

Nos. 17-1239, 18-1093

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

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

REBECCA JOHNSTON
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2948
(202) 273-1066

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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

MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	Nos. 17-1239 & 18-1093
Petitioner/Cross-Respondent)	
)	
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CA-135971
)	08-CA-136613
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Petitioner/Cross-Respondent Midwest Terminals of Toledo International, Inc. (“Midwest”) was the Respondent before the Board in the underlying proceeding (Board Case Nos. 08-CA-135971 and 08-CA-136613). The Board’s General Counsel was a party before the Board. Don Russell and International Longshoremen’s Association, Local 1982, AFL-CIO, were the charging parties before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Midwest on December 15, 2017, and reported at 365 NLRB No. 159. (JA 1-18.)

C. Related Cases

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

The parties are involved in two separate unfair-labor-practice cases currently pending before the Court: *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (reviewing 365 NLRB No. 157), and *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 17-1238 & 18-1094 (reviewing 365 NLRB No. 158). The Court has ordered that these cases, and the instant case (Nos. 17-1239 & 18-1093), will be calendared for oral argument on the same day before the same panel.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 24th day of August 2018

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GLOSSARY

The Act	The National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
The Board	The National Labor Relations Board
Br.	Opening Brief of Petitioner/Cross- Respondent Midwest Terminals of Toledo International, Inc.
CR/cr	Crane operator
JA	Joint Appendix
Midwest	Midwest Terminals of Toledo International, Inc.
<i>Midwest I</i>	<i>Midwest Terminals of Toledo Int'l, Inc.</i> , 365 NLRB No. 157 (Dec. 15, 2017), <i>pending on review</i> , D.C. Cir. Nos. 18-1017 and 18-1049
<i>Midwest II</i>	<i>Midwest Terminals of Toledo Int'l, Inc.</i> , 365 NLRB No. 158 (Dec. 15, 2017), <i>pending on review</i> , D.C. Cir. Nos. 17-1238 and 18-1094
NCCCO	National Commission for the Certification of Crane Operators
The Order	<i>Midwest Terminals of Toledo Int'l, Inc.</i> , 365 NLRB No. 159 (Dec. 15, 2017)
The Union	International Longshoremen's Association, Local 1982
SA	Supplemental Appendix
SG/sg	Signalperson

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Midwest Terminals of Toledo International, Inc. (“Midwest”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board

Decision and Order issued against Midwest on December 15, 2017, and reported at 365 NLRB No. 159. (JA 1-18.)¹

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction because the Board’s Order is final, and venue is proper under Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review may be filed in this Court, and, in turn, that the Board may cross-apply for enforcement. The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that Midwest violated Section 8(a)(5) and (1) of the Act by departing from the selection criteria required by the parties’ collective-bargaining agreement when it added employees to the “skilled list,” which determines how much they work, in April 2014, and by unilaterally discontinuing its established practice of meeting and

¹ Record references in this brief are to the Joint Appendix (“JA”) filed by Midwest on July 9, 2018. “SA” refers to the Supplemental Appendix filed with this brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to Midwest’s opening brief.

conferring with the International Longshoremen's Association, Local 1982 ("the Union") before selecting employees to add to the skilled list.

2. Whether substantial evidence supports the Board's finding that Midwest violated Section 8(a)(3) and (1) of the Act when it discriminatorily denied employee Fred Victorian Jr. placement on the skilled list.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

The attached Addendum contains the pertinent statutory and regulatory provisions.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After investigating timely charges of unfair labor practices, the Board's Acting Regional Director issued complaint on behalf of the General Counsel alleging that Midwest violated the Act. (JA 661-68.) Following a hearing, an administrative law judge issued a decision and recommended order finding several of the alleged unfair labor practices. (JA 3-18.) Specifically, the judge found that Midwest violated Section 8(a)(5) and (1) of the Act by unilaterally departing from the selection criteria for the skilled list set forth in the collective-bargaining agreement, and by unilaterally discontinuing the established practice of meeting and conferring with the Union before adding employees to the skilled list. (JA 12-13, 16-17.) The judge further found that Midwest violated Section 8(a)(3) and (1)

of the Act by discriminatorily denying a qualified employee placement on the skilled list. (JA 13-14, 16-17.) The judge dismissed the remaining allegations. (JA 16.) On review, the Board affirmed the judge's findings with slight modification. (JA 1-3 & n.1 & n.2.)

II. THE BOARD'S FINDINGS OF FACT

A. Background

Since 2004, Midwest has provided stevedoring and warehousing services at the Port of Toledo in Toledo, Ohio. (JA 4; JA 844, SA 1, 5.) Its business involves loading and unloading cargo from vessels and trucks and warehousing product at the port facility. (JA 4; JA 681, SA 2, 5, see JA 843-71.)

The Union has represented employees at the port facility for decades. (JA 4; SA 2-3.) From approximately April 2010 through summer 2012, the Union was placed in trusteeship, and officials of umbrella labor organizations served as trustees. (JA 4; JA 119, 893.) Thereafter, local leadership resumed control, with Otis Brown as local president of the Union. (JA 4; JA 418, 893.) At the time of the hearing, the Union and Midwest were operating under the terms of an expired collective-bargaining agreement effective January 1, 2006, through December 31, 2010. (JA 4; JA 830, 843-71.)

The Union represents a unit of approximately 36 individuals who are responsible for loading and unloading trains, trucks, and vessels and performing

warehouse work in the dock area. (JA 4; JA 502, 844.) In performing their work, they operate a variety of equipment, including chutes, forklifts, endloaders, and cranes. (JA 4; JA 681, SA 2, 4, 6.)

B. In Two Separate Proceedings, the Board Finds that Midwest Has Repeatedly Violated the Act

Historically, Midwest has had a contentious relationship with the Union. Two prior Board proceedings against Midwest culminated in findings that it committed numerous unfair-labor-practice violations between summer 2008 and October 2013. (JA 1 n.1, 4-5.) Specifically, the Board found that Midwest unlawfully discriminated against employee Brown by refusing to assign him work and certain light-duty assignments, and that Director of Operations Terry Leach made antiunion threats and physically assaulted a union steward because of his union and/or protected concerted activity. *Midwest Terminals of Toledo Int'l, Inc.*, 362 NLRB No. 57 (2015), *vacated and remanded*, 2017 WL 5662235 (D.C. Cir. 2017), *aff'd on remand* 365 NLRB No. 157 (Dec. 15, 2017), *pending on review*, D.C. Cir. Nos. 18-1017 and 18-1049 (hereinafter “*Midwest I*”).

In a subsequent decision, the Board found that Midwest discriminatorily discharged Brown because of his union activities and for participating in the Board’s processes, unlawfully threatened a union steward and discriminatorily denied him pay, and made numerous unilateral changes to unit members’ terms and conditions of employment without first notifying the Union and giving it an

opportunity to bargain. *Midwest Terminals of Toledo Int'l, Inc.*, 365 NLRB No. 158 (Dec. 15, 2017), *pending on review*, D.C. Cir. Nos. 17-1238 and 18-1094 (hereinafter “*Midwest II*”). (JA 709-45.)²

C. Midwest’s “Skilled List” of Employees with Selection Criteria Set Forth in the Collective-Bargaining Agreement

To assign work, Midwest maintains an “Order of Call” document, which lists all unit employees in order of seniority and notes whether each employee is qualified to perform a specific type of work. (JA 5; JA 220, 490-504.) The Order of Call designates each employee into one of three categories: skilled, regular, or casual/new hires. (JA 5; JA 120, 266, 490-504.) Midwest issues the Order of Call in April—the beginning of the shipping season. (JA 105, 122, 266-67, 847.)

The employees on the skilled list typically work more hours than those on the regular list—effectively full time when the port is busy. (JA 5, 12; JA 138-39, 356, 746, 773, 923.) Skilled-list employees are not guaranteed work every day, but they are offered work before regular-list employees, as long as they are qualified for a particular job. (JA 5; JA 356, 746, 773-74, 815-16, 845-46.) Regular-list

² During the hearing, the General Counsel moved to consolidate the instant case with *Midwest II*, which was pending before the same administrative law judge. (JA 3-4.) The Deputy Chief Administrative Law Judge denied the motion, but directed the judge to consider the record in *Midwest II* and “take into account his credibility resolutions drawn from [that] record” in deciding the instant case. (JA 3-4; JA 679-80.)

employees, in contrast, are only offered work when no qualified skilled-list employee is available for a particular job. (JA 5, 12; JA 746, 773-74, 845-46.) As of April 27, 2014, the skilled list had eight employees, notwithstanding language in the collective-bargaining agreement stating that “[t]he Company recognizes a need for twelve (12) skilled employees.” (JA 5; JA 223, 498-504, 849.)

Pursuant to the collective-bargaining agreement, a regular-list employee is eligible for placement on the skilled list if he is qualified in at least four out of five of the following job categories: crane operator, checker, power operator (forklift and/or endloader), signalperson, and hatch leader.³ (JA 5-6; JA 139, 271, 773, 845.) Except for hatch leader, those qualifications are designated by placing two

³ The relevant provision of the contract reads:

5.2.1 Skilled Employees

A. The Company shall employ a core group of employees experienced in longshoreman and warehousing work known as “skilled employees.” These employees will be qualified in four (4) or more of the following job classifications: crane operator, checker, power operator, signal man, and hatch leader. This group (skilled employees) shall include those individuals named on the “Skilled List” which is attached hereto as Exhibit “A” and the Company will first hire skilled employees for available work. These qualification provisions will not apply to individuals on the skilled list as of the effective date of this contract

(JA 845.)

letters on the Order of Call next to an employee's name: cr (crane operator), ch (checker), fl/el (forklift/endloader), and sg (signalperson). (JA 5-6; JA 143-44, 229, 316, 339-40, 490-504.) Lowercase letters signify that an individual needs additional training in that category, but Midwest still considers that individual qualified in that category for purposes of skilled-list eligibility. (JA 5; JA 222, 339-40, 490-504.)

Additionally, per the contract, "seniority will control" when choosing among employees whose qualifications are "relatively equal."⁴ (JA 6, 12; JA 848-49.) Seniority for the regular list is determined by the number of hours an employee worked the prior shipping season whereas seniority for the skilled list is determined by date of hire. (JA 154, 266-67, 327, 819-20, 848.)

⁴ The relevant provision of the contract reads:

6.2 For the purpose of this Agreement, qualifications, abilities and seniority shall be applicable and applied as follows:

A. To fill vacancies on the Skilled List

* * *

C. If the qualifications and abilities of two (2) or more individuals are relatively equal, seniority will control.

(JA 848-49.)

Two of the five skilled-list categories are relevant to the disposition of this case and require further explanation: signalperson and hatch leader. (JA 5-8.)

1. A lowercase “sg” designation on the Order of Call indicates a qualified signalperson for skilled-list eligibility

A signalperson directs and provides assistance to the crane operator from a point outside the crane. (JA 5; JA 152-53.) Midwest used to provide on-the-job crane and signal training to determine whether individuals were qualified in those categories. (JA 5; JA 153, 215-16, 231-32.) In 2010, however, Midwest began using Liebherr cranes, owned by the Port of Toledo, and phasing out operation of its own Gantry and Lucas cranes. (JA 5 & n.5; JA 215-16, 231-33.) As of early 2014, Midwest no longer operated the older cranes. (JA 5 & n.5; JA 769.) The Port of Toledo requires that employees be certified by the National Commission for the Certification of Crane Operators (“NCCCO”) to operate and signal for the new Liebherr cranes. (JA 5; JA 215-16, 231-34, 931-32.) A number of Midwest employees attended third-party training and tested to become NCCCO certified as crane operators and signalpersons. (JA 5; JA 618-29.)

If an individual has passed the NCCCO signal training, he receives an uppercase “SG” designation on the Order of Call, and is capable of signaling for any of the cranes used by Midwest. (JA 5; JA 143, 279-80, 339-40.) If an individual was previously qualified as a signalperson but either did not take the NCCCO test or failed it, he maintains his lowercase “sg” designation on the Order

of Call. (JA 5; JA 143, 339-40.) As with the other qualifications, an employee with a lowercase “sg” designation is nevertheless qualified in that category for purposes of meeting the contractual selection criteria for the skilled list. (JA 5 & n.6; JA 339-40, see 279-80.)

2. An individual is qualified as a hatch leader if Midwest has assigned him to that position in the past

The hatch leader is a unit member responsible for leading a team of eight to fifteen unit employees in loading or unloading the hatch of a vessel. (JA 6; JA 145-46, 226, 358-59.) Management chooses hatch leaders based on their experience and ability to command respect from other unit members. (JA 6; JA 146-47, 226-27, 341, 358-60.) Although there is on-the-job training, there is no formal hatch-leader training and no documentation of which employees are qualified hatch leaders. (JA 6; JA 144-46, 226-28.) Nevertheless, if Midwest has assigned an individual to the hatch leader position in the past, then it considers that person a qualified hatch leader for purposes of skilled-list eligibility. (JA 6, 7; JA 229-30, 340-41.)

D. Midwest’s Established Past Practice Is To Meet and Confer with the Union Before Adding Employees to the Skilled List

Before April 2014, Midwest’s practice was to meet with the Union and confer before adding employees to the skilled list. (JA 5, 6, 12-13; 93-94, 106, 108-113, 221, 224-25, 318-20, 323-24, 329-32, 346-47, 355, 403-07, 414, 682,

684, 893, 896, 922-23, see 831.) In October 2012, Midwest’s Human Resources Manager Christopher Blakely wrote a memorandum to the Union documenting that “[t]he past practice, when fil[ling] vacancies on the Skilled List . . . consistently employed by [Midwest] is to seek the union’s input prior to filling a Skilled List vacancy.” (JA 893, see JA 6, 13.) Local Union President Brown’s understanding of the parties’ past practice is consistent with that writing. (JA 6; JA 221, 224-25, 403-07.)

Indeed, in 2011, the last time Midwest added to the skilled list, Midwest conferred with the Union before adding Brown, who needed to be persuaded to join the list. (JA 7; JA 355, 403-07.) And in 2012 and/or 2013, Midwest discussed with the Union the possibility of adding employee John Murphy. (JA 6, 7; JA 318-20, 329-32, 346-47, 408-10, 541, 690, 891-98.) The parties reached a compromise about Murphy, however, and ultimately Midwest added no employees to the skilled list in either 2012 or 2013.⁵ (JA 7; JA 330, 346-47, 410, 541, 690.)

⁵ Additionally, during trusteeship, Midwest and the Union met before the 2011 and 2012 shipping seasons to generate the skilled lists for the upcoming seasons. (JA 6; JA 328-29.)

E. In April 2014, Midwest Adds Two Employees to the Skilled List Without Meeting and Conferring with the Union and Without Adhering to the Contract's Selection Criteria

In April 2014, Midwest added Ricardo Canales and Joseph Victorian Jr. to the skilled list. (JA 7; JA 502.) Midwest gave the Union no notice and no opportunity to meet and confer before adding them to the list.⁶ (JA 7, 13; JA 140-41, 223-25, 313, 350, 399, 553-54.) Canales and J. Victorian Jr. were the first additions to the skilled list since Brown in 2011. (JA 7; JA 123, 490-504, 552.) Other than Canales's filling in as a union steward on a few occasions, neither was particularly active in the Union. (JA 8; JA 212-13.)

Although Canales was qualified for placement on the skilled list in April 2014, J. Victorian Jr. was not. (JA 8, 12.) Canales was the second most senior employee on the regular list who was qualified for placement on the skilled list. (JA 8; JA 501-02.) He was qualified in four categories: signalperson for all cranes (uppercase "SG" designation given his certification), checker, power operator (forklift), and hatch leader. (JA 8; JA 501-02.) J. Victorian Jr., however, not only had less seniority than other men who were qualified for the skilled list, but he also

⁶ Two employees in this case have the surname Victorian: Fred Victorian Jr. and Joseph Victorian Jr. They will be distinguished by their first initial. Additional individuals with that surname (*e.g.*, Joseph Victorian Sr.) worked at Midwest and appear on the Order of Call in the record, but play no role in this case. (JA 8 n.14.)

failed to meet the contractual selection criteria. (JA 8; JA 501-02.) J. Victorian Jr. only qualified in three categories: crane operator for the older, phased-out cranes (lowercase “cr” designation), power operator (forklift and endloader), and hatch leader. (JA 8, 12; JA 235, 501-02.)

In adding Canales and J. Victorian Jr. to the skilled list, Midwest bypassed two qualified individuals: Don Russell and F. Victorian Jr. (JA 7, 13.) At the time of the additions, Russell was the most senior employee on the regular list who was eligible for placement on the skilled list.⁷ (JA 7; JA 501-02.) Russell was qualified as a signalperson (lowercase “sg” designation), checker, and power operator (forklift). (JA 7; JA 150-52, 218, 258, 501-02.) Additionally, he was a qualified hatch leader, as Midwest had assigned him to that position for a year or two in 2009 or 2010. (JA 7; JA 144, 146-48, 227, 361.)

F. Victorian Jr. was also qualified for the skilled list. (JA 7; JA 501-02, 682.) He was the third most senior, qualified employee after Russell and Canales. (JA 8; JA 501-02.) He was a qualified signalperson (lowercase “sg” designation), checker, and power operator (forklift). (JA 8; JA 218, 257-58, 410-11, 501-02, 682, 921-22.) He was also a qualified hatch leader. (JA 8; JA 226-27, 362, 682.)

⁷ The most senior regular-list employee was not eligible for the skilled list. (JA 7; JA 501-02.)

The following chart summarizes the four employees' qualifications and seniority:

Employee	Qualifications	Seniority (Among Eligible Employees)	Added to Skilled List in April 2014?
Canales	1. signalperson for all cranes (uppercase "SG") 2. checker 3. power operator (forklift) 4. hatch leader	Second	Yes
J. Victorian Jr.	1. crane operator for phased-out cranes (lowercase "cr") 2. power operator (forklift and endloader) 3. hatch leader	Fourth	Yes
Russell	1. signalperson (lowercase "sg") 2. checker 3. power operator (forklift) 4. hatch leader	First	No
F. Victorian Jr.	1. signalperson (lowercase "sg") 2. checker 3. power operator (forklift) 4. hatch leader	Third	No

F. F. Victorian Jr. Is Active in the Union; Leach Threatens Him in Response to His Protected Activity in June 2013

Up until his death in November 2014, F. Victorian Jr. was active in the Union. (JA 7-8, 13; JA 681-89, 921-29.) He was appointed union steward in 2012 or 2013 and elected union steward in 2014. (JA 7, 13; JA 210-11, 412-13.) He was also a union trustee, filed grievances, and challenged Midwest regarding

contract violations. (JA 7, 13; JA 208, 211, 225, 891-905, 922-26, 929.) From June 2012 through 2013, he consistently filed grievances and wrote letters to Leach, Blakely, and President Alex Johnson concerning his eligibility for and desire to be placed on the skilled list. (JA 683-87, 891-98, 922-26.)

On June 1, 2013, F. Victorian Jr. and several other employees engaged in a work stoppage to protest a jurisdictional dispute with the Teamsters at the port facility. (JA 7-8, 14; JA 687-88, 751-62, 926-27.) Unit members met in Leach's office where F. Victorian Jr. and Leach had a heated verbal exchange regarding Leach's interpretation of the jurisdictional dispute. (JA 7-8, 14; JA 687-88, 757-60, 926-27.) F. Victorian Jr. emphatically stated that the Teamsters were not permitted to enter the Union's side of the dock with their forklifts. (JA 687-88, 760, 927.) Leach responded by gesturing toward F. Victorian Jr. with two fingers spread about two inches apart and threatened, "I'm about this far off your ass." (JA 1 n.1, 7-8, 14; JA 688, 760-61, 927.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 15, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) affirmed the administrative law judge's finding that Midwest violated Section 8(a)(5) and (1) of the Act by unilaterally departing from the selection criteria for the skilled list set forth in the applicable collective-bargaining agreement when it added employees to the list and by unilaterally

changing the established practice of meeting and conferring with the Union before selecting employees to add to the skilled list. (JA 1-2, 16.) The Board (Chairman Miscimarra, concurring) also affirmed the judge’s finding that Midwest violated Section 8(a)(3) and (1) of the Act by discriminatorily denying F. Victorian Jr. placement on the skilled list. (JA 1& n.1, 2, 16.)

The Board’s Order directs Midwest to cease and desist from the unfair labor practices found and from “[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act,” 29 U.S.C. § 157. (JA 1.) Affirmatively, the Order requires Midwest, among other things, to: notify and, on request, bargain with the Union before implementing changes to unit employees’ terms and conditions of employment, rescind changes it unilaterally implemented in April 2014 concerning the criteria for inclusion on the skilled list and the established practice of meeting and conferring with the Union before adding employees to the skilled list, make Russell and the estate of F. Victorian Jr. whole for any loss of earnings and other benefits suffered as a result of Midwest’s failure to add them to the skilled list, and post a remedial notice.⁸ (JA 1-2, 13.)

⁸ The Board included both Russell and F. Victorian Jr. in its make-whole relief, even though Canales was qualified for the skilled list and had more seniority than F. Victorian Jr. As the Board reasonably found, Midwest “has not asserted that it

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s findings that Midwest—a repeat offender—once again violated Section 8(a)(5), (3), and (1) of the Act. The unfair-labor-practice violations in this case all stem from Midwest’s decision in April 2014 to elevate two unit members to its skilled list of employees—effectively reassigning them from part-time to full-time work. In doing so, Midwest unilaterally departed from both the contractual selection criteria for the skilled list and its established practice of meeting and conferring with the Union before making any additions. Midwest also discriminatorily passed over a qualified employee—F. Victorian Jr.—because he engaged in protected union activity.

The Board reasonably found that Midwest’s unilateral changes to the selection criteria and procedure for adding to the skilled list violated Section 8(a)(5) and (1) of the Act. Midwest added an employee to the skilled list who was not qualified in the minimum four job categories required by the contract. Midwest did not follow the contract’s seniority provision when adding employees with relatively equal qualifications. And Midwest departed from its established

would have limited its selections to two employees if it had not improperly disqualified F. Victorian from consideration.” (JA 13.) Midwest does not contest this finding.

practice of meeting and conferring with the Union before adding individuals to the list.

Midwest's factual challenges to these findings do not provide a valid basis for the Court to disturb them. At most, Midwest suggests alternative inferences that the Board might have drawn from the evidence and invites the Court to overturn the Board's well-reasoned credibility findings. Also, Midwest's claim that the administrative law judge erred in making two evidentiary rulings, which purportedly relate to the Board's past-practice finding, is wholly without merit. Not only is the relevance of the excluded evidence questionable, at best, but both rulings were well within the factfinder's discretion.

Midwest's affirmative defenses to the unilateral-change violations—untimeliness and waiver—are equally unpersuasive. Both defenses rely on the mistaken premise that the Union somehow intuited the unilateral changes before Midwest implemented them. Substantial evidence supports the Board's finding that Midwest failed to show that the Union was on notice of any changes before Midwest added the two employees to the skilled list in April 2014. Thus, the Union could have neither filed a charge nor requested bargaining over the unilateral changes earlier.

Finally, the Board reasonably found that Midwest violated Section 8(a)(3) and (1) of the Act when it discriminatorily denied F. Victorian Jr. placement on the

skilled list because he engaged in protected union activity. Midwest was well aware that F. Victorian Jr. was especially active in the Union. And Midwest's unlawful motivation is amply evidenced by Leach's threatening F. Victorian Jr.—“I'm about this far off your ass”—in response to his union activity and by its numerous prior unfair-labor-practice violations. Midwest's unpersuasive challenges to the substantial evidence of unlawful motivation are either not properly before the Court or premised on a misunderstanding of the violation found by the Board, and its asserted defense—that F. Victorian Jr. was not qualified for the skilled list—was reasonably rejected by the Board.

STANDARD OF REVIEW

The Board's factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted). This Court will accept credibility determinations made by the administrative law judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MIDWEST VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN IT ADDED CANALES AND J. VICTORIAN JR. TO THE SKILLED LIST WITHOUT MEETING AND CONFERRING WITH THE UNION

A. An Employer Violates Section 8(a)(5) and (1) of the Act When It Makes Unilateral Changes to Mandatory Subjects of Bargaining Without Giving the 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)). An employer that makes unilateral changes to mandatory subjects of bargaining, without giving the union notice and an opportunity to bargain, violates Section 8(a)(5) and (1) of the Act.⁹ *Id. Accord Consol. Commc’ns, Inc. v. NLRB*, 837 F.3d 1, 19 (D.C. Cir. 2016). Indeed, the Supreme Court has held that such a unilateral change

⁹ 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). *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 n.2 (D.C. Cir. 2015).

constitutes “a circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal [to bargain].” *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The “unilateral change doctrine extends to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017) (internal quotation marks and citation omitted). The terms of that agreement remain in effect by operation of law. *Litton*, 501 U.S. at 206-07. *Accord Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001). 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; *Honeywell*, 253 F.3d at 131. The prohibition on unilateral changes also applies to established past practices, even if they are not set forth in a collective-bargaining agreement. *Pub. Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1008 (D.C. Cir. 2016).

An employer’s “assignment of work affects terms and conditions of employment, and therefore is a mandatory bargaining subject.” *Antelope Valley Press*, 311 NLRB 459, 460 (1993). *Accord Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474-75 (D.C. Cir. 1988).

B. The Board Reasonably Found That Midwest Violated Section 8(a)(5) and (1) of the Act by Unilaterally Changing the Selection Criteria and Procedure for Adding Employees to the Skilled List

Substantial evidence supports the Board’s finding that Midwest violated the Act when it “unilaterally departed from both the [established] criteria and procedure” in adding Canales and J. Victorian Jr. to the skilled list in April 2014.

(JA 12.) The Board reasonably found, and Midwest does not dispute, that selection of employees for the skilled list is a mandatory subject of bargaining, as it effectively reassigns individuals from part-time to full-time work and “substantially, materially and significantly [] affects unit employees’ wages and hours.” (JA 12.)

As shown below, Midwest presents no valid basis for the Court to disturb the Board’s well-supported findings. At most, Midwest suggests alternative inferences that the Board might have drawn from the evidence, which is not enough. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 81 (D.C. Cir. 2015) (“The question before the court thus ‘is not whether’ [the employer’s] ‘view of the facts supports its version of what happened, but rather whether the’ Board’s ‘interpretation of the facts is reasonably defensible.’” (citation omitted)).

Moreover, Midwest’s version of events primarily relies on testimony from Leach, a witness emphatically discredited by the Board. (JA 5, 718 n.3.) The Board fully explained its reasons for discrediting Leach, both in this case and in

Midwest II. (JA 4, 5, 718 n.3; see JA 679-80.) For example, the Board found in *Midwest II* that Leach was “unusually evasive,” “self-contradictory,” and exhibited behavior on the stand that “bordered on bizarre.” (JA 718 n.3 (citing JA 766-67, 772, 826-29, 832-42).) As the Board reasonably found, Leach “continued to exhibit those tendencies when he took the stand” in this case. (JA 5.) In particular, he only “grudgingly” admitted that Midwest’s past practice is to first discuss skilled-list additions with the Union after the General Counsel confronted him with his prior testimony to that effect from *Midwest I*. (JA 106-13.) Midwest utterly fails to show the Court, as it must, that the Board’s credibility findings are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Ozburn–Hessey*, 833 F.3d at 217.

1. Midwest failed to bargain with the Union before departing from the contractual selection criteria for the skilled list

Midwest violated the Act when it departed from the contractual selection criteria for the skilled list in April 2014 without providing notice to the Union or an opportunity to bargain. (JA 12.) Under the collective-bargaining agreement, a regular-list employee is eligible for placement on the skilled list only if he is qualified in at least four out of five specified job categories. When two employees have “relatively equal” qualifications, seniority breaks the tie. (JA 849.) Midwest, however, contravened those clear selection criteria in adding Canales and J. Victorian Jr. to the list in April 2014. J. Victorian Jr. not only lacked four

qualifications, but he also had less seniority than passed-over individuals who met that contractual requirement (Russell and F. Victorian Jr.). And, although Canales did have four of the five specified qualifications, he too had less seniority than Russell, a “relatively equal” individual with four qualifications.

In challenging the Board’s finding that Midwest departed from the contractual selection criteria for the skilled list, Midwest focuses solely on the qualifications of the two employees it passed over: Russell and F. Victorian Jr. (Br. 26-34). It does not, however, meaningfully challenge the Board’s finding that it departed from the contractual selection criteria in adding J. Victorian Jr.—an employee with just three skilled-list qualifications. The Board explicitly rejected (JA 8 & n.14) Midwest’s claim, hastily repeated here (Br. 26), that J. Victorian Jr. was a qualified signalperson and thus qualified in four categories.¹⁰ Instead, the Board found compelling documentary evidence—the Orders of Call issued both before and after his placement on the list—showing that he was neither a qualified signalperson nor qualified in four categories total. As the Board reasonably found,

¹⁰ Midwest fails to meaningfully challenge this issue in its opening brief and therefore waives its ability to do so. See *New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); Fed. R. App. P. 28(a)(8)(A). “It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.” *Id.* (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n. 1 (D.C. Cir. 2005)).

“J. Victorian is listed as lacking the signal person qualification on all five of the order of call lists that [Midwest] issued leading up to J. Victorian’s placement on the skilled list, as well as on the order of call lists issued subsequent to his placement on the skilled list.” (JA 8 & n.13 & n.14; see JA 490-504.) Thus, notwithstanding Russell and F. Victorian Jr.’s qualifications, Midwest unilaterally departed from the contractual selection criteria in adding J. Victorian Jr. to the list. With respect to Canales, Midwest does not dispute that he had less seniority than Russell, who was also qualified for addition to the skilled list, and thus it also departed from the contractual selection criteria with his addition.

Midwest’s attempts to attack Russell and F. Victorian Jr.’s qualifications (Br. 26-34) are equally unpersuasive.¹¹ To start, the Board’s finding that Russell and F. Victorian Jr. were qualified signalpersons with lowercase “sg” designations on the Orders of Call is well supported. (JA 5 n.6, 7-8 & n.12.) The Board credited Blakely’s unequivocal testimony that Midwest considers individuals with lowercase designations qualified in that category for purposes of meeting the contractual selection criteria. (JA 5 n.6; JA 339-40.) And the Board considered,

¹¹ Contrary to Midwest’s assertion (Br. 27-28), there is no evidence that the Union took the position that Russell was not qualified for the skilled list in 2013. (See JA 255-57.) Furthermore, he was arguably more “qualified” for elevation to the skilled list in 2014 because he had more seniority that year than in 2013. (JA 256-57, 496-504.)

but rejected, Leach’s testimony (JA 394-95) that Midwest only considers signalpersons with a lowercase “sg” designation qualified for the skilled list if they have never taken NCCCO training, not if they have taken NCCCO training but failed to pass the test. The Board found that not only was Leach a less credible witness than Blakely overall, but that his testimony on this point was “self-serving” and made no sense. Leach could provide no explanation for his illogical claim that a previously qualified signalperson who has never taken the NCCCO signal training is somehow *more* qualified than one who has taken the training, but has not passed the test.¹² (JA 5 & n.6.)

In arguing that Blakely, its Human Resources Manager, should not be believed on this point (Br. 28-29), Midwest attempts to downplay his knowledge about skilled-list qualifications, despite its introducing evidence to show that he

¹² The administrative law judge noted that Midwest provided no support for Leach’s off-the-cuff claim that this illogical position was required by the Occupational Safety and Health Administration. (JA 5 n.6.) In response, Midwest belatedly asked the Board, and now asks this Court, to take judicial notice of 29 C.F.R. § 1926.1428. (Br. 14-15 n.4, see also Br. 27.) It raises that regulation too late. *See, e.g., Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996). In any event, the question here is not whether OSHA considers an employee qualified to signal; rather, the question is whether Midwest considers an employee qualified for its skilled list. And credited testimony from Midwest’s own witness confirmed that Midwest considers a previously qualified signalperson (with a lowercase “sg” on the Order of Call) qualified in that category for skilled-list purposes.

was well-informed and involved with that procedure. (See, e.g., JA 270-72, 279-80, 345, 541-42, 551, 893, 897-98.) Midwest does not even acknowledge, let alone challenge, the Board’s well-supported rationale for crediting Blakely over Leach. And it certainly has not showed, as it must, that Blakely’s testimony was “hopelessly incredible, self-contradictory, or patently unsupportable.” *Ozburn–Hessey*, 833 F.3d at 217.

The Board’s finding that Russell was a qualified hatch leader is also based on well-supported credibility findings. Midwest, however, spends many pages (Br. 29-34) arguing that the Board erred in crediting Russell’s testimony (JA 144) that he was a qualified hatch leader. But that was not the primary evidence the Board relied on in making this finding.¹³ The Board relied on testimony that Midwest had assigned Russell as a hatch leader in the past (JA 146-47, 226-27, 361-62), which Brown credibly testified (JA 229-30) is enough to qualify an individual as hatch leader for purposes of meeting the contractual selection criteria. The only record evidence to the contrary was Leach’s “at best, [] uncertain” denial that he considered Russell a qualified hatch leader. (JA 7; JA 361-62, see also

¹³ The Board mentioned that “Russell also testified that he was a qualified hatch leader.” (JA 7; JA 144.) That reference was proper, particularly considering it was corroborated by Brown’s credible testimony. *See Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001) (trier of fact may credit some but not all of a witness’s testimony especially with conflicts among witnesses).

370.) When asked if Russell was qualified, Leach stated, “[n]o, he hasn’t been a hatch leader in so long, *I don’t know that I would consider him qualified.*” (JA 362 (emphasis added), see also 370.) The Board reasonably considered but rejected Leach’s testimony as coming from a “witness with a demonstrated tendency to give self-serving, unreliable [] testimony,” uncorroborated, and outweighed by other credible evidence. (JA 7.)

2. Midwest unilaterally discontinued the established practice of meeting and conferring with the Union before adding employees to the skilled list

As for the procedure for adding employees to the skilled list, the Board reasonably found (JA 12-13) that Midwest unilaterally departed from its past practice of meeting and conferring with the Union before adding Canales and J. Victorian Jr. in April 2014. Indeed, the record contains ample evidence of that established practice.

To start, Midwest starkly acknowledged the practice in the October 2012 grievance memorandum Blakely sent to the Union. There he wrote: “The past practice, when fill[ing] vacancies on the Skilled List . . . consistently employed by the company is to seek the union’s input prior to filling a Skilled List vacancy. This was true before ILA Local 1982 was placed in trusteeship on April 23, 2010, it was true during the 27-month trusteeship, and the practice remains the same since August 7, 2012 when the company was officially informed that ILA Local

1982 had emerged from trusteeship.” (JA 893-94.) Further, Blakely conceded that he met with the Union to generate the list in preparation for the upcoming shipping seasons in 2011 and 2012 during the trusteeship. (JA 328-39.) Local Union President Brown’s testimony regarding the established practice aligns with Blakely’s memorandum. And Leach too admitted that Midwest’s past practice was to discuss skilled-list additions with the Union.

The most recent examples of Midwest’s skilled-list additions, or contemplated additions, adhere to the parties’ past practice. For example, Midwest conferred with the Union before adding Brown to the list in 2011. And Blakely admitted to meeting and conferring with the Union over possibly adding Murphy to the skilled list in 2012. In 2014, however, Midwest unilaterally departed from that well-established practice when it added Canales and J. Victorian Jr. to the list without first conferring with, or even notifying, the Union.

Midwest does not challenge the Board’s finding that it failed to meet and confer with the Union before adding Canales and J. Victorian Jr. to the skilled list. Instead, it claims that it had no such past practice—unpersuasively attempting to reframe and explain away the substantial record evidence relied on by the Board.

For example, Midwest concedes that it met with the Union to discuss the possible addition of Murphy, but claims that the Board should not have counted that as an example of its past practice because it was under “unique”

circumstances. (Br. 21-24.) Similarly, Midwest suggests that its interactions with the Union regarding Brown's addition in 2011 were unique and should not count because it was seeking the Union's help in persuading Brown, who was reluctant to join the skilled list. (Br. 24.) The Board, however, considered the "unusual wrinkles" in those two examples and reasonably found that they did "not detract from the compelling evidence that, prior to April 2014, [Midwest] had a practice of meeting with the Union to seek its input prior to selecting employees to add to the skilled list." (JA 7.) Indeed, Midwest's Human Resources Manager explicitly spelled out that practice in the memorandum he sent to the Union. Even if the latest two examples of skilled-list additions, or possible additions, arose in an unusual context, they do not negate that writing, which clearly confirmed the parties' established practice. And Midwest certainly does not show that the Board's interpretation of these facts is not "reasonably defensible." *Inova Health Sys.*, 795 F.3d at 81.

Additionally, Midwest's argument that Blakely's purported "one time" (Br. 21-23) interaction with the Union regarding Murphy is insufficient to establish a past practice is belied by its later concession that Leach admitted, more generally, that he has "'discussed' skilled list employee placement with the union" (Br. 23). That Leach and Blakely each admitted to discussing various skilled-list additions, or possible additions, with the Union (JA 93, 106, 108, 111-13, 318-20, 324, 329-

32, 346-47, 355, see 893, 896), but may have denied formally “bargaining” with the Union over them is a distinction without a difference.

Moreover, throughout its brief, Midwest appears to conflate the Board’s past-practice finding here with a peripheral issue—its purported practice of submitting a draft Order of Call and seniority list to the Union for review each year. (Br. 9-10, 21-26, 36, 44-51.) Midwest mistakenly suggests that evidence in the record—and other Board decisions (Br. 25-26, 51)—that may support the existence of that practice somehow preclude a finding that Midwest *also* has an established practice of meeting and conferring with the Union before adding qualified individuals to the skilled list. Midwest further tries to muddy the waters by disingenuously claiming (Br. 25) that Blakely was simply referencing the yearly draft Order of Call in his October 2012 memorandum to the Union. But the record does not support that claim. The memorandum unambiguously refers to Midwest’s “past practice” for “fil[l]ing vacancies on the Skilled List.” (JA 893, see 323-24.)

Midwest’s confusion about the Board’s past-practice finding also colors its challenges to two of the administrative law judge’s evidentiary rulings. (Br. 44-51.) As shown next, each of those rulings was well within the judge’s discretion. *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C. Cir. 2012) (stating that the Court reviews an administrative law judge’s evidentiary rulings for abuse of discretion); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 n.1 (D.C. Cir.

1998) (stating that “the decision of whether to draw an adverse inference has generally been held to be within the discretion of the fact finder”).

To start, Midwest claims that the judge erred in declining to draw an adverse inference from the General Counsel’s decision not to call the union trustees to testify about “the 2012 conversations they engaged in with Midwest regarding the Order of Call.”¹⁴ (Br. 44-46.) But Midwest fails to show how any purported conversations regarding the Order of Call would detract from the Board’s finding regarding its past practice for skilled-list additions, especially considering it did not end up adding any employees to the skilled list in 2012 or 2013.¹⁵ (See JA 13 n.25; JA 493-97.) Accordingly, it has shown no Board error. *See JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910 (8th Cir. 2004) (“The adverse inference rule requires the missing witness’s testimony be relevant and significant.”). Further, the General Counsel presented abundant evidence of the parties’ past practice regarding skilled-list additions through testimony from other witnesses, including Blakely (JA 318-20, 323-24, 329-32, 346-47), Leach (JA 93, 106, 108, 111-13,

¹⁴ Midwest briefly suggests (Br. 45-46) that the Board erred in failing to address the adverse inference in its decision. But “where the legal issue raised is insubstantial . . . the Board need not even specifically address an exception to the decision of an ALJ.” *Human Dev. Ass’n v. NLRB*, 937 F.2d 657, 669 (D.C. Cir. 1991) (citing cases).

¹⁵ Midwest did not add employees to the skilled list yearly, even when there were vacancies and/or qualified individuals. (JA 230, see JA 490-504.)

355), and *Brown* (JA 221, 224-25, 403-07, 414), and through documentary evidence that explicitly admitted the practice (JA 893, 896). She had no need to call the trustees to corroborate. And the judge had no obligation to draw an adverse inference from the absence of cumulative evidence. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1344 (D.C. Cir. 1972) (“[W]here a party has good reason to believe he will prevail without introduction of all his evidence, it would be unreasonable to draw any inference from a failure to produce some of it.”); *Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006) (finding adverse inference to be of little value where testimony is “essentially cumulative”).

Nor did the judge abuse his discretion, as Midwest claims, in granting the General Counsel’s motion to strike Midwest’s “supplemental authority”—which, rather than legal authority, consisted of a portion of a union trustee’s testimony from a subsequent unfair-labor-practice proceeding. (Br. 25, 46-51, see JA 6-7 n. 9.) Again, this testimony (quoted at Br. 46-47) does not detract from the Board’s past-practice finding. Rather than “establish[ing] that the parties do not and have not bargained over the selection of individuals for placement on the skilled list” (Br. 18), the trustee’s testimony simply suggests that Midwest had the Union verify employees’ seniority on Midwest’s yearly draft Order of Call. Moreover, the judge reasonably found that Midwest did not “provide[] any authority permitting

[him to] consider such testimony.” (JA 6-7 n. 9.) Midwest does not meaningfully address this finding, and waives its chance to do so. See *New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007), and cases cited at p. 24 n.10. In any event, although its pleading was styled as a “notice of supplemental authority,” Midwest only proffered extra-record evidence, months after the hearing closed and full briefing. Cf. *Reliant Energy*, 339 NLRB 66, 66 (2003) (allowing parties to “call to the Board’s attention pertinent and significant [legal] authorities that come to a party’s attention after the party’s brief has been filed”). The Board’s Rules do not permit consideration of post-hearing events and testimony not admitted into evidence because they are not part of the record in the administrative proceeding. *Electro-Tec, Inc.*, 310 NLRB 131, 131 n.1 (1993), enforced, 993 F.2d 1547 (6th Cir. 1993) (Table); *Today’s Man*, 263 NLRB 332, 333 (1982) (stating that “consideration of these [extra-record] documents would deny the parties the opportunity for *voir dire* and cross-examination, and would violate the Board’s Rules”). See 29 C.F.R. § 102.45(b) (listing contents of administrative record). Notably, Midwest did not even attempt to call the trustee to testify during the hearing. (JA 6-7 n.9.) Nor did it ask the Board or the judge to reopen the record or remotely show “that the new evidence would compel or persuade to a contrary result.” Cf. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275,

1285 n.10 (D.C. Cir. 1999) (finding administrative law judge did not abuse discretion in refusing to reopen record).

C. Midwest’s Remaining Timeliness and Waiver Defenses Are Unavailing

Midwest’s remaining challenges to the unilateral-change violations are easily disposed of. Both rely on the mistaken premise—reasonably rejected by the Board (JA 12-13, n.24 & n.25)—that the Union somehow intuited the unilateral changes before Midwest implemented them in April 2014.

First, the unfair-labor-practice charge was not barred by Section 10(b), 29 U.S.C. § 160(b), of the Act, as Midwest argues (Br. 35-38). Section 10(b) provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” *Id. See Veritas*, 671 F.3d at 1274. The party raising Section 10(b) as an affirmative defense bears the burden of showing that the charging party had “clear and unequivocal notice” of the violation outside that six-month period. *Vallow Floor Coverings, Inc.*, 335 NLRB 20, 20, 25 (2001). *Accord NLRB v. Pub. Serv. Elec. & Gas Co.*, 157 F.3d 222, 227 (3d Cir. 1998). “The Board’s interpretation of § 10(b), provided it is reasonable, is entitled to judicial deference.” *Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995). Here, the Board reasonably found that “the Union’s September 5, 2014[] charge was filed well-within the 6-month period following

[Midwest's] departure from the contractual criteria on April 27, 2014.” (JA 12-13 n.24.)

Before the Court, Midwest repeats its claim (Br. 35-38) that the Union was somehow on notice that Midwest had decided to unilaterally change the contractual selection criteria for the skilled list as early as October 2012—long before Midwest actually departed from the criteria. As the Board noted in rejecting Midwest's Section 10(b) defense, this claim contradicts Midwest's “consistent position, even as of the time of trial, that it *did not* change the selection criteria.” (JA 13 n.24 (emphasis in original).)

Moreover, in arguing that the Union's charge was untimely, Midwest mischaracterizes the Board's findings. (See Br. 38.) As discussed above, the Board found that Midwest departed from the contractual selection criteria in April 2014 in two ways: by adding an employee with less than four skilled-list qualifications and by filling vacancies without following seniority. (JA 12, see Br. 4.) Before the Board, and again here, Midwest points to no evidence that it clearly and unequivocally notified the Union that it was so changing the selection criteria before the April 2014 additions. At best, Midwest sent the Union mixed and indecipherable signals about particular employees it thought “qualified and

could be considered” (Br. 37) for the skilled list (or not).¹⁶ Those mixed messages do not mention Midwest’s purported decision to change the contractual selection criteria, or how it was doing so, and did not ultimately result in any additions to the skilled list. Thus, Midwest’s cited evidence does not constitute the type of “clear and unequivocal notice” of a violation that starts the Section 10(b) clock. As a result, the Board reasonably found (JA 12-13 n.24), that Midwest failed to prove its affirmative defense. The statutory clock begins with the actual violation, not a signal—even a clear one, unlike here—that a violation may occur. *See Leach*, 54 F.3d at 806 (employer’s stated intent not to bargain following plant relocation was insufficient to start Section 10(b) clock); *Teamsters Local 42 v. NLRB*, 825 F.2d 608, 615-16 (1st Cir.1987) (“Knowledge of a party’s predisposition to commit an unfair labor practice or suspicion that, when the moment is opportune, the knife thrust will follow, is not enough to galvanize § 10(b). The statute begins to run

¹⁶ For example, in a November 2012 grievance meeting, Leach claimed that F. Victorian Jr. was not eligible for the skilled list because he was not “fully” qualified as a checker or signalperson per the Order of Call. (JA 896.) The following year, on September 16, Blakely claimed that Canales was eligible for placement on the skilled list, but not interested, and that J. Victorian Jr. was qualified, but needed journeyman training. (JA 287-88, 551, see 497.) But then on September 30, Midwest claimed that no one was eligible for placement on the skilled list. (JA 12-13 n.24; JA 297.)

only when the impermissible act or omission—the unfair labor practice—actually takes place.”).

To the extent Midwest suggests (Br. 36, 38) that the Union was also on notice that Midwest had changed its past practice of meeting and conferring with the Union before adding individuals to the list, that argument is similarly misplaced. Once again, Midwest misrepresents the Board’s past-practice finding. The past practice at issue is that of meeting and conferring with the Union before adding individuals to the list—not, as Midwest repeatedly suggests (Br. 36, 38, see Br. 40), some other practice related to the yearly draft Order of Call. As the Board reasonably found (JA 13 n.25), Midwest gave the Union no notice of any change until after it implemented it. It did not “deviate from the established practice until April 2014, when it, for the first time, added employees to the skilled list without seeking the Union’s prior input.” (JA 13 n.25.) In 2011 (the last time Midwest added to the list), it adhered to its past practice and conferred with the Union before adding Brown. And in 2012 and 2013, Midwest did not add anyone to the list.

For the same reason, Midwest’s claim (Br. 38-40) that the Union waived its right to bargain over the unilateral changes is misplaced. “A union may expressly waive its right to bargain by a waiver that is ‘clear and unmistakable’ or may implicitly waive by failing to timely demand bargaining.” *StaffCo of Brooklyn*,

LLC v. NLRB, 888 F.3d 1297, 1302 (D.C. Cir. 2018) (citing *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312, 314 (D.C. Cir. 2003)). Midwest appears only to be arguing the latter. And, as the party claiming waiver, Midwest bears the burden of proof. *Id. Accord IMI S., LLC*, 364 NLRB No. 97, 2016 WL 4524115, at *3 n.6 (Aug. 26, 2016).

It is well-settled that a union “is obligated to demand bargaining only ‘[i]f an employer gives a union advance notice of its intention to make a change to a term or condition of employment.’” *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 44-45 (D.C. Cir. 2005) (quoting *Regal Cinemas*, 317 F.3d at 314). *See Vico Prod. Co. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003) (finding that the union “cannot be held to have waived the right to bargain over an issue that was never proposed” (citation omitted)). Thus, an employer’s “[n]otice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated.” *Regal Cinemas*, 317 F.3d at 314 (quoting *Int’l Ladies’ Garment Workers Union, AFL-CIO v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)).

Here, in rejecting Midwest’s Section 10(b) defense, the Board reasonably found that the Union was not on notice of Midwest’s unlawful changes regarding the skilled list until April 2014 when Midwest unilaterally implemented them. (JA 12-13 n.24 & n.25.) That finding also precludes Midwest’s waiver defense. By the time the Union learned of Midwest’s unilateral changes, it was futile to

request bargaining over them. And far from “fail[ing] to object,” as Midwest alleges (Br. 40), the Union filed timely charges against Midwest upon learning of the violation.¹⁷

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MIDWEST VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT DISCRIMINATORILY PASSED OVER F. VICTORIAN JR. FOR PLACEMENT ON THE SKILLED LIST

A. An Employer Violates Section 8(a)(3) and (1) of the Act When It Discriminates Against Employees Because of Their Union Activity

Section 7 of the Act guarantees employees the right “to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157.

Section 8(a)(3) of the Act implements Section 7 by prohibiting employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.”

29 U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) by taking an adverse employment action against an employee for engaging in

¹⁷ Midwest mentions, without argument or citation (Br. 38), that the Board did not specifically address its waiver defense. To the extent this is an argument, it is at best a cursory one, and thus it is waived. *See New York Rehab.*, 506 F.3d at 1076, and cases cited at p. 24 n.10.

activities protected by Section 7.¹⁸ *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In *Transportation Management*, 462 U.S. 393, the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-1089 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *see also Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Evidence of unlawful motivation includes the employer's knowledge of

¹⁸ Violations of Section 8(a)(3) result in derivative violations of Section 8(a)(1) *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

protected activity, *Tasty Baking*, 254 F.3d at 125-26, hostility toward protected conduct, including the commission of other unfair labor practices, *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996), and disparate treatment of employees, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016).

Determining an employer's motive "invokes the expertise of the Board, and consequently, the Court gives 'substantial deference to inferences the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (citation omitted). Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn*, 827 F.3d at 1072.

B. Midwest Discriminated Against F. Victorian Jr. in Violation of Section 8(a)(3) and (1) of the Act When It Passed Him Over for Placement on the Skilled List in April 2014

Substantial evidence supports the Board's finding (JA 1 n.1, 13-14) that Midwest discriminated against F. Victorian Jr. by denying him placement on the skilled list at the start of the 2014 shipping season. The Board reasonably found, and Midwest does not dispute, that Midwest knew F. Victorian Jr. was especially active in the Union through and including 2014, when he was elected steward. (JA 7, 13.) And Midwest's unlawful motivation for denying F. Victorian Jr.

placement on the list is amply evidenced by Leach's reaction to F. Victorian Jr.'s union activity. In June 2013, Leach explicitly threatened F. Victorian Jr. in a raised voice, "I'm about this far off your ass," when he challenged Leach about assigning Longshoremen's unit work to Teamsters-represented employees. (JA 1 n.1, 7-8, 14.) *See Vico Prod.*, 333 F.3d at 210 ("statement . . . reasonably can be construed as evidence of antiunion motivation because it represented a threat"); *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 203 (2007) (same), *enforced*, 519 F.3d 373 (7th Cir. 2008).

Further, as the Board reasonably found (JA 1 n.1), Midwest's unlawful motivation is evidenced by its numerous prior unfair-labor-practice violations found in *Midwest I* and *Midwest II*. *See Vincent Indus.*, 209 F.3d at 735; *1621 Route 22 W. Operating Co., LLC*, 364 NLRB No. 43, 2016 WL 3753474, at *2, 10 (July 13, 2016) (relying on previous Board decision finding violations of Sections 8(a)(1) and (3) as evidence of unlawful motive), *enforced*, 725 F. App'x 129, 142 (3d Cir. 2018); *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007) (same). In those cases, the Board found, among other violations, that Midwest discriminated against, threatened, and even physically assaulted employees, and was motivated by their union and/or protected concerted activities.

Midwest, moreover, failed to show that it would have declined to place F. Victorian Jr. on the skilled list in 2014 notwithstanding his union activity. As

discussed above, the Board explicitly discredited Midwest’s proffered non-discriminatory reason for not elevating him: that he was not qualified in at least four skilled-list categories. (JA 5 & n.6, 14.) *See Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000) (judge reasonably discredited employer’s “version of events”). And rather than adding him to the list in 2014—the first time it added *any* employees since 2011—Midwest chose an employee (J. Victorian Jr.) who was both unqualified and less senior than F. Victorian Jr., but who was not active in the Union. *See Fortuna Enterprises, LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011) (disparate treatment not only justified Board’s inference of unlawful motivation but also foreclosed argument that employer would have taken the same action absent that motive).

Midwest does not directly challenge most of these findings. Instead, it unconvincingly attacks the evidence of its unlawful motivation on timing grounds. (Br. 41-43.) But the Court lacks jurisdiction to consider Midwest’s contention that the unfair labor practices found in *Midwest I* and *Midwest II* are too stale to be evidence of unlawful motivation here. Under the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Although the Board, and not the

administrative law judge, first relied on the unfair-labor-practice findings in *Midwest I* and *Midwest II*, Midwest “never sought reconsideration by the Board and it offers no extraordinary circumstances to excuse its failure.”¹⁹ *Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 313, 316 (D.C. Cir. 2015). *Accord Int’l Longshore & Warehouse Union v. NLRB*, 890 F.3d 1100, 1113 (D.C. Cir. 2018) (“[I]f a party wishes to challenge an issue first raised in a Board decision, it must move for reconsideration so that the Board—not this Court—can address the question in the first instance.”).

In any event, each of Midwest’s cited cases (Br. 42-43) addresses the timing between an employee’s protected activity and an adverse employment action—not, as Midwest claims, the timing between evidence of unlawful motivation and an adverse employment action. And even if evidence of an employer’s unlawful motive might grow stale at some point, it did not here. The unfair labor practices found in *Midwest I* and *Midwest II* show Midwest’s near constant propensity to discriminate against and threaten active union supporters from summer 2008

¹⁹ At several points in its brief, Midwest inaccurately claims that the administrative law judge “heavily” relied on findings from *Midwest I*. (Br. 1, 5, see Br. 25.) But the judge only mentioned the case twice: in the procedural history and in stating that the General Counsel impeached Leach with his testimony from that hearing. (JA 4, 5.)

through at least October 2013. Midwest simply continued that trend at the start of the shipping season in April 2014.

As for the challenge that the Court can consider, Midwest unpersuasively claims (Br. 43) that Leach's June 2013 threat against F. Victorian Jr. cannot evidence unlawful motivation because Midwest told F. Victorian Jr. that he was not qualified for the skilled list as early as 2012. This argument, however, is once again premised on a misunderstanding of the Board's finding. The violation is not that Midwest discriminatorily failed to place F. Victorian Jr. on the skilled list in 2012 or April 2013, as Midwest suggests (Br. 43). Midwest did not place *anyone* on the skilled list those years. Rather, as the judge put it, Midwest "discriminated against F. Victorian in violation of Section 8(a)(3) and (1) when, in April 2014, it passed him over for placement on the skilled list." (JA 14.) And, as shown above, F. Victorian Jr. was qualified at the relevant time. Midwest presents no coherent basis for this Court to disturb that well-supported finding.

CONCLUSION

The Board respectfully requests that the Court deny Midwest's petition for review and enforce the Board's Order in full.

s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

s/ Rebecca J. Johnston

REBECCA J. JOHNSTON

Attorney

National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570
(202) 273-2948
(202) 273-1066

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board
August 2018

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

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MIDWEST TERMINALS OF TOLEDO)	
INTERNATIONAL, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 17-1239, 18-1093
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 10,769 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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

Dated at Washington, DC
this 24th day of August 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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

Dated at Washington, DC
this 24th day of August 2018

STATUTORY ADDENDUM

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National Labor Relations Act

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NATIONAL LABOR RELATIONS ACT

Sec. 7. [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 of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [29 U.S.C. §158.]

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

.....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

.....

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

.....

(d) Obligation to bargain collectively

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

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

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

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

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

Sec. 10 [29 U.S.C. § 160.]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

. . . .

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

. . . .

(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 such 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. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

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

THE BOARD'S RULES AND REGULATIONS

Section 102.45 [29 C.F.R. § 102.45.]

. . . .

(b) Contents of record. The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and

any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

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