

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

TECNOCAP, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC**

Intervenor

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of the issues.....	2
Statement of the case.....	3
I. The Board’s Findings of Fact	5
A. Background; the Union (known as the GMP) represents Tecnocap’s production and maintenance employees; another Union (the IAM) represents die setters and other skilled workers who service Tecnocap’s equipment.....	5
B. Tecnocap unilaterally assigns IAM die setters to perform production work during GMP lunches and break periods, but ceases the practice after the GMP arranges for GMP unit employees to provide lunchtime and breaktime coverage	6
C. Tecnocap attempts to make IAM-represented die setters members of the GMP bargaining unit; it proposes reorganizing the unit into three new classifications and placing die setters in the third classification (Operator III); the Union agrees to the new classifications but does not agree to designate die setters as Operator IIIs.....	7
D. Tecnocap declares impasse because the Union will not include IAM-represented die setters in the GMP Operator III classification; the Union asserts it has no obligation to bargain over the expansion of the GMP unit to include die setters and their work.....	9
E. Tecnocap tells employees that the parties are at an impasse in bargaining and unilaterally implements the new classifications	10

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
F. Tecnocap announces that “GMP Union members” will be locked out of their jobs until the parties reach agreement, but tells non-union-members they can work during the lockout and directs them to contact human resources	11
G. Tecnocap negotiates directly with the GMP bargaining-unit employees who resigned from the Union and hires them as at-will employees to work during the lockout; the parties reach a new collective-bargaining agreement and the lockout ends	13
II. The Board’s Conclusions and Order	15
Standard of review	17
Argument Summary	17
Argument.....	21
I. The Court should uphold the Board’s findings that Tecnocap breached its statutory duty to bargain and violated Section 8(a)(5) and (1) of the Act by engaging in an unlawful course of conduct	21
A. Substantial evidence supports the Board’s findings that Tecnocap unlawfully implemented aspects of a contract offer in the absence of a good-faith impasse, and locked out employees in support of a demand to change the scope of the bargaining unit	22
1. An employer cannot lawfully insist on changing the scope of an established bargaining unit; nor can it make such a change the condition of agreement on mandatory bargaining subjects or lock out employees to compel acceptance of a unit-scope change	22
2. Tecnocap unlawfully implemented part of its “last, best, and final” contract offer in the absence of a good-faith impasse over mandatory bargaining subjects	26

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
3. Tecnocap unlawfully locked out union members with the goal of compelling acquiescence to a change in the scope of the bargaining unit	28
4. Tecnocap errs in asserting that the Union agreed to expand the bargaining unit	31
B. The Court should summarily enforce the portions of the Board’s Order corresponding to its finding that Tecnocap violated Section 8(a)(5) and (1) of the Act by dealing directly with employees about their terms and conditions of employment	33
II. The Court should uphold the Board’s findings that Tecnocap violated Section 8(a)(1) of the Act by telling employees that only union members would be locked out, and violated Section 8(a)(3) and (1) of the Act by selectively locking out union members	36
A. Tecnocap violated Section 8(a)(1) of the Act by announcing a selective lockout of Union members and impliedly soliciting employees to resign their Union membership	37
1. It is unlawful for an employer to condition employees’ continued employment on abandonment of their Union membership	37
2. Tecnocap unlawfully pressured Union members to resign their Union membership by telling them that their jobs were in peril, and that only non-union-members could hope to keep their jobs for the duration of the lockout	39
3. Tecnocap’s claims that it acted lawfully are meritless	41

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
B. The Court should summarily enforce the portions of the Board's Order corresponding to its finding that Tecnocap violated Section 8(a)(3) and (1) of the Act by selectively locking out union members.....	44
III. The Court lacks jurisdiction to consider Tecnocap's belated and meritless arguments that it should not have to remedy its unfair labor practices.....	47
Conclusion	51

TABLE OF AUTHORITIES

Headings	Page(s)
<i>Allentown Mack Sales & Serv., Inc. v. NLRB</i> , 522 U.S. 359 (1998).....	17
<i>Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	24
<i>Alton H. Piester, LLC v. NLRB</i> , 591 F.3d 332 (4th Cir. 2010)	38
<i>American Federation of Television & Radio Artists v. NLRB</i> , 395 F.2d 622 (D.C. Cir. 1968).....	23
<i>AMF Bowling Co. v. NLRB</i> , 63 F.3d 1293 (4th Cir. 1995)	23
<i>AMF Bowling Co. v. NLRB</i> , 977 F.2d 141 (4th Cir. 1992)	23, 24
<i>Amglo Kemlite Laboratories, Inc. v. NLRB</i> , 833 F.3d 824 (7th Cir. 2016)	48
<i>Consol. Diesel Co. v. NLRB</i> , 263 F.3d 345 (4th Cir. 2001)	38, 39
<i>Daniel Constr. Co. v. NLRB</i> , 341 F.2d 805 (4th Cir.1965)	39
<i>El Paso Electric Co.</i> , 355 NLRB 544 (2010)	34
<i>Equitable Gas Co. v. NLRB</i> , 966 F.2d 861 (4th Cir.1992)	38
<i>Evergreen Am. Corp. v. NLRB</i> , 531 F.3d 321 (4th Cir. 2008)	17

TABLE OF AUTHORITIES (cont'd)

Headings	Page(s)
<i>Grayson O Co. v. Agadir Int'l LLC</i> , 856 F.3d 307 (4th Cir. 2017)	34, 46
<i>Greensburg Coca-Cola Bottling Co.</i> , 311 NLRB 1022 (1993), <i>enforcement denied</i> , 40 F.3d 669, 673-74 (3d Cir. 1994)	25
<i>Hill-Rom Co. v. NLRB</i> , 957 F.2d 454 (7th Cir. 1992)	24
<i>J.P. Stevens & Co. v. NLRB</i> , 638 F.2d 676 (4th Cir. 1980)	39
<i>Medo Photo Supply Corp. v. NLRB</i> , 321 U.S. 678 (1944).....	34
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	45
<i>Movers & Warehousemen's Assn.</i> , 224 NLRB 356 (1976), <i>enforced</i> , 550 F.2d 962 (4th Cir. 1977)	25
<i>Newport News Shipbuilding & Dry Dock Co. v. NLRB</i> , 602 F.2d 73 (4th Cir. 1979)	24, 25
<i>NLRB v. Brown</i> , 380 U.S. 278 (1965).....	42
<i>NLRB v. Cast-A-Stone Prods. Co.</i> , 479 F.2d 396 (4th Cir. 1973)	48
<i>NLRB v. Daniel Constr. Co.</i> , 731 F.2d 191 (4th Cir. 1984)	17, 48

TABLE OF AUTHORITIES (cont'd)

Headings	Page(s)
<i>NLRB v. Grand Canyon Mining Co.</i> , 116 F.3d 1039 (4th Cir.1997)	38
<i>NLRB v. Martin A. Gleason, Inc.</i> , 534 F.2d 466 (1976).....	36, 42, 44
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013)	41
<i>NLRB v. Sheet Metal Workers Int’l Ass’n, Local 16</i> , 873 F.2d 236 (9th Cir. 1989)	35
<i>NLRB v. Truck Drivers Union</i> , (<i>Buffalo Linen</i>), 353 U.S. 87 (1957)	42
<i>NLRB v. Wooster Div. of Borg-Warner Corp.</i> , 356 U.S. 342 (1958).....	22, 23, 25
<i>Phelps Dodge Corp.</i> , 313 U.S. 177 (1941).....	50
<i>Richardson v. Perales</i> , 402 U.S. 389 (1971).....	17
<i>Rock-Tenn Servs. v. NLRB</i> , 594 F. App’x 897 (9th Cir. 2014)	28
<i>Sam’s Club v. NLRB</i> , 173 F.3d 233 (4th Cir.1999)	17
<i>Schenk Packing Co.</i> , 301 NLRB 487 (1991)	38, 40, 41, 45
<i>Smurfit-Stone Container Enters.</i> , 357 NLRB 1732 (2011)	28

TABLE OF AUTHORITIES (cont'd)

Headings	Page(s)
<i>Space Needle, LLC</i> , 362 NLRB 35 (2015), <i>enforced mem.</i> , 692 F. App'x. 462 (9th Cir. 2017)	38
<i>Taft Broadcasting Co.</i> , 163 NLRB 475 (1967)	23
<i>Textile Workers Union v. Darlington Mfg. Co.</i> , 380 U.S. 263 (1965).....	38
<i>The Idaho Statesman v. NLRB</i> , 836 F.2d 1396 (D.C. Cir. 1988).....	24, 25
<i>United States v. Holness</i> , 706 F.3d 579 (4th Cir. 2013)	34
<i>United States v. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	48
<i>United States v. Zannino</i> , 895 F.2d 1 (1st Cir. 1990).....	34
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	17
<i>Virginia Concrete Co. v. NLRB</i> , 75 F.3d 974 (4th Cir. 1996)	17
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	47
<i>WXGI, Inc. v. NLRB</i> , 243 F.3d 833 (4th Cir. 2001)	35

TABLE OF AUTHORITIES (cont'd)

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	16, 24, 37
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2-4, 16, 18-24, 26, 28, 30-42, 45-48
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3, 4, 16, 20, 37, 45, 46, 48
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 4, 16, 18, 19, 21-24, 26, 28, 30-36
Section 8(d) (29 U.S.C. § 158(d)).....	22, 33
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	49-50
Section 10(e) (29 U.S.C. § 160(e))	2, 17, 47
Section 10(f) (29 U.S.C. § 160(f))	2

Rules	Page(s)
Fed. R. App. P. 28(a)(8)(A)	35, 46

Regulations	Page(s)
29 C.F.R. § 102.46(a)(1)	48

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**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Tecnocap, LLC to review,
and the cross-application of the National Labor Relations Board to enforce, a

Board Decision and Order against Tecnocap that issued on September 16, 2019, and was reported at 368 NLRB No. 70. (JA 644-58.)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practices occurred in Glen Dale, West Virginia.

Tecnocap filed its petition for review on October 9, 2019. The Board filed its cross-application for enforcement on October 29, 2019. Because the Act establishes no deadline for such filings, both were timely. The labor organization that filed the underlying unfair-labor-practice charge in this case—United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“the Union”)—has intervened in this appeal on the side of the Board.

STATEMENT OF THE ISSUES

1. (a) Whether substantial evidence supports the Board’s finding that Tecnocap violated Section 8(a)(5) and (1) of the Act by implementing portions of

¹ Record references are to the Amended Joint Appendix (“JA”) filed by Teconcap on January 10, 2020, and to the Supplemental Appendix (“SA”) submitted by the Board on February 27, 2020. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Tecnocap’s opening brief.

its contract offer in the absence of a good-faith impasse over a mandatory bargaining subject, and by locking out employees in support of a demand that the Union agree to change the scope of the bargaining unit, a permissive subject.

(b) Whether the Court should summarily enforce the portions of the Board's Order corresponding to its finding that Tecnocap violated the same section of the Act by circumventing the Union and dealing directly with employees about their terms and conditions of employment.

2. (a) Whether substantial evidence supports the Board's finding that Tecnocap violated Section 8(a)(1) of the Act by telling employees that it will only lock out union members and impliedly soliciting their resignation from the Union.

(b) Whether the Court should summarily enforce the portions of the Board's Order corresponding to its finding that Tecnocap violated Section 8(a)(3) and (1) of the Act by selectively locking out employees who are union members.

3. Whether the Court lacks jurisdiction to consider Tecnocap's belated and meritless arguments that it should not have to remedy its unfair labor practices.

STATEMENT OF THE CASE

This case involves Tecnocap's insistence on altering the scope of a long-established bargaining unit represented by the Union, to add a group of employees called die setters, who have historically been represented by a different labor union. Under the Act, a union is not obligated to bargain over a change in unit

scope. Accordingly, the Union was well within its rights in electing not to bargain over Tecnocap's proposed addition of die setters to the bargaining unit.

Nevertheless, Tecnocap sought to impose its will by taking a series of unlawful actions, which precipitated the filing of an unfair-labor-practice charge by the Union.

Acting on that charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging in relevant part that Tecnocap violated Section 8(a)(5) and (1) of the Act by conditioning a successor collective-bargaining agreement on the Union's acceptance of an expanded bargaining unit, unilaterally implementing aspects of a final contract offer in the absence of a good-faith impasse over mandatory bargaining subjects, locking out union members with the goal of inducing acceptance of a re-imagined bargaining unit, and bypassing the Union to deal directly with employees. The complaint also alleged that Tecnocap violated Section 8(a)(1) of the Act by announcing to employees that only union members would be subject to the lockout and impliedly soliciting them to resign their union membership if they wanted to avoid that fate, and violated Section 8(a)(3) and (1) of the Act by ultimately locking out only the employees who maintained their union membership.

Following a hearing, an administrative law judge issued a decision and recommended order finding that Tecnocap violated the Act as alleged. Thereafter,

Tecnocap filed exceptions to the judge’s findings, and the Union filed limited cross-exceptions. On review, the Board affirmed the judge’s findings on the allegations listed above, deemed it unnecessary to pass on other findings, and issued a remedial Order addressing the violations found.

I. THE BOARD’S FINDINGS OF FACT

A. Background; the Union (Known as the GMP) Represents Tecnocap’s Production and Maintenance Employees; Another Union (the IAM) Represents Die Setters and Other Skilled Workers Who Service Tecnocap’s Equipment

Tecnocap manufactures bottle caps and other container closures at its plant in Glen Dale, West Virginia. (JA 647; JA 67-69, 118-20, 412.) Its production and maintenance employees are represented by the Union’s Local 152M (formerly Local 152 of the Glass, Molders, Pottery, Plastics and Allied Workers International Union or “GMP”).² (JA 647; JA 120, 412-13.) The GMP bargaining unit consists of “[a]ll hourly rated production and maintenance employees, including warehousemen” and excluding “employees on jobs covered by contracts with other unions.” (JA 647; JA 120, 412.) Die setters and other employees who service specialized machinery are covered by Tecnocap’s collective-bargaining

² The GMP merged with the Union effective January 1, 2018, and the Union assumed the GMP’s role in all of its collective-bargaining relationships as of that date. (JA 647; JA 412-13.) Notwithstanding the merger, the Union is known at the plant as the GMP. (JA 647, 650; JA 413.) Accordingly, this brief will use “Union” and “GMP” interchangeably.

agreements with the International Association of Machinists and Aerospace Workers Local 818 of District 51 (“IAM”) and therefore are not in the GMP bargaining unit. (JA 647-48; JA 14, 69, 413.)

As relevant here, Tecnocap and the GMP were parties to a collective-bargaining agreement effective by its terms from November 29, 2015, through November 18, 2017. (JA 647; JA 118-77, 413.) Meanwhile, Tecnocap and the IAM were parties to a collective-bargaining agreement effective by its terms from April 6, 2015, through April 8, 2018. (JA 647-48; JA 413.) The events discussed below unfolded while these agreements were concurrently in effect and during negotiations between Tecnocap and the GMP for a successor collective-bargaining agreement.

B. Tecnocap Unilaterally Assigns IAM Die Setters To Perform Production Work During GMP Lunches and Break Periods, But Ceases the Practice After the GMP Arranges for GMP Unit Employees To Provide Lunchtime and Breaktime Coverage

On March 18, 2016, Tecnocap met with both the GMP and the IAM to discuss its plans for continuous production at the facility. It proposed using IAM-represented die setters to do production work during lunches and break periods for GMP-represented production employees. The meeting did not produce any agreement to cross-assign die setters, as Tecnocap had proposed. (JA 648; JA 413.)

Nevertheless, on March 31, 2016, Tecnocap began assigning die setters to perform production work during GMP lunch and break periods. (JA 648; JA 414.) Both unions filed grievances over Tecnocap's unilateral action. (JA 648; JA 414.) Tecnocap ultimately desisted on May 11, 2016, after the GMP arranged for lunchtime and breacktime coverage of production work using GMP unit employees. (JA 648; JA 40, SA 9, 11.)

C. Tecnocap Attempts To Make IAM-Represented Die Setters Members of the GMP Bargaining Unit; It Proposes Reorganizing the Unit Into Three New Classifications and Placing Die Setters in the Third Classification (Operator III); the Union Agrees to the New Classifications But Does Not Agree To Designate Die Setters as Operator IIIs

The following year, with the GMP collective-bargaining agreement set to expire on November 18, 2017, Tecnocap proposed eliminating the 14 employee classifications in the GMP bargaining unit, replacing them with 3 new classifications (Operator I, II, and III), and placing some of the IAM-represented die setters in the new Operator III classification. (JA 648; JA 20-21, 255-62, 414-15.)

As discussions continued on this and other proposals, the parties agreed, on November 15, 2017, to extend the existing collective-bargaining agreement until February 28, 2018. (JA 658; JA 178.) Their memorandum of agreement provided, as "conditions" for the extension, that the GMP "accepts the three job classes of Operator I, Operator II, and Operator III," but that "[n]egotiations [would]

continue as to red-circling, grandfathering, and who falls in what class.” (JA 648; JA 178.)

Consistent with these terms, the GMP sought in the ensuing months to negotiate over “who falls in what class,” but Tecnocap made clear that it would not discuss inclusion of any existing GMP unit employees in the Operator III classification because it intended to reserve that category for die setters. (JA 648-50; JA 178.) Instead, Tecnocap proposed designating all of the existing GMP unit employees as Operator I or Operator II. (JA 648; JA 414-15.) When the Union resisted this approach and proposed, on February 12, 2018, that the parties place four unit employees in the Operator III classification, Tecnocap flatly rejected the idea. (JA 648; SA 3.)

Tecnocap also sought unfettered authority to cross-assign die setters between the IAM and GMP bargaining units as it saw fit. (JA 648; JA 268.) Specifically, in its February 15, 2018 contract offer—which it designated as its “last and final” offer—Tecnocap included language giving it “the absolute discretionary right to assign employees of its own choosing to perform” tasks related to the “changing of dies,” regardless of which union represented them. (JA 648; JA 264, 268, 415.)

D. Tecnocap Declares Impasse Because the Union Will Not Include IAM-Represented Die Setters in the GMP Operator III Classification; the Union Asserts It Has No Obligation To Bargain Over the Expansion of the GMP Unit To Include Die Setters and Their Work

On February 18, the GMP membership voted to reject Tecnocap's February 15 so-called "last and final" contract offer. (JA 649; JA 270, 415.) The Union thereafter sought to resume negotiations with Tecnocap based on a new contract proposal, which contained items that the Union viewed as concessions to Tecnocap on wages, hours of work, overtime, and bidding procedures. (JA 649; JA 270, 272.) In response, however, Tecnocap asserted that there was a lack of "movement" in the Union's proposal, and it cancelled a February 26 meeting previously scheduled to discuss the proposal. (JA 649; JA 271.) Tecnocap suggested that "maybe [the] time [would be] better spent with the union committee having some serious discussions about either accepting proposals or making proposals that address the needs/issues the company has laid out to be solved." (JA 649; JA 271.)

In response, the Union disputed Tecnocap's characterization of its new contract proposal and highlighted the proposal's movement on issues involving wages and hours. (JA 649; JA 272.) Tecnocap, however, maintained that the Union's "moves" were "pointless" and "irrelevant to achieve an agreement," and that the parties were at a standstill on certain "main points." (JA 649; JA 274.) In

particular, Tecnocap asserted that it “continue[d] to register impasse on . . . [the] [t]hree job classifications,” although it “d[id]n’t really know how to interpret [the Union’s] recent genuine objections on those.” (JA 649; JA 274.)

When the parties resumed bargaining on February 28, the Union gave Tecnocap the following document addressing the Company’s professed confusion over the lack of movement in negotiations about the job classifications:

Three job classifications: The third job classification which the Company is insisting upon in bargaining consists exclusively of work that is not in the GMP Council/USW bargaining unit and does not belong to the GMP Council/USW. All of the work in this ‘third job classification’ belongs to the IAM. The GMP Council/USW has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the GMP Council/USW. This is an improper subject for bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the GMP Council/USW does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect.

(JA 650 & n.16; SA 1.)

E. Tecnocap Tells Employees that the Parties Are at an Impasse in Bargaining and Unilaterally Implements the New Classifications

Under the terms of the parties’ November 2017 memorandum of agreement, the extension of the GMP contract expired on February 28, 2018. (JA 648; JA 178.) On March 1, Tecnocap posted a notice in its facility entitled, “GMP Contract – Impasse.” (JA 650; JA 280.) In its notice, Tecnocap stated that the parties had failed to “reach an agreement” and that GMP employees were “working without a

contract.” (JA 650; JA 280.) Tecnocap added that although it “hope[d] an agreement can be reached,” it would in the meantime implement “new items upon which an agreement has been had.” (JA 650; JA 280.)

Specifically, Tecnocap announced that “[e]ffective today, the jobs are organized into three classifications only.” (JA 650; JA 280.) It asserted that “[e]verybody is excited for the simplification offered by the new organization,” and invited employees to raise any questions they had about the new classification system “directly to Darrick Doty,” the director of human resources. (JA 650; JA 280.)

Notwithstanding the lack of agreement between the parties as to how each new classification would be populated, Tecnocap implemented its desired three-classification system as announced on March 1. (JA 650; JA 416.) As part of the unilateral implementation, it placed all of the existing GMP unit employees in the Operator I and II classifications, leaving the Operator III classification exclusively for the IAM-represented die setters. (JA 650; JA 415-16.)

F. Tecnocap Announces that “GMP Union Members” Will Be Locked Out of Their Jobs Until the Parties Reach Agreement, but Tells Non-Union-Members They Can Work During the Lockout and Directs Them To Contact Human Resources

On March 5, Tecnocap posted a notice to employees entitled, “Lock-Out Notice GMP Bargaining Unit.” (JA 650; JA 281.) In its notice, Tecnocap asserted

that the parties were “at impasse” in collective bargaining, and that it had therefore decided to exercise its self-described “employer lock-out right” effective on March 13. (JA 650; JA 281.) In its notice, Tecnocap also stated that “[u]nless notified otherwise, GMP Union members won’t be allowed to enter into the property from [March 13] on and until an agreement between the parties is reached.” (JA 650; JA 281.) In other words, Tecnocap was selectively barring employees who were also members of the GMP from working during the lockout.

In its notice, Tecnocap also urged employees to “get in touch with the HR department for any question [they] may have.” (JA 650; JA 281.) Accordingly, several employees contacted Human Resources Director Doty to ask how they could shed their status as “GMP union members” and thus avoid the lockout. (JA 650; JA 26-27, 79-80, 404-08.) On the heels of these questions, Tecnocap posted another notice to employees on March 7, reiterating that the lockout “applie[d] only to GMP union members.” (JA 650; JA 26-27, 282.)

Although Tecnocap stated in its March 7 notice that it “c[ould] not tell or advise [employees] as to what [they] should or should not do,” it nevertheless underscored that employees “other[.]” than “GMP union members” would “continue to work” during the lockout. (JA 650-51; JA 282.) Tecnocap added that the category of “others” not subject to the lockout would include “temporary employees” that it “may” hire “to work during the lockout,” and that such

employees could “work the entire duration of the lockout, however long that may be—days, weeks, months, years, etc.” (JA 650; JA 282.) In essence, Tecnocap was telling employees that they would be eligible for hire during the lockout only if they were not members of the Union.

On March 12, with the lockout less than 24 hours away, Tecnocap posted a final “Lockout Notice” to employees. (JA 651; JA 286.) The notice reiterated that “[t]he Lockout applie[d] only to GMP union members” and that “others are expected to continue to work.” (JA 651; JA 286.) It added that Tecnocap had decided to hire temporary staff to work “during the lockout,” and it invited those who “wish[ed] to apply” to see its Director of Human Resources. (JA 651; JA 286.)

G. Tecnocap Negotiates Directly with GMP Bargaining-Unit Employees Who Resigned from the Union and Hires Them as At-Will Employees To Work During the Lockout; the Parties Reach a New Collective-Bargaining Agreement and the Lockout Ends

Six GMP bargaining-unit employees approached Doty—as Tecnocap’s notices indicated they should—to discuss their interest in working during the lockout as non-union members. (JA 651; JA 27.) After speaking to each employee and confirming his or her resignation from the Union, Doty drafted letters of hire and presented them to the employees for signature. (JA 651, 656; JA 303-08, 404-08.) The letters gave the employees positions as “Operator Class 1”

or “Operator Class 2,” and advised them that if they accepted, they would be “employee[s] at will.” (JA 651, 656; JA 303-08.) The letters added that at-will employment status “means your employment can be ended by either you or [Tecnocap], at any time, with or without notice, for any reason or no reason.” (JA 656; JA 303-08.) All six employees who had approached Doty signed the letter he presented and proceeded to work during the lockout, while employees who had remained GMP union members were locked out of their jobs. (JA 656; JA 295-308.)

Tecnocap did not inform the Union of the job offers that Doty had made to these bargaining-unit employees. (JA 656; JA 81.) Nor did Tecnocap or Doty include the Union at any step in the process of converting them to at-will employment status and eliminating the protections from discharge to which bargaining-unit employees were entitled. (JA 656; JA 81.)

However, Tecnocap did communicate with the Union, before and during the lockout, about its “disappoint[ment]” that the Union had not agreed to Tecnocap’s view of the new classification scheme, and particularly the inclusion of die setters in the new Operator III classification. (JA 651-53; JA 291-92, 527-29.) In response, the Union made clear that it did not believe it could simply take IAM-represented die setters into the GMP unit without the IAM’s and the die setters’ prior consent. (JA 653; JA 290.) The Union explained that it would “negotiate

with [Tecnocap] on all issues relevant to the die setters,” but only if “the following occur[ed] in a lawful manner”:

(1) [Tecnocap] is able to get the IAM to agree to relinquish jurisdiction over the die setters, (2) the die setters join the GMP Council Local so the [Union] can represent their interests, and (3) [Tecnocap] recognizes the GMP Council as the authorized representative of the die setters.

(JA 653; JA 293.) In the meantime, the Union offered to meet Tecnocap’s “paramount” concern over continuity of production by using GMP unit employees, rather than die setters. (JA 653; JA 293-94.)

On March 19, the parties reached agreement on the terms of a successor collective-bargaining agreement, and Tecnocap ended the lockout. (JA 653-54; JA 12, 309-27, 330, 338.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Ring and Members Kaplan and Emanuel) found that Tecnocap violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by: unilaterally implementing the job classifications from its last contract proposal in the absence of a good-faith bargaining impasse over a mandatory subject; locking out employees in support of a demand that the Union agree to change the scope of the bargaining unit, a permissive subject of bargaining over which Tecnocap could not lawfully declare impasse; and bypassing the Union and dealing directly with GMP unit employees to change their

terms and conditions of employment. (JA 644 & n.2, 656.) The Board further found that Tecnocap violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by announcing to employees that only union members would be subject to the lockout and impliedly soliciting their resignations from the Union, and violated Section 8(a)(3) and (1) of the Act by discriminatorily locking out only union members.³ (JA 644 n.2, 654, 656.)

The Board's Order requires Tecnocap 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 their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 645.) Affirmatively, the Order requires Tecnocap to make whole the GMP unit employees who were locked out of their jobs for any loss of earnings and other benefits they suffered as a result of the unlawful lockout; compensate the affected employees for the adverse tax consequences of any lump-sum backpay awards; remove from its files any reference to the unlawful lockout as it pertains to the affected employees; and post a remedial notice. (JA 645.)

³ The Board found it unnecessary to pass on the administrative law judge's other recommended findings, that Tecnocap also violated Section 8(a)(5) and (1) of the Act by failing to (1) obtain the Union's consent before unilaterally implementing its proposal on a permissive subject of bargaining, and (2) give the Union clear conditions for reinstating the unlawfully locked out employees. (JA 644 n.2.)

STANDARD OF REVIEW

This Court’s review of Board orders is “limited in scope.” *Virginia Concrete Co. v. NLRB*, 75 F.3d 974, 980 (4th Cir. 1996). Specifically, the Board’s factual findings are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Likewise, the Board’s application of law to the facts must be upheld if supported by substantial evidence. *Sam’s Club v. NLRB*, 173 F.3d 233, 239 (4th Cir.1999). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). Accordingly, if “it would have been possible for a reasonable jury to reach the Board’s conclusion,” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998), the Court’s “inquiry ends and [the Board’s] order must be enforced even though [the Court] might have reached a different result had [it] heard the evidence in the first instance,” *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 193 (4th Cir. 1984).

ARGUMENT SUMMARY

In its opening brief, Tecnocap largely recycles meritless arguments it made to the Board in exceptions to the judge’s recommended decision, while ignoring several key findings and failing to acknowledge the substantial evidence that

supports the Board's Decision and Order. Tecnocap accordingly provides no basis for disturbing the Board's reasonable and amply supported findings.

1. Substantial evidence supports the Board's findings that Tecnocap violated Section 8(a)(5) and (1) of the Act by partially implementing a contract offer without reaching a good-faith impasse in negotiations over mandatory bargaining subjects, and locking out employees in support of a demand that the Union agree to a change in the scope of the bargaining unit, a permissive rather than mandatory bargaining subject.

The Act requires bargaining over the subjects identified in Section 8(d)—that is, wages, hours, and other terms and conditions of employment. As to all other subjects, bargaining is purely voluntary or “permissive,” meaning that no party can force the other to negotiate. Accordingly, it is an unfair labor practice for an employer to condition overall agreement on mandatory subjects by requiring bargaining over a permissive subject, such as the description or scope of the represented bargaining unit. As the Supreme Court has explained, such conduct is, in substance, an unlawful refusal to bargain over mandatory subjects.

Here, Tecnocap began a course of unlawful conduct by insisting, over the Union's repeated objections, on expanding the GMP bargaining unit to include IAM-represented die setters, and by mandating their inclusion as the price of an overall successor collective-bargaining agreement. As the Board found, Tecnocap

had no right to declare impasse and unilaterally implement aspects of its “last, best, and final” contract offer in March 2018, because there was no good-faith impasse between the parties at that time. Indeed, Tecnocap’s unlawful insistence on expanding the bargaining unit precluded a good-faith impasse. Likewise, Tecnocap had no right to lock out employees to compel the Union’s acceptance of the IAM-represented die setters in the unit. And contrary to Tecnocap’s tortured argument, there is no evidence that the Union agreed at any point to expand the unit to include the die setters.

Tecnocap mostly ignores the Board’s further finding that it again violated Section 8(a)(5) and (1) of the Act in bypassing the Union and dealing directly with individual represented employees about their terms and conditions of employment. Although it labels that finding as “incorrect,” it provides no supporting argument. Under settled law and the Federal Rules of Appellate Procedure, the Court should accordingly consider any challenge to the direct-dealing finding waived, and summarily enforce the corresponding portions of the Board’s Order.

2. Substantial evidence supports the Board’s finding that Tecnocap violated Section 8(a)(1) of the Act by issuing a series of notices directly telling employees that the lockout applied only to union members, and that their ability to work during the lockout would depend on whether they retained their union membership. As the Board explained, the notices impliedly solicited their

resignation from the Union and created a situation where they would feel jeopardized if they did not resign, thus interfering with their rights under Section 7 of the Act to form, join, or assist a union, and to bargain through representatives of their own choosing. Contrary to Tecnocap's apparent belief, it cannot avoid liability for its objectively coercive conduct by professing—contrary to the plain import of its statements and actions—that it harbored no anti-union animus, or by noting that employees are not obliged to maintain union membership and that some freely resigned.

Nor has Tecnocap provided any basis to disturb the Board's reasonable finding that, in making good on its threats and ultimately locking out union members only, it violated Section 8(a)(3) and (1) of the Act. Because Tecnocap's brief takes only the most passing shot at that finding, it has waived any challenge to the Board's finding, and the Court should summarily enforce the portions of the Order remedying this blatant discrimination against union members.

3. Finally, the Court lacks jurisdiction to consider Tecnocap's newly minted claims that it should escape the Board's remedial Order because its actions purportedly were justified and minor. Under Section 10(e) of the Act, Tecnocap was obligated to raise those baseless arguments in the exceptions that it filed with the Board. Its failure to do so bars consideration of those claims on review.

ARGUMENT

I. THE COURT SHOULD UPHOLD THE BOARD'S FINDINGS THAT TECNOCAP BREACHED ITS STATUTORY DUTY TO BARGAIN AND VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY ENGAGING IN AN UNLAWFUL COURSE OF CONDUCT

Abundant evidence supports the Board's finding that Tecnocap insisted on changes to the scope of the bargaining unit when it had no right to do so, and then unlawfully attempted to force its desired changes on the Union and unit employees. Specifically, as shown below, Tecnocap violated Section 8(a)(5) and (1) of the Act by unilaterally implementing parts of its contract proposal involving unit scope, a permissive subject of bargaining, despite the lack of any lawful impasse over mandatory bargaining subjects. Tecnocap then compounded its violation by locking out employees with the goal of compelling the Union's acquiescence to its desired changes to the bargaining unit. As also shown below, because Tecnocap has only summarily raised a challenge to the Board's separate finding that it violated Section 8(a)(5) and (1) of the Act in bypassing the Union and dealing directly with individual unit employees about their terms and conditions of employment, the Court should consider any challenge to that finding waived, and summarily enforce the corresponding portions of the Board's Order.

A. Substantial Evidence Supports the Board’s Findings that Tecnocap Unlawfully Implemented Aspects of a Contract Offer in the Absence of a Good-Faith Impasse, and Locked Out Employees in Support of a Demand To Change the Scope of the Bargaining Unit

- 1. An employer cannot lawfully insist on changing the scope of an established bargaining unit; nor can it make such a change the condition of agreement on mandatory bargaining subjects or lock out employees to compel acceptance of a unit-scope change**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(d) of the Act, in turn, defines collective bargaining as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d).

“Read together,” these provisions mandate bargaining on the subjects specifically enumerated in Section 8(d): “wages, hours, and other terms and conditions of employment.” *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (quoting 29 U.S.C. § 158(d)). However, as Section 8(d) makes clear, the parties need only “confer in good faith,” 29 U.S.C. § 158(d), and “neither party is legally obligated to yield” its position. *Wooster Div. of Borg-Warner*, 356 U.S. at 349. Accordingly, a party may lawfully “insist upon matters within the scope of mandatory bargaining,” *id.*, and if the parties reach an impasse

after good-faith negotiations, the employer can unilaterally implement changes to employees' wages, hours, and other terms and conditions of employment that are "reasonably comprehended within [the employer's] pre-impasse proposals," *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). *See AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1299 (4th Cir. 1995).

By contrast, neither party may insist on matters outside the scope of mandatory bargaining, because as to such matters, "each party is free to bargain or not to bargain, and to agree or not to agree." *Wooster Div. of Borg-Warner*, 356 U.S. at 349; *accord AMF Bowling Co. v. NLRB*, 977 F.2d 141, 148 (4th Cir. 1992). Moreover, as the Supreme Court has explained, insistence on a proposal that does not involve a mandatory subject of bargaining "is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *Wooster Div. of Borg-Warner*, 356 U.S. at 349. An employer therefore breaches its duty to bargain over mandatory subjects, and violates Section 8(a)(5) and (1) of the Act, when it conditions overall agreement with respect to employees' terms and conditions of employment on the union's acceptance of a proposal on a merely

“permissive” subject. *Id.*; *AMF Bowling*, 977 F.2d at 148; *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979).⁴

Applying the foregoing principles, this Court has long held that an employer violates Section 8(a)(5) and (1) of the Act by insisting on a change to the scope or composition of an established bargaining unit, because “[t]he description of the bargaining unit is not a mandatory subject of bargaining.” *Newport News Shipbuilding & Dry Dock*, 602 F.2d at 76; *cf. AMF Bowling*, 977 F.2d at 148 (no violation where the employer’s proposal “did not create any dispute over who did or did not belong to the bargaining unit, [or] who was or was not covered by the collective bargaining agreement”). Were it otherwise, “an employer could use its bargaining power to restrict (or extend) the scope of union representation”—a matter that has nothing to do with employees’ wages, hours, and working conditions—“in derogation of employees’ guaranteed right to representatives of their own choosing.” *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988) (noting that Section 7 of the Act guarantees to employees the right “to bargain collectively through representatives of their own choosing,” 29 U.S.C. § 157); *see also Hill–Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992) (“if an employer could vary unit descriptions at will, it would have the power to sever the

⁴ A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

link between a recognizable group of employees and its union as the collective bargaining representative”). The Act does not contemplate such an incongruous result. *See Newport News Shipbuilding & Dry Dock*, 602 F.2d at 76 (explaining the statutory basis for excluding unit-scope disputes from mandatory bargaining); *The Idaho Statesman*, 836 F.2d at 1400-01 & n.2 (same).

As a corollary, it is unlawful for an employer to try to force acceptance of its proposal on a nonmandatory subject—such as a change to the bargaining unit—by locking out union-represented employees until the union agrees. *See Movers & Warehousemen’s Assn.*, 224 NLRB 356, 357 (1976), *enforced*, 550 F.2d 962 (4th Cir. 1977) (employer unlawfully locked out employees in support of a proposal on internal union procedure for contract ratification, a nonmandatory subject); *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022, 1023 (1993) (employer unlawfully locked out employees in support of a demand to alter the bargaining unit, a nonmandatory subject), *enforcement denied*, 40 F.3d 669, 673-74 (3d Cir. 1994) (agreeing with the Board that an employer has no right to insist on alteration of the bargaining unit, but disagreeing that the employer sought to do so). Such a lockout—like any insistence on nonmandatory subjects—constitutes a refusal to bargain over mandatory subjects. *See Wooster Div. of Borg-Warner*, 356 U.S. at 349.

2. Tecnocap unlawfully implemented part of its “last, best, and final” contract offer in the absence of a good-faith impasse over mandatory bargaining subjects

The record fully supports the Board’s finding that Tecnocap violated Section 8(a)(5) and (1) of the Act by unilaterally implementing aspects of its last, best, and final contract offer without reaching a good-faith impasse. (JA 644 n.2, 654.)

Specifically, the undisputed evidence shows that in a bargaining session on November 9, 2017, Tecnocap proposed replacing the existing 14 classifications in the bargaining unit with 3 new classifications (Operator I, II, and III), converting all existing unit employees to either the Operator I or Operator II classification, and reserving the Operator III classification for die setters who were represented by the IAM. This clearly constituted a proposal to change the scope or composition of the bargaining unit because, as the Board found, the die setters were “on jobs covered by contracts with other unions” and therefore they were excluded from the bargaining unit under the express terms of the unit description in the parties’ 2015-2017 collective-bargaining agreement. (JA 647-48, 654.)

Moreover, ample evidence supports the Board’s finding that the Union never accepted Tecnocap’s proposal to expand the bargaining unit to include the die setters. (JA 648-55.) To be sure, in agreeing to temporarily extend the collective-bargaining agreement from November 19, 2017, to February 28, 2018, the Union agreed to streamline the number of classifications in the bargaining unit as

Tecnocap had proposed—that is, to reduce the number of unit classifications from 14 to 3. But the Union did not agree to populate the three classifications as Tecnocap had proposed, nor did it agree to reserve the Operator III classification for die setters represented by the IAM. Indeed, the memorandum of understanding that extended the collective-bargaining agreement expressly left all such questions of “who falls in what class” open for “continue[d]” negotiations. (JA 178.)

Further, in the negotiations that followed, the Union made clear that it did not accept Tecnocap’s proposal to include die setters in the bargaining unit. Thus, when Tecnocap reiterated its plan to move die setters into the Operator III classification in February 2018, the Union proposed instead moving four current unit jobs there. And when Tecnocap flatly rejected that proposal and “register[ed] impasse” on “the three job classifications” on February 27, the Union responded the very next day that it would not discuss the Operator III classification any further because that classification “consists exclusively of work that is not in the . . . bargaining unit and does not belong to [the Union].” (JA 650; SA 1.)

Given this obvious disagreement about Tecnocap’s proposed expansion of the bargaining unit to include non-unit die setters, and the Union’s point-blank, justifiable refusal to discuss adding the die setters to the bargaining unit on February 28, the Board reasonably found that Tecnocap had no right to unilaterally implement its proposed new classification system on March 1. As the Board

explained, the parties could not have reached impasse on March 1, when Tecnocap unilaterally implemented its proposal, because it was unlawfully insisting on a change to the bargaining unit—a permissive subject—as the condition of overall agreement with the Union. (JA 654.) *See Smurfit-Stone Container Enters.*, 357 NLRB 1732, 1735-36 (2011) (“a party *precludes* good-faith impasse when it insists on such a [permissive] proposal as the price of an agreement” (original emphasis)), *enforced sub nom. Rock-Tenn Servs. v. NLRB*, 594 F. App’x 897 (9th Cir. 2014). In the absence of a good-faith impasse, moreover, Tecnocap was not privileged to unilaterally implement any aspect of its last contract offer to the Union. Accordingly, the Board was entirely justified in finding that Tecnocap violated Section 8(a)(5) and (1) of the Act by “partially implementing its last, best, and final offer by establishing new job classifications without reaching a good-faith impasse.” (JA 644 n.2.)

3. Tecnocap unlawfully locked out union members with the goal of compelling acquiescence to a change in the scope of the bargaining unit

In the wake of the Union’s refusal to negotiate over the inclusion of die setters in the bargaining unit, Tecnocap declared to employees on March 5 that the parties were “at impasse” and that it would therefore exercise its supposed “lock-out right” effective March 13. (JA 281.) True to its word, Tecnocap then locked out employees (at least, those who were members of the Union) beginning on

March 13, and did not let them return to work until March 22. As the Board found and the record shows, the nine-day lockout represented yet another instance of Tecnocap's unlawful insistence on its proposed expansion of the bargaining unit, with the clear "goal of compelling the employees' acquiescence with a contract proposal upon which [Tecnocap] had no right, under the Act, to insist." (JA 655.)

Indeed, as the lockout approached, Tecnocap increased its pressure on the Union to accept its view of the new classification scheme for the GMP unit, and particularly its view as to which employees should be included in the Operator III classification. Thus, on March 9, Tecnocap reminded the Union that it had agreed to the three classifications in November 2017, and urged the Union to think of the Operator III classification "like a dinner reservation" for another elite group that could not accommodate the GMP unit employees because it was being held "for the die setters and their work when they came over from the IAM to the [Union]." (JA 651; JA 78.) Tecnocap concurrently submitted a "last, best and final" contract offer to the Union reflecting its demand that the Operator III position be reserved for the die setters. (JA 651; JA 283.)

Thereafter, on March 13, Human Resources Director Doty, who represented Tecnocap in negotiations, wrote to Union Negotiator Pete Jacks as the lockout began to inform Jacks that he was "deeply disappointed" with the Union's recalcitrance on the Operator III classification. (JA 652; JA 291.) Doty urged the

Union not to trouble itself with the details of how the movement of die setters to the GMP unit would be made acceptable to their current bargaining representative, the IAM. (JA 652; JA 290, 292.) Doty reminded the Union about Tecnocap's tenacity on this issue, and its absolute "intention to move the die setters to Class III operator" in the GMP unit. (JA 652; JA 292.)

Given Tecnocap's clear agenda, which it expressed through its communications with the Union just before and during the lockout, there is no question that Tecnocap locked out its employees in order to expand the GMP bargaining unit to include die setters. Accordingly, the record amply supports the Board's finding that Tecnocap violated Section 8(a)(5) and (1) of the Act "by locking out union members in support of a demand that the Union agree to a contract provision to change the scope of the bargaining unit, a permissive subject of bargaining" on which Tecnocap had no right to insist.⁵ (JA 644 n.2, 655.)

⁵ In its brief, Tecnocap tilts at windmills by challenging the administrative law judge's recommended finding that it further violated Section 8(a)(5) and (1) of the Act by failing to give the Union clear conditions for ending the lockout and reinstating the locked-out employees. (Br. 20-21, JA 655.) Tecnocap apparently does not realize that the Board specifically found it unnecessary to pass on (and therefore did not adopt) this particular finding because it "would not materially affect the remedy." (JA 644 n.2.)

4. Tecnocap errs in asserting that the Union agreed to expand the bargaining unit

On review, Tecnocap does not question that an employer violates Section 8(a)(5) and (1) of the Act by insisting on a change in the scope of the bargaining unit, unilaterally implementing aspects of a final contract offer based on a supposed impasse over the scope of the bargaining unit, and locking out employees in an effort to force acceptance of a desired change to the unit scope. Instead, Tecnocap argues as a purely factual matter that it did not insist on changes to the scope of the bargaining unit, but merely sought to enforce a prior agreement between the parties to change the unit scope. (Br. 10-16, 20.) This argument is a mischaracterization of the record evidence, and thus meritless.

In essence, Tecnocap claims that because it repeatedly aired its understanding of the three new job classifications with the Union, including through proffered job descriptions for each new classification, the Union “knew” that “Operator III would include some die setter duties and [] possibly die setters from IAM would be transferred over to the Operator III position.” (Br. 12.) But as the Board reasonably found, the Union’s knowledge of Tecnocap’s strongly held position and its proffered job descriptions does not amount to acceptance of all that Tecnocap had stated or implied. (JA 648.)

This is particularly true given the express terms of the parties’ November 15, 2017 memorandum of agreement, which memorialized the Union’s qualified

acceptance of the new classifications. As the Board explained, the memorandum of agreement “made no mention of the die setter position or the job descriptions proposed by [Tecnocap],” and it specifically left the matter of “who falls in what class” open for further negotiations. (JA 648.) The record, thus, directly undercuts Tecnocap’s tortured claim that in agreeing to a bare set of new classifications for the GMP bargaining unit the Union also took the extraordinary step of agreeing to an expansion of the bargaining unit to encompass die setters who have historically been represented by the IAM.⁶

Moreover, because Tecnocap’s overall factual argument fails, Tecnocap is left with no basis to challenge the Board’s amply supported findings, discussed above pp. 26-30, that it violated Section 8(a)(5) and (1) of the Act by partially implementing a contract offer without reaching a good-faith impasse in negotiations over mandatory bargaining subjects, and by locking out employees in support of a demand that the Union agree to a change in the scope of the bargaining unit, a permissive rather than mandatory bargaining subject. (JA 644.)

⁶ Tecnocap also quibbles with the Board’s passing reference to the un rebutted testimony of a union official that the Union only agreed to the three bare classifications on a temporary basis, pending further negotiations over the details as provided in the November 15 memorandum of agreement. (Br. 13, 16; JA 648 n.7.) However, the duration of the limited arrangement to which the Union agreed is irrelevant. Whether the arrangement is characterized as temporary or permanent, as shown above, it did not encompass an agreement by the Union to expand the GMP bargaining unit to include die setters.

B. The Court Should Summarily Enforce the Portions of the Board’s Order Corresponding to Its Finding that Tecnocap Violated Section 8(a)(5) and (1) of the Act by Dealing Directly with Employees About Their Terms and Conditions of Employment

The Board found that Tecnocap compounded the violations discussed above, and further breached its statutory bargaining obligation, by circumventing the Union—the employees’ exclusive bargaining representative—and dealing directly with individual employees about the terms and conditions of their employment during the lockout. (JA 644, 656.) *See* 29 U.S.C. § 158(d) (requiring employer to “confer in good faith” with “the representative of the employees” in regard to “wages, hours, and other terms and conditions of employment”). As the Board found and the undisputed record evidence shows, Tecnocap’s human resources director “drafted letters of hire for six employees who wished to resign their union membership and continue working” through the lockout; the letters “altered the[] employees’ status to that of at-will employees, thereby affecting their rights related to discharge,” which “is a term and condition of employment”; and Tecnocap secured the employees’ agreement to their new terms and conditions of employment “without consulting the Union,” despite its status as the GMP unit employees’ exclusive bargaining representative. (JA 656.)

The Board reasonably found that such an obvious circumvention of the Union—directly re-negotiating terms and conditions of employment with

individual employees—is unlawful under Section 8(a)(5) and (1) of the Act. (JA 655-56, applying the test for direct-dealing set forth in *El Paso Electric Co.*, 355 NLRB 544, 545 (2010).) *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (it is unlawful for an employer “to disregard” the employees’ designated bargaining agent “by negotiating with individual employees . . . with respect to wages, hours, and working conditions”).

In its opening brief, Tecnocap does not challenge the Board’s finding of direct dealing. Instead, it merely suggests in an argument heading that the Board’s analysis was “incorrect.” (Br. 21.) Moreover, its only paragraph of “argument” addresses matters that have nothing to do with the Board’s finding of direct dealing. (Br. 21.) Under settled law, such a meager effort that only summarily raises an issue does not preserve it for the Court’s review.

As this Court has made clear, an appellant waives issues “not raised in the argument section of the opening brief.” *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013). And to “raise” an issue, an appellant must do more than simply “take[] a passing shot at [it].” *Grayson O Co. v. Agadir Int’l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (internal quotation marks and citations omitted); *accord United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (“issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived”). Rather, the opening brief must develop an argument with

“citations to the authorities and parts of the record on which the appellant relies.”
Fed. R. App. P. 28(a)(8)(A).

Applying these principles here, Tecnocap took nothing more than a passing shot at the Board’s direct-dealing finding, calling it “incorrect” without providing any concrete reasons for this position or supporting argument keyed to the specific findings pertaining to direct dealing. Tecnocap therefore waived any challenge to the Board’s finding that it dealt directly with individual bargaining-unit employees in violation of Section 8(a)(5) and (1) of the Act.

The consequences of such waiver are clear. When a party forfeits its opportunity to challenge an unfair-labor-practice finding on appeal, the Board is entitled to summary enforcement of the portions of its Order corresponding to the uncontested violation. *WXGI, Inc. v. NLRB*, 243 F.3d 833, 839 (4th Cir. 2001); *NLRB v. Sheet Metal Workers Int’l Ass’n, Local 16*, 873 F.2d 236 (9th Cir. 1989).

In any event, even if Tecnocap’s claims were dignified as a challenge worthy of the Court’s consideration, they would provide no basis for reversal of the Board’s reasonable finding that Tecnocap unlawfully “circumvented the Union” and “communicated directly with represented employees” to “alter [their] status to that of at-will employees, thereby affecting their rights related to discharge”—a term and condition of employment. (JA 656.) Tecnocap purports to establish that this finding is “incorrect” by briefly pointing out that employees have

a right to resign their union membership, and by noting that under a 1976 decision of the Second Circuit, an employer allegedly can “respond to questions” from employees “so long as it is not soliciting, encouraging, [or] influencing employees to resign their union membership.” (Br. 21, citing *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (1976).) But these observations have no bearing on whether Tecnocap unlawfully bypassed the Union and re-negotiated a term and condition of employment with individual GMP bargaining-unit employees. Indeed, the 1976 case that Tecnocap cites, *Martin A. Gleason*, did not involve any allegation of direct-dealing in violation of Section 8(a)(5) and (1) of the Act. *See* pp. 42-44 below, for further discussion of *Martin A. Gleason*. Accordingly, Tecnocap’s claims would fall flat, as a non-response to the Board’s direct-dealing finding, even if they were properly before the Court, which they are not.

II. THE COURT SHOULD UPHOLD THE BOARD’S FINDINGS THAT TECNOCAP VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING EMPLOYEES THAT ONLY UNION MEMBERS WOULD BE LOCKED OUT, AND VIOLATED SECTION 8(a)(3) AND (1) BY SELECTIVELY LOCKING OUT UNION MEMBERS

Undisputed record evidence supports the Board’s findings that Tecnocap engaged in additional unfair labor practices as part of its unlawful campaign of pressuring the Union to accept its bargaining demands on a permissive bargaining subject (unit scope). Specifically, as shown below, Tecnocap violated Section 8(a)(1) of the Act by telling employees that it would only lock out union members

and impliedly soliciting their resignations from the Union. Moreover, because Tecnocap has not substantively challenged the Board's related finding that it violated Section 8(a)(3) and (1) of the Act by selectively locking out union members, the Court should consider any challenge to that unfair-labor-practice finding waived, and summarily enforce the corresponding portions of the Board's Order.

A. Tecnocap Violated Section 8(a)(1) of the Act by Announcing a Selective Lockout of Union Members and Impliedly Soliciting Employees To Resign Their Union Membership

1. It is unlawful for an employer to condition employees' continued employment on abandonment of their union membership

Section 7 of the Act guarantees to employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. By the same token, Section 7 also guarantees their "right to refrain from any or all of such activities," if they so choose. *Id.* Employee free choice in such matters is ensured by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Applying Section 8(a)(1), the Board has long held that although an employer “may lawfully provide neutral information to employees regarding their right to withdraw their union support,” it cannot “create an atmosphere wherein employees would tend to feel peril in refraining from withdrawing.” *Space Needle, LLC*, 362 NLRB 35, 36 (2015) (citing cases) (internal quotation marks and citations omitted), *enforced mem.*, 692 F. App’x. 462 (9th Cir. 2017). Thus, it is an unfair labor practice for an employer to take actions such as issuing a “statement to employees that conditions employment on giving up union membership or activity.” *Schenk Packing Co.*, 301 NLRB 487, 489 (1991).

As the Court has recognized, the Board applies an objective test to determine whether an employer’s statement or conduct violates Section 8(a)(1). *See Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 336 (4th Cir. 2010). The question is whether, “under all of the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees.” *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). Accordingly, it is irrelevant “whether the [employer’s] language or acts were coercive in actual fact.” *Equitable Gas Co. v. NLRB*, 966 F.2d 861, 866 (4th Cir. 1992) (internal quotation marks and citation omitted). “Nor does it matter whether the employer acted with anti-union animus.” *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001) (citing *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965)). Conduct or statements that

reasonably tend to coerce or intimidate employees violate Section 8(a)(1), unless the employer shows a legitimate business interest that outweighs employees' Section 7 interests and justifies subordination of their rights. *See Consol. Diesel*, 263 F.3d at 352.

The finding of a Section 8(a)(1) violation thus turns on consideration of the “particular labor relations setting,” and requires a balancing of employee and employer interests where the employer has asserted a business justification for its objectively coercive action. As the Court has recognized, such fine assessments are for “the specialized experience of the [Board],” and accordingly the Court generally will not disturb the Board’s finding of a Section 8(a)(1) violation that is supported by substantial evidence. *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 687 (4th Cir. 1980) (finding two employer notices to employees violated Section 8(a)(1)) (quoting *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 811 (4th Cir.1965)).

2. Tecnocap unlawfully pressured union members to resign their union membership by telling them that their jobs were in peril, and that only non-union-members could hope to keep their jobs for the duration of the lockout

Substantial evidence supports the Board’s finding that Tecnocap’s “bulletin board postings [to employees] on [March] 5, 7, and 12, 2018, violated Section 8(a)(1) of the Act,” because they “created a situation where employees would feel jeopardized if they did not resign” their union membership. (JA 654.) As the

Board explained, all three notices plainly conveyed to employees that the lockout applied only to union “members,” and “that their ability to continue to work” during the lockout would “depend on whether or not they were members of the Union.” (JA 654.)

Thus, the March 5 notice stated that during the lockout period, “GMP Union members won’t be allowed to enter the property.” (JA 281.) Moreover, the March 7 notice squarely emphasized that “[t]he lockout applies only to GMP union members,” and that “others” would be able “to continue to work”—in other words, that only employees who were not union members would be hired as replacements. (JA 282.) Similarly, Tecnocap’s final March 12 lockout notice directly confirmed that the lockout would “appl[y] only to GMP union members,” and that temporary positions during the lockout would be available exclusively to non-union-members. (JA 286.)

As the Board found, Tecnocap’s notices conveyed to employees in the plainest terms an effective admission “that their ability to continue to work would depend on whether or not they were members of the Union.” (JA 654.) Indeed, as in *Schenk Packing Company*, on which the Board appropriately relied, Tecnocap’s message “was that it would not even *consider* unit employees for employment while the lockout was in effect unless they withdrew from the Union.” 301 NLRB 487, 489 (1991) (emphasis in original). Tecnocap, thus, “created a situation where

employees would feel jeopardized if they did not resign.” (JA 654, citing *Schenk Packing*, 301 NLRB at 489 (employer “created a situation in which the employees would reasonably tend to perceive a substantial employment risk should they fail to resign from the Union”).) Such conduct violates Section 8(a)(1) of the Act because it effectively “constitutes unlawful solicitation of resignation from union membership.” *Schenk Packing*, 301 NLRB at 489.

3. Tecnocap’s claims that it acted lawfully are meritless

Tecnocap does not assert that it had a legitimate business justification for telling employees they should resign their union membership if they wanted to avoid being locked out of their jobs. *See* below pp. 48-49. Instead, it makes claims that miss the mark entirely, professing that it did not act with “anti-union animus” or “ask[] any employee to resign from the union,” and noting that employees who resigned had “their own reasons” as well as a right to do so. (Br. 9, 19, 22.) These claims overlook Tecnocap’s bald admission that it squarely told employees they would be locked out if they maintained their union membership. *See, e.g., NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785 (8th Cir. 2013) (“[w]hen the employer’s admitted motivation encompasses protected labor activity, the employer has in effect admitted an NLRA violation”).

In any event, because Section 8(a)(1) of the Act focuses on whether the employer objectively interfered with, restrained, or coerced employees in the

exercise of their Section 7 rights (see above pp. 38-39), the professed purity of Tecnocap's motivations does not help it here. Likewise, neither the subjective reactions of individual employees nor their right to resign from union membership obviates the Section 8(a)(1) violation, which focuses squarely on the employer's conduct. (JA 655.) Nor does it matter that Tecnocap, instead of instructing employees outright to give up their union membership, simply told them they would be locked out if they did not, thereby impliedly soliciting their resignations. The salient question is simply whether Tecnocap's statements to employees reasonably tended to interfere with their Section 7 rights. As shown above, substantial evidence supports the Board's finding that they had such an unlawful tendency.

Contrary to Tecnocap's further claim, *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976), does not undermine the Board's finding. That 1976 out-of-circuit case involved entirely distinguishable circumstances—namely, employers in a multi-employer bargaining relationship who engaged in a lawful “defensive” lockout of all employees in the multi-employer unit, in response to the union's initiation of a selective strike on three of the employers during negotiations for a successor collective-bargaining agreement. *Id.* at 468-69, 471, 475 (citing *NLRB v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87 (1957), and *NLRB v. Brown*, 380 U.S. 278 (1965)). Following announcement of the lawful lockout, two

of the employers—at the instance of their employees—“fell into discussing the revival of an arrangement” used in an earlier strike. *Id.* at 477. Under that arrangement, employees “would resign from the union, return to work as nonunion employees . . . for the period of the strike and lockout[, and then] . . . apply to rejoin the union at the end of that time,” with the understanding that their employer “would see to it that any new contract would provide that there would be no recriminations or sanctions against the employees for their resignations.” *Id.* at 477. The Second Circuit held that there was nothing necessarily unlawful about the employers’ participation in such employee-initiated discussions, and remanded the case to the Board for critical credibility determinations to confirm “the absence of any solicitation of union members to accept nonunion employment or encouragement of workers by the[ir] employer to resign from the union.” *Id.* at 476-77.

The present case presents a starkly different scenario. As shown above pp. 28-32, Tecnocap made its statements in the context of its unlawful selective lockout of union members—a lockout that denigrated union membership from the outset, and that further unlawfully sought to compel the Union’s acquiescence to a nonmandatory subject of bargaining (changing the unit scope to include employees represented by a different union). Unlike the employers in the 1976 case, moreover, Tecnocap did not merely entertain employee suggestions as to how they

might temporarily resign their union membership as a device to continue working during the lockout. Rather, Tecnocap proactively reached out to all employees, regardless of their expressed interest, and contrasted the negative consequences of union membership (unemployment for “days, weeks, months, [or possibly] years”) with the positive consequences of resigning from the Union (continued employment).

Further, in *Martin A. Gleason* the Second Circuit squarely recognized that an employer not only cannot “ask its union employee to resign [his union membership],” it also cannot “urge, induce, recommend, encourage, persuade or compel him to do so.” *Id.* at 477. But that is exactly what Tecnocap did here. Accordingly, the 1976 case provides no basis for disturbing the Board’s well-supported finding that Tecnocap’s March postings violated Section 8(a)(1) of the Act.

B. The Court Should Summarily Enforce the Portions of the Board’s Order Corresponding to Its Finding that Tecnocap Violated Section 8(a)(3) and (1) of the Act by Selectively Locking Out Union Members

The record undisputedly shows that Tecnocap “made good on its threats” and locked out GMP “unit employees who [we]re union members while permitting unit employees who [were] not union members to continue working.” (JA 644 n.2, 654.) By doing so, as the Board found, Tecnocap blatantly violated Section 8(a)(3) of the Act, which makes it an unfair labor practice for an employer “by

discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”

29 U.S.C. § 158(a)(3).⁷

In its brief, Tecnocap does not provide any basis for disturbing the Board’s reasonable finding. Indeed, it does not deny that it exclusively subjected “union members” to the lockout, consistent with its unequivocal pre-lockout announcements that “[t]he Lockout applies only to GMP union members,” and that only non-union-members would be eligible to continue working during the lockout. (JA 644 n.2, 651; JA 280-81, 286.) Nor does it cite any legal authority to defend the distinction it admittedly drew—based on union membership alone—“between employees who performed the same kind of work, were subject to the same [collective-bargaining agreement], and had the same interest in the contract proposals that led to the lockout.” (JA 654.) *See Schenk Packing Co.*, 301 NLRB 487, 489 (1991) (employer had not even “a remote justification” for a lockout that distinguished on the basis of union membership).

Instead, Tecnocap takes only a glancing shot at the Board’s finding, asserting that “[i]t is difficult to understand how the [Board] could find anti-union animus” motivated its actions. (Br. 19.) But such an assertion, unsupported by

⁷ A violation of Section 8(a)(3) of the Act produces a derivative violation of Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

any specific argument or defense of its decision to selectively lock out union members, does not qualify as an argument deserving of the Court's consideration. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017), and cases cited at p. 34.

As noted above pp. 34-35, an appellant's opening brief must contain not only appellant's contentions, but also "the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Here, Tecnocap has provided no reason for its decision to target union members for lockout from their jobs, much less a developed defense of its action complete with citations to the record and relevant authorities. Accordingly, Tecnocap has waived any claim that such a targeted lockout was lawful, and the Board is entitled to summary enforcement of the portions of its Order corresponding to the uncontested finding that the selective lockout violated Section 8(a)(3) and (1) of the Act. *See* above p. 35.

In any event, to the extent that Tecnocap fleetingly suggests that it did not act with anti-union animus or attempt to discourage union membership, its statements and actions belie that claim and speak for themselves. All of the notices about the lockout expressly stated that it applied "only to GMP union members," and two of the notices effectively solicited employees to resign their union membership by telling them that only non-union-members would be eligible for

continued employment during the lockout. (JA 281-82, 286.) The record accordingly leaves no doubt that Tecnocap discriminated among employees based on union membership, with the goal of discouraging union membership, as specifically proscribed by Section 8(a)(3) and (1) of the Act.

III. THE COURT LACKS JURISDICTION TO CONSIDER TECNOCAP'S BELATED AND MERITLESS ARGUMENTS THAT IT SHOULD NOT HAVE TO REMEDY ITS UNFAIR LABOR PRACTICES

In a final effort to escape its obligations under the Board's Order, Tecnocap somewhat paradoxically contends, at the end of its brief, that its unfair labor practices were substantially justified and yet "so ineffective or inconsequential" as to make a remedy unnecessary. (Br. 23-24.) The Court lacks jurisdiction to consider these afterthoughts on the adjudicated violations and remedial order, because they were not raised to the Board in the first instance. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (courts are "without jurisdiction to consider [a] question" not raised to the Board).

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). As this Court has recognized, Section 10(e) "codifies" the "general principle that administrative decisions should not be overturned 'unless the administrative body not only erred but has erred against

objection made at the time appropriate under its practice.” *NLRB v. Cast-A-Stone Prods. Co.*, 479 F.2d 396, 397 (4th Cir. 1973) (quoting *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Here, under the Board’s Rules and Regulations, it was incumbent on Tecnocap to raise its challenge to the remedial Order in timely and sufficient exceptions that should have been filed with the Board. *See* 29 C.F.R. § 102.46(a)(1) (establishing requirements for valid exceptions and noting that exceptions “not specifically urged” are deemed waived). But Tecnocap filed no exceptions urging the claims it now presses, that the judge “failed to evaluate” whether its actions “were based on legitimate and substantial business reasons.” (Br. 24; *compare* JA 659-67.) Nor did it assert, as it does here, that its conduct was too “inconsequential” to warrant a remedy. (Br. 23; *compare* JA 659-67.) Because Tecnocap does not assert that an extraordinary circumstance excused these failures, its claims are plainly barred from review. *See NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 198 (4th Cir. 1984) (the Court was “foreclosed from reaching” an employer argument not made with requisite specificity in exceptions, that even if it committed unfair labor practices the standard backpay remedy was improper); *see also Amglo Kemlite Laboratories, Inc. v. NLRB*, 833 F.3d 824, 829 (7th Cir. 2016) (employer must establish its claim of *de minimis* violation, or that

no employees were affected, in the proceeding before the Board on the merits of the unfair labor practices).

In any event, Tecnocap's skeletal briefing on its new-found defenses provides no basis for this Court to overturn the Board's amply supported unfair-labor-practice findings and remedy. Thus, although Tecnocap asserts that it was "suffering from a substantial production issue" (Br. 24), it does not explain how that vaguely defined problem could possibly have justified the wide range of unlawful actions it took in this case. Indeed, Tecnocap does not establish any specific nexus between its claimed production issue and the litany of unfair labor practices it committed.

Moreover, in claiming that its conduct was too "ineffective or inconsequential" to warrant a remedy, Tecnocap relies on nothing more than its unsupported view that no remedy is warranted even though, as it acknowledges, the lockout lasted over a week and its coercive conduct actually prompted employees to resign their union membership. (Br. 23-24.) Tecnocap's view cannot be squared with Section 10(c) of the Act, which provides that if the Board finds a violation of the Act, it "shall issue" a remedial order "requiring [the violator] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." 29 U.S.C. § 160(c). Consistent with

this statutory mandate, the Board issued an Order that appropriately includes remedies such as a cease-and-desist order and make-whole relief for employees who suffered lost wages and other benefits as a result of Tecnocap's violations of Section 8(a)(1), (3), and (5) of the Act. *See Phelps Dodge Corp.*, 313 U.S. 177, 194 (1941) ("the relation of remedy to [statutory] policy is peculiarly a matter for administrative competence"). Accordingly, Tecnocap's objections to the Board's remedy would fail even if they were properly before the Court, which they are not.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Tecnocap's petition for review and enforcing the Board's Order in full.

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February 2020

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FOR THE FOURTH CIRCUIT**

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v.)	
)	
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)	Board Case No.
Respondent/Cross-Petitioner)	06-CA-216499
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE WORKERS)	
INTERNATIONAL UNION, AFL-CIO, CLC)	
)	
Intervenor)	
_____)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its document contains 11,645 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
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Dated at Washington, DC
this 27th day of February 2020

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 27th day of February 2020