No. 19-70651

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 15

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of International Alliance of Theatrical Stage Employees, Local 15 ("the Union") of a Decision and Order ("the Order") issued by the National Labor Relations Board ("the Board") against Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services ("the Company"). The Board's Decision and Order, reported at 367 NLRB No. 103 (Mar. 12, 2019), 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). The Union's petition for review is timely. This Court has jurisdiction under Section 10(f) of the Act, *id.* § 160(f). Venue is proper under Section 10(f) because the alleged unfair labor practices occurred in Washington state.

STATEMENT OF ISSUES

1. Whether the Board had a rational basis for dismissing the allegation that the Company unlawfully refused to provide general financial information responsive to bullet point 1 of the Union's information request.
2. Whether the Board had a rational basis for dismissing the allegation that the Company failed to bargain in good faith.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

During negotiations over a collective-bargaining agreement, the Union filed Board charges alleging that the Company violated the Act by failing to provide information the Union had requested and by bargaining in bad faith. The Board found that the Company violated the Act by refusing to provide some, but not all, of the requested information, and that the Company did not engage in bad-faith

bargaining. The Board ordered the Company to furnish the unlawfully withheld information to the Union and dismissed the remaining charges.

The Union has petitioned this Court to review the Board's Order and the allegations dismissed by the Board. The Company has not petitioned for review. The Board does not seek enforcement of its Order against the Company; instead, the Board simply asks the Court to deny the Union's petition.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. Background

The Company provides labor and technology for meetings and events in hotels and conference centers nationwide. (ER 16; SER 24, 27.)[1] On December 18, 2015, the Regional Director of the Board's Region 19 certified the Union as the exclusive collective-bargaining representative of the Company's technicians in the Seattle, Washington area. On January 4, 2016, the Company filed a request for the Board to review the Regional Director's certification of the Union. The Company declined to recognize and bargain with the Union while its request was pending. On May 19, the Board denied the Company's request for review. Four days later, on May 23, the Company accepted the Union's request to

[1] Citations are to the Excerpts of Record ("ER") filed with the Union'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 the Union's opening brief.

schedule negotiations for their first collective-bargaining agreement. (ER 1; ER 115-16, SER 37-39.)

In the interim, the Board's General Counsel issued a complaint against the Company for refusing to bargain. On May 19, 2017, the Board issued a Decision and Order finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union from January 4 to May 23, 2016. *Audio Visual Servs. Grp., Inc. d/b/a PSAV Presentation Servs.* (*PSAV*), No. 19-RC-167454, 365 NLRB No. 84, 2017 WL 2241025 (May 19, 2017). The Company has not petitioned to review the Board's order in *PSAV*, and therefore that case is not before the Court.

B. The Parties Begin Bargaining for a First Contract

The parties held their first bargaining session on June 24, 2016, and devoted most of it to establishing ground rules for their negotiation. (ER 1; SER 20, 33.) In addition, they discussed a preliminary contract proposal presented by the Union, which did not include any economic terms. (ER 1; ER 117-23, SER 28-30.) Shortly after that session, the Company supplied the Union with information about the wage rates of its full-time employees. (ER 1; ER 113.)

On July 19, the Union e-mailed its first complete contract proposal to the Company. (ER 1; ER 86-87, 125-36.) The Union proposed to raise the Company's hourly wage rates, which ranged from $15 to $28.88, to between $33

and $45, an increase of 73 to 120 percent. (ER 1; ER 113, 129-30, SER 40-42, 168.) In addition, the Union proposed that the Company contribute to the Union's health and pension funds, and pay employees overtime in some circumstances not required by state or federal law. (ER 1; ER 130, 132-34.) The Union also proposed to restrict the Company's ability to subcontract unit work, resolve differences through final and binding arbitration, and implement a just-cause and progressive-disciplinary system. (ER 1; ER 128-29, 134.)

On August 11, the Company communicated its counterproposal to the Union. (ER 1; ER 168-98.) The Company offered to keep existing wage rates for current employees, set wages for new hires at its discretion within certain specified ranges, and continue giving raises based on existing guidelines and performance appraisals. (ER 1; ER 182-83.) The proposal limited overtime to federal and state requirements and gave unit employees the same benefits as their unrepresented counterparts. (ER 1; ER 184, 192-93.) The Company also suggested a disciplinary system without a progressive structure, but with a requirement that it show a "reasonable belief" that an infraction had occurred. (ER 1; ER 194.) The Company further proposed a management-rights clause giving it sole discretion over matters such as discipline and subcontracting "[e]xcept as specifically restricted" by other contractual provisions. (ER 2; ER 173.) Lastly, the Company

proposed a grievance-and-arbitration clause providing for judicial enforcement of arbitral decisions in case of default by either party. (ER 1-2, 7; ER 195-96.)

The next bargaining sessions took place on August 17 and 18. (ER 2; ER 90-91.) On the 17th, Union Business Representative Mylor Treneer expressed disappointment with the Company's wage proposal. (ER 2; ER 92, SER 43-44.) The Company's attorney, David Shankman, responded that Treneer was "delusional" and that it would be "suicide" for the Company to pay the Union's proposed wages. (ER 2; ER 74-75, 92-93, SER 31, 43-44, 48.) Shankman told union representatives that the Company's contracts with Seattle-area hotels and convention centers were non-exclusive, precarious, and included commissions up to 50 percent for the host properties. Shankman also asserted that the market could not support the Union's proposed wages and that the Company would lose clients and go "under water" if it agreed to that proposal. (ER 2; ER 74, 93, SER 19.)

Shankman then asked how the Union had come up with its numbers, which would constitute large wage increases. (ER 2; ER 92-93, SER 21-22, 45-46.) Treneer replied that they were based in part on the Company's contractual rates with other union locals in San Francisco and San Diego. (ER 2; ER 73-74, SER 21-22, 45.) Shankman explained that those contracts applied only to technicians hired on a sporadic, as-needed basis to work billable events. By contrast, the Seattle contract would cover the Company's in-house technicians,

who have regular hours and do billable and nonbillable work. (ER 2; ER 93-94, SER 17-18, 22-23, 41, 46, 48-50.) Treneer told Shankman the Union would request information from Company on that issue. (ER 2; ER 94, SER 20.)

The following day, August 18, the Union reduced its wage proposal by $2 for each job classification—still a 64 to 106 percent increase over the Company's then-current rates—and offered to limit overtime opportunities for employees. (ER 2; ER 200-01, SER 169.) The Union also modified its earlier proposal on discipline, keeping the just-cause requirement but adding a list of infractions that would result in immediate termination. (ER 2; ER 199.) At the end of their two days of meetings, the parties had tentative agreements on a variety of issues such as shop stewards, employee safety, nondiscrimination, power tools, a prohibition on employees donating their services, and the definition of a workweek. (ER 2; ER 221.)[2]

C. The Union Requests Financial Information from the Company

On September 2, the Union's attorney, Katie Sypher, sent Shankman the following e-mail:

> I write with respect to your remarks on [the Company]'s economic position at the parties' most recent bargaining session. To further the parties' negotiations, [the Union] would like to better understand [the Company]'s financial position.

[2] The Company's last contract proposal, dated February 22, 2017, includes a list of all tentative agreements ("TA'd articles") reached during the negotiations. (ER 221, SER 51-52.)

> At the session, you expressed [the Company]'s inability to pay the wages requested by the tech bargaining unit in strong terms, stating both that [the Union]'s wage proposal "would put [the Company] underwater" and "would be suicide for [the] company." You also connected the company's inability to pay the wages requested both with the commissions that it pays back to its hotel property clients and the rates it charges for its services to event clients, stating that "50% of our revenue, roughly, goes to commissions" to the hotel properties and that "the money [needed pay the wages requested] isn't there based on the market rates that can be charged" for [the Company]'s event services to clients.
>
> Thus, [the Union] makes the following request for information from [the Company]:
>
> - Documents sufficient to substantiate [the Company]'s claim of its inability to pay the requested wages; particularly, we request that the [C]ompany provide documents that demonstrate the [C]ompany's gross revenues, expenses, and profits for 2015 and 2016 to date;
> - [The Company]'s current contracts with any and all of its hotel clients in Seattle, SeaTac, Bellevue, Tukwila, and Tacoma;
> - If the contracts requested in above [sic] don't expressly establish the commission rates and sums [the Company] has paid to such property owners between January 1, 2015 and the present, documents that demonstrate that information; and,
> - Documents sufficient to show the rates charged to all event clients to whom [the Company] has provided service in the cities listed above within the past year (September 1, 2015 to present).

(ER 2-3; ER 203.) On September 6, Shankman replied by e-mail that the Union's request "grossly misstate[d] the context in which" he made his statements, and that –

> What I was explaining during our negotiations is that no employer in this business would pay such a wage to its hourly workforce that was so grossly outside of its business model and if it did so, it would be suicide for the company. This is not an inability to pay for lack of revenue. It's a refusal to pay an hourly rate that would be detrimental to the business. . . .

> The balance of your request (hotel contracts, commission rates and rates charged to end clients) is premised off of your inability to pay claim which we clearly did not assert. Indeed, and to keep this in perspective (either for purposes of your request or the negotiations going forward), we shared with you the issue of commissions not to explain hardship or the ability to pay wages. Rather, we shared this in the context of explaining why we can pay higher union-call rates for *billable* events vs. the rates being paid to [the Company]'s regular hourly employees for many hours which are not-billable. . . .

(ER 3; ER 202.) The Union never discussed that response with the Company, despite Shankman's offer to do so. (ER 3; SER 31.) Instead, on October 11, the Union filed a Board charge alleging that the Company unlawfully refused to provide all of the requested information. (SER 1.)

D. The Parties Continue to Bargain and Reach Tentative Agreements; the Union Files Another Unfair-Labor-Practice Charge and Ends Negotiations

On September 12, the Company sent the Union a second complete contract proposal, which kept its initial proposals for wages, overtime, benefits, disciplinary policy, and grievance and arbitration. (ER 3; SER 68-70, 77-82.) However, the Company modified its management-rights provision to limit the circumstances in which it could subcontract work to other entities. (ER 3; SER 59.)

On September 13, the Union responded with a partial counterproposal that modified some noneconomic provisions, including those related to union security

and dues checkoff, and subcontracting.[3] The Union did not revisit its earlier proposals relative to wages, benefits, discipline, grievance and arbitration, or subcontracting. (ER 3; SER 89-92.)

On September 19, the parties met again to discuss their latest proposals. (ER 3; SER 32.) During that session, they reached tentative agreements on provisions regarding the implementation of work rules, a labor-management committee, excused absences, direct deposit, and scheduling.[4] (ER 3; ER 221.)

On November 5, the Company cancelled a scheduled bargaining session but conveyed its third complete contract proposal to the Union. (ER 3; SER 93-123.) The Company did not modify its proposals for wages, benefits, discipline, or grievance and arbitration. (ER 3-4; ER 105-06, SER 109-10, 117-20.) However, the Company added a separate provision for subcontracting, which further reduced its ability to subcontract work. (ER 4; SER 107.) The Company also proposed modifications to the union-security and dues-checkoff provision. (ER 4; SER 103.)

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[3] A union-security clause requires employees to be members of the union in order to work for the employer. A dues-checkoff provision defines the manner in which union dues will be collected from employees' pay. (SER 126.) The other modified provisions related to excused absences, scheduling, and access to company premises by union representatives. (SER 90-92.)

[4] (*See* SER 141 (work rules), 146 (labor-management committee), 147 (excused absences, direct deposit), 154 (scheduling).) The parties also agreed to discard union proposals regarding prior policies (ER 126), confidential information and intellectual property (ER 135), and media relations and public inquiries (ER 136).

On December 6, the Union cancelled the bargaining session planned for later that month, but presented a modified union-security and dues-checkoff proposal. (ER 4; SER 124-26.)

On January 24, 2017, the Union submitted a series of revisions to earlier proposals made by both parties. (ER 4; SER 127-35.) Specifically, the Union modified the Company's discipline proposal, replacing "reasonable belief" with "just cause," removing language that made progressive discipline optional, and adding a list of offenses warranting immediate suspension or termination. (ER 4 & n.10; SER 133-34.) The Union also added "final and binding" language to the Company's grievance-and-arbitration proposal, and removed exclusions for discipline not involving loss of time or pay, grievances not involving personal relief to the grievant, allegations of discrimination, and unfair-labor-practice charges.[5] (SER 131-32.) In the accompanying e-mail, the Union stated, "We look forward to the parties' return to the table and hope that the time away brings a renewed sense of purpose to the parties' talks and an eye toward real progress." (ER 4; SER 127.)

[5] In addition, the Union modified the Company's proposals regarding union recognition, implementation of new work rules, and employee categories and classifications. (SER 128-30.) The Union also revised its subcontracting proposal. (SER 135.)

On January 26, during what would be their final bargaining session, the parties discussed the Union's recent proposals and tentatively agreed on two more provisions relative to employee probationary periods and scheduling. (ER 4; ER 106, 221, SER 34.) The next day, the Union filed its bad-faith-bargaining charge. (ER 4; SER 2.)

On February 22, after the Union's charge, the Company made one last contract proposal that kept the same language on wages, overtime, and benefits, but included several modifications to disputed provisions such as discipline, grievance and arbitration, subcontracting, and union-security and dues-checkoff. (ER 4; SER 145, 148, 150-51, 158-62.)

Two days later, on February 24, the Union cancelled the bargaining session scheduled for March 1. (ER 4; SER 166.) Thereafter, the Union did not respond to the Company's repeated attempts to reschedule. (ER 4; SER 36, 166.)

E. CEO McIlwain's Philadelphia Statements

On January 26, the same day as the parties' final bargaining session, the Company held a mandatory preelection meeting for employees in the Philadelphia, Pennsylvania area, where another local affiliated with the Union was leading an organizing campaign. (ER 9 & n.21; SER 25-26.) At that meeting, Chief Executive Officer Michael McIlwain mentioned the Seattle negotiations and noted that the parties were at a stalemate and not making progress. (ER 9; ER 78, 80.)

McIlwain told the audience that negotiations "could very well go the same way in Philadelphia, as far as dragging out and nothing happening," and that while the Company would have to bargain in good faith, it did not have to agree to any specific terms. (ER 9; ER 78-79.) McIlwain also gave a PowerPoint presentation that included a slide stating, "Collective bargaining does not always result in an agreement . . . [The Company] will not enter into an agreement that would negatively impact our business model." (ER 22; ER 114.)

II. PROCEDURAL HISTORY

On May 24, 2017, after investigating unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to provide information requested by the Union and failing to bargain in good faith. (SER 1-13.) On April 6, 2018, after a hearing, Administrative Law Judge Gerald Michael Etchingham issued a decision finding that the Company violated the Act as alleged. (ER 16-31.) The case was then transferred to the Board, where the Company filed exceptions to the judge's decision. (ER 1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 12, 2019, the Board (Chairman Ring and Member Emanuel, Member McFerran, dissenting in part) issued an Order affirming the judge's decision in part, and reversing it in part. (ER 1-16.) The Board unanimously

affirmed the judge's finding that the Company violated the Act by failing to provide specific financial information identified in bullet points 2-4 of the Union's request. It therefore issued an Order to remedy that violation, which is not at issue here. (ER 1, 5, 10, 15-16.)

Contrary to the judge, however, the Board dismissed the two remaining allegations. It unanimously found that the Company was not required to produce general financial information listed under bullet point 1 because it had effectively retracted its inability-to-pay claim. (ER 1, 4-5.) Additionally, the Board majority found that the evidence did not support finding that the Company had engaged in bad-faith bargaining. (ER 6-10.) Notably, the majority found that the Company did not engage in dilatory tactics, and that its proposals on wages and benefits, discipline, management rights, and grievance and arbitration were not calculated to frustrate the bargaining process. Instead, it found that, viewing the record as a whole, both parties had engaged in lawful hard bargaining and the Union had not sufficiently tested the Company's willingness to bargain before resorting to Board proceedings. (ER 6-8.) Finally, the majority found that McIlwain's comments to Philadelphia employees were not indicative of bad faith. (ER 8-9.) Member McFerran dissented from the majority's finding that the Company did not violate its duty to bargain in good faith. (ER 10-15.)

SUMMARY OF ARGUMENT

The duty to bargain in good faith is one of the most basic principles of labor law. In this case, the Board found that the Company did not violate that fundamental duty by refusing to provide general financial information requested by the Union. In addition, the Board found that the Company's overall conduct did not support finding that it acted to frustrate the possibility of reaching any collective-bargaining agreement with the Union.

The Board had a rational basis for dismissing allegations that the Company violated the Act by refusing to furnish general financial information listed in bullet point 1 of the Union's request. Substantial evidence supports the Board's finding that, while Shankman initially said the Company could not afford the Union's proposed wages, he effectively retracted that claim by clarifying that he only meant such high wages would hurt the Company's business, not that it lacked the revenue to pay them. The Board's determination is consistent with its precedent and this Court's jurisprudence. Moreover, the Union fails to disprove the Board's finding that Shankman's subsequent statements did not revive the Company's inability-to-pay claim, but simply repeated its unwillingness to depart from its business model.

The Union also fails to show that the Board erred in finding that the Company did not violate its statutory duty to bargain in good faith. To begin, the Union does not contest the Board's findings that the Company did not engage in

dilatory tactics, and that its conduct and proposals relative to subcontracting, grievance and arbitration, and management rights were not indicative of bad faith.

More generally, the Board had a rational basis for concluding that the Company did not engage in unlawful bad-faith bargaining, but rather that both sides pursued lawful hard-bargaining tactics. That is particularly evident in the parties' negotiations over wages. The Union opened with a proposal to raise existing rates by 73 to 120 percent, which the Company rejected as unrealistic. But even after the Company offered a reasonable explanation for its position, the Union continued to demand increases of 64 to 106 percent. Under those circumstances, and contrary to the Union's claims, the Company's refusal to depart from its status-quo proposals on wages is not *per se* evidence of bad faith.

The same hard-bargaining patterns appear in negotiations over discipline, where both parties refused to accept any proposal that did not include their chosen disciplinary standard, "just cause" for the Union and "reasonable belief" for the Company. Although the Union insists that the reasonable-belief standard would allow the Company to maintain unfettered control over the disciplinary process, the Board reasonably found that by abandoning the status quo of at-will employment, the Company's proposal would effectively reduce its discretion over disciplinary matters.

Other challenges by the Union are essentially *pro forma*. The Union disputes the Board's finding that the Company's refusal to bargain with the Union immediately following the Union's certification, and while the Company's request to review that certification was pending with the Board, was not indicative of bad faith because the Company reversed its position as soon as its request was denied. Similarly, the Union challenges the Board's finding that because the Union's information request was couched entirely in terms of the Company's inability-to-pay claim, the Company may have had a good-faith belief that it was not required to furnish any of the requested information once that claim was retracted. In both cases, however, the Union offers no basis to overturn the Board's determinations, and therefore the Court should decline to do so. *See United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) ("Arguments made in passing and not supported by citations to the record or to case authority are generally deemed waived.").

In addition, the Board reasonably concluded that the record did not demonstrate that the Company engaged in bad-faith bargaining because the Union failed to sufficiently test its willingness to bargain. For instance, substantial evidence supports the Board's finding that the Union gave up negotiating over wages even though the Company never explicitly refused to raise them. Similarly with regard to discipline, the Union did not seek to clarify the meaning of the Company's reasonable-belief proposal before rejecting it as insufficient.

Finally, the Board reasonably found that CEO McIlwain's statements to employees in Philadelphia did not show that the Company proceeded in bad faith with negotiations in Seattle. McIlwain correctly summarized the Company's statutory obligation to bargain in good faith, and his description of the Seattle negotiations accurately reflected the state of bargaining at the time. Therefore, McIlwain's comments were not an admission of bad faith.

ARGUMENT

I. THE BOARD HAD A RATIONAL BASIS FOR FINDING THAT THE COMPANY LAWFULLY REFUSED TO FURNISH INFORMATION LISTED IN BULLET POINT 1 OF THE UNION'S REQUEST

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. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (citations omitted). In reviewing the Board's application of the law, the Court accords "considerable deference" to the Board's interpretation of the Act "is as long as it is rational and consistent with the statute." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (internal quotation marks and citation omitted).

The Court treats the Board's factual findings as conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *accord Healthcare Emps. Union, Local 399 v. NLRB*, 463

F.3d 909, 918 & n.12 (9th Cir. 2006). 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.*, 515 F.3d at 945. "The 'substantial evidence' standard is not modified in any way when the Board and its [judge] disagree." *Universal Camera*, 340 U.S. at 496-97; *accord Int'l Chem. Workers Union Council v. NLRB*, 467 F.3d 742, 748 n.2 (9th Cir. 2006).

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). This remains true in cases where the Board's inferences run counter to the judge's interpretation of the facts. *NLRB v. Pac. Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978). Further, 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).

Ultimately, in cases like this one, where the Board concludes that there has been no violation of the Act, the Court must uphold the Board's determination unless it has no rational basis. *See Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978); *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (9th Cir. 1972); *accord Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990); *Kankakee-Iroquois Cnty. Emp'r Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987). In other words, a reviewing court may reverse the Board's dismissal only where "the evidence required the Board" to find a violation of the Act. *Amalgamated Clothing Workers v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964). The application of the "rational basis" standard in dismissal cases essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'" *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-87 (D.C. Cir. 1991) (quoting 29 U.S.C. § 160(f)).

B. Applicable Information-Request Law

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). The duty to bargain in good faith entails an obligation for employers to "provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit*

Edison Co. v. NLRB, 440 U.S. 301, 303 (1979); *accord Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1064 (9th Cir. 2012). Failure to provide relevant information upon request, or to offer a timely, legitimate basis for refusing to do so violates Section 8(a)(5) and (1) of the Act.[6] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *U.S. Postal Serv.*, 332 NLRB 635, 636 (2000).

An employer who claims it cannot afford to pay for union bargaining proposals—such as increased wages, in this case—must provide the union with adequate financial documents to support its position. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); *Frankl*, 693 F.3d at 1064. However, the employer can retract its inability-to-pay claim, so long as it makes its revised position clearly known. *Int'l Chem. Workers Union*, 467 F.3d at 752 ("A company must make it 'unmistakably clear' to a union that it has abandoned its plea of poverty." (quoting *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 964 (D.C. Cir. 2003))); *Media Gen. Operations, Inc.* (*Richmond Times-Dispatch*), 345 NLRB 195, 198 (2005). The clarity of the retraction is assessed based on the employer's actions as a whole,

[6] 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]," 29 U.S.C. § 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). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1078 n.8 (9th Cir. 2008).

in the particular circumstances of each case. *Truitt*, 351 U.S. at 153-54; *accord Int'l Chem. Workers Union*, 467 F.3d at 748.

C. Substantial Evidence Supports the Board's Finding That the Company Clearly Retracted Its Inability-To-Pay Claim

The Board found that the Company lawfully refused to provide general financial information responsive to bullet point 1 of the Union's information request. (ER 4-5.) There is no question that Shankman's statements at the August 17 bargaining session—particularly his claim that it would be "suicide" for the Company to accept the Union's proposal because it would go "under water"—indicated that the Company could not afford to pay the proposed wages. (ER 4.) However, the Board found that Shankman effectively retracted that inability-to-pay claim in his e-mail response to the Union's information request. (ER 5.) Substantial evidence supports that determination.

The Board found that Shankman's e-mail made clear to the Union that the Company was not unable to pay the proposed wages, but was simply unwilling to do so. (ER 5.) Indeed, Shankman's response explained that the Company's position was not predicated on "an inability to pay for lack of revenue," but rather on a discretionary determination that paying the proposed wages "would be detrimental to the business." (ER 202.) Moreover, the Board found, after this clarification the Company remained consistent in its position. (ER 5 & n.12.) For instance, on October 13, 2016, Shankman sent Treneer a letter reaffirming the

Company's commitment to its business model and refusal to deviate from it.[7] (ER 210-11.) And McIlwain's PowerPoint presentation in Philadelphia echoed that sentiment, stating, "[The Company] will not enter into an agreement that would negatively impact our business model." (ER 114.) Viewed as a whole, therefore, the evidence amply supports the Board's finding. *See Lakeland Bus Lines*, 347 F.3d at 963-64 (holding that record as a whole showed employer effectively disavowed statements suggesting it was claiming inability to pay).

The Board's determination is also on all fours with its ruling in *Media General*, 345 NLRB at 195. In that case, the employer sent a letter to employees announcing that it would be "unable to pay" a bonus due to the "poor economic climate." *Id.* at 195. The employer also referred to its revenue outlook as "bleak," and added that several steps already taken to cut costs "would not be enough to offset the projected decline in . . . revenues." *Id.* When the union requested financial information to verify those claims, the employer declined, stating:

> Media General has not indicated that it is unable to pay the bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace. Because the revenue outlook for the rest of the year is bleak, Media General has chosen as a discretionary matter to introduce some institutional belt-tightening.

[7] For further discussion of that letter, *see infra* note 16.

Id. at 208. The Board found that the employer's comments did not amount to an inability-to-pay claim, and that even if they did, the employer's response to the union's request made clear that was not the case. *Id.* at 198. As in *Media General*, Shankman's response spelled out that the Company's refusal to entertain the Union's wage proposal was not based on lack of funding, but rather due to its incompatibility with the Company's Seattle business model.

Contrary to the Union's claim (Br. 19-20), the Board's finding is consistent with this Court's decision in *International Chemical Workers Union*, 467 F.3d at 742. In that case, after ostensibly retracting its inability-to-pay claim, the employer made several other statements that effectively revived it. *Id.* at 746, 753. Not only that, but three months after its "retraction," the employer laid off 75 percent of the bargaining unit due to poor economic conditions, while maintaining its refusal to share financial records. *Id.* at 747, 753. Here, by contrast, Shankman clarified that he meant the Union's wage proposal could not be squared with the Company's practice of employing regular hourly employees in Seattle, and the Company consistently adhered to that position thereafter. *Cf. Wayron, LLC*, No. 19-CA-032983, 364 NLRB No. 60, 2016 WL 4141199, at *6 (Aug. 2, 2016) (employer retraction of inability-to-pay claim belied by comments that its goal was to "stay in business" and that it "[could] not continue at current cost").

The Union disputes that Shankman effectively retracted his inability-to-pay claim (Br. 20), citing his response to its information request, where he wrote that "no employer in this business would pay such a wage to its hourly workforce that was so grossly outside of its business model and if it did so, it would be suicide for the company." (ER 202.) But that statement is not synonymous with saying that the Company could not, under *any* circumstance, pay the proposed wages. Rather, Shankman was making the same point the Company has maintained since, *i.e.*, that it would have to change its Seattle business model to accommodate the Union's proposal, and that it was unwilling to do so.

The Union also argues that the Company's retraction was ineffective because it did not engender a change in the Company's bargaining posture with regard to wages. (Br. 14.) First, and contrary to the Union's suggestion, there is no legal nor logical requirement that the retraction of an inability-to-pay claim be followed by wage concessions in order to be effective. *See, e.g.*, *Lakeland Bus Lines*, 347 F.3d at 964 (finding effective retraction in the absence of financial concessions); *Media General*, 345 NLRB at 198 (same). Second, it is the *substance* of an employer's bargaining position that matters, not whether it changed positions after retracting its inability-to-pay claim. *Int'l Chem. Workers Union*, 467 F.3d at 749. In this case, the Company's position was always that the Union's proposed wages were incompatible with its Seattle business model. That

rationale was no less valid after Shankman clarified that the Company's refusal to accept the Union's proposal was not based on a lack of revenue. Moreover, to the extent that the Union disputes the sincerity of the Company's retraction, the Union does not challenge the Board's finding that the Company credibly explained why its business model would not accommodate such high wages. (ER 5 n.12.) Shankman testified that this was because the Company's Seattle operations employ regular hourly technicians paid to work billable *and* non-billable events, in contrast with San Francisco and San Diego, where the Company pays higher wages but only hires staff on a sporadic, as-needed basis to work specific billable events. (ER 3, 5 n.12; ER 202, SER 22-23, 49-50.) Not only is Shankman's testimony uncontroverted, but the Union admitted that its proposal was partly based on the Company's wage rates in San Francisco and San Diego. (Br. 4.)

In sum, substantial evidence supports the Board's finding that the Company effectively retracted its inability-to-pay claim and did not subsequently revive it. Accordingly, the Board rationally dismissed the claim that the Company violated the Act by refusing to provide general financial information responsive to bullet point 1 of the Union's request.

II. THE BOARD HAD A RATIONAL BASIS FOR FINDING THAT THE COMPANY BARGAINED IN GOOD FAITH

The Board found that the Company's bargaining proposals regarding wages, benefits, and discipline were symptomatic of hard bargaining, not bad faith. (ER 6-7.) The Board also found that the Union failed to sufficiently test the Company's willingness to bargain, thus precluding a finding of bad faith on the Company's part. (ER 8.) The Board found further that the Company's refusal to bargain while its request for review was pending, as well as its failure to turn over some of the information requested by the Union, did not support finding that the Company undertook negotiations in bad faith. (ER 6 & 7 n.14.) Finally, the Board found that CEO McIlwain's statements at the preelection meeting in Philadelphia were not indicative of bad faith. (ER 8-9.) Together, those findings show that the Board had a rational basis for concluding that the Company did not violate the Act by bargaining in bad faith.

A. Applicable Bargaining Law

"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)). Satisfying that obligation requires bargaining parties to make "a serious attempt to resolve differences and reach a common ground," *NLRB v. Ins. Agents' Int'1 Union*, 361

U.S. 477, 486 (1960), but "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

The determination of good faith is a delicate one "for the Board's expertise," and for that reason "the Board has been afforded flexibility to determine . . . whether . . . conduct at the bargaining table evidences a real desire to come into agreement." *Queen Mary Rests. Corp. v. NLRB*, 560 F.2d 403, 407 (9th Cir. 1977) (quoting *Ins. Agents*, 361 U.S. at 498). To determine a party's good faith, the Board examines and draws inferences from that party's conduct as a whole, both at and away from the bargaining table. *Public Serv. Co. of Okla.*, 334 NLRB 487, 487 (2001); *accord Frankl v. HTH Corp.*, 650 F.3d 1334, 1359-60 (9th Cir. 2011). The central question to resolve is whether a party engaged in "hard but lawful bargaining" to achieve a favorable contract, or "unlawfully endeavor[ed] to frustrate the possibility of arriving at any agreement." *Public Serv. Co.*, 334 NLRB at 487; *accord K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980). "[A] party . . . is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party." *Challenge-Cook Bros.*, 288 NLRB 387, 389 (1988) (ellipsis in original) (quoting *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981)).

While the Board does not evaluate the merits of each party's bargaining proposals, when appropriate, it will examine those proposals and consider "whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." *Reichold Chems., Inc.*, 288 NLRB 69, 69 (1988), *enforced in relevant part sub nom. Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990); *see also Pac. Grinding Wheel*, 572 F.2d at 1348-49 ("[T]he Board can look at the content of the bargaining proposals as part of its review of all the circumstances."). Finally, there can be no finding of bad faith unless a party's willingness to bargain is actually tested. *See Nagio Rest., Inc.*, 289 NLRB 22, 23 (1988).

B. The Company's Proposals Regarding Wages, Benefits, and Discipline Reflect a Strategy of Hard Bargaining, Not Bad Faith

The Board found that although the Company's bargaining proposals with regard to wages, benefits, and discipline essentially maintained the status quo, the Company never suggested that those proposals were "take it or leave it," or that it would not consider any other ideas put forth by the Union.[8] (ER 6.) Substantial evidence supports the Board's determination.

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[8] The Union does not dispute the Board's findings that the Company's bargaining proposals relative to subcontracting, grievance-and-arbitration procedures, and management rights were not indicative of bad faith. (ER 7-8, 10 n.2.) Accordingly, the Union has forfeited its chance to challenge those findings. *See* Fed. R. App. P. 28(a)(8)(A) (argument section of brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of

1. Wages and benefits

The parties' sparring over wages and benefits epitomizes hard bargaining. The Union opened with a proposal to raise wages by 73 to 120 percent, cover unit employees with its own pension and health plans, and pay them overtime in situations not contemplated by state or federal law. (ER 1; ER 129-30, 132-33.) The Company counteroffered to essentially maintain the status quo, except that wage rates for new hires would be set within certain pre-defined ranges for each job classification. (ER 6; ER 182-84.) At that time, Shankman also conveyed the Company's view that the Union's proposal was incompatible with its Seattle business model. (ER 2; SER 47-50.) In response, the Union offered to lower its proposed wage rates by $2—still a 64 to 106 percent increase—and limit overtime, but did not alter its benefit proposal. (ER 2; ER 200-01.) Disappointed with the Union's offer, the Company reiterated its status-quo proposal, and thereafter the parties' positions remained unchanged.[9] (ER 3-4; SER 68-70, 77, 79-82.)

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the record on which the appellant relies"); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) ("[A]n issue . . . not discussed in the body of the opening brief is deemed waived" and cannot be raised for the first time in reply brief).

[9] The Union has not challenged the Board's finding that the Company did not engage in dilatory tactics in presenting its counterproposals for wages and benefits. (ER 6, 10 n.2.) Therefore, any such challenge is now waived. *Martinez-Serrano*, 94 F.3d at 1259.

On this record, the Board reasonably found that the Company's actions reflected a strategy of hard bargaining and not bad faith. (ER 6.) Under established Board law, "[a] party is entitled to stand firm by a bargaining proposal legitimately proffered." *K-B Res., Ltd.*, 294 NLRB 908, 908 (1989). Thus, the mere fact that the Company refused to depart from its status-quo proposal does not establish bad faith. Moreover, the Company's rejection of the Union's wage proposal was hardly specious. To the contrary, the Company offered a reasonable explanation, namely that the Union's proposal was based on markets where the Company hired employees on a sporadic, as-needed basis, and that this model could not be replicated in Seattle, where the Company employed regular technicians paid hourly wages to perform billable and non-billable work. *Cf. Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1221-22 (2001) (finding bad faith where employer refused multiple requests to explain or provide information about "extreme" compensation proposal).

The same economic factors also explain the Company's refusal to entertain the Union's follow-up offer to lower its proposed wages rates by $2. Shankman testified that the Company viewed that offer as "almost lip service to the process," a reflection of the Union's unwillingness to recognize the fundamental differences between the Company's operations in Seattle and elsewhere. (ER 6; SER 47-50.) Indeed, not only did that offer still amount to a 64 to 106 percent raise, but it also

made clear that the parties could not even agree on a common set of facts upon which to base their discussion. In those circumstances, the Board reasonably found that the Company did not act intransigently by sticking to its status-quo proposal while the Union continued to push for substantial increases. (ER 6.) After all, the epitome of hard bargaining is where both parties camp on their positions and wait for the other side to blink.

Although the Union portends to challenge the Board's determination on wages (Br. 24-25), it does not actually dispute *any* aspect of the rationale detailed above. The same is true of its claim that the Company "reserve[ed] to itself unbridled discretion to unilaterally determine wage rates for new hires and set any wage increases." (Br. 26.) Indeed, the Union does not deny that the Company offered to limit its discretion to set wages for new hires by proposing to set them within certain pre-defined ranges applicable to each job classification. (ER 7 n.14; ER 182-83.) Likewise, the Union does not dispute that it never countered the Company's proposal to retain discretion over wage increases. (ER 7 n.14.) Finally, the Union does not dispute that, although the Company stood firm on its positions, it never displayed a closed mind to any proposal by the Union, nor did it convey that its proposals were "take it or leave it." *Cf. A-I King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (employer's statements at bargaining table reflected "a mind closed to the possibility of change" regarding wages);

Hydrotherm, Inc., 302 NLRB 990, 994-95 (1991) (finding bad faith where employer made "a take-it-or-leave-it proposal" to maintain existing merit raises if union agreed not to seek further wage increases). That fact alone disproves the Union's claim that the Company displayed "unwavering insistence on sole control over wages." (Br 24.)

The Union's only argument appears to be that the Company's failure to depart from its status-quo proposals on wages and benefits is evidence of bad faith *per se*. Such is not the law. To the contrary, and as recognized by this Court, "[a] company's adamant insistence on strong pro-management terms . . . cannot alone support a finding of failure to bargain." *Pac. Grinding Wheel*, 572 F.2d at 1348. To find bad faith, there must also be "substantial evidence that the company's attitude was inconsistent with its duty to seek an agreement." *Id.* at 1348-49 (internal quotation marks and citation omitted). The Union fails to offer any such evidence here. Notably, the Union tries unsuccessfully to portray the Company as intransigent by claiming that references to its "business model" were actually "a shorthand signifier for all of [the Company]'s pre-existing conditions on core subjects of bargaining." (Br. 28.) But not only were the Company's references to its business model limited to economic discussions, they were also perfectly justified in view of the Union's admission that its wage proposal was partly based on cities where the Company operated in a completely different manner than in

Seattle. Therefore, the Board reasonably found that the Company's positions on wages and benefits were not symptomatic of bad faith, but rather of a strategy of hard bargaining.

2. Disciplinary policy

The parties' back-and-forth over discipline provides another example of the hard-bargaining tactics espoused by both sides.[10] The Union led with its just-cause proposal and refused to consider any counteroffer that did not include that standard, while the Company took the same approach with regard to its reasonable-belief proposal. Again, a party's refusal to compromise on a legitimately proffered bargaining proposal is not *per se* evidence of bad faith. *See K-B Res.*, 294 NLRB at 908-09 (finding no evidence of bad faith where employer insisted on changing employees' compensation method and union refused to give up hourly wage system). As with wages and benefits, the Company and the Union opted to stick to their guns rather than engage the other side's proposal—the hallmark of hard bargaining.

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[10] The Union's initial proposal included a progressive-disciplinary system that required showing "just cause" to discipline and terminate employees. (ER 1; ER 134.) The Company responded with a proposal in which discipline would require showing a "reasonable belief" that an infraction happened, but where progressive discipline was not mandatory. (ER 1; ER 194.) The Union then suggested maintaining the "just cause" requirement, but adding a list of infractions that would result in immediate termination. (ER 2; ER 199.) In response, the Company resubmitted its "reasonable belief" proposal. (ER 3; SER 79.) Thereafter, the parties did not budge from their respective positions. (ER 3-4.)

Moreover, and contrary to the Union's claims (Br. 10, 11), the Company's reasonable-belief proposal was not equivalent to maintaining the status quo of at-will employment. As the Board explained (ER 7), at-will employment is "universally understood to place no limits on an employer's right to discipline or discharge its employees, except those limits imposed by law." (ER 7 & n.15.) By contrast, a threshold requirement to show a reasonable belief that an infraction occurred would undeniably limit the Company's ability to discipline employees as it saw fit. It is simply incorrect, therefore, for the Union to argue that the Company's proposal would have given it "unfettered control" and "complete discretion" over the disciplinary process. (Br. 27.) Indeed, that claim is all the more unfounded because the Union never even sought to clarify the meaning of "reasonable belief." *Cf. Public Serv. Co.*, 334 NLRB at 488 (finding bad faith where employer insisted on defining "just cause" so expansively that it would provide "virtually no limitation on disciplinary action"). To the contrary, substantial evidence supports the Board's finding that "by proposing to move from 'at-will' employment . . . to the 'reasonable belief' standard, the [Company] plainly indicated that it was willing to limit its discretion over discipline and discharge." (ER 7 n.15.)

The Union's attitude, then and now, is encapsulated in Treneer's testimony that he simply "didn't feel that [the reasonable-belief standard] was anything close

to what we were asking." (SER 35.) True as that may be, a party's good faith is not measured by the extent to which its proposals satisfy other bargaining parties. *See Schweigers, Inc.*, 185 NLRB 420, 424 (1970) ("The record does not establish that Respondent was insisting upon unfettered control . . . ; it shows only that Respondent was unwilling to relinquish as much control as the Union was demanding."). On those facts, the Board reasonably found that the Company's reasonable-belief proposal was not evidence of bad-faith bargaining because it showed a "willing[ness] to limit its discretion over discipline and discharge" by abandoning the more advantageous standard of at-will employment. (ER 7 n.15.)

C. The Union Did Not Sufficiently Test the Company's Willingness to Bargain

In order for the Board to assess the willingness of bargaining parties to negotiate in good faith, the parties themselves have to sufficiently test each other's disposition and proposals. *Nagio Rest.*, 289 NLRB at 23-24. The Board will not find that a party bargained in bad-faith unless its resolve has sufficiently been tested. *Id.* Substantial evidence supports the Board's finding that the Union did not sufficiently test the Company's willingness to bargain before abandoning the negotiations.

The Board identified several factors, which support finding that bargaining had not run its full course by the time the Union filed its bad-faith-bargaining charge. First, the parties met only 5 times over approximately 8 months of

bargaining, with one session devoted primarily to ground rules. (ER 8.) The Union does not dispute that both parties are to blame for the slow pace of the negotiations, nor could it, given that they each cancelled one bargaining session. Second, despite meeting so infrequently, the parties still managed to reach tentative agreement on several provisions covering issues as varied as general working conditions, excused absences, on-the-job safety, weekly work schedules, job stewards, and a probationary period.[11] (ER 8 & n.18; ER 221.) Third, the parties had agreed in principle to union-security and dues-checkoff provisions, and were revising the language of those clauses when the Union broke off negotiations. (ER 8.) Fourth, the Company made several unprompted concessions regarding meals and breaks to which the Union did not respond.[12] (ER 8.) Fifth, while the Company may have held firm on some of the more contentious issues—like wages and benefits, grievance and arbitration procedures, and disciplinary policy—those items remained on the table until the end, proof that the Company was open to

[11] Other items to which the parties tentatively agreed included defining the Company's workweek, a non-discrimination policy, the Company's obligation to supply power tools, compensation for workday travel time, a labor-management committee, implementation of work rules, and employee direct deposit. (ER 8 & n.18; ER 221.)

[12] The Company initially rejected the bulk of the Union's proposals relative to meals and breaks. (ER 190-91.) However, and without prodding, the Company offered several concessions in its second and third contract proposals. (SER 75-76, 115-16.) The Union did not respond to any of those proposals, which were still on the table when it filed its bad-faith-bargaining charge.

considering alternatives. (ER 8.) Indeed, the Company never indicated that its proposals on those matters were not subject to further discussion. Perhaps even more significant, the Union never asked how much room there was to negotiate on those issues, or if the Company's proposals were final. Sixth, because both parties cancelled planned bargaining sessions after September 19, 2016, they did not meet again until January 26, 2017. Nothing occurred in that interval, or at that last session, to indicate that further bargaining would be futile. To the contrary, the parties tentatively agreed on a few more provisions and discussed the Union's latest proposal, which had been communicated only 2 days earlier. (ER 8.) Finally, the Union filed its bad-faith-bargaining charge before the Company even had a chance to consider the Union's last proposal, making it impossible to know how the Company would have responded, including whether it might have acquiesced to some of the Union's suggestions and offered more counterproposals of its own. (ER 8.) This evidence amply supports the Board's finding that the Union did not sufficiently test the Company's willingness to bargain before giving up on the entire process.

The Union takes issue with only one of those factors, namely, the Board's observation that the parties reached tentative agreements on a number of contract provisions. In particular, the Union points out—correctly—that some of those tentative agreements involved issues where the Union withdrew its proposals, and

others incorporated rights employees were already guaranteed by law. (Br. 25-26.) However, the Union ignores that others were the result of a successful bargaining in which the parties exchanged ideas, countered and revised each other's proposals, and eventually settled on language agreeable to both.[13] The parties' tentative agreement on scheduling is especially noteworthy in view of the fact that the Union had earlier accused the Company of not taking employees' concerns on that issue seriously. (ER 211.) Moreover, the Union reads too much into the Board's finding about tentative agreements. The Board's point was simply that the parties were able to make progress despite meeting only 5 times over the course of 8 months. The fact that they did not reach agreement on the more complex or controversial issues in so few sessions is neither surprising nor indicative of what they might have been able to accomplish, had the Union not prematurely ended negotiations.

D. The Company's Initial Refusal to Bargain and Refusal to Furnish Information Are Not Evidence of Bad Faith

The Board majority found that the Company's initial refusal to bargain for purposes of testing the Union's certification, while unlawful, did not evince bad-faith bargaining. (ER 6 & 10 n.2.) The majority also found that the Company's unlawful refusal to furnish the materials in bullet points 2-4 of the Union's

[13] *See, e.g.*, tentative agreements on scheduling (ER 131, 187, SER 73, 91, 113, 154) and excused absences (ER 128, 178, SER 65, 90, 147).

information request did not reflect an intent to stymie the parties' chances of reaching an agreement on wages. (ER 7 n.14.) Substantial evidence supports both of those findings.

1. Failure to bargain

As explained above (pp. 3-4), the Union was certified as the bargaining-unit representative on December 18, 2015. However, on January 4, 2016, the Company filed a request for the Board to review Union's certification. While that request was pending, the Company declined to recognize and bargain with the Union. On May 19, the Board denied the Company's request, and on May 23, the Company accepted the Union's renewed request to bargain. (ER 1; ER 115-16, SER 39.) The Board subsequently found that the Company violated the Act by refusing to recognize and bargain with the Union from January 4 to May 23, 2016. *PSAV*, 2017 WL 2241025, at *2.

The Union asserts that the Company's refusal to bargain between January 4 and May 23 supports finding that the Company approached the entire collective-bargaining endeavor in bad faith. (Br. 22-23.) The Board soundly rejected that claim, as should the Court. (ER 6.)

First, as the Board noted, Board rules permit a union certification to issue before the Board has ruled on a request for review. (ER 6 n.13.) The Union does not cite any case in which the Board weighed the fact that an employer refused to

bargain with a union in order to test its certification in the course of finding that the employer bargained in bad faith. Second, the Company abandoned its refusal to bargain only 4 days after the Board rejected its request for review and quickly reached out to the Union. (ER 6.) The Company could have delayed bargaining for several additional months, if not years, by exercising its right to challenge the Board's *PSAV* order in court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964) (explaining that Congress designed the Act so employers could only obtain judicial review of Board representation decisions by refusing to bargain with newly certified unions); *accord NLRB v. S.R.D.C., Inc.*, 45 F.3d 328, 330 n.2 (9th Cir. 1995). Third, the Board did not find the Company's request for review to be frivolous at the time, and the Union makes no such allegation now. And finally, the Union does not dispute the Board's finding that the Company did not generally engage in dilatory tactics over the course of bargaining. In sum, there is no evidence to support finding that the Company's refusal to bargain while its request for review was pending reflected an overall bad-faith disposition towards the bargaining process in general or an effort to avoid agreement.

2. Failure to provide requested information

As discussed above in Part I.C., the Board found that the Company lawfully refused to produce general financial information listed in bullet point 1 of the Union's request. Notwithstanding that determination, the Board found that the

Company violated the Act by refusing to furnish specific financial information contained in bullet points 2-4—copies of the Company's contracts with Seattle-area hotels, information about the commissions paid to those hotels, and documents showing the rates charged to clients who hired the Company to organize events in those hotels—because that information was relevant to the Union in assessing claims the Company made during bargaining and formulating proposals. (ER 2-3, 5.) However, the Board found that the Company's refusal to provide that information was not otherwise indicative of bad faith because the Company may have had a good-faith belief that, having retracted its inability-to-pay claim, it was relieved of the duty to produce any of the requested information. (ER 7 n.14.) The Union challenges that latter finding, but its supporting argument is essentially nonexistent and should therefore be considered waived. *See Graf*, 610 F.3d at 1166 (unsubstantiated arguments are deemed waived). In any event, substantial evidence supports the Board's determination.

The Union does not dispute the Board's finding (ER 7 n.14) that its information request was couched entirely in reference to the Company's inability-to-pay claim, which the Board found was retracted. Sypher began her e-mail by referencing Shankman's "remarks on [the Company]'s economic position," quoting his statements that the Union's wage proposal would be "suicide" and would put the Company "under water." (ER 203.) Sypher then explained that

Shankman had "connected the [C]ompany's inability to pay the wages requested both with the commissions that it pays back to its hotel property clients [topic of bullet points 2-3] and the rates it charges for its services to event clients [topic of bullet point 4]," again quoting from Shankman's statements. (ER 203.) In Shankman's own words, Sypher's message unmistakably communicated that "[t]he balance of [her] request (hotel contracts [bullet point 2], commission rates [bullet point 3] and rates charged to end clients [bullet point 4]) [was] premised off of [the Company's] inability to pay claim." (ER 202.) And even after Shankman conveyed that this was how he understood the request, the Union never sought to correct him, to clarify the relevance of bullet points 2-4, or to provide any other basis for those requests. Indeed, aside from filing a Board charge, the Union did not make any other attempt to obtain those materials after the Company retracted its inability-to-pay claim. Thus, the only reason the Union ever gave for seeking that information was "to better understand [the Company]'s financial position." (ER 203, SER 31.)

Moreover, the fact that the Union did not challenge the Company's failure to produce information in bullet points 2-4 separately from its refusal to produce information in bullet point 1 could reasonably be construed as an admission that

the Union's only interest in those materials was to probe the Company's finances.[14] That assumption would have been all the more likely given that the relevance of the requested information was not otherwise self-evident. Accordingly, it was perfectly reasonable for the Board to infer that the Company's refusal to provide information requested in bullet points 2-4 was the result of a mistaken but good-faith belief that it was not required to provide it, and not "an intentional ploy to disrupt the parties' negotiations or to thwart the possibility of reaching agreement on wages." (ER 7 n.14.)

The Union's only semblance of an argument is that withholding relevant information hampers the requesting party's ability to bargain effectively. (Br. 23.) As an initial matter, the Union fails to offer any evidence that the Company's actions hobbled its ability to bargain.[15] But even if that was true, it would be no different from any other failure-to-provide-information case. Essentially, the Union argues that a party's failure to provide information suffices on its own to establish bad-faith bargaining. However, that view runs contrary to established

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[14] The Union's charge and the General Counsel's complaint simply alleged that the Company violated the Act by failing to produce the requested information, but drew no distinction between bullet points 1 and 2-4. (SER 1, 7-8.)

[15] As the Board observed, the Union based its wage proposals in part on rates the Company pays as-needed technicians in other cities, and the information in bullet points 2-4 was not necessary to grasp the fundamental difference between those employees and the Company's regular hourly technicians in Seattle. (ER 7 n.14.)

law, which requires the Board to consider a party's conduct as a whole in determining whether it bargained in bad faith. *Ins. Agents*, 361 U.S. at 498; *Public Serv. Co.*, 334 NLRB at 487. Indeed, in the cases cited by the Union, the Board's bad-faith finding was not based solely on the fact that the employer did not provide information to the union, but also on the circumstances surrounding the employer's rejection of the union's request. *See Regency Serv. Carts, Inc.*, 345 NLRB 671, 675 (2005) (finding bad faith where employer followed pattern of making frivolous objections to clearly relevant requests and only supplying information after unreasonable delays); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992) (finding bad faith where employer initially could not explain failure to provide basic employee information and then blamed delay on event that occurred 10 days after union's request). Here, by contrast, the Board concluded that the totality of the circumstances did not support finding that the Company's refusal to provide information in bullet points 2-4 evidenced bad faith. (ER 7 n.14.) The Union offers no basis to overturn that determination.

E. McIlwain's Statements in Philadelphia Were Not Indicative of Bad-Faith Bargaining in Seattle

The Board found that CEO McIlwain's statements at a mandatory preelection meeting of Philadelphia-area technicians was not evidence that the Company proceeded in bad faith with negotiations in Seattle. (ER 9 & n.22.) The Board is generally "reluctant to find bad-faith bargaining exclusively on the basis

of a party's misconduct away from the bargaining table." *Litton Sys., Inc.*, 300 NLRB 324, 330 (1990), *enforced*, 949 F.2d 249 (8th Cir. 1991). The Board's determination is again supported by substantial evidence.[16]

As an initial matter, the Union does not argue with the Board's finding that McIlwain correctly summarized the Company's statutory bargaining obligation when he said the Company would have to bargain in good faith, but not agree to any specific terms. (ER 9.) Nor can the Union dispute that, when McIlwain made his statements, the Seattle negotiations had been stalled for nearly 4 months. Thus, McIlwain's description of those talks as "dragging out and nothing happening" (ER 78) was an accurate representation of the situation at the time. Moreover, as the Board noted (ER 9 n.22), McIlwain did not say, nor did his language imply, that the Company was purposefully working to drag those negotiations out. Indeed, it is undisputed that the delay was due in part to the Union's cancelling of a

[16] The Board rejected the judge's finding that the Company violated the Act by distributing to the entire bargaining unit copies of a letter written by Shankman and addressed to Treneer. (ER 9, 10 n.2.) In that letter dated October 13, 2016, the Company expressed its commitment to "maintaining [its] business model," stated that it rejected the Union's wage proposal, and explained the difference between its Seattle operations, which used in-house technicians, and other cities where the Company used as-needed hires. (ER 3; ER 210.) The Company argued that the Union's wage proposals ignored this "substantial difference in work structure," and also disputed the Union's claims that it was not offering a livable wage or taking scheduling concerns seriously. (ER 210-11.) The Union does not dispute the Board's finding that the October 13 letter was protected employer speech under Section 8(c) of the Act, 29 U.S.C. § 158(c), and that even if it was not protected speech, the letter was at best weakly probative of bad faith. (ER 9, 10 n.2.)

scheduled bargaining session. (ER 9 n.22; SER 124.) And while the Company was also forced to cancel a session, it requested to reschedule the meeting "as soon as possible," conveyed by e-mail a new counterproposal it had intended to present to the Union at that session, and asked the Union to share any proposals of its own "so that we can keep things moving forward until we can meet again." (ER 9 n.22; SER 93.) On those facts, it was eminently reasonable for the Board to conclude that McIlwain's comments were simply an accurate representation of the stark realities of collective bargaining, not an avowal of bad faith. (ER 9 & n.22.)

McIlwain's statements are a far cry from *Overnite Transportation Co.*, on which the Union relies. 296 NLRB 669 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991). In that case, the employer's vice president delivered several threat-laden, pre-election speeches in which he also "stated that the [employer] would not sign a contract, and threatened to bargain in bad faith to force a strike." *Id.* at 671, 673-74. Those facts simply do not compare with McIlwain's blunt, but fundamentally accurate description of the Seattle negotiations. Not only that, but the *Overnite* employer's statements were "unmitigated by any assurances that [it] would bargain in good faith" *id.* at 671, whereas McIlwain rightly acknowledged the Company's overarching obligation to bargain in good faith. The fact that McIlwain offered a somber but realistic assessment of the pitfalls of collective

bargaining does not support finding bad faith on the Company's part, especially where his comments accurately depicted the parties' negotiations at the time.

Viewed as a whole, therefore, the record supports the Board's determination that both parties engaged in lawful hard bargaining, that the Union cut off the negotiations before it sufficiently tested the Company's willingness to bargain, and that McIlwain's Philadelphia statements did not evince bad faith in the Company's course of bargaining in Seattle. Accordingly, the Board acted with a rational basis in dismissing claims that the Company violated its duty to bargain in good faith.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's petition for review.

STATEMENT OF RELATED CASES

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

Respectfully submitted,

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August 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, LOCAL 15,	)	
Petitioner	)	No. 19-70651
v.	)	Board Case Nos. 19-CA-186007 19-CA-192068
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent	)	

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 11,534 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word for Office 365. The Board further 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.

s/ David Habenstreit
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Dated at Washington, DC
this 19th day of August 2019

STATUTORY ADDENDUM
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National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq.

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(c) of the Act (29 U.S.C. § 158(c)):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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

(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:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(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.

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, LOCAL 15,	)	
Petitioner	)	No. 19-70651
v.	)	Board Case Nos. 19-CA-186007 19-CA-192068
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 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.

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