

**Nos. 19-1101, 19-1103, 19-1109, 19-1110**

---

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

**PACIFIC MARITIME ASSOCIATION**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

**LONG BEACH CONTAINER TERMINAL**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**KIRA DELLINGER VOL**  
*Supervisory Attorney*

**ERIC WEITZ**  
*Attorney*

*National Labor Relations Board*  
**1015 Half Street SE**  
**Washington, DC 20570**  
**(202) 273-0656**  
**(202) 273-3757**

**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Deputy General Counsel*

**DAVID HABENSTREIT**

*Acting Deputy Associate*

*General Counsel*

**National Labor Relations Board**

---

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

PACIFIC MARITIME ASSOCIATION	)	
Petitioner/Cross-Respondent	)	Nos. 19-1101 & 19-1109
	)	
v.	)	Board Case Nos.
	)	21-CA-197882
NATIONAL LABOR RELATIONS BOARD	)	21-CA-198530
Respondent/Cross-Petitioner	)	
_____	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	
Petitioner/Cross-Respondent	)	Nos. 19-1103 & 19-1110
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

**A. Parties and Amici**

Pacific Maritime Association (“PMA”) and Long Beach Container Terminal (“LBCT”) (collectively, “the Employers”) were the respondents before the Board and are the petitioners/cross-respondents before the Court. The Board’s General Counsel was a party before the Board in the unfair-labor-practice proceeding. The Board is the respondent/cross-petitioner before the Court. ILWU, Warehouse, Processing & Distribution Workers’ Union, Local 26 (“Local 26”) was the

charging party before the Board. International Longshore & Warehouse Union (“the International”) filed an amicus brief before the Board.

### **B. Rulings Under Review**

This consolidated case is before the Court on the Employers’ petitions for review and the Board’s cross-applications for enforcement of an unfair-labor-practice Decision and Order of the Board, issued on May 2, 2019, and reported at 367 NLRB No. 121. The Board seeks full enforcement of that Order.

### **C. Related Cases**

The case on review was not previously before this Court or any other court. Board counsel is unaware of any related cases currently pending in this Court or any other court.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 9th day of January, 2020

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issues .....	2
Relevant statutory provisions.....	2
Statement of the case.....	3
I. The Board’s findings of fact .....	3
A. Background; the Employers’ bargaining relationships .....	3
B. Article 18 of the Watchmen’s Agreement.....	5
C. Section 13.2 of the PCL&CA.....	7
D. The parties’ bargaining history and past practice.....	8
E. A Section 13.2 complaint is filed against a Local 26 watchman .....	11
F. The Employers participate in the Section 13.2 hearing .....	13
G. The Employers discipline the Local 26 watchman pursuant to the Section 13.2 proceeding; Local 26 files unfair-labor-practice charges with the Board .....	15
II. The Board’s conclusions and Order .....	16
Summary of argument.....	17
Standard of review .....	20
Argument.....	21
The Employers violated Section 8(a)(5) and (1) of the Act by imposing a new disciplinary procedure from an outside contract in order to discipline a bargaining-unit watchman represented by Local 26.....	21

## TABLE OF CONTENTS

<b>Headings-Cont'd</b>	<b>Page(s)</b>
I. The Board reasonably found that the Employers' actions constituted an unlawful midterm modification of the Watchmen's Agreement.....	23
A. The Employers modified the clear language of the Watchmen's Agreement by utilizing the Section 13.2 procedure from the PCL&CA in order to discipline Pleas .....	25
B. The Employers failed to demonstrate a sound arguable basis for interpreting the Watchmen's Agreement as permitting them to utilize the Section 13.2 procedure and to issue an unprecedented disciplinary action against Pleas.....	30
C. The parties' bargaining history forecloses any notion that the Employers were relying in good faith on an interpretation of the Watchmen's Agreement with a sound arguable basis in the contract.....	36
II. The Board reasonably found that the Employers' actions constituted an unlawful unilateral change to bargaining-unit employees' terms and conditions of employment .....	41
A. The Employers changed employees' terms and conditions of employment by subjecting Pleas to the Section 13.2 procedure .....	42
B. The Employers have failed to demonstrate that applying the Section 13.2 procedure to the Local 26 bargaining unit was a mere continuation of the status quo.....	45
C. No provision in the Watchmen's Agreement covers the Employers' right to impose a new disciplinary procedure .....	50
Conclusion .....	57

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Advanced Life Sys., Inc. v. NLRB</i> , 898 F.3d 38 (D.C. Cir. 2018).....	46
<i>Allied Chem. &amp; Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	23-24, 35
<i>B&amp;D Plastics, Inc.</i> , 302 NLRB 245 (1991) .....	46
<i>*Bath Iron Works Corp.</i> , 345 NLRB 499 (2005), <i>affirmed sub nom.</i> <i>Bath Marine Draftsmen’s Ass’n v. NLRB</i> , 475 F.3d 14 (1st Cir. 2007)....	21-25, 50
<i>Chevron Mining, Inc. v. NLRB</i> , 684 F.3d 1318 (D.C. Cir. 2012).....	38
<i>City Cab Co. of Orlando, Inc. v. NLRB</i> , 787 F.2d 1475 (11th Cir. 1986) .....	45-46
<i>Comau, Inc.</i> , 364 NLRB No. 48, 2016 WL 3853834 (July 14, 2016).....	22, 45
<i>Daycon Prods. Co.</i> , 360 NLRB 357 (2014) .....	24, 37-38
<i>DMI Distrib. of Delaware, Ohio, Inc.</i> , 334 NLRB 409 (2001) .....	46
<i>Dodge of Naperville, Inc.</i> , 357 NLRB 2252 (2012), <i>enforced</i> , 796 F.3d 31 (D.C. Cir. 2015) .....	22
<i>E.I. du Pont de Nemours &amp; Co. v. NLRB</i> , 682 F.3d 65 (D.C. Cir. 2012).....	46

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>El Paso Elec. Co.</i> , 355 NLRB 428 (2010), <i>enforced</i> , 681 F.3d 651 (5th Cir. 2012) .....	24, 44
<i>Enloe Med. Ctr. v. NLRB</i> , 433 F.3d 834 (D.C. Cir. 2005).....	50
<i>Enter. Leasing Co. of Fla. v. NLRB</i> , 831 F.3d 534 (D.C. Cir. 2016).....	32
<i>EEOC v. Waffle House, Inc.</i> , 534 U.S. 279 (2002).....	35
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004) .....	21
<i>George Banta Co. v. NLRB</i> , 686 F.2d 10 (D.C. Cir. 1982).....	53
<i>Goya Foods, Inc. v. NLRB</i> , 298 F. App'x 12 (D.C. Cir. 2008) .....	46
<i>Honeywell Int'l, Inc. v. NLRB</i> , 253 F.3d 119 (D.C. Cir. 2001).....	55
<i>Hosp. of Barstow, Inc. v. NLRB</i> , 897 F.3d 280 (D.C. Cir. 2018).....	56
<i>Hosp. San Carlos Borromeo</i> , 355 NLRB 153 (2010) .....	38
<i>Knollwood Country Club</i> , 365 NLRB No. 22, 2017 WL 1088796 (Mar. 8, 2017).....	25

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>*Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB</i> , 797 F.2d 1027 (D.C. Cir. 1986).....	25, 38, 40, 52-53
<i>Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB</i> , 927 F.2d 635 (D.C. Cir. 1991).....	20
<i>Martinsville Nylon Emps. Council Corp. v. NLRB</i> , 969 F.2d 1263 (D.C. Cir. 1992).....	52
<i>Media Gen. Operations, Inc.</i> , 346 NLRB 74 (2005), <i>affirmed</i> , 225 F. App'x 144 (4th Cir. 2007).....	46
<i>Migali Indus., Inc.</i> , 285 NLRB 820 (1987).....	24
<i>Minteq Int'l, Inc.</i> , 364 NLRB No. 63, 2016 WL 4087601 (July 29, 2016), <i>enforced</i> , 855 F.3d 329 (D.C. Cir. 2017).....	42
<i>MV Transp., Inc.</i> , 368 NLRB No. 66, 2019 WL 4316958 (Sept. 10, 2019) .....	42, 55
<i>NLRB v. C&amp;C Plywood Corp.</i> , 385 U.S. 421 (1967).....	20, 22, 41-42, 55
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	22, 41, 45-46
<i>NLRB v. Strong</i> , 393 U.S. 357 (1969).....	24, 55
<i>*NLRB v. U.S. Postal Serv.</i> , 8 F.3d 832 (D.C. Cir. 1993).....	17, 22, 42, 50, 53-54

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>N.Y. Rehab. Care Mgmt., LLC v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2007).....	56
<i>Parsons Elec., LLC v. NLRB</i> , 812 F.3d 716 (8th Cir. 2016) .....	43
<i>Rahco, Inc.</i> , 265 NLRB 235 (1982) .....	47
<i>Regal Cinemas, Inc. v. NLRB</i> , 317 F.3d 300 (D.C. Cir. 2003).....	41, 51
<i>S. Nuclear Operating Co. v. NLRB</i> , 524 F.3d 1350 (D.C. Cir. 2008).....	54
<i>StaffCo of Brooklyn, LLC v. NLRB</i> , 888 F.3d 1297 (D.C. Cir. 2018).....	20, 36, 50
<i>Tramont Mfg., LLC v. NLRB</i> , 890 F.3d 1114 (D.C. Cir. 2018).....	52
<i>United Steelworkers, Local Union 14534 v. NLRB</i> , 983 F.2d 240 (D.C. Cir. 1993).....	28
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	20
<i>*Wilkes-Barre Hosp. Co. v. NLRB</i> , 857 F.3d 364 (D.C. Cir. 2017).....	41-42, 53-55
<i>Wilson &amp; Sons Heating &amp; Plumbing, Inc. v. NLRB</i> , 971 F.2d 758 (D.C. Cir. 1992).....	33

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>W.R. Grace &amp; Co. v. Local Union 759,</i> <i>Int'l Union of United Rubber, Cork, Linoleum &amp; Plastic Workers,</i> 461 U.S. 757 (1983).....	36
<b>Statutes</b>	
National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.)	
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 16, 18, 21, 23, 41, 56
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 16, 18, 21, 23, 35, 41, 56
Section 8(d) (29 U.S.C. § 158(d)).....	21, 23
Section 9(a) (29 U.S.C. § 159(a)) .....	35
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 20, 32, 50
Section 10(f) (29 U.S.C. § 160(f)) .....	2

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## **GLOSSARY**\*

Act	National Labor Relations Act, 29 U.S.C. §§ 151, <i>et seq.</i>
Board	National Labor Relations Board
Employers	Pacific Maritime Association and Long Beach Container Terminal, collectively
International	International Longshore & Warehouse Union
LBCT	Long Beach Container Terminal
Local 26	ILWU, Warehouse, Processing & Distribution Workers Union, Local 26
PCL&CA	Pacific Coast Longshore and Clerks' Agreement
PMA	Pacific Maritime Association
Br.	Employers' Opening Brief to the Court
D&O	Board's May 2, 2019 Decision and Order (JA.9-38)
JA	Deferred Joint Appendix

---

\* The Board is cognizant that the Court disfavors acronyms in briefs. The Board has retained the acronyms "LBCT," "PCL&CA," and "PMA" in order to maintain consistency and avoid confusion between its brief, the Employers' opening brief, the Board's Decision and Order, and the record evidence.

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

---

**Nos. 19-1101, 19-1103, 19-1109, 19-1110**

---

**PACIFIC MARITIME ASSOCIATION  
Petitioner/Cross-Respondent**

**v.**

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

---

**LONG BEACH CONTAINER TERMINAL  
Petitioner/Cross-Respondent**

**v.**

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

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This consolidated case is before the Court on the petitions of Pacific Maritime Association (“PMA”) and Long Beach Container Terminal (“LBCT”) (collectively, “the Employers”) for review, and the cross-applications of the

National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Employers on May 2, 2019, and reported at 367 NLRB No. 121. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petitions and applications are timely, as the Act provides no time limit for such filings.

### **STATEMENT OF THE ISSUES**

Did the Employers violate Section 8(a)(5) and (1) of the Act by imposing a new disciplinary procedure from an outside contract in order to discipline a bargaining-unit employee, and, specifically: (i) did the Employers’ actions constitute an unlawful midterm modification of the governing collective-bargaining agreement; and (ii) did the Employers’ actions constitute an unlawful unilateral change to bargaining-unit employees’ terms and conditions of employment?

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are included in the attached Addendum.

## STATEMENT OF THE CASE

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

#### A. Background; the Employers' Bargaining Relationships

The Employers are involved in the shipping, longshore, and cargo-handling industries at ports on the Pacific coast. (D&O1, 15.)<sup>1</sup> PMA is a mutual-benefit corporation composed of approximately fifty stevedore companies, marine terminal operators, and other employers. (D&O15; JA.135-36.) PMA serves as the multiemployer collective-bargaining agent for its employer-members, with the primary purpose of negotiating, executing, and administering collective-bargaining agreements with various labor organizations representing employees at ports in California, Oregon, and Washington. (D&O15; JA.135-37.) One of PMA's employer-members is LBCT, which operates a marine container terminal at the Port of Long Beach. (D&O16; JA.50.) LBCT employs both watchmen and marine clerks, with each classification represented by a different union and covered by a separate multiemployer contract. (D&O1; JA.414-610, 881-1092.)

For many years, all watchmen at the Ports of Los Angeles and Long Beach have been represented by ILWU, Warehouse, Processing & Distribution Workers

---

<sup>1</sup> "JA." refers to the deferred joint appendix filed by the Employers. "D&O" references are to the Board's May 2, 2019 Decision and Order (JA.9-38) using its own internal pagination (D&O1-30). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Employers' opening brief to the Court.

Union, Local 26 (“Local 26”). (D&O14, 16; JA.45, 71, 74-75.) The Employers and Local 26 are parties to a multiemployer collective-bargaining agreement covering all watchmen employed by four signatory employers at the Ports of Los Angeles and Long Beach. (D&O1, 16; JA.75-77, 143-44.) The contract with Local 26 is known as the “Watchmen’s Agreement.” (D&O1.)<sup>2</sup> Pursuant to the Watchmen’s Agreement, Local 26 and PMA jointly operate a dispatch hall that refers watchmen out for short-term jobs with the four signatory employers, including LBCT. (D&O16; JA.46-48, 446-49.)

The Employers are also parties to a separate multiemployer collective-bargaining agreement covering a much larger coastwide unit of longshore workers and marine clerks. (D&O16; JA.78-79, 136, 138-39.) That agreement is negotiated with PMA by the International Longshore & Warehouse Union (“the International”) on behalf of local unions representing longshore workers and marine clerks at various ports, including the Ports of Los Angeles and Long Beach. (D&O16; JA.80-81, 140-42.) The International does not negotiate on behalf of Local 26 or the watchmen unit. (D&O24; JA.93, 140, 143, 189.) The coastwide

---

<sup>2</sup> The operative 2014-2019 Watchmen’s Agreement is included in the record as two exhibits: the full text of the 2008-2014 Watchmen’s Agreement (JA.414-585), and the text of the parties’ amendments for the 2014-2019 final contract (JA.586-610).

contract with the International is known as the Pacific Coast Longshore and Clerks' Agreement ("PCL&CA"). (D&O1.)

**B. Article 18 of the Watchmen's Agreement**

Article 18 of the Watchmen's Agreement provides a detailed procedure for resolving disciplinary issues and other disputes arising under the contract. (D&O2; JA.452-55, 594-96.) Article 18 creates a Joint Labor Relations Committee, composed of representatives from Local 26 and the signatory employers, which meets to resolve grievances, secure conformance to the contract, and "generally administer the Agreement." (D&O18; JA.92-94, JA.452 art. 18(A), (B), JA.594 art. 18(B).) Pursuant to Article 18(C), the Joint Labor Relations Committee "establish[es] rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules," with the caveat that "nothing herein shall restrict [an employer's] existing right to discipline or discharge men for intoxication, pilferage, assault, incompetency, or failure to perform work as directed." (D&O2; JA.452, 594-95.)

In order to discipline a watchman for misconduct that does not involve one of those enumerated offenses, Article 18(D) specifies that an employer must first "notify and discuss the alleged incident with the individuals involved and [a representative of] Local 26 and attempt to resolve the matter." (D&O2; JA.94-95, 181-82, 595.) In "cases of discipline and/or discharge," the employer is required to

“describe in detail the violation committed by the watchman,” and specifically identify “the company procedure and/or Contract provision violated.” (D&O18; JA.452-53 art. 18(D).) If the parties cannot resolve the issue at that informal stage, then the employer may file a complaint with the Joint Labor Relations Committee. (D&O2; JA.452-53 art. 18(D), (E), JA.595 art. (D), (E).) Only if “a satisfactory settlement cannot be reached by the [Joint Labor Relations Committee]” may a party refer the matter to the contractual Watchmen’s Area Arbitrator. (D&O2; JA.453 art. 18(E), JA.595 art. 18(E).) The contract outlines the rules for any such arbitration and the contractual appeal process. (D&O2; JA.453-54, 595-96.)

When there is a disciplinary action affecting a watchman’s dispatch rights, Article 18(I) specifies that it shall only be applicable “to the terminal where the complaint arose.” (D&O2; JA.454.)

Article 18(H) dictates that the procedures outlined in the contract “shall be the exclusive remedy with respect to any dispute arising under the [contract] and no other remedies shall be used by the Union, the Employer, or any covered employee.” (D&O2; JA.454.) That includes disputes involving alleged misconduct arising under Article 16 of the Watchmen’s Agreement, which broadly prohibits discrimination against “any person” on the basis of “race, color, . . . or political beliefs.” (D&O2, 19; JA.365, 374, 451.) The Watchmen’s Agreement does not include a general management-rights clause, and Article 21 specifies that

no provision of the contract “may be amended, modified, changed, altered or waived, except by a written document executed by the parties hereto.” (D&O19; JA.414-610.)

**C. Section 13.2 of the PCL&CA**

The PCL&CA contains its own distinct mechanism for the signatory unions and employers to resolve disputes regarding covered longshore workers and marine clerks. (D&O16; JA.706-27 art. 17, JA.945-63 art. 17.) In addition, Section 13.2 of the PCL&CA establishes a special grievance procedure for resolving allegations of discrimination or harassment. (D&O1-2, 16-17; JA.692-94, 939-41, 1093-1135.) First negotiated by PMA and the International in 2001, the Section 13.2 procedure allows individual employees covered by the PCL&CA to file complaints that are assigned directly to a designated arbitrator. (D&O2, 16; JA.1093-1135, 1228-46.) The arbitrator is required to promptly schedule a hearing to investigate the alleged incident and to take witness testimony. (D&O2; JA.1109-13.) Within fourteen days after the hearing, the arbitrator must issue a written decision that includes, when necessary, disciplinary penalties consistent with guidelines in the PCL&CA. (D&O2 & n.6; JA.1109-18.) The arbitrator’s decision is final, with a limited appeal mechanism. (D&O17; JA.1109-15.)

The PCL&CA incorporates Section 13.2 itself, a special Section 13.2 handbook, and several letters of understanding negotiated by PMA and the

International. (D&O1-2, 16-17; JA.148-49, 692-94, 939-41, 1093-1138.) In addition to the broad prohibition on discrimination contained in Section 13.1 of the PCL&CA, those side agreements provide detailed rules of conduct and examples of prohibited conduct warranting discipline, such as “name-calling.” (D&O1-2 & n.5; JA.1104.) In July 2014, PMA and the International entered into a letter of understanding (“the 2014 Letter of Understanding”) to clarify the scope of Section 13.2. (D&O2, 17; JA.1097-1102, 1136-38.) The 2014 Letter of Understanding specifies that Section 13.2 complaints may be brought against “other employees of PMA member companies (such as ILWU-represented guards),” but makes clear that those outside employees may not file Section 13.2 complaints. (D&O2; JA.1097-1102, 1136-38.)

#### **D. The Parties’ Bargaining History and Past Practice**

On multiple occasions, Local 26 has rejected proposals to incorporate the PCL&CA’s special Section 13.2 procedure into the Watchmen’s Agreement. (D&O2.) During bargaining for the 2008-2014 contract, the Employers presented Local 26 with a proposal to modify the contractual disciplinary procedure by adopting the Section 13.2 procedure for discrimination-related complaints. (D&O2, 19; JA.49-61, 85-87, 287-336, 352.) Local 26 rejected the proposal, and the Employers eventually agreed to withdraw it prior to the parties reaching a final agreement. (D&O2, 19; JA.85-87, 287-336, 352.) Local 26 objected on the

grounds that Section 13.2 or similar procedures would make it too easy for management or employees with ulterior motives to target bargaining-unit employees for discipline. (D&O2, 19; JA.103.) Local 26 was also concerned that, as compared to the existing Article 18 employer-complaint procedure, the Section 13.2 procedure would allow employers to pit employees directly against each other. (D&O19; JA.72-73.)

During bargaining for the 2014-2019 contract, the Employers again proposed that the parties incorporate the Section 13.2 procedure, and later alternatively proposed modifying Article 16 of the Watchmen's Agreement to provide similar expedited disciplinary procedures for discrimination-related complaints. (D&O2, 19; JA.61-66, 82-85, 89-90, 110, 182-83, 346, 354.) Local 26 once again rejected such proposals, and the Employers withdrew them prior to reaching final agreement. (D&O19; JA.65, 84-85, 89, 183, 346, 354.) The Employers separately proposed to modify Article 18(I) to allow discipline affecting dispatch rights at all terminals rather than just the terminal where the formal complaint arose, but that proposal was not incorporated into the final agreement. (JA.351, 594-96.) By the time of the events at issue in the present case, Local 26 had become the last holdout among unions representing workers employed by PMA or its employer-members that had not agreed to adopt Section

13.2 or to include similar procedures in its collective-bargaining agreement.

(D&O19 n.17; JA.158-59.)

The Employers initially continued the practice of addressing allegations of discrimination or harassment exclusively through the Article 18 procedure.

(D&O2, 23.) For example, LBCT filed an employer complaint against a watchman in March 2016 alleging discrimination and a hostile work environment, which was resolved by the Joint Labor Relations Committee and resulted in a disciplinary action. (D&O2; JA.374-79.) In February 2017, an employee in the watchmen's bargaining unit attempted to file a Section 13.2 grievance against another unit employee. (D&O2, 19; JA.356-61, 380-93.) When PMA informed Local 26 President Luisa Gratz, she wrote in response that the parties had already rejected the use of Section 13.2 during contract negotiations, and that requiring Local 26 or its members to "participate in [the] unilateral imposition of another local's contract process" would violate the Watchmen's Agreement. (D&O19; JA.356-58.) In response, PMA clarified that it was not requesting to meet "to conduct a [Section] 13.2 hearing," but to discuss the matter with Local 26 informally. (D&O2, 19; JA.369.) PMA ultimately did not process the employee's grievance through the Section 13.2 procedure. (D&O2, 19 & n.18; JA.356-61.)

**E. A Section 13.2 Complaint Is Filed Against a Local 26 Watchman**

On March 28, 2017, watchman Demetrius Pleas, an employee represented by Local 26 and covered by the Watchmen’s Agreement, got into an argument about work jurisdiction with a marine clerk represented by a different local union and covered by the PCL&CA. (D&O3, 19; JA.1247.) Pleas was working for LBCT at its Port of Long Beach terminal. (D&O3, 20; JA.1247.) During the course of the argument, both men allegedly cursed and engaged in racially tinged name-calling. (D&O3; JA.1247.) The marine clerk allegedly called Pleas “boy” and threatened to have him fired. (D&O3 n.9; JA.1218.) Pleas allegedly called the marine clerk a “white, Trump-loving motherfucker.” (D&O3 n.9; JA.1195.) Later that day, the two employees temporarily resolved the dispute in an informal meeting with the general manager of LBCT. (D&O3; JA.1247.)

Two days later, the marine clerk filed a Section 13.2 grievance under the PCL&CA regarding the March 28 incident, alleging racial and political harassment by Pleas. (D&O3; JA.1145-53, 1247.) One day after the grievance was filed, LBCT separately informed Local 26 that it had begun investigating the incident and intended “if necessary” to pursue discipline against Pleas pursuant to Article 18 of the Watchmen’s Agreement. (D&O3, 20 n.21; JA.99-100, 248-250, 253, 363.) LBCT later concluded that there was insufficient evidence that Pleas engaged in wrongdoing to warrant a disciplinary complaint under the Watchmen’s

Agreement, and LBCT instead sent Local 26 a non-disciplinary warning letter addressed to Pleas. (D&O3 n.10; JA.129, 254-55, 365.)

Meanwhile, an arbitrator assigned to the grievance under Section 13.2 of the PCL&CA scheduled a hearing for May 3 and sent notice to Pleas instructing him to appear. (D&O3, 20; JA.1154-60.) Neither LBCT nor PMA notified Local 26 that a Section 13.2 grievance had been filed or that a hearing had been scheduled until several weeks later. (D&O3; JA.102.) On April 19, PMA Labor Relations Representative Eric Naefke informed Local 26 President Gratz of the grievance against Pleas and the scheduled hearing. (D&O3, 20; JA.102-03.) Gratz reminded Naefke that the Section 13.2 procedure was not contained in the Watchmen's Agreement and could not be utilized to discipline Pleas, and stated that neither Local 26 nor Pleas would participate in the scheduled hearing. (D&O20; JA.102-04.) Naefke replied that Gratz and Pleas should be at the hearing, and that Gratz should "tell it to the arbitrator." (D&O20; JA.103-04.)

On April 27, Local 26's attorney sent a letter to PMA reiterating that Local 26 was not a party to the PCL&CA or the Section 13.2 procedure, that the terms of employment for Local 26 watchmen are governed by the Watchmen's Agreement, and that neither Local 26 nor Pleas would participate in the scheduled hearing. (D&O20; JA.1139.) PMA responded by asserting that it was a "longstanding and well-known component of the watchmen's terms and conditions of employment"

that watchmen could be disciplined through the separate Section 13.2 procedure. (D&O20; JA.1142-44.) PMA wrote that if Pleas did not attend the hearing then he would be unable to defend himself. (D&O20; JA.1144.) PMA further warned that LBCT and the other PMA employer-members “[would] implement” whatever discipline the arbitrator determined was appropriate. (D&O20; JA.1144.)

#### **F. The Employers Participate in the Section 13.2 Hearing**

On May 3, 2017, the arbitration hearing took place as scheduled at PMA’s offices in Long Beach. (D&O3, 20; JA.1154-89.) Neither Pleas nor any representative of Local 26 attended. (D&O3; JA.104-05, 1165.) Multiple representatives of both PMA and LBCT did attend, including PMA Labor Relations Representative Naefke, LBCT Manager of Labor Relations John Beghin, and PMA manager Philip Tabyanan, who informed the arbitrator that he was representing LBCT. (D&O3, 20; JA.1165.) Near the start of the hearing, the arbitrator reminded the parties that he did not “really have authority over Mr. Pleas” pursuant to the PCL&CA and that it “would be up to the Employer to enforce any decision if any action was needed.” (D&O4 n.14, 20; JA.1167.) PMA responded that both Employers were “ready to implement or prepared to implement any decision made.” (D&O3-4 & n.14; JA.1167.)

Both Employers’ representatives actively participated in the hearing. (D&O3-4 & n.14; JA.1165-67, 1169, 1171-72, 1174-77.) Without being prompted

by the arbitrator, both Employers affirmatively argued that Pleas was subject to the Section 13.2 procedure under the PCL&CA. (D&O3-4 & n.14, 22; JA.1166-67.) PMA introduced multiple supporting exhibits on behalf of both Employers, including a highlighted copy of the 2014 Letter of Understanding between PMA and the International. (D&O3-4 & n.14, 22; JA.1167, 1174-75.) The hearing focused in part on whether Pleas' alleged conduct contravened the specific language of the PCL&CA and its associated documents. (D&O3-4 & n.14, 20; JA.1173.) The arbitrator stated that he had no authority to interpret similar provisions in other contracts, including the Watchmen's Agreement. (JA.1174-76, 1200.) In response to the arbitrator's question regarding whether Pleas was required to abide by the policies set forth in Section 13.2, LBCT's representative replied that the 2014 Letter of Understanding "speaks to" that matter. (D&O3, 20; JA.1175.)

At the end of the hearing, the arbitrator proposed barring Pleas from working at LBCT until a final decision was rendered, while reiterating that he would "have to find out from LBCT if this [was] possible," that he had "no authority to advise Local 26 of anything," and that any discipline had to go "through the Employers." (D&O20; JA.1176.) Both Employers agreed to the proposed interim order and requested that that arbitrator place it in writing. (D&O20; JA.1176-77, 1190-92.) The arbitrator issued his final decision the following month, concluding that Pleas

had violated the specific policies contained in the PCL&CA. (D&O3, 20; JA.1193-1202.) The arbitrator again noted that his duty was “confined solely to interpreting and applying Section 13.2 of the PCL&CA as written,” and that he lacked any authority to interpret the Watchmen’s Agreement. (D&O3; JA.1200-01.) The arbitrator’s decision directed that Pleas should be suspended for twenty-eight days from working for any employer covered by the PCL&CA, and should be required to undertake an unpaid training and to sign a statement pledging to abide by the policies in the PCL&CA before returning to work. (D&O20; JA.1201.)

**G. The Employers Discipline the Local 26 Watchman Pursuant to the Section 13.2 Proceeding; Local 26 Files Unfair-Labor-Practice Charges with the Board**

In July 2017, PMA sent a letter to its employer-members informing them that Pleas had been suspended and directing them not to allow Pleas “on the premises, including parking lots, of any terminal under the PCL&CA.” (D&O21; JA.1223.) Pleas subsequently attempted to request work through the dispatch hall and was initially dispatched to work for Hanjin Terminal, one of the four employer-members covered by the Watchmen’s Agreement. (D&O21; JA.66-69, 184-86.) Upon arriving at the jobsite, Pleas was ordered to leave and threatened with arrest if he did not comply. (D&O21; JA.66-69, 183-84.) Pleas contacted a Local 26 representative, who confirmed with Hanjin Terminal that PMA had

directed its employer-members to bar Pleas from working. (D&O21; JA.66-69.)

In August, PMA sent a second letter to its employer-members reiterating that Pleas was suspended and would continue to remain ineligible to return to work until he completed the unpaid training. (D&O21; JA.1226.)

Meanwhile, Local 26 filed unfair-labor-practice charges against both PMA and LBCT, and the Board's General Counsel issued a consolidated unfair-labor-practice complaint in January 2018 alleging that the Employers violated the Act by modifying the Watchmen's Agreement and unilaterally imposing a new disciplinary procedure. (D&O15; JA.263-75.) Following a two-day evidentiary hearing, an administrative law judge issued a recommended decision finding that the Employers violated the Act as alleged. (D&O14-28.)

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

On May 2, 2019, the Board (Members McFerran and Emanuel; Member Kaplan dissenting) found that the Employers violated Section 8(a)(5) and (1) of the Act by applying Section 13.2 of the PCL&CA to Pleas and consequently disciplining him pursuant to the Section 13.2 procedure. (D&O1.) The Board found that the Employers' actions violated the Act by: impermissibly modifying the disciplinary procedures and penalties set forth in Article 18 of the Watchmen's Agreement without Local 26's consent, and unilaterally changing bargaining-unit employees' terms and conditions of employment through the imposition of an

outside disciplinary procedure without providing Local 26 prior notice and an opportunity to bargain. (D&O1, 4-6.)

The Board's Order requires the Employers to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (D&O6.) Affirmatively, the Board's Order requires the Employers to rescind the unlawful suspension of Pleas and restore him to the dispatch list; make Pleas whole for any loss of earnings and other benefits; abide by the terms of the Watchmen's Agreement by exclusively applying the disciplinary procedures set forth therein; notify and, on request, bargain with Local 26 before implementing any changes to unit employees' terms of employment; withdraw the instructions given to PMA's employer-members; and post a remedial notice. (D&O6-7.)

### **SUMMARY OF ARGUMENT**

The proper starting point in this case is to recognize the principle on which the Employers' brief ends (Br. 62)—namely, that “neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better agreement.” *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993). It is equally well established that neither *party* to a contract may simply ignore their bargained-for commitments by unilaterally implementing a term that they failed to

secure during the give-and-take of collective bargaining. That is true regardless of whether that party, the Board, or this Court considers the unilateral action at issue to be more desirable than what is provided for in the contract. The fundamental purpose of federal labor law is to protect the collective-bargaining process and the results that process produces, including by requiring an employer to refrain from unilaterally modifying the terms of a negotiated contract, and from unilaterally changing terms of employment without first notifying and bargaining with its employees' union until the parties reach agreement or good-faith impasse. More specifically, an employer violates Section 8(a)(5) and (1) of the Act when it refuses to bargain with its employees' union by implementing a midterm modification to a collective-bargaining agreement or by unilaterally changing terms of employment.

In the present case, the Board found that the Employers committed both of those unfair labor practices when they modified the exclusive disciplinary procedure outlined in the Watchmen's Agreement and unilaterally changed employees' terms of employment by subjecting a bargaining-unit watchman to the special disciplinary procedure contained in Section 13.2 of the PCL&CA. The watchmen's exclusive bargaining representative neither negotiated nor agreed to that procedure. To the contrary, Local 26 has consistently and vocally objected to the procedure in question and has unequivocally rejected the Employers' proposals to incorporate it into the Watchmen's Agreement during successive contract

negotiations. Perhaps frustrated that Local 26 had become the last holdout among local unions representing PMA employer-members' employees on the Pacific coast to refuse to adopt Section 13.2 or similar procedures allowing individual employee complaints and expedited arbitration hearings, the Employers simply imposed the procedure unilaterally.

As explained below, the Employers' actions modified the exclusive disciplinary procedure in Article 18 of the Watchmen's Agreement and changed bargaining-unit employees' terms of employment in numerous respects. Having found a presumptively unlawful midterm modification and unilateral change, the Board reasonably rejected the Employers' contractual defenses. There is simply no basis in the Watchmen's Agreement for concluding that the contract permits the Employers to unilaterally impose an alternative disciplinary procedure contrary to the exclusive procedure outlined in the contract, much less that the contract affirmatively grants the Employers the right to impose alternative disciplinary procedures unilaterally. Nor is there any evidence that the Employers had ever previously departed from the agreed-upon procedure for disciplining watchmen, which requires, *inter alia*, that the Employers collaborate with Local 26. Even if the language of the Watchmen's Agreement were not clear, the parties' bargaining history forecloses any reasonable interpretation of the contract as permitting or authorizing the Employers' decision to discipline a Local 26 watchman using the

disputed Section 13.2 procedure. In their brief to the Court, the Employers instead rely on a variety of shifting and disingenuous arguments that are more reflective of a desire to avoid unfair-labor-practice liability than of a genuine, good-faith interpretation of the governing contract.

### **STANDARD OF REVIEW**

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Reviewing courts may not “displace the Board’s choice between two fairly conflicting views,” even if the court would justifiably have made a different choice in the first instance. *Universal Camera*, 340 U.S. at 488. While the Board has the authority to interpret parties’ collective-bargaining agreements in order to adjudicate unfair labor practices, *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court gives “no special deference” to the Board’s contract interpretations, and the Court will interpret such contracts de novo, *Local Union No. 47, Int’l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640-41 (D.C. Cir. 1991). However, the Court’s normal deference to the Board’s findings of fact “extends to findings related to the contract, including evidence of intent from ‘bargaining history,’ and other ‘factual findings on matters bearing on the intent of the parties.’” *StaffCo of Brooklyn, LLC v. NLRB*, 888 F.3d 1297, 1302 (D.C. Cir. 2018) (citations omitted).

## ARGUMENT

### **THE EMPLOYERS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY IMPOSING A NEW DISCIPLINARY PROCEDURE FROM AN OUTSIDE CONTRACT IN ORDER TO DISCIPLINE A BARGAINING-UNIT WATCHMAN REPRESENTED BY LOCAL 26**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively” with its employees’ chosen bargaining representative. 29 U.S.C. § 158(a)(5).<sup>3</sup> Section 8(d) defines an employer’s statutory “duty to bargain collectively” as requiring the employer to refrain from terminating or modifying the provisions of an active collective-bargaining agreement without the consent of its employees’ union. 29 U.S.C. § 158(d). Thus, an employer violates Section 8(a)(5) by modifying terms and conditions of employment established in a collective-bargaining agreement, unless the employer can show that its actions were based on an interpretation of the contract that had a “sound arguable basis,” and such interpretation was not motivated by animus or bad faith. *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affirmed sub nom. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

In addition, Section 8(a)(5) generally prohibits an employer from making unilateral changes to subjects affecting employees’ terms and conditions of

---

<sup>3</sup> Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with” or “restrain” employees in the exercise of their statutory rights. 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

employment without first notifying the employees' union and bargaining to good-faith impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The statutory prohibition on unilateral changes remains in effect during the life of a collective-bargaining agreement. *C&C Plywood*, 385 U.S. at 425. An employer can defend against a unilateral-change allegation by showing that its right to act unilaterally is "covered" by a provision in the parties' collective-bargaining agreement, such that the employees' union has already exercised its statutory right to bargain over that issue. *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993).

The midterm-modification and unilateral-change unfair labor practices constitute distinct violations of the Act, with different governing standards and different appropriate remedies. *Bath Iron Works*, 345 NLRB at 501-03. The Board may find an unlawful unilateral change, in addition or in the alternative, where it has also found an unlawful midterm modification. *E.g.*, *Comau, Inc.*, 364 NLRB No. 48, 2016 WL 3853834, at \*4-6 (July 14, 2016) (finding separate violations under both midterm-modification and unilateral-change theories); *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2271 (2012) (same), *enforced*, 796 F.3d 31 (D.C. Cir. 2015). An employer's actions may modify a provision "contained in" a collective-bargaining agreement, *Bath Iron Works*, 345 NLRB at 501, while also imposing a change to a mandatory bargaining subject where nothing in the contract "covers" the employer's right to act unilaterally, *U.S. Postal Serv.*, 8 F.3d at 836.

In the present case, the Board found that the Employers violated Section 8(a)(5) and (1) by modifying contractual provisions in the Watchmen's Agreement without Local 26's consent and by unilaterally changing a mandatory subject of bargaining without first notifying Local 26 and bargaining to good-faith impasse. (D&O4-6.) In other words, the Board found both that the applicable contract *forbade* the Employers' actions, and that nothing in that contract *privileged* the Employers' actions. *See Bath Iron Works*, 345 NLRB at 502. Either unfair-labor-practice finding is sufficient to support the portions of the Board's Order requiring the Employers to make whole the Local 26 watchman unlawfully disciplined as a result of the Employers' actions. (D&O1, 6-7.)

**I. The Board Reasonably Found That the Employers' Actions Constituted an Unlawful Midterm Modification of the Watchmen's Agreement**

As noted, an employer violates Section 8(a)(5) and (1) of the Act by terminating or modifying a provision in a collective-bargaining agreement without the consent of its employees' union. 29 U.S.C. § 158(a)(5), (1), 158(d). In making an employer's midterm modification of a contract a distinct refusal to bargain in violation of the Act, Congress had in mind the "specialized purpose" of stabilizing the collective-bargaining process and avoiding parties' use of economic warfare by providing recourse to the Board's unfair-labor-practice proceedings. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-88 (1971). As such, the statutory question of whether an employer unlawfully

modified a contract is distinct from the interpretive question of whether there was a breach of contract. *Id.*

It is well established that “the authority of the Board and the law of the contract are overlapping, concurrent regimes,” and that “the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts.” *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969). Because the unfair-labor-practice question derives from an employer’s statutory duty to bargain, a midterm modification is only unlawful if it involves a mandatory subject of bargaining for which the employer was required to bargain in the first place. *Pittsburgh Plate Glass*, 404 U.S. at 185-88. A midterm modification involving a permissive subject may constitute a breach of contract, but it is not an unfair labor practice. *Id.* There is no dispute that disciplinary procedures are a mandatory subject of bargaining. *See, e.g., El Paso Elec. Co.*, 355 NLRB 428, 453 (2010), *enforced*, 681 F.3d 651, 662-64 (5th Cir. 2012); *Migali Indus., Inc.*, 285 NLRB 820, 820-21 (1987).

An employer can defend against the finding of an unlawful midterm modification if it can demonstrate that there was a “sound arguable basis” for interpreting the contract as permitting its actions, and if it was relying on that interpretation in good faith. *Bath Iron Works*, 345 NLRB at 502; *see Daycon Prods. Co.*, 360 NLRB 357, 357-58 (2014). In evaluating an employer’s sound-

arguable-basis defense, the Board gives “controlling weight to the parties’ actual intent underlying the contractual language in question” and may examine “both the contract language itself and relevant extrinsic evidence,” such as bargaining history or past practice. *Knollwood Country Club*, 365 NLRB No. 22, 2017 WL 1088796, at \*1 (Mar. 8, 2017); see *Local Union 1395, Int’l Bhd. of Elec. Workers v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986) (holding that contract language may be supplemented by bargaining history and evidence of “parties’ actual intent”). There is no sound arguable basis in support of an employer’s purported interpretation of the contract where, for example, that interpretation runs “counter to the clear intention of the parties.” *Bath Iron Works*, 345 NLRB at 502.

**A. The Employers Modified the Clear Language of the Watchmen’s Agreement by Utilizing the Section 13.2 Procedure from the PCL&CA in Order To Discipline Pleas**

As the Board reasonably found, the Employers unlawfully modified the “clear language” of Article 18 of the Watchmen’s Agreement by replacing the negotiated procedures and remedies with those contained in Section 13.2 of the PCL&CA. (D&O5, 22-24.) Article 18(C) establishes that the contractual Joint Labor Relations Committee “shall establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations,” subject to a narrow list of enumerated exceptions for which the signatory employers retain an unrestricted right to issue discipline. (JA.452, 594.)

For all other disciplinary actions, however, Article 18 sets forth a detailed procedure requiring an employer to collaborate with Local 26. (JA.452-54, 594.)

More specifically, Article 18(D) mandates that the employer and Local 26 attempt to informally resolve incidents of alleged misconduct or other issues prior to a complaint being filed. (JA.452-53, 595.) If the employer and Local 26 are unable to resolve the matter informally, then the employer may file a complaint with the Joint Labor Relations Committee. (JA.453 art. 18(E), JA.595 art. 18(E).) Only after the Joint Labor Relations Committee has failed to reach agreement may the employer refer the matter to arbitration. (JA.453 art. 18(E), JA.595 art. 18(E).) The contract contains provisions governing the selection of arbitrators, the rules and standards for arbitration, and the contractual appeal process. (JA.453-54 art. 18(E), (F), (G), JA.596.) When a disciplinary action is found to be warranted, Article 18(C) requires the employer to utilize the agreed-upon progressive penalties (JA.526, 594-95 art. 18(C)), and Article 18(I) mandates that discipline affecting a watchman's dispatch rights will "only [be] applicable to the terminal where the complaint arose" (JA.454 art. 18(I)).

Article 18(H) confirms that the contractual procedure "shall be the exclusive remedy with respect to any dispute arising under [the contract]" and that "no other remedies shall be used" by Local 26 or an employer. (JA.454.) That includes disciplinary actions for violating the contractual antidiscrimination provision in

Article 16, which prohibits discrimination against “any person.” (D&O23; JA.451 art. 16.) Accordingly, the Board reasonably found that the plain language of the contract “establishes that the parties intended to prohibit all other mechanisms—including, a fortiori, one set forth in a different contract covering a different bargaining unit—for addressing alleged watchmen misconduct.” (D&O5.)

In accordance with the contractual language, and prior to the events at issue here, the Employers and Local 26 had consistently resolved instances of alleged harassment by bargaining-unit watchmen through the Article 18 procedure—either informally with the participation of Local 26 or, when necessary, through the formal complaint process. (D&O2, 6 n.22, 23.) In the present case, however, the Employers disregarded the exclusive contractual procedure in the Watchmen’s Agreement and instead utilized the procedure outlined in Section 13.2 of the PCL&CA. For example, the Employers ignored their obligations to attempt to resolve the matter informally with Local 26 and to file an employer complaint with the Joint Labor Relations Committee as necessary. They instead facilitated an alternative procedure initiated by an individual employee complaint, which directly triggered an arbitral proceeding with rules and a final decisionmaker distinct from the arbitration rules and arbitrator-selection mechanisms contained in the Watchmen’s Agreement. By adopting the Section 13.2 arbitrator’s conclusion that Pleas should be suspended at all terminals, the Employers also contravened the

requirement in Article 18(I) that discipline restricting a watchman's dispatch rights may only apply to the terminal where the complaint arose. The use of the Section 13.2 procedure was incompatible with Article 18 of the Watchmen's Agreement and the exclusive disciplinary procedure outlined therein.

As the Board further explained, the Employers' assertion that they did not actually participate in the Section 13.2 process and thus cannot face unfair-labor-practice liability—which the Employers repeat throughout their brief to the Court (Br. 25-27, 47-48, 60)—is factually spurious. (D&O4 n.14.) Before the Board, PMA never disputed that it had processed the marine clerk's grievance and participated in the Section 13.2 proceeding. (D&O4 n.14.) To the contrary, PMA made a binding admission to that effect in its answer to the unfair-labor-practice complaint. (JA.282.) *United Steelworkers, Local Union 14534 v. NLRB*, 983 F.2d 240, 247 (D.C. Cir. 1993) (“The Company admitted the accuracy of this allegation in its answer to the complaint. In doing so, the Company took the issue out of the case.”). Although LBCT argued to the Board that *it* was not actively involved in the Section 13.2 process, the Employers do not challenge the Board's dispositive finding that, at a minimum, LBCT is liable through the actions of its agent PMA. (D&O4 n.14.)

In any event, substantial evidence supports the Board's findings that both Employers directly participated in the Section 13.2 process and imposed the

disciplinary procedure upon Pleas. (D&O3-4 & n.14, 20-22.) After the clerk covered by the PCL&CA made a Section 13.2 complaint against Pleas in March 2017, the Employers: decided not to pursue discipline through the employer-complaint process in the Watchmen’s Agreement; willingly facilitated the Section 13.2 procedure; informed Local 26 that Pleas was subject to discipline under that procedure; urged Pleas and Local 26 to accept that procedure’s applicability by attending the scheduled hearing; actively participated in the Section 13.2 hearing and argued to the arbitrator that Pleas could be disciplined under the PCL&CA; emphasized their willingness to discipline Pleas based on whatever the arbitrator decided; and enforced the arbitrator’s decision by disciplining Pleas, beyond what was permitted under the Watchmen’s Agreement, for a purported violation of the distinct antidiscrimination language in the PCL&CA.<sup>4</sup>

Accordingly, the notion that the Employers were merely innocent bystanders is simply untenable—and illogical, given that the Employers were the only entities with the ultimate authority to discipline Pleas by suspending him. Indeed, the Employers made the novel assertion to Local 26 that it was a “longstanding and well-known” aspect of the bargaining-unit watchmen’s terms of employment that

---

<sup>4</sup> There is no basis for the Employers’ professed confusion at the inclusion of LBCT in the Board’s Order. (Br. 26-27, 43-46 & n.10). LBCT attended the Section 13.2 hearing and participated, both directly and through its agent PMA, in a disciplinary process resulting in the suspension of Pleas for alleged misconduct as an employee of LBCT. (D&O3.)

they could be disciplined pursuant to Section 13.2 of the PCL&CA. (JA.1142-44; *see* JA.1166-67, 1174-77.) By informing Local 26 that in their view *all* bargaining-unit watchmen are prospectively subject to the Section 13.2 process, the Employers plainly altered the contractual disciplinary procedure.<sup>5</sup>

**B. The Employers Failed To Demonstrate a Sound Arguable Basis for Interpreting the Watchmen’s Agreement as Permitting Them To Utilize the Section 13.2 Procedure and To Issue an Unprecedented Disciplinary Action Against Pleas**

Having determined that the Employers actively modified the exclusive disciplinary procedure agreed to by the parties in Article 18 of the Watchmen’s Agreement, the Board reasonably found that the Employers failed to establish in their defense that there was a “sound arguable basis” for interpreting the contract as permitting their actions. (D&O5, 22-24.) The Employers’ arguments to the contrary are facially implausible.

The Employers first argue that they did not modify Article 18 of the Watchmen’s Agreement because the contract only governs discipline based on formal employer complaints and here “there was no employer complaint about Pleas’ [alleged] misconduct.” (Br. 24-29.) The Employers’ own argument proves

---

<sup>5</sup> The Employers’ additional argument that they did not actually discipline Pleas because he voluntarily stopped seeking dispatch with LBCT (Br. 44-46) warrants little response. PMA issued written directives suspending Pleas from working for any of its member-employers until he complied with the requirements of the unlawful disciplinary action. (JA.1223.) When Pleas did seek dispatch to another employer in July 2017, he was barred from working and threatened with arrest.

the violation. The obvious purpose of Article 18 is to *limit* the Employers’ right to discipline bargaining-unit employees *unless* they follow the contractual steps, including by filing a disciplinary complaint with the Joint Labor Relations Committee when seeking to discipline an employee over the objections of Local 26. Aside from the enumerated offenses in Article 18(C)—exceptions which prove the rule—the Watchmen’s Agreement does not permit a signatory employer to unilaterally discipline unit employees, regardless of whether there is an outside complaint filed by an individual employee “using a distinct mechanism provided to him under the terms of his own collective bargaining agreement” (Br. 25). Indeed, there is no evidence that the Employers had ever previously disciplined a bargaining-unit watchman without using the Article 18 procedure. (D&O5.) In this very case, LBCT initially investigated the alleged misconduct, determined that discipline was unwarranted, and warned that future incidents could result in a complaint being filed with the Joint Labor Relations Committee. (JA.365.) The Employers’ admission that they subsequently ignored the requirements of the Watchmen’s Agreement does not constitute a “sound arguable basis” for interpreting the contract as permitting their actions.

The Employers’ additional argument (Br. 29-31) that their decision to discipline Pleas did not involve a dispute “arising under [the Watchmen’s Agreement]” within the meaning of the exclusivity provision in Article 18(H) is

equally dubious. As an initial matter, the legitimacy of the Employers' purported understanding of the contract is undermined by the fact that they never presented this particular interpretation to the Board, but instead have adopted for the first time on appeal the views of a dissenting Board member. Indeed, the Employers' failure to argue before the Board that they were relying in good faith on this construction of the contract means that their argument is jurisdictionally barred by Section 10(e) of the Act. 29 U.S.C. § 160(e); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550-51 (D.C. Cir. 2016).

In any event, as the Board explained, if the language in the Watchmen's Agreement does not encompass contested disciplinary actions against bargaining-unit employees, "it is difficult to conceive what language would." (D&O5 n.18.) Article 18 states that the contractual procedures will be used to "establish rules and regulations governing the conduct of watchmen as well as penalties for the breach of these rules and regulations" (JA.452 art. 18(C)), and that the exclusive Article 18 complaint procedure applies to, inter alia, "cases of discipline and/or discharge" (JA.452-53 art. 18(D)). Article 16 specifically prohibits the type of conduct that Pleas was disciplined for (JA.451), and the Employers had previously utilized Articles 16 and 18 to discipline employees for discrimination (JA.374). The Employers' acknowledgment that their actions in disciplining Pleas here were

based entirely on the PCL&CA and that “[t]he Watchmen’s Agreement played no role” (Br. 30) once again simply proves the violation.

Likewise, the Employers’ illogical contention that Article 18 places no restrictions whatsoever on their ability to issue discipline is baseless. (Br. 32-37.) As noted, Article 18(H) mandates that the contractual procedure “shall be the exclusive remedy” for disputes arising under the contract, including disputed employee misconduct allegedly warranting a disciplinary action. Moreover, the Employers’ purported construction of the contract is inconsistent with the parties’ uniform past practice. *See Wilson & Sons Heating & Plumbing, Inc. v. NLRB*, 971 F.2d 758, 761 (D.C. Cir. 1992) (noting that “parties’ course of performance under a contract may give meaning to otherwise unclear contract terms”). Setting aside the five offenses enumerated in Article 18(C), there is no evidence that the Employers have *ever* previously disciplined a bargaining-unit watchman without utilizing the Article 18 procedure by consulting with Local 26 and, when necessary, filing an employer complaint with the Joint Labor Relations Committee. Indeed, LBCT’s non-disciplinary warning letter to Pleas in this very case confirms that the next step under the Watchmen’s Agreement would have been to file a complaint pursuant to Article 18. (JA.365.)

The record evidence cited by the Employers in an attempt to derogate the clear language of Article 18 (Br. 33-36) does not advance their claim. The

testimony of PMA Senior Counsel Todd Amidon merely confirms that discipline can result from individual allegations of harassment, and that the process for pursuing such discipline is for the employer to file a complaint. (JA.174-79; *see* JA.149-56; *see also* D&O6 n.22.) The cited testimony from Local 26 President Gratz is irrelevant, as the union’s preference for attempting to resolve disputes internally *to avoid potential discipline* has no bearing on what is contractually required when the Employers decide to suspend a bargaining-unit employee and bar him or her from working. (D&O23 n.27.) Likewise, the cited grievance filed by Local 26 (JA.372) merely illustrates the Article 18 procedure, which allows either party to file a complaint with the Joint Labor Relations Committee if the parties cannot agree on how to resolve a disciplinary issue at the informal pre-complaint stage (JA.452-53, 594-96). Local 26 was not authorizing the employer there to take a “unilateral action” (Br. 36), as the union was the party advocating for discipline.<sup>6</sup>

---

<sup>6</sup> Nor is there any significance to the Employers’ observation (Br. 36) that only one example of an employer complaint was introduced at the unfair-labor-practice hearing. There is only one example because the Employers chose to introduce only one example. (JA.374.) The Board made no findings as to the frequency of Article 18 disciplinary complaints, and the Employers’ misleading insinuation that such complaints are rare has no basis in the record. Indeed, given the Employers’ implausible position that the Watchmen’s Agreement does not restrict their right to unilaterally discipline employees, it is much more telling that the Employers have failed to identify *any* examples of discipline *not* involving the Article 18 procedure.

Finally, the Employers' assertion in support of their contract interpretation that Local 26 is "not entitled to override the views and contractual rights of [non-Local 26] unions and workers" (Br. 41-43) misconstrues both federal labor law and the law of contracts. As the Board observed (D&O5, 23 n.28), it is an elementary principle of law that "a contract cannot bind a nonparty," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). That is particularly true in the context of the Act, which establishes a system of *exclusive* collective-bargaining representation in which employers are statutorily obligated to bargain with their employees' chosen representative over subjects such as employee disciplinary procedures. *See* 29 U.S.C. §§ 158(a)(5), 159(a). Accordingly, insofar as both the Watchmen's Agreement and the PCL&CA purport "to establish the terms and conditions of employment of represented watchmen employees whose representative is not party to the PCL&CA, the two contracts do not stand on the same ground." (D&O6 n.22, 23 n.28.)<sup>7</sup>

---

<sup>7</sup> Thus, the Employers' speculation that the Board "likely would have entertained contract-modification charges from the marine clerk's union" if the Employers had failed to discipline Pleas using Section 13.2 (Br. 42) is unsupported by any evidence or prior Board precedent. Moreover, to establish an unfair labor practice, the marine clerk's union would preliminarily have had the uphill task of showing that discipline affecting employees in a *different* bargaining unit is a mandatory subject of bargaining. *See Pittsburgh Plate Glass*, 404 U.S. at 185-88 (noting that contract modifications involving permissive subjects do not violate the Act).

And while the Section 13.2 procedure in the PCL&CA may be a laudable attempt to address discrimination in the longshore industry (Br. 39-41), it is well established that such goals do not override the negotiated terms of a collective-bargaining agreement. *Cf. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770 (1983). In any event, the Watchmen's Agreement already includes a provision explicitly condemning discrimination and a contractual procedure allowing the Employers to discipline employees for harassment or discrimination, which the parties had successfully utilized in recent years prior to the Employers' unlawful conduct in the present case. (D&O2-4.)

**C. The Parties' Bargaining History Forecloses Any Notion That the Employers Were Relying in Good Faith On an Interpretation of the Watchmen's Agreement with a Sound Arguable Basis in the Contract**

Even assuming that there were some ambiguity in the language of the Watchmen's Agreement, the Board found that the parties' bargaining history unequivocally confirms that the Employers lacked a sound arguable basis in the contract for disciplining Pleas pursuant to Section 13.2 of the PCL&CA. (D&O5, 23.) Unlike the Board's interpretation of contractual language, the Court reviews such findings for substantial evidence. *StaffCo of Brooklyn*, 888 F.3d at 1302.

The Board credited testimonial and documentary evidence demonstrating that, during successive rounds of bargaining for both the 2008-2014 and 2014-

2019 contracts, Local 26 successfully objected to the Employers' proposals to incorporate the Section 13.2 procedure or similar procedures into the Watchmen's Agreement. (D&O2, 5, 19, 23-26.) Whatever the merits of Local 26's position—an inquiry not properly before the Board or the Court—it firmly opposed a disciplinary procedure that would allow bargaining-unit watchmen to be disciplined based on formal complaints filed by individual employees, or that would proceed directly to arbitration without intervening discussions between the Employers and Local 26. Rather than attempting to insist on such a procedure to the point of impasse, or to secure agreement through the give-and-take of collective bargaining, the Employers agreed to withdraw their proposals during both rounds of contract negotiations.<sup>8</sup>

Accordingly, because substantial evidence supports the Board's factual finding that the Employers "could not have mistaken or misunderstood Local 26's intent that no such procedure be applicable to watchmen," the Employers "had no sound arguable basis for interpreting the Watchmen's Agreement to permit their conduct." (D&O5.) *See, e.g., Daycon Prods.*, 360 NLRB at 357 ("Even if there were any facial ambiguity permitting the alternative interpretation suggested by

---

<sup>8</sup> During bargaining for the 2014-2019 Watchmen's Agreement, the Employers' separately proposed amending Article 18(I) to permit disciplinary actions affecting dispatch rights that apply to all of PMA's employer-member terminals (JA.351), and that proposal also was not included in the final agreement (JA.594-96).

[the employer], the undisputed evidence of the parties' [contract] negotiation[s] . . . renders that interpretation completely implausible."); *Hosp. San Carlos Borromeo*, 355 NLRB 153, 153 & n.5 (2010) (rejecting employer's proffered interpretation as facially implausible and noting that credited testimony established parties intended language to have different purpose).

In an attempt to obscure the fact that Local 26 expressly rejected the use of the Section 13.2 procedure during bargaining—a fact which would be largely dispositive in the present case even if the language of the contract were not clear—the Employers make a variety of baseless arguments. The suggestion that the Board and the Court cannot consider the parties' bargaining history when evaluating the merits of the Employers' sound-arguable-basis defense (Br. 38) is meritless, particularly where the Employers themselves acknowledge that, at the very least, "the Watchmen's Agreement does not specifically authorize discipline based on the outcome of Section 13.2 proceedings" (Br. 60-61). *See Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1323 (D.C. Cir. 2012) ("Because the text does not speak directly to the question . . . we must turn to extrinsic evidence of the parties' intent."); *Local Union 1395, Elec. Workers*, 797 F.2d at 1036 (discussing role of bargaining-history evidence in determining "the parties' actual intent").

Meanwhile, the Employers' characterizations of the Board's factual findings and of the parties' bargaining history are inaccurate. The Board did not merely

find that Local 26 “dislike[d]” (Br. 37) the Section 13.2 procedure, or that Local 26 had a particular “subjective attitude” or “opinion” (Br. 38-39). Rather, the Board found that: the parties’ actively discussed proposals to incorporate Section 13.2 or similar procedures into the Watchmen’s Agreement as alternatives to the Article 18 procedure for resolving discrimination allegations; Local 26 expressly rejected those proposals at the bargaining table; and the Employers agreed to withdraw them prior to reaching final agreement. (D&O2, 5, 19.) Those findings are supported by substantial testimonial and documentary evidence. (E.g., JA.51-66, 83-90, 182-83, 287-354.) The Employers’ implausible claim that the parties solely discussed the ability of Local 26 watchmen to *file* Section 13.2 complaints (Br. 38-41) is contrary to the credited evidence. The managerial testimony cited by the Employers does not support that claim, and the Employers provide no basis for setting aside the Board’s decision to credit mutually corroborative testimony from multiple union witnesses describing the Employers’ proposals.<sup>9</sup>

---

<sup>9</sup> Even crediting, *arguendo*, the testimony about the 2014-2019 negotiations cited by the Employers, PMA’s manager merely denied that the parties explicitly discussed “what would happen if a longshore worker or a clerk filed a [Section] 13.2 complaint against a Local 26 watchman.” (JA.228.) The cited testimony otherwise confirms that Local 26 did not want an expedited procedure allowing an arbitrator to directly adjudicate disputes between individual employees (JA.209), that “the union was very reluctant to have any process” directly proceeding to an investigatory hearing in front of an arbitrator (JA.225-26), and that Local 26 firmly opposed “a process for an individual to bring these [discrimination or harassment] matters” without the involvement of the union (JA.227).

The Employers' argument is further belied by the fact that the Employers and the International did not even enter into the 2014 Letter of Understanding that purportedly allows complaints under the PCL&CA against Local 26 watchmen until *after* Local 26 had previously rejected adoption of the Section 13.2 procedure during collective bargaining. (D&O5 n.19.) Indeed, the Employers make no argument and cite no evidence calling into question the Board's finding that, at a minimum, Local 26 expressly rejected adoption of the Section 13.2 procedure during bargaining for the 2008-2014 contract. There are no pertinent changes in the language of the 2014-2019 contract or other evidence that Local 26 subsequently agreed to modify the exclusivity of the Article 18 procedure.

Furthermore, this Court has stressed that collective-bargaining agreements must be given a reasonable reading "in light of the realities of labor relations." *Local Union 1395, Elec. Workers*, 797 F.2d at 1033. It is "highly unlikely, to say the least," *id.*, that the Employers ever thought that Local 26 was solely objecting to the watchmen's ability to file Section 13.2 complaints, while sub silentio agreeing that watchmen be fully exposed to disciplinary actions based on an extracontractual procedure allowing complaints filed by non-bargaining-unit employees. Given that Local 26 rejected the proposed adoption of the Section 13.2 procedure during bargaining—and never agreed to be bound by the 2014 Letter of Understanding between PMA and the International, or to otherwise permit unit

watchmen to be disciplined under the PCL&CA—the Employers had absolutely no basis for concluding that they were entitled to modify the clear language of the Watchmen’s Agreement and the exclusive disciplinary procedure in Article 18.

## **II. The Board Reasonably Found That the Employers’ Actions Constituted an Unlawful Unilateral Change to Bargaining-Unit Employees’ Terms and Conditions of Employment**

In addition to the midterm-modification violation discussed above, the Board also found that the imposition of the Section 13.2 disciplinary procedure was an unlawful unilateral change. (D&O5-6, 24-26.) After an employer and its employees’ union have executed a collective-bargaining agreement, the employer remains obligated to refrain from making unilateral changes to mandatory subjects of bargaining without first notifying its employees’ chosen representative and bargaining to good-faith impasse. *C&C Plywood*, 385 U.S. at 425. As a result, an employer separately violates Section 8(a)(5) and (1) by unilaterally changing union-represented employees’ terms and conditions of employment. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003). The imposition of a new policy or procedure is an unlawful unilateral change unless it constitutes a “mere continuation of the status quo.” *Katz*, 369 U.S. at 746.

However, an employer can defend against the finding of a unilateral-change violation by demonstrating that the employees’ union “surrendered [its statutory] right to bargain over the . . . change[] through either waiver or contract.” *Wilkes-*

*Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 376 (D.C. Cir. 2017). Thus, an employer can demonstrate that “some provision of [the parties’ collective-bargaining agreement] authorizes” its unilateral actions. *C&C Plywood*, 385 U.S. at 425. This Court has long invoked the “contract coverage” standard in unilateral-change cases, pursuant to which the relevant inquiry is whether a union has already “exercise[d] its right to bargain” by memorializing in a contract the employer’s right to act unilaterally, thereby removing the covered action from the range of further mandatory bargaining. *U.S. Postal Serv.*, 8 F.3d at 836.<sup>10</sup>

**A. The Employers Changed Employees’ Terms and Conditions of Employment by Subjecting Pleas to the Section 13.2 Procedure**

In analyzing the unilateral-change violation, the Board first found that the Employers’ actions in applying the Section 13.2 procedure to discipline Pleas resulted in a material, substantial, and significant change to employees’ existing terms and conditions of employment. (D&O5-6, 24.) As the Board observed, the

---

<sup>10</sup> In the present case, the Board first found that Local 26 did not waive its right to bargain, applying its then-controlling “clear and unmistakable waiver” standard. In the alternative, the Board applied this Court’s contract-coverage standard. (D&O5-6 & n.21, 25-26.) The Board has since adopted the contract-coverage approach as its governing legal standard in future unilateral-change cases. *MV Transp., Inc.*, 368 NLRB No. 66, 2019 WL 4316958 (Sept. 10, 2019), *petition for review filed*, No. 19-72375 (9th Cir. Sept. 17, 2019). The Board is not seeking enforcement based on the now-overruled clear-and-unmistakable-waiver theory. *See, e.g., Minteq Int’l, Inc.*, 364 NLRB No. 63, 2016 WL 4087601, at \*4-5 & n.14 (July 29, 2016), *enforced*, 855 F.3d 329, 333-34 (D.C. Cir. 2017) (enforcing Board order based on alternative contract-coverage analysis).

parties had consistently utilized an established disciplinary procedure set forth in Article 18 of the Watchmen's Agreement to discipline bargaining-unit employees, which included the informal resolution of disputes prior to the issuance of formal employer complaints. (D&O2-3 & n.10, 5-6 & n.22, 19, 23 & n.27.) It is undisputed that no employee represented by Local 26 had ever been subjected to the Section 13.2 procedure prior to the incident involving Pleas. (D&O5-6, 24.)

As the Board explained, the Employers' actions changed employees' existing terms and conditions of employment in numerous ways. (D&O6, 24.) For example, the Employers asserted for the first time that bargaining-unit watchmen are required to comply with not only the general antidiscrimination standards in Article 16 of the Watchmen's Agreement and any corollary rules established by the contractual Joint Labor Relations Committee, but also the distinct language and standards set forth in the PCL&CA. As a result, Pleas was suspended for violating the PCL&CA's detailed rules of conduct (JA.1197-99), based on a verbal altercation that Pleas' direct employer had already investigated and found to be nonactionable under the Watchmen's Agreement (JA.365). *See, e.g., Parsons Elec., LLC v. NLRB*, 812 F.3d 716, 720-22 (8th Cir. 2016) (affirming unilateral-change finding where employer rephrased wording of break policy in manner altering employee expectations).

The Employers also changed the status quo disciplinary procedure by permitting a bargaining-unit watchman to be disciplined based on a complaint filed by an individual employee that directly proceeded to a formal arbitration hearing conducted by an outside arbitrator. That had never occurred before in the watchmen’s unit and, indeed, it was the precise scenario that Local 26 wished to avoid when it rejected the proposed adoption of the Section 13.2 procedure during successive rounds of collective bargaining. The substitution of a formal arbitral proceeding in place of a pre-complaint investigation by the parties and the multistage collaborative process that had previously been utilized—which only culminated in arbitration if the Employers, Local 26, and the Joint Labor Relations Committee could not resolve the issue—was a dramatic departure from past practice. *See, e.g., El Paso Elec.*, 355 NLRB at 453 (finding unilateral change where employer replaced “discretionary and flexible enforcement” system with “highly structured and formalized disciplinary procedure”).

In addition, the Employers changed established disciplinary penalties by enforcing the Section 13.2 arbitrator’s decision. First, the Employers suspended Pleas for twenty-eight days at *all* of the terminals operated by PMA’s employer-members. PMA implemented such discipline by issuing repeated directives to its employer-members, which resulted in Pleas being barred from working and threatened with arrest when he was dispatched to Hanjin Terminal in July 2017.

Yet, consistent with language in the Watchmen’s Agreement, the existing practice was that discipline affecting dispatch rights would only be effective at the terminal where the alleged misconduct took place. Second, the Employers imposed an additional unprecedented penalty by mandating that in order to return to work Pleas would have to sign a statement pledging to abide by the Section 13.2 policy and the terms of an outside collective-bargaining agreement. Those requirements served to significantly increase the previously recognized penalties for employee misconduct. *E.g., Comau*, 364 NLRB No. 48, 2016 WL 3853834, at \*6 (finding unilateral change where employer imposed outside shop rules that included, inter alia, increased penalties for infractions).

**B. The Employers Have Failed To Demonstrate That Applying the Section 13.2 Procedure to the Local 26 Bargaining Unit Was a Mere Continuation of the Status Quo**

In response to those straightforward findings by the Board, the Employers attempt to distort the relevant legal standards. Indeed, the Employers’ brief inverts the appropriate inquiry by suggesting that the Board was required to affirmatively prove that there was a “binding past practice” *preventing* the Employers from unilaterally imposing a new and unprecedented disciplinary procedure. (Br. 46-48, 53-57.) That argument misconstrues the nature of the Employers’ statutory duty to bargain. *See Katz*, 369 U.S. at 742-48. An employer is presumptively required to bargain over its imposition of any “new or different working conditions,” and it is

the employer's burden to establish that its actions were instead a mere continuation of the status quo. *City Cab Co. of Orlando, Inc. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986); accord *Goya Foods, Inc. v. NLRB*, 298 F. App'x 12 (D.C. Cir. 2008).<sup>11</sup> Only in cases where there is an allegation that an employer acted unlawfully by withholding certain benefits is the Board required to demonstrate that there was an established practice of regularly providing those benefits such that they had become an implied term of employment. *Advanced Life Sys., Inc. v. NLRB*, 898 F.3d 38, 46-47, 49-51 (D.C. Cir. 2018). The cases cited by the Employers (Br. 49, 53-57) arose in that distinct context and are thus inapposite.<sup>12</sup> In contrast, where an employer imposes a new term of employment or grants a benefit that was previously irregular or discretionary, the employer commits an unfair labor practice by acting unilaterally. *Katz*, 369 U.S. at 746-47; *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012).

---

<sup>11</sup> As previously noted, there is no dispute that the imposition of a disciplinary procedure is a mandatory subject of bargaining.

<sup>12</sup> See *Advanced Life Sys., Inc. v. NLRB*, 898 F.3d at 46-47, 49-51; *Media Gen. Operations, Inc.*, 346 NLRB 74, 74 n.2 (2005), *affirmed*, 225 F. App'x 144, 149-50 (4th Cir. 2007). The Employers also cite cases outside the unilateral-change context involving questions of whether employers attempted to impermissibly influence voters in a representation election by providing benefits that were not in keeping with an existing practice. *DMI Distrib. of Delaware, Ohio, Inc.*, 334 NLRB 409, 411 (2001); *B&D Plastics, Inc.*, 302 NLRB 245, 245 n.2 (1991).

There is no question that the imposition of the Section 13.2 disciplinary procedure was a new and unprecedented change for the Local 26 watchmen. The Employers conceded below that no bargaining-unit employee had ever previously been subjected to the Section 13.2 procedure or disciplined as a result. (D&O5.) Thus, the Board was not required to “prove” that the Employers were deviating from a uniform and established practice (Br. 48-49) or that there was “an established practice *against* imposing such discipline” (Br. 55). Even assuming that the Employers had *no* established disciplinary practices whatsoever, and that all previous instances of employee discipline were ad hoc and discretionary, the decision to adopt a new formal mechanism for individual antidiscrimination complaints resulting in arbitral proceedings was undoubtedly a change from the status quo. *See, e.g., Rahco, Inc.*, 265 NLRB 235, 257 (1982) (finding violation where recently unionized employer implemented new disciplinary procedure, even though there were few examples of prior discipline and employer lacked “any kind of a system prior to that date”). Accordingly, the Employers were required to notify and bargain with Local 26.

In any event, and as discussed above, pp. 42-45, substantial evidence supports the Board’s findings that the Employers did have established practices relating to employee discipline, which the Employers deviated from by suspending Pleas through a Section 13.2 proceeding. (D&O6.) In arguing that the decision to

begin requiring watchmen to comply with distinct rules of conduct in the PCL&CA was not a change and that it did not “impose[] more demanding standards of conduct,” the Employers’ selectively omit relevant language from the PCL&CA. (Br. 49-52.) Although both the PCL&CA and the Watchmen’s Agreement generally prohibit discrimination, the PCL&CA and its accompanying documents—including the Section 13.2 handbook and letters of understanding between PMA and the International—contain much more detailed rules of conduct mandating employee discipline in certain circumstances. (JA.692-94, 939-41, 1093-1138.) For example, the PCL&CA policies specifically prohibit “name calling,” and the arbitrator relied in part on that prohibition in concluding that Pleas violated the PCL&CA. (JA.1104-05, 1197-99.) The Court need not endorse the conduct that Pleas allegedly engaged in to conclude that a specific rule against name calling is more restrictive than the general policy against racial discrimination contained in Article 16 of the Watchmen’s Agreement.

The Employers’ additional argument regarding the lack of any “consistent” practice for disciplining Local 26 watchmen (Br. 52-54) is legally irrelevant for the reasons previously discussed, but also factually erroneous. As the Board explained, all of the incidents cited by the Employers are consistent with the established Article 18 procedure. (D&O2, 6 n.22, 23 n.27.) Moreover, the Employers’ observation that Pleas was the first Local 26 watchman to be

disciplined for alleged harassment involving a non-bargaining-unit employee (Br. 54) fatally undermines rather than advances their arguments. There is nothing in the parties' past practice suggesting that there was an implied exception to the contractual procedure that governs all watchmen discipline. But even assuming such procedure did not apply, the Employers were statutorily required to bargain with Local 26 prior to imposing a new procedure to resolve a novel situation.

Finally, in arguing that they did not depart from established disciplinary penalties (Br. 56-57), the Employers conspicuously ignore the most significant aspect of the change in question—namely, that Pleas was suspended at all PMA-member terminals rather than just the site of the alleged misconduct. The scope of his suspension was directly contrary to the established limitation on discipline affecting watchmen's dispatch rights, and this unprecedented penalty had a severe impact on Pleas by preventing him from working. In addition, Pleas was not merely required to "agree not to engage in harassment" (Br. 56-57), but instead to sign a written statement pledging to abide by the policies contained in an outside collective-bargaining agreement. Such penalties were a major change from any prior instance of discipline involving Local 26 watchmen, and thus, at a minimum, the Employers were required to notify and bargain with their employees' union.

**C. No Provision in the Watchmen’s Agreement Covers the Employers’ Right To Impose a New Disciplinary Procedure**

The Board reasonably rejected the Employers’ defense that their right to impose a new disciplinary procedure was “covered” by the terms of the Watchmen’s Agreement (D&O5-6 & n.21)—an argument that the Employers only fleetingly raised before the Board and that they only marginally expand upon in their brief to the Court.<sup>13</sup> The contract-coverage standard requires an employer to demonstrate that its actions were within the compass of contractual language granting it the right to act unilaterally. *U.S. Postal Serv.*, 8 F.3d at 836-37. Since the contract-coverage standard turns on the existence of a contractual provision that privileges an employer’s unilateral change, the inquiry is thus “a matter of ordinary contract interpretation,” which this Court performs *de novo*. *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838-39 (D.C. Cir. 2005). However, as noted, the Court will defer to the Board’s findings of fact as necessary to interpret the meaning of the contract, so long as those findings are supported by substantial evidence. *StaffCo of Brooklyn*, 888 F.3d at 1302.

---

<sup>13</sup> The Employers’ cite dicta from an out-of-circuit case suggesting that the “sound arguable basis” standard should apply in unilateral-change cases as well. (Br. 58, 62 (citing *Bath Marine Draftsmen’s Ass’n*, 475 F.3d at 25).) That argument was never presented to the Board and, thus, this Court lacks jurisdiction to entertain it. 29 U.S.C. § 160(e). In any event, that argument is inconsistent with this Court’s distinct and well-established contract-coverage standard, which the Board applied here. (D&O6 n.21.) See *Wilkes-Barre Hosp.*, 857 F.3d at 376 (citing *Bath Marine Draftsmen’s Association* before applying contract-coverage standard).

Here, the Employers' only claim of right under the Watchmen's Agreement is facially without merit. The Employers assert that the contract grants them an "unrestricted right to impose discipline for a number of broadly stated reasons." (Br. 60-61.) However, as the Employers themselves acknowledge (Br. 61), the contract expressly limits such right to discipline involving "intoxication, pilferage, assault, incompetency, or failure to perform work as directed" (JA.452 art. 18(C)). The Employers do not attempt to claim that Pleas was disciplined for any of the enumerated offenses. All other disciplinary actions are governed by the Article 18 procedure, with Article 18(H) specifying that the contractual procedure is exclusive and that "no other remedies shall be used." (JA.454.)

As a result, it is unclear on what basis the Employers are claiming an affirmative contractual right to "unilaterally impose discipline" and suspend Pleas for alleged racial discrimination (Br. 61), much less to impose an entirely new disciplinary procedure involving an outside arbitrator. Insofar as the Employers are arguing that the carveout in Article 18(C) means the opposite of what it says and that it affirmatively grants the Employers the right to unilaterally take *any* disciplinary action whatsoever, that illogical interpretation should be rejected. *Regal Cinemas*, 317 F.3d at 313 (rejecting interpretation that was contrary to "literal language" of clause enumerating specific rights). Moreover, that interpretation would render superfluous the list of enumerated offenses for which

the Employers retain an “existing right” to issue discipline and it would make the detailed contractual procedure in Article 18 merely advisory and largely meaningless. *See, e.g., Martinsville Nylon Emps. Council Corp. v. NLRB*, 969 F.2d 1263, 1267 (D.C. Cir. 1992) (holding that parties should not be presumed to have included “meaningless provision[s]” in their agreement).

Furthermore, as discussed above, pp. 36-41, the Board’s factual findings regarding the parties’ bargaining history foreclose any reasonable interpretation of the Watchmen’s Agreement as “covering” the Employers’ actions here. Local 26 expressly rejected the Section 13.2 procedure or similar procedures allowing individual employee complaints that directly trigger expedited arbitration proceedings, and the Employers agreed to withdraw those proposals prior to reaching agreement or good-faith impasse. It is immaterial that the Employers purportedly agreed to allow Section 13.2 discipline against Local 26 watchmen in a separate document negotiated with a different union. The rationale underlying the contract-coverage defense “evaporates” where, as here, an employer argues that its statutory bargaining obligations were displaced not by a bargained-for contractual term, but by a policy “to which [its employees’ union] has never agreed.” *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1120 (D.C. Cir. 2018). Even if the parties had merely “agreed to disagree” at the bargaining table about whether use of the Section 13.2 procedure was permitted by language in the contract, the Employers

still would have no valid claim of right, because “absent mutual consent on the issue, there could be no binding contractual commitment.” *Local Union 1395, Elec. Workers*, 797 F.2d at 1036; *see also George Banta Co. v. NLRB*, 686 F.2d 10, 20 (D.C. Cir. 1982) (“If [the employer] entertained a different subjective view of the negotiations, the burden was on [the employer] to correct what was so obviously [the union’s] understanding of the situation.”).

Given the lack of any provision in the contract that even arguably authorizes the unilateral adoption of the Section 13.2 procedure, the Employers instead attempt to radically distort this Court’s longstanding contract-coverage standard by suggesting that an employer’s unilateral actions are “covered” as long as the parties generally bargained over an expansive subject like “the imposition of discipline.” (Br. 57-58, 61-62.) Such argument is incompatible with the principles underlying the contract-coverage standard. The premise of the contract-coverage doctrine is that the parties have already *reached agreement* as to a particular issue, such that the union has fully exercised its statutory rights and the employer is no longer obligated to bargain before acting unilaterally. *U.S. Postal Serv.*, 8 F.3d at 836. Although the contract-coverage standard does not always require that the parties’ agreement “specifically mention” the precise unilateral action in question, an employer must identify a valid claim of right under the contract in order to displace the union’s statutory right to bargain. *Wilkes-Barre Hosp.*, 857 F.3d at

376-77; see *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358-59 (D.C. Cir. 2008) (reiterating that employer must show that its employees' union "exercise[d] its right to bargain . . . by negotiating for a provision in the collective bargaining contract" (emphasis in original)).

The Act does not permit an employer to impose unilateral changes at will simply because they involve a broad subject area that the parties addressed in other respects during bargaining or in their contract. *E.g.*, *Wilkes-Barre Hosp.*, 857 F.3d at 377 (holding that contract language did not authorize employer's decision to cease wage increases, even though parties had generally negotiated over and agreed to contractual provisions relating to such increases); *S. Nuclear Operating Co.*, 524 F.3d at 1359-60 (analyzing contractual healthcare provisions on contract-by-contract basis to determine whether there was sufficient language authorizing employer's specific health-benefit changes). In the present case, the Employers have not demonstrated that their right to impose an alternative disciplinary procedure was "within the compass" of any particular provision in the Watchmen's Agreement, and thus there is no contract coverage. *Wilkes-Barre Hosp.*, 857 F.3d at 377. The reason that the contract-coverage standard does not always require an agreement to specifically reference a given unilateral action is that "bargaining parties [cannot realistically] anticipate every hypothetical grievance and purport to address it in their contract." *U.S. Postal Serv.*, 8 F.3d at 838. But here the parties

actually discussed the Section 13.2 procedure during bargaining and consciously agreed not to adopt it. Indeed, there can be no more quintessential example of an issue *not* being covered by a collective-bargaining agreement.<sup>14</sup>

Finally, the Employers observe that Local 26 did not attempt to file a grievance under the Watchmen’s Agreement (Br. 61-62)—although the relevance of this fact is never fully explained, particularly with respect to the Board’s unilateral-change finding. To the extent the Employers are implying that a party to a collective-bargaining agreement cannot initiate unfair-labor-practice proceedings with the Board and must instead pursue contractual remedies, that proposition is contrary to settled law. *Strong*, 393 U.S. at 360-61; *C&C Plywood*, 385 U.S. at 425-30.<sup>15</sup> To the extent the Employers are obliquely attempting to renew an argument rejected by the Board (D&O27) that Local 26 was required to exhaust its contractual remedies prior to filing an unfair-labor-practice charge, they have

---

<sup>14</sup> Insofar as their actions are not covered by the Watchmen’s Agreement, the Employers do not argue that Local 26 otherwise waived its statutory right to bargain to agreement or good-faith impasse. Such waiver must be “clear and unmistakable.” *Wilkes-Barre Hosp.*, 857 F.3d at 377-78; *accord MV Transp.*, 368 NLRB No. 66, 2019 WL 4316958, at \*2, 17.

<sup>15</sup> The language cited by the Employers (Br. 58) from this Court’s opinion in *Honeywell International, Inc. v. NLRB*, 253 F.3d 119, 124 (D.C. Cir. 2001), is not to the contrary. That case involved a midterm-modification violation. The Court faulted the Board and held that it had “inject[ed] itself into a purely contractual dispute,” because the Board expressly declined to apply the sound-arguable-basis standard and instead sought to resolve the meaning of the contract. *Id.* at 122-25.

failed to adequately raise that issue in their opening brief. *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (noting that parties waive an issue by not raising it in their opening brief and that it is not enough to allude to “a possible argument”). The Employers make no attempt to address or dispute the Board’s findings in rejecting such argument and, even if they had, the Court will not second guess the Board’s discretionary decision to decline deferral to arbitration as long as that decision was “rational and consistent with the Act.” *Hosp. of Barstow, Inc. v. NLRB*, 897 F.3d 280, 289 (D.C. Cir. 2018).

The relevant statutory question is whether there is a provision in the contract covering the Employers’ right to independently adopt an alternative disciplinary procedure from an outside agreement, such that their unilateral imposition of the procedure at issue here did not violate federal law. The Employers have largely conceded that there is not, and any notion that Local 26 has already fully exercised its right to bargain over the use of the Section 13.2 disciplinary procedure in particular is foreclosed by the parties’ clear bargaining history. Local 26 rejected that procedure at the bargaining table and convinced the Employers to withdraw their proposals prior to reaching final agreement. As such, the Employers violated Section 8(a)(5) and (1) of the Act by acting unilaterally.

## CONCLUSION

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

Respectfully submitted,

/s/ Kira Dellinger Vol  
KIRA DELLINGER VOL  
*Supervisory Attorney*

/s/ Eric Weitz  
ERIC WEITZ  
*Attorney*  
*National Labor Relations Board*  
1015 Half Street SE  
Washington, DC 20570  
(202) 273-0656  
(202) 273-3757

PETER B. ROBB  
*General Counsel*

ALICE B. STOCK  
*Deputy General Counsel*

DAVID HABENSTREIT  
*Acting Deputy Associate*  
*General Counsel*

National Labor Relations Board  
January 2020

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

PACIFIC MARITIME ASSOCIATION	)	
Petitioner/Cross-Respondent	)	Nos. 19-1101 & 19-1109
	)	
v.	)	Board Case Nos.
	)	21-CA-197882
NATIONAL LABOR RELATIONS BOARD	)	21-CA-198530
Respondent/Cross-Petitioner	)	
_____	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	
Petitioner/Cross-Respondent	)	Nos. 19-1103 & 19-1110
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its proof brief contains 12,851 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 9th day of January, 2020

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

PACIFIC MARITIME ASSOCIATION	)	
Petitioner/Cross-Respondent	)	Nos. 19-1101 & 19-1109
	)	
v.	)	Board Case Nos.
	)	21-CA-197882
NATIONAL LABOR RELATIONS BOARD	)	21-CA-198530
Respondent/Cross-Petitioner	)	
_____	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	
Petitioner/Cross-Respondent	)	Nos. 19-1103 & 19-1110
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on January 9, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 9th day of January, 2020



## STATUTORY ADDENDUM

### Federal Statutes

**Page(s)**

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

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	i
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	i
Section 8(d) (29 U.S.C. § 158(d)).....	i
Section 9(a) (29 U.S.C. § 159(a)) .....	iii
Section 10(a) (29 U.S.C. § 160(a)) .....	iii
Section 10(e) (29 U.S.C. § 160(e)) .....	iv
Section 10(f) (29 U.S.C. § 160(f)).....	v

### **29 U.S.C. § 158(a)(1)**

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

### **29 U.S.C. § 158(a)(5)**

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

### **29 U.S.C. § 158(d)**

[Sec. 8.] (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: 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 lockout, 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:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

### **29 U.S.C. § 159(a)**

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

### **29 U.S.C. § 160(a)**

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

## **29 U.S.C. § 160(e)**

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

## **29 U.S.C. § 160(f)**

[Sec. 10.] (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.