

ORAL ARGUMENT SCHEDULED SEPTEMBER 17, 2020
Nos. 19-1263 and 20-1020

In the United States Court of Appeals
For the District of Columbia Circuit

Wyman-Gordon Pennsylvania, LLC,
Petitioner/Cross-Respondent

v.

National Labor Relations Board,
Respondent/Cross-Petitioner

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied
Industrial, and Service Workers International Union, AFL-CIO-CLC,
Intervenor

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
CASE NOS. 04-CA-188990, 04-CA-182126, 04-CA-186281

FINAL REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT
WYMAN-GORDON PENNSYLVANIA, LLC

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SUMMARY OF ARGUMENT

To quote the National Labor Relations Board (“NLRB” or “Board”), the Board “spill[ed] much ink” (NLRB Br. 38)¹ in an attempt to derail Wyman-Gordon Pennsylvania, LLC’s (“Wyman”) arguments – both substantively and procedurally. The Board’s arguments are unavailing and include several errors that must be addressed. Accordingly, Wyman submits this Reply Brief in further support of its opening brief.

As an initial matter, the Board disagrees with the way in which Wyman excepted to the Administrative Law Judge’s (“ALJ”) decision. Wyman has, however, preserved its exceptions for purposes of the present petition for review.

The foregoing aside, the Board moves this Court for summary enforcement of remedies that do not exist. The alleged overly broad confidentiality statement in Wyman’s employee handbook has been corrected. Additionally, to the extent the Board concluded that Wyman unilaterally discontinued its practice of assigning light-duty work to employees on workers’ compensation, again, the alleged harm was remedied, and employees were made whole. As such, the record supports that any alleged harm has already been remedied.

¹ For purposes of this Reply Brief, “NLRB Br.” refers to the Brief of the National Labor Relations Board filed May 6, 2020 and “Wyman Br.” refers to the Brief of Wyman-Gordon Pennsylvania, LLC filed April 6, 2020.

The Board next relies on several mischaracterizations of the record: (1) that Rick Grimaldi, on behalf of Wyman, made a factual statement specific to Wyman during bargaining, prompting the Union to cross-check those assertions and (2) that Wyman relied only on the petition when it withdrew recognition from the Union. Not so. Ultimately, and as detailed in full below, review of the entirety of the underlying record makes clear that the Board's findings are not supported by substantial evidence. The Board, in its brief, attempts to convince this Court otherwise. However, the substantial evidence dictates that, contrary to the Board's findings, Wyman did not engage in any of the alleged unfair labor practices and further, the employees demanded withdrawal of their own volition and were not influenced by any alleged conduct on the part of Wyman. In keeping with employees' Section 7 rights to bargain through a representative *of their choosing*, should this Court find that the withdrawal of recognition from the Union was not objectively based – which Wyman does not contend – the only proper remedy would be to order an election.

ARGUMENT²

I. The Board's Request for Summary Enforcement of the Board's Findings Pertaining to Wyman's Confidentiality Statement and Light-Duty Practice is a Non-Starter.

The Board requests summary enforcement of the following findings: (1) Wyman violated Section 8(a)(1) of the Act by maintaining an unlawful confidentiality statement in its employee handbook and (2) Wyman violated Sections 8(a)(5) and (1) by unilaterally discontinuing its practice of assigning light-duty work to employees on workers' compensation. (NLRB Br. 21-23). More specifically, the Board contends that because Wyman allegedly failed to except to these findings, the Court is precluded from review pursuant to Section 10(e) of the Act. (*Id.*). The Board is correct, *in part*.

The Board is correct only that Wyman did not except to either of the foregoing findings by the ALJ. However, there is nothing to enforce. First, Wyman did not except to the ALJ's finding regarding the confidentiality statement because the alleged harm was remedied and, most notably, the ALJ found that Wyman's maintenance of the confidentiality statement did not have "any tendency to cause employees to become disaffected from the Union." (JA 0022). In other words, if

² Wyman notes that the Union's Brief, filed May 13, 2020, does not substantially differ from the Board's – both Briefs request the same remedies. As such, the arguments made in this Reply serve as a rebuttal to both the Board and the Union.

Wyman did in fact lawfully withdraw recognition of the Union, the confidentiality statement had no bearing on the employee's decision. In short, no harm was caused, and the statement has been remedied. Accordingly, the issue is moot and there was nothing to except. Likewise, there is nothing for the Court to enforce. The Board's request should be denied.

Second, Wyman did not except to the ALJ's finding regarding whether or not Wyman unilaterally discontinued its practice of assigning light-duty work to employees on workers' compensation because, again, the alleged harm was remedied. To quote the ALJ, it was "corrected after the Union filed an unfair labor practice charge." (**JA 0023**). Not only were the individuals put back to work on light duty, but they were in fact paid for the missed time. (**JA 0299**). In addition, the ALJ did not find that Wyman's action related to light duty tainted the decertification petition. (**JA 0023**). The issue was corrected, the employees were made whole and, regardless, it did not affect the employee's decision to decertify the Union. Thus, again, there was nothing to except. Likewise, there is nothing to be enforced. The Board's failure to acknowledge *why* Wyman did not except to either of the foregoing Board findings is critical, as it illustrates the arguments were made for no other reason than to undermine Wyman's arguments by pointing to false omissions.

Regardless, to the extent this Court is persuaded by the Board's requests for summary enforcement, there is no enforcement to be had – the record supports that any alleged harm has already been remedied.

II. The Court Does Not Lack Jurisdiction to Consider the Issue of Whether or Not Wyman Failed to Negotiate Over the Amount of the Annual Wage Increase.

The Board argues that the Court lacks jurisdiction to consider whether Wyman failed to negotiate over the amount of the annual wage increase because Wyman allegedly did not except to the ALJ's finding on this issue. The Board is inappropriately parsing words. In footnote one of the Board's Decision and Order, the Board states, "No party has excepted to the judge's findings that [Wyman] . . . violated Sec. 8(a)(5) and (1) by failing to grant union employees an annually recurring wage increase in August 2016 (the annual August wage increase)." (JA 0001). Now, the Board, in its Brief, relies on this single footnote and attempts to argue that Wyman's exceptions 2 and 77 fail to address just that. (NLRB Br. 24-25). Such reading is in error.

Wyman's exceptions 2 and 77 to the ALJ decision state:

Exception 2: To the judge's finding that "employees had not granted [sic] a wage increase on August 1, as in past years without bargaining with the Union about the increase." (Decision p. 3, line 7.)

Exception 77: To the judge's finding that the Union proposed wage increases in line with those the company

had given for the past several years. (Decision p. 17, line 17.)

(**JA 0484; JA 0491**). In other words, the ALJ erred in finding that Wyman had not granted a wage increase on August 1 because the wage increase was in fact provided retroactively, and Wyman did not fail to negotiate because the Union did not propose a consistent increase. On the contrary, the Union's position made it impossible for the parties to effectively bargain.

Exceptions 2 and 77 properly preserve the following assertions by Wyman in its opening brief: Wyman indeed provided an increase to unit employees, retroactive to August 1, 2016 and, even if there was a failure to negotiate over the increase by August 1, 2016, there can be no backpay or damages because the unit employees were made whole. Indeed, the ALJ seemingly understood this as, unlike the Board, it did not order that Wyman make unit employees whole for any loss of earning and other benefits suffered as a result of the alleged failure to grant them an annually recurring wage increase in 2016. (**JA 0011 to JA 0012; JA 0025 to JA 0026**); *see Tschiggfrie Properties, Ltd. v. NLRB*, [896 F.3d 880, 886](#) (8th Cir. 2018) (finding Boards' opinion implied awareness of appellant's objection for purposes of compliance with section 10(e)); *NLRB v. FedEx Freight, Inc.*, [832 F.3d 432, 438](#) (3d Cir. 2016) ("Board member Harry Johnson's concurrence ... indicates [the employer's objection] provided sufficient notice of [it's] challenge"). Even if, therefore, Wyman failed to notify or bargain with the Union before August 1, 2016,

or implement the wage increase by August 1, there is no resulting harm. The Board's inability to properly incorporate Wyman's exceptions into its argument is no fault of Wyman.

The Board's argument related to the Regional Director's October 31, 2016 letter is similarly misguided. Despite the Board's persistence otherwise, the Court *should* consider the Regional Director's letter approving the Union's request to withdraw the portion of Case 04-CA-182126 alleging that Wyman violated the Act by not distributing annual wage increases on August 1, 2016 and by telling an employee that the wage increase was not distributed yet because the amount of the increase was still being negotiated with the Union. *See Dilling Mechanical Contractors, Inc. v. NLRB*, [107 F.3d 521, 524](#) (7th Cir. 1997) ("While it is not [the Court's] job to engage in fact finding or to replace the Board's reasonable conclusions, a mere cursory review of the record is insufficient. Instead, [the Court] must take into account the entire record – which would include any evidence contrary to the Board's view."). *Pepsi-Cola Bottlers of Atlanta*, cited by the Board, is inapplicable. [267 NLRB 1100, 1100](#) n.2 (1983) (*See* NLRB Br. 27-28). The relevant portions of the October 31, 2016 letter indicate *an approval of the Union's request*. Stated differently, the Union's request is more akin to a withdrawal, which, is inherently relevant for purposes of determining which issues were contested between the parties.

For these reasons, the Board is not entitled to summary enforcement of this portion of its Order.

III. The Court Does Not Lack Jurisdiction to Consider the Issue of Whether or Not Wyman Provided Paragraphs 1 and 2 of the Union's August 31, 2016 Information Request.

Contrary to the Board's assessment (NLRB Br. 29-30), the Union's failure to bargain over health care premiums and additional failure to demonstrate the relevancy of the information requests 1 and 2 of the August 31, 2016 information request at the time they were requested, were (i) properly preserved via Wyman's exceptions and (ii) relevant for purposes of demonstrating that the Union's requests were made in bad faith.

Wyman's exceptions 74, 75, and 76 to the ALJ's decision are sufficient to put the Board on notice of the issues currently presented by Wyman in this petition. By way of example, exception 74 states: To the judge's finding that the Union was entitled to the health insurance plan document. (Decision p. 16, line 39.). Inherent within this exception is the logical converse: The Union was not entitled to the health insurance plan document. In support, Wyman argued the irrelevancy of the information requests. (Wy. Br. 30-34). The fact that Wyman asserted pieces of its irrelevancy argument in response to the General Counsel's exceptions is unavailing. *See Dilling*, [107 F.3d at 524](#) ("While it is not [the Court's] job to engage in fact finding or to replace the Board's reasonable conclusions, a mere cursory review of

the record is insufficient. Instead, [the Court] must take into account the entire record – which would include any evidence contrary to the Board’s view.”).

In addition, Wyman did not “miss[] the mark” by relying on arguments that the Union failed to bargain over health care premiums. (NLRB Br. 29-30). Wyman has repeatedly maintained that the Union’s actions, which necessarily included the Union’s failure to bargain over health care premiums, supports its contention that the information requested in paragraphs 1 and 2 of the August 31, 2016 information request were made in bad faith. (Wy Br. 33-34).

The Board, therefore, is not entitled to summary enforcement of this portion of the Board’s Order. *See Int’l Union of Petroleum & Indus. Workers v. NLRB*, [980 F.2d 774, 778 n. 1](#) (D.C. Cir. 1992) (holding that only findings not challenged before the Board are entitled to summary enforcement).

IV. Wyman Has Consistently Maintained Paragraphs 4 and 5 of the Union’s August 12, 2016 Information Request Are Irrelevant.

The Board again takes issue with *the way in which* Wyman preserved its objections. (NLRB Br. 33). Wyman’s exception 72 to the ALJ’s decision states: “To the judge’s finding that the Union was entitled to information related to the calculation to the Quarterly Cash Bonus, an issue not before the judge in this case. (Decision p. 16, line 18.)” (JA 0491). According to the Board, Wyman’s current challenge of the presumptive relevance of the requested information – paragraphs 4 and 5 of the August 12, 2016 information request – and the inability of the Union to

show relevance at the time of its request, does not naturally grow from exception 72. (NLRB Br. 33). Such reading is inappropriate. Wyman has consistently maintained that paragraphs 4 and 5 of the August 12, 2016 information request are irrelevant. (Wy. Br. 27-30). It therefore follows that Wyman's challenge to the presumptive relevance of the requested information is preserved in accordance with Section 10(e) of the Act and the Board is not entitled to summary enforcement. *See Int'l Union of Petroleum & Indus. Workers*, [980 F.2d at 778 n. 1](#) (holding that only findings not challenged before the Board are entitled to summary enforcement).

Notwithstanding the foregoing, the Board wholly fails to address Wyman's contention that because the QCB was *not* discretionary, Wyman had no obligation to bargain with the Union. On March 1, 2017, the Regional Director dismissed portions of Case 04-CA-188990 alleging that Wyman violated Sections 8(a)(1) and (5) of the Act by paying QCBs without bargaining over discretionary components of the bonuses. (Wy. Br. 17). More specifically, the Regional Director noted:

Regarding the alleged failure to bargain concerning the discretionary components of the Quarterly Cash Bonuses (QCBs) before awarding QCBs to unit employees, the investigation established that [Wyman] has an established formula which it uses to calculate the amount of the bonuses and there is insufficient discretion in the formula itself to require bargaining with the Union.

(*Id.*). Insofar as the QCB formula is dictated from Wyman's corporate office, the only thing the parties could negotiate was whether the employees would continue to

participate in it or not. (Wy. Br. 12). Wage rates are separate and distinct, and the QCB had no bearing on same. (*Id.*). As explained by Brad Georgetti, Wyman's then-Human Resources Manager, there was no formula, nor any criteria, on which the annual wage increase amount was based. (*Id.*).

Accordingly, the Board's finding that Wyman violated Sections 8(a)(5) and (1) of the Act by refusing to provide the Union with the requested information pertaining to the QCB program is not supported by substantial evidence.

V. The Board's Reliance on a Mischaracterization of Grimaldi's Bargaining Statement is in Error.

The Board has concluded that the relevancy of paragraphs 1, 2, and 4 of the Union's September 6, 2016 information request stems from a single *alleged* statement made by Rick Grimaldi ("Grimaldi") on behalf of Wyman: The Union's wage proposal would compel Wyman to increase prices by 15 percent. (NLRB Br. 40). The Board then supports this proposed reading of the record by citing the "credited" testimony of Union lawyer Nathan Kilbert, the Union's September 21, 2016 letter, and Wyman's September 30, 2016 letter. (*Id.*) Simply put, a reasonable factfinder could find that these three pieces of evidence do not compel the belief that Grimaldi made that specific statement.

The September 21, 2016 letter from Wyman does not, contrary to the Board's findings, include a concession that Wyman's customers would not understand a 15 percent price increase when referring to the Union's wage proposal. Rather, and

consistent with Grimaldi's testimony, the letter unequivocally states "The Company stated at the table that that no customer would understand a 15% price increase" with respect to health care. (**JA 1422 to JA 1424; JA 0440**). Grimaldi never made such statement with respect to Wyman's own customers. (*Id.*). This is expressly addressed in the September 21, 2016 letter from Wyman to the Union. (**JA 1422 to JA 1424**). Indeed, while the Board "credits" Kilbert's testimony, it also does not discredit Grimaldi's – that is, it does not specifically outline why Grimaldi's testimony is unworthy of credence.

Ultimately, if this Court finds that Grimaldi's statement was stated in the context in which it was outlined in the September 21, 2016 letter, paragraphs 1, 2, and 4 of the Union's September 6, 2016 information request would be irrelevant. Stated differently, under the case law cited by the Board (NLRB Br. 37-39), there would be no specific factual assertion made by Wyman that would prompt the Union to cross-check its assertion.

For these reasons, and as further outlined in Wyman's opening brief, the Board's findings in this respect are not rationally derived from the record. *See Truserv Corp. v. NLRB*, [254 F.3d 1105, 1116](#) (D.C. Cir. 2001), *cert. denied*, [70 USLW 3395](#) (2002) (where the Board makes findings as to the intentions of the parties, those findings must be rationally derived from the record; the Board cannot substitute its "intuitive belief.>").

VI. Wyman Had Objective Evidence to Support that the Union Lost Majority Support.

The Board notes that “[t]here is nothing to authenticate because the petition is evidence only that a non-majority nine employees no longer desired union representation.” (NLRB Br. 46). Not so. None of the witnesses (who were *permitted*³ to testify) testified that, at the time they signed the petition, they did not receive all of the pages of the petition. On the contrary, they testified that *all* pages were included. (JA 0494 to JA 0548; JA 0028 to JA 0268). For this reason, regardless of whether the statement as to the signatories’ intent regarding union representation was missing from three of the five pages, the employees received all five pages and knew what they were signing.

The Board also notes that Wyman relied *only* on the petition when it withdrew recognition. (NLRB Br. 49). Again, this is inaccurate. Tim Brink testified that he reviewed the petition, recognized the signatures through weekly meetings called “toolbox talks,” and subsequently confirmed those signatures by comparing them to those on file. (Wyman Br. 15). Based on the petition, the one-margin vote in the initial representation election, and the fact that there had been turnover and shrinkage to the bargaining unit, Wyman ceded to the employees’ demand and withdrew

³ Wyman continues to maintain that the ALJ’s refusal to permit Wyman to introduce the testimony of all petition signers was an egregious error that substantially prejudiced Wyman in its ability to meet its burden. (Wy. Br. 47).

recognition of the Union. (Wyman Br. 16). The Board again ignores a clear argument made by Wyman.

VII. An Election Would Better Serve the Purposes of the Act.

Wyman's challenge of the Board's issuance of an affirmative bargaining order is not, as the Board notes, hypocritical. (NLRB Br. 53). The Board has not offered this Court a single citation in support of the notion that where a company could have petitioned for an election, but chose to unilaterally withdraw recognition of the Union, the Board is prohibited from ordering an election as remedy. (*Id.*). The Board cannot point to any instructive case law because it does not exist.

While the Board attempts to distinguish *Scomas*, it conveniently ignores one of the overarching themes in *Scomas*: An affirmative bargaining order “give[s] no credence whatsoever to employee free choice.” [849 F.3d 1147, 1151](#) (D.C. Cir. 2017) (quoting *Skyline Distribs. v. NLRB*, [99 F.3d 403, 411](#) (D.C. Cir. 1996)). In 2014, the union representation election yielded a difference of two (2) votes between those employees for the union and those employees against the union. Regardless of whether this Court determines that Wyman withdrew recognition based on an invalid petition – which Wyman does not contend – the employees are entitled to a remedy that allows them choice. See *Levitz*, [333 NLRB 717, 723](#) (2001) (“The fundamental policies of the [National Labor Relations] Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage

collective bargaining, and to promote stability in bargaining relationships.”). As

Section 7 of the Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157. “Thus the Board must be guided by the Act’s mandate *to give effect to employees’ choice*, whether it is the choice to be represented by a union, or not.” *NLRB v. B.A. Mullican Lumber and Mfg. Co.*, 535 F.3d 271, 282 (4th Cir. 2008) (emphasis in original). For this reason, an election is the proper remedy.

CONCLUSION

For the foregoing reasons, as well as those set forth in Wyman's opening brief, Wyman prays that the Court grant its petition for review, and deny the NLRB General Counsel's cross-application for enforcement of the Board's December 16, 2019 Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), Petitioner/Cross-Respondent Wyman-Gordon Pennsylvania, LLC hereby certifies that the foregoing Final Reply Brief complies with the type-volume limitations because this Final Reply Brief contains 3,510 words, excluding the parts of the Final Reply Brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Cir. Rule 32(e).

This Final Reply Brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because this Final Reply Brief has been prepared in proportionally-spaced typeface, using Microsoft Word 2016 in Times New Roman 14-point font.

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