(c)(5)(A)-(B)).

Delta inflates the written-agreement requirement of Section 302(c)(5)(B), claiming that it means a signed agreement is required any time contribution rates increase. But nothing in the statutory language suggests that, once an LMRA-

compliant fringe-benefit fund has been created, additional “written agreements” are necessary to keep it functioning.²⁰ Moreover, there can be no dispute that the Fund conforms to LMRA requirements, otherwise it could not legally accept *any* contribution—whether at the \$1.95 or \$9.78 rate—from Delta. Finally, Delta fails to identify a single case that construes the LMRA as requiring a separate signed agreement for every increase in contribution rates. Thus, the statutory language does not support Delta’s defense.

The LMRA’s purpose and legislative history also belie Delta’s attempt to read a separate written-agreement requirement into the statute. Section 302 was enacted to address concerns “with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.” *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (footnotes omitted); *Hinson d/b/a Red Hen House Market No. 3 v. NLRB (Hen House)*, 428 F.2d 133, 139 (8th Cir. 1970) (per curiam). To protect against those practices, Congress devised a framework

²⁰ Of course, there is nothing to prevent bargaining parties from creating the type of “contract within a contract” that Delta envisions. *See, e.g., Merrimen v. Paul F. Rost Elec., Inc.*, 861 F.2d 135, 136-39 (6th Cir. 1988) (payments found unlawful where employer failed to sign separate letter of assent required to be bound by collective-bargaining agreement). But Delta does not identify any language to that effect, in the parties’ Contract or elsewhere.

that would “insure that employer contributions are made only for proper purposes and that fund benefits reach only proper parties.” *Bricklayers*, 512 F.2d at 1025. This legislative history explains why “courts view the ‘detailed basis’ requirement through the lens of Section 302(c)’s purpose: to protect union members’ fringe benefits by preventing the misappropriation or dissipation of money that is owed to union employees.” *Furwa v. Operating Engineers Local 324 Health Care Plan*, 354 F. Supp. 3d 775, 783 (E.D. Mich. 2018) (internal quotation marks and citation omitted); *see also, e.g., Hen House*, 428 F.2d at 139 (expired collective-bargaining agreement and trust agreements together “provide that safeguard which the framers of the statute clearly intended”).

In this case, there is no question that the Fund was established in accordance with Section 302(c)(5)(B). Therefore, the concerns that led Congress to pass the LMRA have already been alleviated, and there is no justification, let alone a statutory requirement, for another writing specifically to authorize contribution-rate increases. Nor does the lack of such a writing expose Delta to being “tricked, threatened or bullied” into paying rehabilitation rates. (Br. 19, 33-34.) Indeed, the record establishes that those rates were put in place after the Fund was “certified by its actuary to be in critical status” (ER 48), and not for any corrupt reason. Thus, the increase in contribution rates was no “shake down” (Br. 2), but a direct consequence of a legally mandated rehabilitation plan. And while Delta claims it

paid those rates by mistake, it identifies no evidence that it was duped. Not only did its own witness, Mrs. Sanders, testify that her husband gave her Schedule A to use as the rate sheet, but when Delta first reduced its payments, it acknowledged that rehabilitation rates were mandatory. (ER 35 & n.6; ER 316, SER 21.)

Moreover, while Delta presents itself as the victim of the need to raise contribution rates, it completely ignores the fact that the rehabilitation plan also reduced pension benefits for employees. (ER 53.) Finally, Delta has not shown, or even alleged, that its payments were misappropriated or used for any purpose other than to resolve the Fund's financial difficulties and guarantee employees the benefits they are owed.

Additionally, Delta omits and therefore waives any challenge to the Board's observation that requiring a separate written agreement to implement rehabilitation rates would stymie the PPA's purpose of safeguarding underfunded pension funds from financial ruin.²¹ (ER 36.) If Delta was correct that the LMRA requires a separate agreement to raise fringe-benefit contribution rates, employers could eschew their obligations simply by refusing to sign any agreement to pay rehabilitation rates, thus condemning pension funds to failure. It is hardly surprising, therefore, that although the PPA contemplates that bargaining parties will, of their own accord, "adopt" rehabilitation plans proposed by the funds'

²¹ See *supra* note 13.

trustees, 29 U.S.C. § 1085(e)(1)(B), (e)(3)(C)(i), nowhere does the statute require such adoption to take the form of a written agreement. The Board stated it was “reluctant to ascribe to Congress the intent to both require and prohibit rehabilitation plan payments to a pension fund in circumstances like those presented here.” (ER 36.) Delta has offered no challenge to the reasonableness of that approach.

Delta cites myriad cases to support its position, but none warrants a different result because they are all solely concerned with the issue whether an employer can contribute *at all* to an employee trust fund—not whether a separate agreement is required to alter contribution rates. Because it is undisputed that Delta can legally contribute to the Fund pursuant to an LMRA-compliant agreement, those cases are inapposite. *See, e.g., Guthart v. White*, 263 F.3d 1099, 1103-04 (9th Cir. 2001) (no written agreement allowing employer to contribute for non-union employees where trust-fund documents (a) required payments to be pursuant to a collective-bargaining agreement, and (b) did not specify “detailed basis” for payments on behalf of non-union employees); *Thurber v. W. Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976) (holding that employer’s payment, made after-the-fact to cure temporary break in service that rendered employee ineligible

for benefits, violated LMRA because no written agreement allowed fund to receive retroactive fringe-benefit contributions).²²

Delta is thus unable to show that Section 302(c)(5)(B) requires a separate written agreement in order to raise fringe-benefit contribution rates. But even if that was true, the result of this case would be no different. That is because Article 18.4 of the Contract requires the parties to “instruct the Trustees . . . to take appropriate action to eliminate any underfunded liability” incurred by the Fund. (ER 119.) Here, the Fund’s Trustees took appropriate action by adopting the rehabilitation plan, and its escalating rates were incorporated into the Contract through Schedule A. Together, therefore, Article 18.4 and Schedule A satisfy any (hypothetical) requirement for a written agreement authorizing rehabilitation rates. And even if the Court were to agree with Delta’s claim that Article 18.4 and Schedule A do not specify the “detailed basis” for its contributions (Br. 34-36), there is also the rehabilitation plan itself, which spells out in comprehensive fashion the Trustees’ rationale for increasing contribution rates. (ER 48-55.) Like

²² See also *Moglia*, 403 F.2d at 117 (no written agreement where employer refused to sign contract with union); *R.V. Cloud*, 566 F. Supp. at 1428-29 (no written agreement where employer and union never fully agreed on terms of their contract); *Midwest Power Sys., Inc.*, 335 NLRB 237, 237-38 (2001) (no written agreement where union contract only referred to employee insurance plans, without mentioning fringe-benefit plans). *Rinard v. Eastern Co.*, 978 F.2d 265, 268 (6th Cir. 1992), also cited by Delta (Br. 21), has absolutely no bearing on this case because it addresses the distribution of surplus assets upon termination of ERISA plans under 29 U.S.C. § 1344(d)(1).

the rates themselves, the plan and its annual updates (ER 56-103) constitute “appropriate actions” of the Trustees, and as such they are incorporated into the Contract by Article 18.4. Therefore, even if Section 302(c)(5)(B) did require a separate written agreement just to implement rehabilitation rates—which it does not—that requirement would be met here.

3. Delta’s Remaining Arguments Are Meritless

Delta reprises its claim that the Board erred in considering the fact that it paid into the Fund at rehabilitation rates for at least 2 years. (Br. 19, 32-34.) Once again, however, Delta misunderstands the scope of the Board’s reliance on past practice. Contrary to Delta’s suggestion, the Board did not find that the practice of paying rehabilitation rates, *by itself*, created the equivalent of a “written agreement” such that would satisfy Section 302(c)(5)(B). Instead, the Board found that Delta’s conduct, *together* with Article 18.4 and Wage Schedule A, established that the parties intended to incorporate rehabilitation rates into their Contract, thus satisfying the written-agreement requirement of Section 302(c)(5)(B).²³ (ER 36.)

The Board’s rationale is no different than the Eighth Circuit’s analysis in *Hen House*, which also involved an employer with a history of contributing to

²³ The cases on which Delta relies are again inapposite. In all of those cases, courts found that there was no written agreement of any kind. *See supra* note 16. By contrast, Delta does not dispute that a Section 302(c)(5)(B)-compliant written agreement exists in this case.

fringe-benefit funds referenced in a union contract. 428 F.2d at 138. In that case, the court found that together, the contractual language and the employer's conduct established that the trust-fund agreements were incorporated into the union contract, thus satisfying Section 302(c)(5)(B). *Id.* at 139. However, like the Board in this case, the *Hen House* court did not find that the employer's practice of making trust-fund contributions was enough *on its own* to create an LMRA-compliant written agreement. *Cf. Moglia*, 403 F.2d at 118.

Delta also contends that if the parties had intended to allow for contribution rates to increase, they would have included language like the BAE contract's Article 18 into their own agreement. (Br. 8, 26 (citing ER 245).) What Delta fails to mention is that the BAE contract was renegotiated and rewritten after the rehabilitation plan went into effect. By contrast, the parties' old agreement expired before 2008 and kept rolling over until 2014, when Delta's wages fell below BAE's. (ER 291-92.) And when the parties finally decided to update their agreement, there is no evidence that they altered, or even discussed changing, the language of Article 18. Therefore, the absence of language akin to the BAE contract proves nothing.

Finally, Delta cites the fact that the Contract contains no language explicitly permitting pension-rate increases as evidence that such raises require separate authorization. (Br. 6-7, 8.) If that were true, the Contract would also proscribe

rate increases for health-and-welfare contributions, and yet it is undisputed that those have also gone up since 2008. (*Compare* ER 223 (\$5.78), *with* ER 140 (\$7.63).) Moreover, Delta’s claim runs afoul of the contractual language itself. As Delta is forced to admit, paragraph 2 of the “Notes to Schedule ‘A’” section states that “Schedule ‘A’ rates are minimums only.” (ER 139.) To reconcile that language with its argument, Delta posits that because the Contract elsewhere uses the term “wage rates,” paragraph 2 should be read to apply only to wage rates, and not to fringe-benefit contribution rates. (Br. 8, 36 n.7.) But paragraph 2 plainly refers to Schedule A, which contains three different types of rates—hourly wages, health and welfare, and pension. Therefore, the omission of the term “wage” does not render paragraph 2 vague or ambiguous, and there is no need to look elsewhere to determine its meaning.²⁴ *See M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (“Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.”) (quoting 11 Richard A. Lord, *Williston on Contracts* § 30:6 (4th ed. 2012)); *Am. Fed’n of Musicians of U.S. & Can. v. Paramount Pictures Corp.*, 903 F.3d 968, 977 (9th Cir. 2018) (same).

²⁴ Moreover, the clear language of the other provisions on which Delta relies (ER 179, 206) shows that they apply specifically to wages and have absolutely no bearing on fringe benefits.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Delta's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board counsel are not aware of any related cases pending in this Circuit.

Respectfully submitted,

/s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

/s/ Gregoire Sauter

GREGOIRE SAUTER

Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2948
(202) 273-1714

PETER B. ROBB

General Counsel

ALICE B. STOCK

Associate General Counsel

DAVID HABENSTREIT

Acting Deputy Associate General Counsel

July 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DELTA SANDBLASTING COMPANY, INC.,)	
)	
Petitioner/Cross-Respondent,)	
)	
v.)	
	)	Nos. 18-73097
NATIONAL LABOR RELATIONS BOARD,	)	18-73305
)	
Respondent/Cross-Petitioner,	)	Board Case Nos.
	)	20-CA-176434
DISTRICT COUNCIL 16 OF THE	)	32-CA-180490
INTERNATIONAL UNION OF PAINTERS)	
AND ALLIED TRADES,)	
)	
Intervenor for Respondent/Cross-Petitioner.)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its brief contains 10,282 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word for Office 365. The Board also certifies that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program. The Board further certifies that the paper copy of its brief is identical to the electronic version filed in PDF format.

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

Dated at Washington, DC
this 11th day of July 2019

STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS

National Labor Relations Act (“the Act”), 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 8(d) (29 U.S.C. § 158(d))	i
Section 10(e) (29 U.S.C. § 160(e))	ii
Section 10(f) (29 U.S.C. § 160(f))	ii

Labor Management Relations Act of 1947, 29 U.S.C. § 141, et seq.

Section 302(a)-(c) (29 U.S.C. § 186(a)-(c))	iii-vi
---	--------

Pension Protection Act of 2006, 29 U.S.C. § 1082, et seq.

Section 202(a)(2)(A) (29 U.S.C. § 1085(a)(2)(A))	vi
Section 202(e)(1) (29 U.S.C. § 1085(e)(1))	vii
Section 202(e)(3)(A)(i) (29 U.S.C. § 1085(e)(3)(A)(i))	viii
Section 202(e)(3)(C)(i) (29 U.S.C. § 1085(e)(3)(C)(i))	viii

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

Section 4044(d)(1) (29 U.S.C. § 1344(d)(1))	ix
---	----

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(d) of the Act (29 U.S.C. § 158(d)) provides in relevant part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(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.

(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 a 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. 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.

THE LABOR MANAGEMENT RELATIONS ACT

29 U.S.C. § 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment

which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for

preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

THE PENSION PROTECTION ACT

29 U.S.C. § 1085 Additional funding rules for multiemployer plans in endangered status or critical status

(a) General rule

For purposes of this part, in the case of a multiemployer plan in effect on July 16, 2006—

* * *

(2) if the plan is in critical status--

(A) the plan sponsor shall adopt and implement a rehabilitation plan in accordance with the requirements of subsection (e), . . .

* * *

(e) Rehabilitation plan must be adopted for multiemployer plans in critical status

(1) In general

In any case in which a multiemployer plan is in critical status for a plan year, the plan sponsor, in accordance with this subsection--

(A) shall adopt a rehabilitation plan not later than 240 days following the required date for the actuarial certification of critical status under subsection (b)(3)(A), and

(B) within 30 days after the adoption of the rehabilitation plan--

(i) shall provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to emerge from critical status in accordance with the rehabilitation plan, and

(ii) may, if the plan sponsor deems appropriate, prepare and provide the bargaining parties with additional information relating to contribution rates or benefit reductions, alternative schedules, or other information relevant to emerging from critical status in accordance with the rehabilitation plan.

The schedule or schedules described in subparagraph (B)(i) shall reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status. One schedule shall be designated as the default schedule and such schedule shall assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under section 1054(g) of this title) have been reduced to the maximum extent permitted by law.

* * *

(3) Rehabilitation plan

For purposes of this section--

(A) In general

A rehabilitation plan is a plan which consists of--

(i) actions, including options or a range of options to be proposed to the bargaining parties, formulated, based on reasonably anticipated experience and reasonable actuarial assumptions, to enable the plan to cease to be in critical status by the end of the rehabilitation period and may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties, or any combination of such actions, or . . .

* * *

(C) Imposition of schedule where failure to adopt rehabilitation plan

(i) Initial contribution schedule

If--

(I) a collective bargaining agreement providing for contributions under a multiemployer plan that was in effect at the time the plan entered critical status expires, and

(II) after receiving one or more schedules from the plan sponsor under paragraph (1)(B), the bargaining parties with respect to such agreement fail to adopt a contribution schedule with terms consistent with the rehabilitation plan and a schedule from the plan sponsor under paragraph (1)(B)(i),

the plan sponsor shall implement the schedule described in the last sentence of paragraph (1) beginning on the date specified in clause (iii).

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

29 U.S.C. § 1344 Allocation of assets

* * *

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

- (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
- (B) the distribution does not contravene any provision of law, and
- (C) the plan provides for such a distribution in these circumstances.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DELTA SANDBLASTING COMPANY, INC.,)	
)	
Petitioner/Cross-Respondent,)	
)	
v.)	
	)	Nos. 18-73097
NATIONAL LABOR RELATIONS BOARD,	)	18-73305
)	
Respondent/Cross-Petitioner,	)	Board Case Nos.
	)	20-CA-176434
DISTRICT COUNCIL 16 OF THE	)	32-CA-180490
INTERNATIONAL UNION OF PAINTERS)	
AND ALLIED TRADES,)	
)	
Intervenor for Respondent/Cross-Petitioner.)	

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit

David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 11th day of July 2019