

**Nos. 20-1060, 20-1061, & 20-1134**

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

**LEGGETT & PLATT, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS (IAM), AFL-CIO**

**Intervenor**

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**KEITH PURVIS**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

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

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**ELIZABETH HEANEY**

*Supervisory Attorney*

**BARBARA SHEEHY**

*Attorney*

*National Labor Relations Board*

**1015 Half Street, SE**

**Washington, DC 20570**

**(202) 273-1743**

**(202) 273-0094**

**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Deputy General Counsel*

**RUTH E. BURDICK**

*Acting Deputy Associate General Counsel*

**DAVID HABENSTREIT**

*Assistant General Counsel*

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Petitioner/Cross-Respondent	)	
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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Nos. 20-1060 & 20-1134
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	Board Case Nos.
INTERNATIONAL ASSOCIATION OF	)	09-CA-194057
MACHINISTS AND AEROSPACE WORKERS	)	09-CA-196426
(IAM), AFL-CIO	)	09-CA-196608
	)	
Intervenor	)	
	)	
	)	
KEITH PURVIS	)	
	)	
Petitioner	)	
	)	No. 20-1061
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
	)	

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

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

**A. Parties, Intervenors, Amicus.** In Case Nos. 20-1060 and 20-1134, Leggett & Platt, Inc. (“the Company”) is the petitioner before the Court; the Board is the respondent before the Court; and the International Association of Machinists and Aerospace Workers (IAM), AFL-CIO (“the Union”) is the intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in Cases 09-CA-194057, 09-CA-196426, and 09-CA-196608.

In Case No. 20-1061, Keith Purvis is the petitioner before the Court; and the Board is the respondent before the Court. The Board denied Purvis’ intervention in Board Cases 09-CA-194057, 09-CA-196426, and 09-CA-196608.

**B. Ruling Under Review.** The case involves the Company’s and Purvis’ petitions to review a Board Supplemental Order issued on December 9, 2019 (368 NLRB No. 132), affirming and ordering the remedies set forth in the Board’s prior Order issued on December 17, 2018 (367 NLRB No. 51).

**C. Related cases.** The ruling under review was, in part, before the Court in Case Nos. 19-1003, 19-1005, and 19-1034. In August 2019, before the parties completed briefing, the Board moved for, and the Court granted, remand to the Board.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board

1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 31st day of July 2020

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	2
Statement of the issues .....	3
Statement of the case .....	3
I. The Board’s findings of fact.....	5
A. Background; the parties.....	5
B. The decertification effort begins .....	5
C. The Union notifies the Company that it seeks to negotiate a successor agreement; the Company notifies the Union and employees that it has received evidence of loss of majority support and will withdraw recognition when the collective-bargaining agreement expires.....	6
D. The Union holds an open house to rehabilitate support and to take a strike vote .....	7
E. The Union notifies the Company that it disputes majority loss and demands to bargain; the Company refuses; the Company withdraws recognition and makes unilateral changes.....	9
F. The Union files unfair-labor-practice charges; Human Resource Manager Day aids a second decertification petition; the General Counsel issues a consolidated complaint; the Regional Director denies Purvis’ motion to intervene.....	10
II. Procedural History .....	11
A. The administrative law judge’s decision.....	11
B. The Board’s 2018 Decision and Order.....	12

**TABLE OF CONTENTS (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
C. The Court remands for the Board to consider <i>Johnson Controls</i> .....	13
D. The Board’s Supplemental Decision and Order.....	14
Summary of the argument .....	16
Standard of review .....	17
Argument.....	19
I. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union .....	19
A. Under <i>Levitz</i> , an employer violates the Act by withdrawing recognition from a union unless it can prove that, at the time of withdrawal, it had objective evidence establishing that the union lacked majority support .....	19
B. The Company failed to carry its burden of proving that, at the time it withdrew recognition, it had objective evidence showing that the Union had lost majority support .....	21
C. The Board’s decision comports with the Act’s mandates and applicable precedent .....	25
D. The Board acted within its discretion in not retroactively applying <i>Johnson Controls</i> to this case .....	28
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment .....	33

**TABLE OF CONTENTS (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
III. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by unlawfully aiding a petition to decertify or repudiate the Union.....	34
IV. The Board’s imposition of an affirmative bargaining order was within its broad remedial authority .....	40
V. The Board’s denial of Purvis’ motion to intervene was within its broad remedial authority .....	49
Conclusion .....	58

## TABLE OF AUTHORITIES

<b>Headings</b>	<b>Page(s)</b>
<i>Adair Standish Co. v. NLRB</i> , 912 F.2d 854 (6th Cir. 1990) .....	35
<i>Auciello Iron Works, Inc. v. NLRB</i> , 517 U.S. 781 (1996).....	19
<i>Camay Drilling Co.</i> , 239 NLRB 997 (1978), <i>enforced sub nom. Operating Engineers Pension Trust v. NLRB</i> , 676 F.2d 712 (9th Cir. 1982).....	54
<i>Caterair International</i> , 322 NLRB 64 (1996), <i>affirmed in relevant part</i> , 22 F.3d 1144 (D.C. Cir. 1994).....	40
<i>Central Washington Hospital</i> , 279 NLRB 60 (1986), <i>enforced</i> , 815 F.2d 1493 (9th Cir. 1987) .....	34
<i>Chelsea Industries, Inc. v. NLRB</i> , 285 F.3d 1073 (D.C. Cir. 2002).....	56, 57
<i>Clark-Cowlitz Joint Operating Agency v. FERC</i> , 826 F.2d 1074 (D.C. Cir. 1987).....	28, 29
<i>Consolidated Freightways v. NLRB</i> , 892 F.2d 1052 (D.C. Cir. 1989).....	28
<i>Dentech Corp.</i> , 294 NLRB 924 (1989) .....	35

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
<i>DTR Industries, Inc.</i> , 311 NLRB 833 (1993), <i>enforcement denied on other grounds</i> , 39 F.3d 106 (6th Cir. 1994) .....	23
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	32
<i>Enterprise Leasing Co. of Florida. v. NLRB</i> , 831 F.3d 534 (D.C. Cir. 2016).....	34, 35
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	33
<i>Flying Food Group, Inc. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006).....	21, 22
<i>Fremont Medical Center</i> , 354 NLRB 453 (2009) .....	26
<i>Gary Steel Products Corp.</i> , 144 NLRB 1160 (1963).....	53
<i>Hotel del Coronado</i> , 345 NLRB 306 (2005) .....	51
<i>HQM of Bayside, LLC</i> , 348 NLRB 758 (2006), <i>enforced</i> , 518 F.3d 256 (4th Cir. 2008) .....	22, 26
<i>Inova Health System v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	18, 24, 37, 40

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
<i>International Association of Machinists, Tool &amp; Die Makers Lodge No. 35 v. NLRB</i> , 311 U.S. 72 (1940).....	51
<i>International Union, United Automobile, Aerospace &amp; Agricultural Implement Workers of America, UAW-AFL-CIO v. NLRB</i> , 392 F.2d 801 (D.C. Cir. 1967).....	49
<i>J.P. Stevens &amp; Co.</i> , 179 NLRB 254 (1969).....	53
<i>Johnson Controls, Inc.</i> , 368 NLRB No. 20, 2019 WL 2893706 (July 3, 2019).....	4, 13, 14
<i>Lee Lumber &amp; Building Material</i> , 306 NLRB 408 (1992).....	35
* <i>Levitz Furniture Co. of the Pacific, Inc.</i> , 333 NLRB 717 (2001).....	4, 5, 20-22, 25, 27, 48
<i>Local 900, IUE v. NLRB</i> , 727 F.2d 1184 (D.C. Cir. 1984).....	31
* <i>Lopez v. NLRB</i> , 655 F. App'x. 859 (D.C. Cir. 2016).....	50, 55, 56
<i>McDonald Partners, Inc. v. NLRB</i> , 331 F.3d 1002 (D.C. Cir. 2003).....	19
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	19

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
<i>Mickey’s Linen &amp; Towel Supply, Inc.</i> , 349 NLRB 790 (2007) .....	34, 35
<i>National Licorice Co. v. NLRB</i> , 309 U.S. 350 (1940).....	50
<i>New England Confectionary Co.</i> , 356 NLRB 432 (2010) .....	53
<i>NLRB v. American Linen Supply Co.</i> , 945 F.2d 1428 (8th Cir. 1991) .....	39
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	20
<i>NLRB v. Hollaender Manufacturing Co.</i> , 942 F.2d 321 (6th Cir. 1991) .....	21
<i>NLRB v. Ingredion, Inc.</i> , 930 F.3d 509 (D.C. Cir. 2019).....	29
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	33
<i>NLRB v. Mosey Manufacturing Co.</i> , 595 F.2d 375 (7th Cir. 1979) .....	29
<i>NLRB v. Todd Co.</i> , 173 F.2d 705 (2d Cir. 1949) .....	51, 52
<i>Novato Healthcare Center v. NLRB</i> , 916 F.3d 1095 (D.C. Cir. 2019).....	31

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
<i>Novelis Corp.</i> , 364 NLRB No. 101, 2016 WL 4524113 (Aug. 26, 2016), <i>enforcement denied</i> , 885 F.3d 100 (2d Cir. 2018) .....	53
<i>Oughton v. NLRB</i> , 118 F.2d 486 (3d Cir. 1941) .....	51
<i>Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	18, 24, 40
* <i>Pacific Coast Supply, LLC v. NLRB</i> , 801 F.3d 321 (D.C. Cir. 2015).....	20, 21, 40
<i>Parkwood Development Center v. NLRB</i> , 521 F.3d 404 (D.C. Cir. 2008).....	20
<i>Petrochem Insulation, Inc. v. NLRB</i> , 240 F.3d 26 (D.C. Cir. 2001).....	18
<i>Raymond Interior Systems, Inc. v. NLRB</i> , 812 F.3d 168 (D.C. Cir. 2016).....	39
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	18
<i>Sagamore Shirt Co.</i> , 153 NLRB 309 (1965) .....	53
<i>Sanson Hosiery Mills, Inc.</i> , 92 NLRB 1102 (1950), <i>enforced</i> , 195 F.2d 350 (5th Cir. 1952) .....	51

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
* <i>Scomas of Sausalito, LLC v. NLRB</i> , 849 F.3d 1147 (D.C. Cir. 2017).....	17, 26, 32, 44, 47, 48
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	28
<i>Semi-Steel Casting Co. v. NLRB</i> , 160 F.2d 388 (8th Cir. 1947) .....	50, 51, 52
<i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012).....	35
<i>SNE Enterprises, Inc.</i> , 344 NLRB 673 (2005) .....	29
<i>Southwest Regional Council</i> , 356 NLRB 613 (2011) .....	54
<i>Taylor Bros. Inc.</i> , 230 NLRB 861 (1977) .....	53
<i>Tenneco Auto., Inc.</i> , 357 NLRB 953 (2011), <i>enforcement denied on other grounds</i> , 716 F.3d 640 (D.C. Cir. 2013).....	51
<i>Times Herald, Inc.</i> , 253 NLRB 524 (1980) .....	35
<i>Tishomingo County Electric Power Association</i> , 74 NLRB 864 (1947) .....	51
<i>Treasure Island Food Store</i> , 205 NLRB 394 (1973) .....	35

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Headings</b>	<b>Page(s)</b>
<i>United Dairy Farmers Co-Op Association</i> , 242 NLRB 1026 (1979), <i>enforced</i> , 633 F.2d 1054 (3d Cir. 1980) .....	50
<i>United Food &amp; Commercial Workers International Union v. NLRB</i> , 1 F.3d 24 (D.C. Cir. 1993).....	28
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	31
<i>United Steelworkers of America v. NLRB</i> , 983 F.2d 240 (D.C. Cir. 1993).....	17
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	18
<i>Virginia Electric &amp; Power Co. v. NLRB</i> , 319 U.S. 533 (1943).....	18
<i>Veritas Health Services, Inc.</i> , 363 NLRB No. 108, 2016 WL 453588, <i>enforced in relevant part</i> , 895 F.3d 69 (D.C. Cir. 2018).....	51
* <i>Vincent Industrial Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000).....	17, 41-43
<i>Washington Gas Light Co.</i> , 302 NLRB 425 (1991) .....	54
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	31

---

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

**TABLE OF AUTHORITIES (cont'd)**

<b>Statutes</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3(d) (29 U.S.C. § 153(d)).....	57
Section 7 (29 U.S.C. § 157) .....	33
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 12, 15, 19, 33, 34, 35, 36
Section 8(a)(5) 29 U.S.C. § 158(a)(5)) .....	2, 3, 12, 15, 19, 21, 33, 34
Section 8(d) (29 U.S.C. § 158(d)).....	33
Section 9(c)(1)(B) (29 U.S.C. § 159(c)(1)(B)) .....	20
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(b) (29 U.S.C. § 160(b)).....	49
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 30
Section 10(f) (29 U.S.C. § 160(f)) .....	2
<b>Regulations</b>	<b>Page(s)</b>
29 C.F.R. § 102.60(a).....	20
29 C.F.R. § 102.29 .....	50
<b>Other Authorities</b>	<b>Page(s)</b>
NLRB Organization & Functions, § 202, 32 Fed Reg. 9588 (1967) .....	57

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

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FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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## **BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

### **STATEMENT OF JURISDICTION**

Leggett & Platt, Inc. (the Company) and Keith Purvis petition for review, and the National Labor Relations Board cross-applies to enforce, a Board Supplemental Order issued on December 9, 2019 (368 NLRB No. 132), affirming and ordering the remedies set forth in the Board’s prior Order issued on December 17, 2018 (367 NLRB No. 51). The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petitions and application were timely; the Act provides no time limits for such filings. The International Association of Machinists and Aerospace Workers (IAM), AFL-CIO (the Union) has intervened in support of the Board.<sup>1</sup>

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<sup>1</sup> In this proof brief, “D&O” refers to the Board’s 2018 Decision and Order and “Supp. D&O” refers to the 2019 Supplemental Decision and Order). “GCX”, “RX”, and “JX” refer to General Counsel, Company, and Joint exhibits, respectively. “Tr.” refers to the hearing transcript, and “Br.” and “PBr.” refer to the Company’s and Purvis’ briefs, respectively. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

## **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union?

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment?

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by unlawfully aiding a petition to decertify or repudiate the Union?

4. Whether the Board's imposition of an affirmative bargaining order was within its broad remedial discretion?

5. Whether the Board's denial of Purvis' motion to intervene was within its broad remedial discretion?

## **STATEMENT OF THE CASE**

This case concerns the legality of the Company's anticipatory withdrawal of recognition from the Union and the Company's post-withdrawal conduct involving unilaterally changing the employees' terms and conditions of employment and unlawfully aiding decertification efforts. Having received a decertification petition ostensibly signed by a majority of employees, the Company anticipatorily

announced withdrawal several months before the parties' collective-bargaining agreement expired. When the Company withdrew recognition at contract expiration, precipitously ending a 50-year bargaining relationship, the Union presented it with a pro-union petition, demonstrating that it had reacquired majority status. The Union's petition contained several "crossover signatures"—employees who had originally signed the Company's petition but subsequently signed the Union's petition.

The Board, relying on the Union's later petition, found that the Company failed to show that, at the time of withdrawal, the Union had actually lost majority support; therefore, the Company's withdrawal and subsequent unilateral changes were unlawful. In finding a violation, the Board adhered to the principles of *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001), then-extant law, which cautions that an employer relying on a decertification petition to anticipatorily withdraw recognition does so at its peril because an incumbent union can defeat that withdrawal by presenting evidence of reacquired majority status between the "anticipatory" withdrawal and the actual withdrawal upon contract expiration. The Board has referred to this process as the "last-in-time" principle.

While this case was previously pending before the Court on petitions for review and the Board's cross-application for enforcement, the Board issued *Johnson Controls, Inc.*, 368 NLRB No. 20, 2019 WL 2893706 (July 3, 2019),

overruling *Levitz*'s "last-in-time" principle and foreclosing the incumbent union's ability to "reacquire" majority status following an employer's anticipatory withdrawal of recognition. The Court remanded the case for the Board to determine the effect, if any, of *Johnson Controls* on this case. Emphasizing the circumstances of this case, the Board determined that retroactive application would work a manifest injustice, and it affirmed its prior application of *Levitz* to find that the Company's withdrawal of recognition and subsequent unilateral changes were unlawful.

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

### **A. Background; the Parties**

The Company manufactures and sells innerspring mattresses at two facilities in Winchester, Kentucky. Since September 1965, the Union has represented a unit of the Company's approximately 295 production and maintenance employees. The parties' most recent collective-bargaining agreement was effective from February 28, 2014, to February 28, 2017. (D&O 6; GCX 1, JX1, Tr.61,63,200.)

### **B. The Decertification Effort Begins**

In December 2016, employee Keith Purvis circulated an antiunion petition entitled "EMPLOYEE PETITION FOR THE UNION DECERTIFICATION," which contained the following language at the top: "The undersigned employees of Leggett & Platt #002 do not want to be represented by IAM 619 hereinafter

referred to as ‘union’.” Other employees assisted with signature collection. (D&O 7; RX7, Tr. 318,328,379-80.)

On December 19, Purvis gave general manager Chuck Denisio the petition signed by a majority of unit employees. Denisio asked two managers to review and verify the signatures by comparing them against signatures in personnel files. The managers excluded two signatures after their review process. (D&O 7; Tr. 238,241.)

**C. The Union Notifies the Company that It Seeks To Negotiate a Successor Agreement; the Company Notifies the Union and Employees that It Has Received Evidence of Loss of Majority Support and Will Withdraw Recognition when the Collective-Bargaining Agreement Expires**

On December 22, the Union business representative, Billy E Stivers Sr., notified Denisio that the Union wanted to terminate the parties’ expiring collective-bargaining agreement and negotiate a successor agreement. In January 2017, Purvis, who continued to collect antiunion signatures, provided general manager Denisio with additional signatures. Once again, Denisio asked a manager to verify the new signatures. In early January, the antiunion petition contained employer-verified signatures from a majority of the unit employees. (D&O 7; JX2, RX7, Tr.475-77.)

On January 11, the Company responded to the Union’s December 22 letter by advising the Union that it had “received evidence from a majority of employees

in the bargaining unit that they no longer wish to be represented by your union.” The Company then informed the Union that given its anticipatory withdrawal, it would “not negotiate a successor agreement . . . [and would] withdraw [its] recognition . . . effective when the current collective bargaining agreement expires on February 28, 2017.” The Company expressed a commitment to honor its obligations under the existing collective-bargaining agreement and the law through contract expiration. (D&O 7; JX4.)

On January 12, the Company notified unit employees that it would no longer recognize the Union as of March 1, and would not bargain over a successor agreement. The Company listed specific changes that it would make after contract expiration, including a wage increase, personal paid time off, lower health insurance deductibles, shorter periods of time to accrue vacation, implementation of a stock bonus plan, participation in a 401(k) plan, and changes in dental and vision insurance providers and to life and disability insurance benefits. (D&O 7; JX5.)

**D. The Union Holds an Open House To Rehabilitate Support and To Take a Strike Vote**

After receiving the Company’s notice, the Union announced an open house at the union hall on January 18 and 19, for unit employees “to learn more about right to work state and decert[ification] of [the] union.” At the open house, the Union made no formal presentation, but representatives answered members’

questions and concerns. The Union set up two desks spaced fifteen feet apart. On one desk, the Union placed information regarding the Union, health insurance, and the possible effects of decertification. On the same desk, there was a petition for employees to sign, the top of which read: “We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc.” Under the statement of support, there were lines for employees to print, sign, and date their names. (D&O 7-8; GCX2, GCX6-7, Tr.102-03,557,638,653-55.)

The other desk had a sign-in sheet for employees to vote if they wanted to strike. There was a union official at the strike sanction vote desk explaining what the sign-in sheet was for and to answer any questions. Under the Union’s constitution, the Union must have a strike sanction vote before striking; otherwise, striking members are unable to receive strike benefits. This sign-in sheet had two columns of numbered lines for signatures and no heading or written purpose. (D&O 8 & n.9; GCX3, Tr.635-39,641,645,650-52,671-72.)

As union members entered the open house, a union representative told them that they should sign the sheet if they wanted to vote on whether to strike and if they wanted to receive strike benefits in the event a strike was called. Union members who signed the strike sanction sign-in sheet received a ballot to vote on whether they wanted to strike. There was a box for the employees to cast their

ballot. Several union members signed both the prounion petition and the sign-in sheet for the strike sanction vote. (D&O 8; Tr.70,107,635-41,645,671-73.)

**E. The Union Notifies the Company that It Disputes Majority Loss and Demands To Bargain; the Company Refuses; the Company Withdraws Recognition and Makes Unilateral Changes**

After the open house, the Union continued to collect prounion petition signatures. On February 21, union business representative Stivers sent general manager Denisio a letter disputing the Company's claim that a majority of unit employees no longer wished to be represented by the Union and demanding to negotiate a successor agreement. The next day, Denisio refused and repeated the Company's position that a majority of unit employees expressed a desire not to be represented by the Union when the collective-bargaining agreement expired. The letter added: "To date, the Company has not received any evidence indicating that any employees have changed their minds in this regard," and that the Company intended to withdraw recognition upon expiration. (D&O 8; JX6-7, Tr.70,107,113.)

On March 1, the Company withdrew recognition. On that date, the bargaining unit consisted of 295 employees; 181 employees signed the antiunion petition. Of the 181 signatories, 15 had left the bargaining unit by March 1, and 28 had subsequently "crossed over" and signed the prounion petition. The Union collected all the prounion petition signatures before expiration of the parties'

collective-bargaining agreement. Neither the Company nor the Union shared with the other a copy of its petition or the names of signatories. (D&O 8-9; GCX2, JX9, RX7, Tr.675-76.)

After its withdrawal, the Company “unilaterally made material, substantial, and significant changes to the unit employees’ wages, hours, and other terms and conditions of employment, without bargaining with the Union.” (D&O 9.) Changes included: increased wages; three paid days off rather than five; new health, dental, and vision insurance providers; changed health insurance premiums; a health flexible spending plan; increased vacation days; a stock bonus plan and new 401(k) plan; changes to life insurance coverage and supplemental and dependent life insurance; and changes to short and long-term disability. The Company ceased dues check-off and announced that unit employees would become limited participants in the pension plan as of December 31, 2017. (D&O 9; JX10.)

**F. The Union Files Unfair-Labor-Practice Charges; Human Resource Manager Day Aids a Second Decertification Petition; the General Counsel Issues a Consolidated Complaint; the Regional Director Denies Purvis’ Motion To Intervene**

On March 1, the Union filed an unfair-labor-practice charge challenging the withdrawal of recognition. After the filing, a new decertification petition circulated, spearheaded again by Purvis. On April 4, employee Cordell Roseberry began working for the Company and met briefly with Human Resource Manager

Steven Day. The next day, while Roseberry was standing near a conference room where Day was meeting with employees, Day pointed at Roseberry and then pointed at Purvis and motioned Roseberry over to Purvis. Roseberry obliged and walked over to Purvis; Roseberry had not yet met Purvis but was aware that he led the decertification effort. Day was also aware of Purvis decertification efforts. Purvis asked Roseberry if he had signed any sort of petition, Roseberry responded that he had not, and then Purvis told Roseberry to meet him at his truck after work. (D&O 11-12; Tr.142-47,163-66,186.)

On April 6 and 10, the Union filed two additional charges, and the General Counsel subsequently issued a consolidated complaint. On July 19, Purvis and other employees moved to intervene in the unfair-labor-practice proceedings, which the Regional Director denied. (D&O 6.)

## **II. PROCEDURAL HISTORY**

### **A. The Administrative Law Judge's Decision**

An administrative law judge opened the three-day hearing on July 24, 2017, and denied the renewed motion to intervene of Purvis and other employees. In denying the motion, the judge emphasized that it was an unfair-labor-practice proceeding rather than a representation case, and that under *Levitz*, the relevant inquiry involved only objective evidence. (Tr.34-35.) The judge emphasized that employee feelings toward the Union were irrelevant and played no role in the

proceeding. The judge also underscored that Purvis could file a decertification petition to challenge the Union's majority status. (Tr.34-35.)

Turning to the merits of the case, the administrative law judge relied on *Levitz* to find that the Company's withdrawal of recognition violated the Act because the Company failed to show that at the time of withdrawal the Union had lost majority support. The Company's reliance on the January anti-union petition was insufficient to show actual loss of majority support at the time of withdrawal because a critical number of employees had subsequently reaffirmed their support for the Union. Having found that the withdrawal was unlawful, the judge likewise determined that the Company's unilateral changes violated the Act. And lastly, the judge found that Human Resource Manager Day had unlawfully assisted with a decertification petition.

#### **B. The Board's 2018 Decision and Order**

On December 17, 2018, the Board (Chairman Ring and Members McFerran and Kaplan) issued its Decision and Order, 367 NLRB No. 51, finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) by unlawfully withdrawing recognition from the Union and unilaterally changing the terms and conditions of employment for bargaining unit employees. In finding that the Company had violated the Act, the Board agreed with the judge's application of the analytical framework laid out in *Levitz*. The

Board also agreed that the Company violated Section 8(a)(1) of the Act by directing an employee to meet with another employee for the purpose of obtaining signatures on a petition to decertify or repudiate the Union. (D&O 1-2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (D&O 3.) Affirmatively, the Board's Order imposes a bargaining order, which requires that the Company recognize and, upon request, bargain with the Union and bars any challenge to the Union's majority status for a reasonable period of time. (D&O 3.) The Board also directed the Company to make employees whole for any losses suffered as a result of the Company's unlawful repudiation of the collective-bargaining agreement. (D&O 3.) Lastly, the Board directed the Company to post a notice. (D&O 3.)

**C. The Court Remands for the Board To Consider *Johnson Controls***

In January 2019, the Company and Purvis filed petitions for review in this Court, and the Board sought enforcement. On July 3, while the consolidated case was pending, the Board issued *Johnson Controls, Inc.*, 368 NLRB No. 20, 2019 WL 2893706 (Jul. 3, 2019), wherein it announced a new framework for evaluating the lawfulness of an employer's "anticipatory" withdrawal of recognition, that is,

when the employer announces a withdrawal while a collective-bargaining agreement remains in effect.

In *Johnson Controls*, the Board overruled that portion of *Levitz* applying the “last-in-time” rule, holding instead that “proof of an incumbent union’s actual loss of majority support, if received by an employer within 90 days prior to contract expiration, *conclusively rebuts* the union’s presumptive continuing majority status when the contract expires.” *Johnson Controls*, 2019 WL 2893706, at \*2 (emphasis added). Under the new rule, an employer may withdraw recognition regardless of whether a union may have reacquired majority status in the interim, and the Board will no longer consider “whether a union has reacquired majority status as of the time recognition was actually withdrawn.” *Id.* A union wanting to reestablish its majority status must file an election petition. *Id.* The Board determined that the new standard in *Johnson Controls* would be applied retroactively, including “other pending cases.” *Id.*

On August 7, the Court granted the Board’s motion to remand the case for the Board “to determine whether *Johnson Controls* affects the Board’s Decision and Order.” (Mot. Remand at 3.)

#### **D. The Board’s Supplemental Decision and Order**

On December 9, 2019, the Board issued its Supplemental Decision and Order, 368 NLRB No. 132, wherein the Board determined “not to apply *Johnson*

*Controls* retroactively here,” (Supp. D&O 2), and reaffirmed its findings in the 2018 Decision and Order. The Board observed (Supp. D&O 2) that while *Johnson Controls* expressed an intent to apply a new policy to “all pending cases,” it did not address whether cases previously decided by the Board and pending appeal should be reassessed under the new policy. Relying on institutional concerns and the Act’s purposes and considering whether retroactivity would result in manifest injustice, the Board decided not to apply *Johnson Controls* to the present case. Accordingly, the Board affirmed its 2018 Decision and Order. (Supp. D&O 3.)

The Company filed a motion for reconsideration, which the Board denied. In doing so, “[t]o the extent it was not clear in the Board’s prior Decision or Supplemental Decision,” the Board clarified that “retroactive application of *Johnson Controls* would have worked a manifest injustice under the specific circumstances of this case.” (Denial Mot. Reconsideration at 2 n.2.) The Board reiterated the bases outlined in its Supplemental Decision for denying retroactive application, explaining that such a determination is firmly committed to its discretion and that “nothing in the Act compels [it] to retroactively apply such changes, whether to all pending cases or to any particular case.” (Denial Mot. Reconsideration at 2 n.2.)

## SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that the Company's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act. The Company failed to establish under *Levitz* that on the date of withdrawal the Union had actually lost majority support. It relied instead on an earlier petition that included employees who were no longer in the unit as of withdrawal and employees who had subsequently reaffirmed their support for the Union. The Company's challenges are based on factual and credibility findings and otherwise seek to relitigate *Levitz*. The Company also fails to show that the Board erred in determining that retroactive application of *Johnson Controls* to the present case would result in a manifest injustice.

2. Substantial evidence supports the Board's finding that the Company's unilateral changes to the terms and conditions of employment violated the Act. Given that the Company unlawfully withdrew recognition, it was not privileged to impose changes without bargaining with the Union. The Company offers no independent challenge to this finding beyond the argument that its withdrawal was lawful.

3. Substantial evidence likewise supports the Board's finding that the Company engaged in coercive conduct by unlawfully assisting the second decertification petition. Specifically, the Company's Human Resource Manager

directed a new hire to meet with the known leader of the decertification effort while on duty time and company property. The Company's challenges to this finding rest primarily on credibility and factual disputes—none of which is persuasive or well suited for appellate review.

4. The Board properly exercised its broad discretion in imposing an affirmative bargaining order. Beyond an affirmative bargaining order being the Board's traditional remedy for an unlawful withdrawal of recognition, the Board properly weighed the factors articulated by the Court in *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-39 (D.C. Cir. 2000), to find the remedy appropriate in this case. The Company cannot show the Board abused its discretion or that *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), mandates a contrary result.

5. The Board did not abuse its discretion in denying Purvis' motion to intervene. Purvis had no evidence that would have changed the result in this case, and the relevant forum for vindicating an employee's interests regarding a union is a representation proceeding, not an unfair-labor-practice proceeding.

### **STANDARD OF REVIEW**

The Court "accords a very high degree of deference to administrative adjudications by the [Board]," *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993), and will affirm the Board's findings unless they are

“unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to fact.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). “Substantial evidence” for purposes of judicial review consists of “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will reverse the Board’s findings of fact “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Id.*; *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (same). And the Court “accepts all credibility determinations made by the [administrative law judge] and adopted by the Board unless those determinations are ‘patently insupportable.’” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015).

Section 10(c) of the Act, 29 U.S.C. § 160(c), grants the Board “broad discretionary power . . . to fashion remedies that effectuate the policies of the Act . . . subject to quite limited review.” *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001). Thus, the Court “will not disturb a remedy ordered by the Board ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly be said to effectuate the policies of the Act.’” *Id.* (quoting *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

## ARGUMENT

### I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNLAWFULLY WITHDRAWING RECOGNITION FROM THE UNION

#### A. Under *Levitz*, an Employer Violates the Act by Withdrawing Recognition from a Union Unless It Can Prove that, at the Time of Withdrawal, It Had Objective Evidence Establishing that the Union Lacked Majority Support

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees.<sup>2</sup> The Board—with the goal of fostering industrial peace and stability in collective-bargaining relationships—has adopted certain judicially-approved presumptions about the existence of union support. Once a union is recognized as the collective-bargaining representative of a unit of employees, it is entitled to a presumption that it enjoys the support of a majority of the represented employees. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-87 (1996). Relevant to this case is the principle that a union’s presumption of majority status is irrebuttable during the term of a collective-bargaining agreement (up to three years); upon expiration of the agreement, the presumption continues but becomes rebuttable. *Id.*; *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1004 (D.C. Cir. 2003).

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<sup>2</sup> A violation of Section 8(a)(5) carries a “derivative” violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

When the union’s majority status is rebuttable, the preferred avenue for challenging the presumption is a secret-ballot election. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (“Secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.”). Because secret-ballot elections are preferred, an employer can obtain a Board-conducted election with evidence creating a “reasonable good-faith uncertainty” as to the union’s majority status. *Levitz*, 333 NLRB at 724. An employer may therefore initiate an election by filing a Representation Management (“RM”) petition with the Board on the basis of the “lower showing of good-faith uncertainty.” *Id.*; *see* 29 U.S.C. § 159(c)(1)(B)); 29 C.F.R. § 102.60(a). A union’s failure to garner a majority of votes in the ensuing election relieves an employer of its bargaining obligation.

An employer may pursue another permissible, though less favored, route for testing a union’s majority status by unilaterally withdrawing recognition, which is the path the Company chose here. Under *Levitz* and this Court’s precedent, an employer may unilaterally withdraw recognition, however, only if it satisfies a more demanding showing: It must show that, at the time of the withdrawal, it has objective evidence that the union has in fact lost majority support. *Id.* at 725; *see also Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 326 (D.C. Cir. 2015); *Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 408 (D.C. Cir. 2008). As the Board

explained in *Levitz*, “unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally.” 333 NLRB at 725.

Actual loss of majority support is an affirmative defense to a refusal-to-bargain charge, making the burden of such a showing fall on the employer. *Id.*; *see also Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006). To prove an actual loss of majority support, “the employer must make a numerical showing that a majority of employees opposed the union *as of the date that union recognition was withdrawn.*” *NLRB v. Hollaender Mfg. Co.*, 942 F.2d 321, 325 (6th Cir. 1991) (emphasis added); *accord Pacific Coast*, 801 F.3d at 331-32.

Finally, as the Court has made clear, an employer opting to forgo a favored secret-ballot election “withdraws recognition at its peril.” *Flying Food*, 471 F.3d at 182 (citing *Levitz*, 333 NLRB at 725). If the employer is unable to provide the necessary proof, it will have failed to rebut the presumption of the union’s majority status, and “the withdrawal of recognition will violate Section 8(a)(5).” *Flying Food*, 471 F.3d at 182.

**B. The Company Failed To Carry Its Burden of Proving that, at the Time It Withdrew Recognition, It Had Objective Evidence Showing that the Union Had Lost Majority Support**

As noted, the operative date for determining whether there is objective evidence of a lack of majority support is the date the employer’s withdrawal of

recognition becomes effective. *See Levitz*, 333 NLRB at 725. The Board has also held that an employer cannot rely on signatures of employees who are no longer part of the bargaining unit on the date of withdrawal to demonstrate actual loss of majority support. *HQM of Bayside, LLC*, 348 NLRB 758, 759 (2006), *enforced*, 518 F.3d 256 (4th Cir. 2008). Nor can the employer rely on signatures of employees who subsequently demonstrated support for the union by signing a prounion petition prior to the date of withdrawal, referred to as “crossing over.” *Flying Food*, 471 F.3d 185.

Here, as of March 1, 2017, the date of withdrawal, there were 295 employees in the unit, so the Company needed to present objective evidence that a majority, or 148, of the unit employees demonstrated that they no longer wanted to be represented by the Union. The antiunion petition on which the Company relied had 181 unit-employee signatures. (JX10, Tr.15.) However, 15 signatories to that petition no longer worked in the unit as of March 1, and 28 other signatories had subsequently signed the prounion petition. Under Board law, those 43 signatures are not evidence of actual loss of majority support on March 1, and the Company cannot rely on them. Accordingly, after excluding those signatures, the antiunion petition had 138 unit-employee signatures, falling short of showing an actual loss of majority support by 10 signatures.

The Company pedals its version of certain facts and urges the Court to reassess witness credibility in claiming (Br. 34-35) that the record is “replete” with evidence that the Union created a confusing atmosphere at the open house. The Company cites (Br. 34-35) evidence such as the Union failing to make a presentation, providing multiple documents for signatures, obtaining signatures in dark and rainy conditions, and omitting the prounion statement heading on the petition signature sheets. And the Company asks the Court (Br. 35 n.10) to reverse the judge’s credibility determination that Union President Elmer Tolson did not tell employees that they needed to sign the petition to receive strike benefits or keep their insurance.

Substantial evidence supports the Board’s finding that the Union did not use confusion or coercion to obtain petition signatures. Concerning the prounion petition, the Board explained that the language at the top of the petition “stating that ‘We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc.’ was unambiguous.” (D&O 14); *see DTR Indus., Inc.*, 311 NLRB 833 (1993) (“[W]here as here, the purpose of the card is set forth on its face in unambiguous language, the Board may not, in the absence of misrepresentations, inquire into the subjective motives or understanding of the card signer to determine what the signer intended to do by signing the card.”), *enforcement denied on other grounds*, 39

F.3d 106 (6th Cir. 1994). The Board, in rejecting “any nefarious intent or conduct on the part of the Union” (D&O 14), emphasized that the prounion petition and the strike sanction vote sheet were on different desks and that union officials were present to answer questions. These circumstances, as the Board explained, did not support a finding that “employees were confused or coerced so as to invalidate their signatures on the prounion petition.” (D&O 14.)

The judge properly credited Tolson and rejected employee Dwayne Hawkins’ testimony that Tolson told him that he would lose his job and double his insurance costs without union representation. The judge “found Tolson to be an honest witness who provided logical, detailed testimony about events,” whereas Hawkins “seemed to be paraphrasing the exchange based upon his impressions of what was discussed, as opposed to what was actually said and the context in which it was said.” (D&O 8 n.11.) The judge also found “it telling that no other witness testified about Tolson, or any other Union official, making similar statements [claimed by Hawkins].” (D&O 8 n.11.)

In sum, the Company has shown neither that the “record is so compelling that no reasonable factfinder could fail to find to the contrary,” *Ozburn-Hessey*, 833 F.3d at 217, or that the credibility determinations are “patently insupportable.” *Inova*, 795 F.3d at 80. Accordingly, substantial evidence supports the Board’s finding that the Company unlawfully withdrew recognition.

### **C. The Board's Decision Comports with the Act's Mandates and Applicable Precedent**

The Company takes a scattershot approach claiming that the Board failed to balance employee free choice (Br. 29) and that the decision fosters labor instability (Br. 29) and is inconsistent with precedent (Br. 32). The Company is wrong on all counts, and its criticism distills to the following: *Levitz* is wrongly decided. Understood in this context, the Court can quickly dispose of the Company's arguments.

The Company's effort to paint this case as falling outside *Levitz's* parameters falls flat. *Levitz* contemplated and addressed the very course of conduct the Company took in this case. As noted (pp. 20-21), *Levitz* strongly disfavors an abrupt rupture in the bargaining relationship through unilateral action. But an employer may forge ahead with withdrawal, so long as it is prepared to satisfy the more onerous burden of showing actual loss of majority support on the day of withdrawal. This is a heavy burden by design. And in this regard, *Levitz* is unequivocal. Words have meaning, and *Levitz* teaches that an employer acts "at its peril" through unilateral withdrawal.

The Board rejected (D&O 13-14), as contrary to *Levitz*, the Company's claim that the Union had an obligation to share its signatures and that failure to do so relieved the Company of any duty to show actual majority loss. 333 NLRB at 724 ("We think it entirely appropriate to place the burden of proof on employers to

show actual loss of majority support.”); *Fremont Med. Ctr.*, 354 NLRB 453, 459-60 (2009), *adopted in* 359 NLRB 452 (2013) (“the Union had no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession which were executed prior to the withdrawal of recognition by the Hospital”); *HQM*, 348 NLRB at 759 (“The Union does not have to demonstrate conclusively to the employer prior to withdrawal of recognition that it still has majority status. Rather, it is the employer’s burden to show an actual loss of the union’s majority support at the time of the withdrawal of recognition.”). And *Levitz* makes clear that an employer (or a disaffected employee) is not stuck if it believes that a union has lost majority support—it can file for a Board-conducted election. *Levitz* encourages this more-favored approach by lowering the required showing for such elections.

Contrary to the Company’s claim (Br. 29-30), there is no finding that the Union “hid” information, engaged in subterfuge, or waited until withdrawal to act. And none of the cases cited by the Company (Br. 32) show that it was privileged to withdraw recognition because it advised the Union that it had lost majority support and the Union did not actively provide information to the contrary. The Board properly found that *Levitz* rejects this position outright, and the Court has as well. *See Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1155 (D.C. Cir. 2017) (finding an unlawful withdrawal even in the face of union passivity). *Levitz* places

no value on what others knew and when; rather, as the Board stated here: “The Board has placed the burden of proof entirely on the employer when it decides to withdraw recognition to later prove in the event of an unfair-labor-practice charge that it had objective evidence of actual loss of majority support.” (D&O 14.) The Board cautioned further that, under *Levitz*, acting at one’s peril “is particularly true in this case when [the Company] relied upon a petition signed by employees up to three months prior to the withdrawal of recognition.” (D&O 14.) Reliance on such signatures, the Board explained, is risky under *Levitz* “because employees’ opinions may change in the interim, and there may not be objective evidence of an actual loss of majority of support [] as of the date recognition is withdrawn.” (D&O 14.) For this reason—the inherent uncertainty of union sentiment on the day of withdrawal—*Levitz* finds that “elections are the preferred method of testing employees’ support for unions.” 333 NLRB at 727.

Accordingly, under applicable precedent, the Union lawfully continued to collect signatures until February 28, and lawfully opted not to turn over information to the Company. The Company wrongly casts itself as the “innocent” party (Br. 30), ignoring *Levitz*’s explicit warning that an employer must be able to show actual loss of majority support on the day of withdrawal. If an employer relies on a petition that circulated weeks before contract expiration, it has acted at its peril under *Levitz* and not “innocently.”

In short, the Court should rebuff the Company’s attempt both to relitigate *Levitz* after years of this Court’s application of its principles and to reinvent *Levitz* to impose various burdens on a union. The Board’s decision here is reasonable and consistent with the Act, as interpreted in *Levitz*.

**D. The Board Acted within Its Discretion in Not Retroactively Applying *Johnson Controls* to this Case**

The Court has recognized that its “formulation of the standard for evaluating challenges to the retroactive application of a ruling from an agency adjudication has varied.” *United Food & Commercial Workers Int’l Union v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993). Notwithstanding that variation, the Supreme Court has stated that, in determining whether to apply newly adopted interpretations retroactively, it must balance “such retroactivity . . . against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles,” and “[i]f that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity condemned by law.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Further, this Court has held that, “[a]s a general matter, new rules announced in agency adjudications may be applied retroactively absent any ‘manifest injustice.’” *Consol. Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)). In weighing the equities, the Court will balance the interests of the parties—accounting for such factors as the degree

of hardship they will experience, their justifiable reliance on past practices, and the statutory interest in a retroactive application of the new rule. *See, e.g., Consol. Freightways*, 892 F.2d at 1058-59; *Clark-Cowlitz*, 826 F.2d at 1081. The Board is entitled to some deference because part of the retroactivity analysis includes consideration of the statutory purpose. *NLRB v. Ingredion, Inc.*, 930 F.3d 509, 514 (D.C. Cir. 2019) (“[t]he court’s assessment of the Board’s decision occurs in light of Congress’s broad delegation to the Board to carry out the Act”); *see also NLRB v. Mosey Mfg. Co.*, 595 F.2d 375, 378 (7th Cir. 1979) (“Determination of whether standards should be retroactively applied is in itself a matter of agency discretion in the first instance.”). As shown below, the Board properly decided not to retroactively apply the policy shift announced in *Johnson Controls* to this case.

The Board recognized its “usual practice” of applying “new policies and standards retroactively to all pending cases ‘in whatever stage,’ unless retroactive application would work a ‘manifest injustice.’” (Supp. D&O at 2 (quoting *SNE Enters., Inc.*, 344 NLRB 673, 673 (2005))). Relying on “the particular circumstances of this case,” the Board concluded that retroactive application of *Johnson Controls* “would seriously undermine the Board’s expectation of prompt compliance with its bargaining orders.” (Supp. D&O 2.) The Board also relied on the institutional damage wrought by retroactive application in this case, namely, that application of the new *Johnson Controls* policy would “negate the Board’s

deliberate determination to the contrary.” (Supp. D&O 2.) Further, the Board observed that the affirmative bargaining order included in the Board’s remedy had been in effect for over six months, during which time “the parties should have been negotiating for, and perhaps could have reached, a new collective-bargaining agreement.” (Supp. D&O 2.) Accordingly, retroactivity would run counter to the Act’s purpose by “not only disrupt[ing] the bargaining relationship of the parties to this case but also incentiviz[ing] parties to delay compliance with bargaining orders in the hope or expectation of a change in the law.” (Supp. D&O 2.) As the Board clarified in denying the Company’s motion for reconsideration, these very considerations are the basis for the Board’s conclusion that “retroactive application of *Johnson Controls* would have worked a manifest injustice under the specific circumstances of this case.” (Denial Mot. Reconsideration at 2 n.2.)

The Company lodges several claims attacking the Board’s decision to decline retroactive application of *Johnson Controls* to this case. One of those claims is not properly before the Court and is, in any event, meritless, and the others are equally unpersuasive.

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 . . . to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). That statutory prohibition creates a jurisdictional bar against

judicial review of issues not raised to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes court review of a claim not raised to the Board); *accord Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1107 (D.C. Cir. 2019). Further, Section 10(e) accords with the general principle that “[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

The Company never raised to the Board its assertion (Br. 24-25) that the Board failed to specify its institutional reasons. (Mot. for Reconsideration.) As such, Section 10(e) bars the Court from considering it. In any event, the Board identified institutional concerns that militated in favor of non-retroactive application—namely, concern that retroactivity would undermine the Board’s expectation of prompt compliance and upend the Board’s deliberate determination to apply an unmodified *Levitz* rule to this case.

Contrary to the Company’s claim (Br. 26), the Board’s rationale in this case is consistent with its statutory duties; while the Board announced a policy shift in *Johnson Controls* that it believes better effectuates the purposes of the Act, the Supreme Court recognizes that such shifts are lawful: “Agencies are free to change

their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The Company next posits (Br. 25) that the Board, having weighed its expectation of prompt compliance, “punishes” the Company’s decision to appeal the Board’s Order, which is not self-enforcing. Not true. A party’s right to appeal does not erase the Board’s reasonable expectation for voluntary compliance. Additionally, the Board’s expressed expectation for compliance was only one of several considerations tipping the balance in favor of non-retroactive application to the instant case. And the Company reads *Scomas* too broadly in urging (Br. 26-27) the Court to find that the Board’s decision to follow its former policy concerning withdrawal of recognition in this case is inconsistent with *Scomas*. In *Scomas*—“an unusual case”—the Court disagreed that the Board had sufficiently justified imposition of an affirmative bargaining order under the specific facts of that case, but it did not overrule *Levitz*; nor did the Court suggest that an employer that withdrew recognition on the basis of a decertification petition would not be subject to a bargaining order. *See Scomas*, 849 F.3d at 1156.

Moreover, the Court should reject the Company’s invitation to follow *Johnson Controls*. As the Board has shown above, retroactive application would work a manifest injustice, runs counter to the purposes of the Act, and would compromise institutional considerations. Even if the Court were to determine that

the Board unreasonably declined to retroactively apply *Johnson Controls*, the Company's extraordinary request for the Court to simply decide the case in the first instance, rather than remand to the Board, would improperly trample on the Board's statutory authority.

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT**

Section 7 of the Act guarantees employees the "right to self-organization, to form, join, or assist labor organization . . . and to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158 (a)(1). And Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ." 29 U.S.C. §158(a)(5). The Act defines the duty to bargain collectively as the obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). Failure to bargain over mandatory subjects therefore violates Section 8(a)(5) and (1) of the Act. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679-82 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

Here, the parties stipulated to a series of “material, substantial, and significant” changes to the terms and conditions of employment that the Company unilaterally implemented following its withdrawal of recognition on March 1. (JX10.) The Company’s only defense (Br. 36-37) is that it lawfully withdrew recognition, so it was privileged to act unilaterally. As shown (pp. 21-24), the Company’s withdrawal of recognition on March 1 was unlawful, and, therefore, its unilateral changes flowing from that withdrawal likewise violated Section 8(a)(5) and (1) of the Act.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY UNLAWFULLY AIDING A PETITION TO DECERTIFY OR REPUDIATE THE UNION**

An employer interferes with, restrains, or coerces employees’ in their decision whether to decertify a union and therefore violates Section 8(a)(1) “by ‘actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.’” *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 545 (D.C. Cir. 2016) (quoting *Mickey’s Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007)); *Cent. Wash. Hosp.*, 279 NLRB 60, 64 (1986) (“When an employer instigates and promotes a decertification petition or another union repudiation document, it interferes with the rights of employees under Section 7 of

the Act and therefore violates Section 8(a)(1) of the Act.”), *enforced*, 815 F.2d 1493 (9th Cir. 1987).

In determining whether an employer’s assistance is unlawful, the Board examines whether the conduct is more than “ministerial aid.” *Times Herald, Inc.*, 253 NLRB 524 (1980); *accord Enter. Leasing*, 831 F.3d at 545-46. An employer violates the Act by directly promoting its employees’ decertification campaign, including by soliciting an employee to obtain signatures for a decertification petition. *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 8-10 (D.C. Cir. 2012); *Treasure Island Food Store*, 205 NLRB 394, 397 (1973). As the Court has explained, the fact that “the employee created and disseminated the petition” is immaterial to the employer’s unlawful promotion of an on-going decertification campaign. *SFO Good-Nite*, 700 F.3d at 9; *accord Mickey’s Linen*, 349 NLRB at 791. Likewise, an employer gives more than ministerial aid by “offer[ing] both the method and the means to withdraw from the union” and encourage[ing] consideration of this option.” *Adair Standish Co. v. NLRB*, 912 F.2d 854, 860 (6th Cir. 1990). And an employer violates the Act by permitting employees to solicit decertification signatures and file a decertification petition on duty time. *See Lee Lumber & Bldg. Material*, 306 NLRB 408, 418 (1992); *Dentech Corp.*, 294 NLRB 924 (1989).

Here, the Board found that Human Resource Manager Day exceeded the permissible bounds of ministerial aid. Specifically, the Board found that Day directed employee Roseberry to meet with Purvis “for the purpose of having Roseberry sign the decertification petition.” (D&O 16.) The Board attached significance to the specific role of the three individuals involved—Day was the Company’s Human Resource Manager, Roseberry was a new hire who was on his first day of employment, and Purvis was the known leader of the decertification effort. Further, the Board gave weight (D&O 16) to the fact that Day directed Roseberry to speak to Purvis about the antiunion petition while on duty time and company property. Under these circumstances, the Board properly found that “Day’s conduct had a reasonable tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1).” (D&O 16.)

The Company mounts only weak challenges (Br. 41-45) to the Board’s finding that Day’s conduct violated Section 8(a)(1), relying on disagreements with the Board’s credibility determinations and its factual findings. As shown (p. 18), the Company faces strong headwinds in urging the Court to disturb the Board’s factual findings and credibility determinations.

First, the Company claims (Br. 41) that the Board should have credited Day’s testimony that he was only directing employee Roseberry to Purvis so that

Purvis could take Roseberry to his supervisor because that testimony “did not conflict” with Roseberry’s. But the judge found that Day “simply was not credible regarding these events,” (D&O 12), basing this finding on Roseberry’s credited and undisputed testimony that Purvis never took him over to meet his supervisor and only asked him whether he had signed a petition. The judge found it “highly improbable” that if Day had directed Purvis to escort Roseberry to his supervisor and Purvis agreed, that Purvis would not have done so or, at least, explained why he was not doing so. (D&O 12.) Further, the judge explained (D&O 12) that the Company never sought to corroborate Day’s proffered explanation when it questioned Purvis about his exchange with Roseberry. It certainly was on notice to do so since Purvis testified after Roseberry; indeed, as the judge observed: the Company “asked Purvis nothing about this,” which is “a telling omission that undermines Day’s credibility regarding his motive for directing Roseberry over to meet with Purvis on the day in question.” (D&O 12.) The Company cannot show that the judge’s detailed credibility findings are “patently unsupportable.” *Inova*, 795 F.3d at 80.

The Company next errantly suggests (Br. 42-43) that the judge engaged in “pure conjecture based on an adverse inference” in finding that Day directed Roseberry to Purvis for the purpose of furthering Purvis’ decertification effort. Not so. The judge properly considered all of the testimony surrounding the

interactions between Day, Roseberry, and Purvis, and found that, on balance, it supported a finding that Day's real motivation was, contrary to his discredited account, to have Roseberry meet with Purvis to support the antiunion petition. In doing so, the judge did not rely on silence alone, nor did he fill in an evidentiary gap; rather, the judge relied on (D&O 12) Roseberry's account of his conversation with Purvis, coupled with Day's discredited account, which the Company failed to have Purvis corroborate. The judge properly viewed this failure with suspicion in assessing the Company's view of the facts. And the Company's assertion (Br. 43) that the evidence does not establish Day's purpose for directing Roseberry to Purvis ignores two important points—one, the judge found that Purvis was the known leader of the decertification effort, and two, Day's self-serving, proffered basis for directing Roseberry to Purvis was wholly unsupported by both Roseberry and Purvis. (D&O 12.)

Third, the Company wrongly argues (Br. 44) that Day's conduct was insufficient to find that the Company aided in the decertification effort. The judge relied on Day having directed an interaction between a new employee and the widely known antiunion leader on duty time and on company property. The fact that Purvis asked Roseberry to meet him at his truck later does not undermine the finding, as the Company maintains (Br. 44 n.14), inasmuch as the initial interaction, at Day's behest, occurred on company property. Nor does the

Company make headway by comparing (Br. 44) Day’s conduct to other supervisors in other cases. The proper inquiry is not whether Day’s conduct mirrors that of another violator in a different case, but, rather, whether substantial evidence supports the finding that Day offered more than ministerial assistance. Here, the substantial evidence shows that Day assisted with an ongoing decertification campaign by offering to new-hire Roseberry the means and methods of withdrawal (i.e., contact with Purvis) while on company time and property. The Company cites no support for its view (Br. 45) that there is no violation without a direct conversation between Day and Roseberry or its theory (Br. 45) that assisting only a single employee with decertification efforts is lawful. *See, e.g., NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991) (rejecting employer’s defense that its conduct was “*de minimis*” because evidence did not show more than one employee’s solicitation). The Board properly considered the totality of the circumstances and determined that the Company’s conduct was coercive. *See Raymond Interior Sys., Inc. v. NLRB*, 812 F.3d 168, 17 (D.C. Cir. 2016) (coercion is assessed by reference to the “totality of the circumstances”). Further, the Court has stated that it “is obliged to recognize the Board’s competence in the first instance to judge the impact of [coercive conduct].” *Id.*

In sum, the Company has failed to show that “the record is so compelling that no reasonable factfinder could fail to find to the contrary,” *Ozburn-Hessey*, 833 F.3d at 217, or that the Board’s credibility determinations are “patently unsupportable,” *Inova*, 795 F.3d at 80. Accordingly, it has provided no basis to disturb the Board’s finding of a violation.

#### **IV. THE BOARD’S IMPOSITION OF AN AFFIRMATIVE BARGAINING ORDER WAS WITHIN ITS BROAD REMEDIAL DISCRETION**

As discussed (p. 18), Section 10(c) of the Act authorizes the Board to order a violator to take affirmative action that “will effectuate the policies” of the Act. Here, the Board acted well within its remedial discretion when it issued an order requiring the Company to recognize and bargain with the Union. A bargaining order under these circumstances constitutes “the standard Board remedy for more than 50 years when an employer has refused to bargain with an incumbent . . . union.” *Caterair Int’l*, 322 NLRB 64, 65 (1996), *affirmed in relevant part*, 22 F.3d 1144 (D.C. Cir. 1994); *see also Pacific Coast*, 801 F.3d at 325, 335 (enforcing affirmative bargaining order to remedy unlawful withdrawal of recognition). The Board offered further justification for an affirmative bargaining order in this case beyond it being “the traditional, appropriate remedy for the [Company’s] unlawful withdrawal of recognition,” (D&O 1, citing *Caterair*, 322 NLRB at 68), and, after careful consideration of the particular facts in this case, properly balanced the three

considerations set forth in *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-39 (D.C. Cir. 2000). Specifically, *Vincent Industrial* asks the Board to weigh: “(1) the employees’ Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.” *Id.* at 738.

With respect to the first consideration, the Board determined (D&O 2) that an affirmative bargaining order would vindicate employees’ Section 7 rights. As it explained, the Union had “actively engaged in representing the unit employees” since 1965 and had timely requested a successor agreement to advance employees’ interests to secure terms and conditions of employment for a new contract term. (D&O 2.) After a 50-year bargaining relationship, the Company withdrew recognition without showing an actual loss of majority support and immediately implemented a host of changes to working conditions. The Company’s “unlawful conduct demonstrated disregard for the employees’ Section 7 right to choose union representation and tended to undermine unit employees’ continuing support for the Union.” (D&O 2.)

The Board then considered the other side of the scale—the effect of an affirmative bargaining, which would bar questions concerning the Union’s continuing majority status for a reasonable period of time, on the Section 7 rights

of employees who oppose continued union representation. The Board concluded that the finite nature of the bar—“only for a reasonable period of time to allow the good-faith bargaining that the [Company’s] unlawful withdrawal of recognition cut short”—would not unduly burden the rights of employees not favoring the Union. (D&O 2.) Status quo restoration and imposition of a bargaining order, according to the Board (D&O 2), will vindicate employees’ Section 7 right to union representation. And the remedy will permit employees to assess the Union’s effectiveness as a bargaining representative and determine whether continued representation is in their best interests. (D&O 2.)

In concluding its consideration of the first *Vincent Industrial* factor, the Board acknowledged (D&O 2) the pending decertification petition, but observed that the Company’s unlawful withdrawal of recognition, unilateral changes, and aid in the decertification effort blocked the processing of that petition. And the Board rejected (D&O 2) the Company’s request to direct an election rather than impose a bargaining order, because “doing so without first giving the Union an opportunity to reestablish itself with the bargaining unit employees would unjustly reward the Company for its unlawful interference in the collective-bargaining process and its unlawful role in the decertification effort.” (D&O 2.)

With respect to the second *Vincent Industrial* factor—whether other purposes of the Act override employees’ right to choose their representative—the

Board determined (D&O 2) that an affirmative bargaining order in this case serves the Act's purpose by furthering collective bargaining and industrial peace and by eliminating any incentive for the Company to delay bargaining with an aim of discouraging union support. The order will ensure that the Union has a reasonable time to bargain without pressure to show immediate results at the bargaining table following resolution of this case. (D&O 2.) And, the Board found that “[a] bargaining order seems particularly conducive to the aim of industrial peace given that the parties have enjoyed over a 50-year collective bargaining relationship.” (D&O 2.)

With respect to the last *Vincent Industrial* consideration—alternative remedies—a cease-and-desist order alone, according to the Board (D&O 2), would not sufficiently remedy the Company's withdrawal of recognition, refusal to bargain, and unilateral changes. The Board determined (D&O 2) that a cease-and-desist would deprive the Union of a period of time to bargain and allow another challenge to its majority status before the taint of the Company's unlawful conduct had dissipated and unit employees had had reasonable time to regroup and bargain through their chosen representative for a successor agreement. Indeed, a cease-and-desist alone would be particularly unjust in this case, the Board explained (D&O 2), because the Company's unlawful withdrawal of recognition, accompanied by its unlawful assistance with the decertification petition filed just

one month later, would likely have a continuing “thereby tainting any employee disaffection from the Union.” (D&O 2.) Under these circumstances, the Board found that the inadequacies of a cease-and-desist remedy outweighed “the temporary impact of an affirmative bargaining order [would] have on the rights of employees who oppose continued union representation.” (D&O 2.) Accordingly, as the foregoing demonstrates, the Company’s assertion (Br. 38) that the Board simply “quote[d] wholesale” from *Anderson Lumber* without exploring the case-specific considerations is plainly false.

In challenging the Board’s imposition of a bargaining order, the Company and Purvis assert (Br. 37-40, PBr. 34, 39-40) that *Scomas* compels reversal.<sup>3</sup> Upon examination, the efforts to liken the two cases quickly falter, and it is clear that the Board correctly found *Scomas* “easily distinguishable.” (D&O 3 n.8)

First, it does not matter for purposes of imposing a bargaining order that the employees themselves initiated the decertification effort here—as they did in *Scomas*—rather than the Company. (Br. 37 n.11, PBr. 36, 39.) Contrary to the Company’s assertion, the imposition of a bargaining order here, in fact, respects employee free choice by giving greater value to the Board-certified election

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<sup>3</sup> As discussed below (pp. 49-57), because the Board acted within its discretion in denying Purvis’ motion to intervene, the Court need not entertain his arguments against the Board’s affirmative bargaining order. Out of an abundance of caution, however, the Board responds to Purvis’ arguments; in large measure, little daylight exists between Purvis’ and the Company’s bargaining order challenges.

wherein employees chose the Union that has represented employees for over 50 years than to a decertification petition. Further, the bargaining order remedies the Company's unlawful withdrawal of recognition from the Union, not the conduct allegedly having given rise to the employees' petition. Notably, too, the Company's assistance with renewed efforts to secure a second decertification petition distinguishes it from the employer in *Scomas*, which was not involved in any decertification effort whatsoever.

The Court should also reject the Company's and Purvis' attempts (Br. 38, PBr. 39-40) to cast the Union as having engaged in conduct similar (or worse) to the union in *Scomas*. The Company asserts that the Union "refused" to disclose evidence of a reacquired majority despite the Company's request "at every turn." (Br. 38.) Purvis likewise litters his brief (PBr. 33-36, 38, 39) with allegations of union gamesmanship, hiding, purposeful and deliberate withholding of evidence, and entrapment. It bears repeating that under *Levitz*, a union has no obligation to disclose any rehabilitation efforts to an employer seeking to withdraw recognition. As explained (pp. 20-21), *Levitz* squarely places the risk of unilateral withdrawal on the employer without regard to a union's conduct and counsels against such unilateral action by permitting a lower showing of disaffection to obtain a Board-conducted election.

Moreover, even if the Union’s conduct mattered to whether the Company unlawfully withdrew—and it doesn’t—the Company’s characterizations are inaccurate. On February 21, after collecting prounion signatures for about four weeks (the same amount of time Purvis and other employees circulated the decertification petition before turning it over to the Company), the Union notified the Company that it disputed the claim that a majority of employees had expressed a desire not to be represented by the Union. The record establishes that on one occasion, the Company’s February 22 letter, the Company implicitly asked the Union for information by stating that it had not “received any evidence indicating that any employees have changed their minds” concerning decertification. Under *Levitz*, the Union had no obligation to respond, and it did not. Nor did the Company volunteer its list of names. The Union therefore had no easy way to identify the number or identity of signatories to the antiunion petition. The Union advised the Company the best it could at the time—that it believed that a majority of employees still wanted to be represented by the Union—even though it had no obligation to do so.<sup>4</sup>

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<sup>4</sup> Purvis complains that the Board allowed the Union’s response “to prevent an employer from lawfully withdrawing recognition in good faith based upon the objective evidence it actually possesses.” (PBr. 40.) Not so. The Union’s response had no effect on the Company’s burden of proof.

The Company's and Purvis' irrelevant allegation that the Union deliberately withheld information also ignores that the Union's rehabilitation campaign endured through February 28, and that at least 18 employees signed the prounion petition on February 27 and 28. (GCX2 at 8-9.) Moreover, at least seven of the February 28 signatories were "cross-over" employees, meaning they had also signed the earlier decertification petition. (GCX2 at 8-9.) So, even if the Union knew the identities of the decertification petition signatories, it could not have disclosed to the Company the changed position of these seven employees until February 28. Under these facts, the Company wrongly claims (Br. 38) that its "early" notice renders the Union's conduct more egregious than in *Scomas*. (See D&O 14: "[The Company] relied upon a petition signed by employees up to three months prior to the withdrawal of recognition. . . . [T]here is a risk of relying upon such signatures because employees' opinions may change in the interim, and there may not be objective evidence of an actual loss of majority of support when recognition as of the date recognition is withdrawn.")

Further distinguishing this case from *Scomas* is, as the Board noted (D&O 3 n.2), the fact that the Union here immediately filed an unfair labor practice challenging the withdrawal rather than waiting twelve days while withholding evidence of reacquired majority support. See *Scomas*, 849 F.3d at 1159 ("At minimum, the [union] should have told *Scomas* about the revocation signatures

when Scomas withdrew recognition so that it could take immediate corrective action. [Its] refusal to do so reflects that [it] deliberately let Scomas act ‘at its peril,’ *Levitz*, 333 NLRB at 725, positioning the [u]nion to pursue a ULP charge and delay the election.”) (Henderson, J., concurring).

*Levitz* makes clear that regardless of whether the Company acted “incautiously” and in good faith (Br. 39), unilateral withdrawal of recognition requires a showing of actual loss of majority support. Under *Levitz*, the Company had alternative courses of action, but deliberately chose the riskiest path despite not knowing the number of employees who would be in the unit on the date of withdrawal or whether employees would subsequently reaffirm support for the Union. To impose an affirmative bargaining order does not “punish” the Company (Br. 39); rather, it directs the Company to accept the well-established consequences of its actions. And while Purvis points to (PBr. 41) the Board’s supposition in *Johnson Controls* that “an affirmative bargaining order issued under [*Levitz*] would be in serious doubt,” that assertion fails to recognize that *Johnson Controls* and its attendant reasoning do not apply here, nor was the Board faced with the present facts of this case.

The Company and Purvis next argue (Br. 39, PBr. 40) that a bargaining order interferes with employee free choice and blocks the decertification petition. The Board acknowledged this interference but found that countervailing

considerations outweighed the temporary interference. This is not error. What is erroneous is Purvis' claim that (PBr. 41-43) the Board imposed a bargaining order to remedy the Company's unlawful assistance with the decertification effort.

Rather, the Board's affirmative bargaining order remedies the Company's unlawful withdrawal of recognition and the Company's subsequent violation provides additional support for its imposition.

Lastly, the Company hypocritically posits (Br. 39-40) that an election would be more appropriate than an affirmative bargaining order. The Company had this option but bet on the riskier path of severing the bargaining relationship. Its gamble did not pay off. The Court should not allow the Company to escape the consequences of its choices and obtain a remedy that it had the ability to solicit before it was found to have committed multiple violations of the Act.

#### **V. THE BOARD'S DENIAL OF PURVIS' MOTION TO INTERVENE WAS WITHIN ITS BROAD REMEDIAL DISCRETION**

Intervention in an unfair-labor-practice case is "[i]n the discretion of the [judge] conducting the hearing or the Board," 29 U.S.C. § 160(b), and may be allowed "to such extent and upon such terms as [they] may deem proper," 29 C.F.R. § 102.29; *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW-AFL-CIO v. NLRB*, 392 F.2d 801, 809-10 (D.C. Cir. 1967) ("intervention is a matter of discretion for the [judge] or the Board"). Because Purvis' participation would not have affected the outcome of the case, and because

the proper venue for evaluating employee sentiment regarding a union is a representation proceeding rather than an unfair-labor-practice proceeding, the Board did not abuse its discretion in affirming the administrative law judge's denial of Purvis' motion to intervene.

Contrary to Purvis' claim (PBr. 19-20), the Board's standard for assessing intervention is readily discernible. The Board properly denies a motion to intervene when "none of the parties seeking intervention proffers any additional facts which might affect the outcome of the unfair labor practices alleged in th[e] case." *United Dairy Farmers Co-Op Ass'n*, 242 NLRB 1026, 1045 n.3 (1979), *enforced*, 633 F.2d 1054 (3d Cir. 1980). Additionally, the Board and courts have found no abuse of discretion in denying motions to intervene by employees in unfair-labor-practice cases against their employer. *See, e.g., Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir. 1947); *cf. Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940) (holding that employees "are not indispensable parties" in such cases). The proper avenue for evaluating employee support for a union is a representation proceeding, even when employees opposed to the union seek to intervene in unfair-labor-practice cases addressing their employer's duty to bargain. *See, e.g., Lopez v. NLRB*, 655 F. App'x. 859, 863 (D.C. Cir. 2016) ("There is nothing to stop [the proposed intervenor] from pursuing representation proceedings based on a decertification petition after the bargaining order

expires.”); *NLRB v. Todd Co.*, 173 F.2d 705, 707 (2d Cir. 1949); *Semi-Steel Casting*, 160 F.2d at 393; *Oughton v. NLRB*, 118 F.2d 486, 495-96 (3d Cir. 1941); *Tishomingo Cnty. Elec. Power Ass’n*, 74 NLRB 864, 866 n.5 (1947); *see also Int’l Ass’n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 83 (1940) (“Sec[ti]on 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees’ full freedom of choice.”).

Given this standard, the Board routinely denies intervention by individual employees seeking to intervene in unfair-labor-practice proceedings against employers where their participation does not affect the outcome, including unlawful withdrawal-of-recognition cases. *See, e.g., Veritas Health Servs., Inc.*, 363 NLRB No. 108, 2016 WL 453588, at \*4 (Feb. 4, 2016) (denying intervention in withdrawal-of-recognition case for employee leading decertification effort), *enforced in relevant part*, 895 F.3d 69 (D.C. Cir. 2018); *Tenneco Auto., Inc.*, 357 NLRB 953, 967 n.1 (2011) (denying intervention by employees who filed a decertification petition), *enforcement denied on other grounds*, 716 F.3d 640 (D.C. Cir. 2013); *Hotel del Coronado*, 345 NLRB 306 (2005) (denying employee who opposed representation intervenor status in an unfair-labor-practice proceeding where the employer allegedly refused to recognize and bargain with the union); *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, 1107 (1950) (same), *enforced*, 195

F.2d 350 (5th Cir. 1952); *Todd Co.*, 173 F.2d at 707 (denying intervention by employees seeking to register opposition to union); *Semi-Steel Casting*, 160 F.2d at 393 (same).

Here, the administrative law judge denied Purvis' motion to intervene by applying the standard established in the foregoing precedent, rendering meritless his claim that the judge ruled "without reference to any objective standard." (PBr. 21.) As the judge explained (Tr. 34), the proceedings involved unfair-labor-practice charges against the Company, so the determinative issue was whether the Company possessed objective evidence showing an actual loss of majority support when it unilaterally withdrew recognition on March 1, 2017. The issue before the Board was therefore the *Company's* conduct, not the employees' decertification conduct, and Purvis' participation as a party to the proceeding would not affect the outcome. Decertification and individual employee disaffection play no role in the unfair-labor-practice proceeding assessing a withdrawal of recognition. As the judge plainly stated: "This is not a representation case. . . . There were avenues in this case for the employees to elect to pursue their individual interests in this case. They could have filed a decertification petition." (Tr. 34.) The judge further explained his denial of Purvis' motion:

So to the extent that the employees' preferences to have or not have the Union, the Board has a procedure for that. It's through the representation process, and the issue in this case is whether or not there was objective evidence, and I believe that the burden is on the

[Company] in this case to establish that such evidence exists or existed at the time [it] withdrew recognition.

(Tr. 34.) The denial of intervention is squarely within Board discretion, and Purvis cannot show that the Board abused that discretion by hewing to its routine practice of denying intervention of disaffected employees in an unfair-labor-practice case.

Contrary to Purvis' claim (PBr. 21-22), the Board only grants intervenor status in a decertification-related unfair-labor-practice proceeding in narrow circumstances—when there are questions of fact or law *beyond* loss of majority support. For instance, in *New England Confectionary Co.*, 356 NLRB 432 (2010), the administrative law judge granted an employee's intervention to assist with determining whether the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.<sup>5</sup> Likewise, in *Novelis Corp.*, 364 NLRB No. 101, 2016 WL 4524113 (Aug. 26, 2016), *enforcement denied*, 885 F.3d 100 (2d Cir. 2018), intervention was limited to the Section 8(a)(5) refusal-to-bargain allegation and offering evidence as to union intimidation and misrepresentation during the original organizing campaign.<sup>6</sup>

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<sup>5</sup> Purvis also cites *Taylor Bros. Inc.*, 230 NLRB 861 (1977), but that case did not involve a decertification petition and pre-dates *Levitz*.

<sup>6</sup> The other pre-*Levitz* cases that Purvis cites (PBr. 21 n.6, 23, 24) are equally unavailing. In *Gary Steel Products Corp.*, 144 NLRB 1160, 1160 n.1 (1963), *Sagamore Shirt Co.*, 153 NLRB 309, 311, 322 (1965), and *J.P. Stevens & Co.*, 179 NLRB 254, 254 n.1 (1969), the employers' refusal to bargain after receiving union-authorization cards could have been lawful if they had harbored a good-faith

Purvis cannot rely on (PBr. 22) *Johnson Controls* to argue that intervention is appropriate. The administrative law judge in that case granted intervention to similarly situated employees interested in decertification, but the General Counsel filed exceptions with the Board on that decision. The Board dismissed the underlying charges alleging unlawful withdrawal of recognition, which likewise resulted in the dismissal of the intervention issue. Therefore, the judge’s decision in *Johnson Controls* is not binding authority and was never reviewed by the Board. *See Sw. Reg’l Council*, 356 NLRB 613, 635 (2011). For the same reason, Purvis’ reliance on *Renaissance Hotel Operating Co.*, No. 28-CA-113793 (NLRB Div. of Judges, July 18, 2014), another non-precedential ruling by an administrative law judge, is misplaced. In short, none of the cases that Purvis relies on involve employee intervention in a withdrawal of recognition case.

Purvis offers (PBr. 13) three bases for intervention—none of which satisfies the Board’s standard. First, he claims that intervention was necessary for him to

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doubt that the cards truly indicated majority support for the unions. Therefore, the intervening employees’ testimony as to whether they were coerced into signing was, unlike here, relevant to whether a violation occurred. In *Washington Gas Light Co.*, a case involving an employer’s unlawful refusal to withhold union dues, the employee who intervened had no other forum to vindicate his interest. 302 NLRB 425, 425-26 & n.1 (1991). In *Camay Drilling Co.*, pension-fund trustees were allowed to intervene “[i]n light of the rigorous fiduciary obligations imposed upon the[m] by ERISA,” and because they had evidence that could affect the remedy for the employer’s failure to make payments into the fund. 239 NLRB 997, 998 (1978), *enforced sub nom. Operating Eng’rs Pension Trust v. NLRB*, 676 F.2d 712 (9th Cir. 1982).

authenticate the first decertification petition; to the contrary, authentication was not an issue in this case, and even if it were, Purvis' participation would be unnecessary to resolve that issue. Second, he asserts that intervention was necessary for him to defend the subsequent decertification petition; again, however, resolution of the allegations against the Company did not turn on the validity of that petition. And as was the case with the first petition, Purvis' participation would have been unnecessary to resolve that issue even if it were relevant. Further, the fact that Purvis' attorney could have asked him questions surrounding Day's involvement with the decertification effort does not support his intervention request. The coercive conduct allegation was against the Company, not Purvis, and Purvis could add nothing to that calculus that the Company could not offer on its own as the charged party. Third, Purvis claims that intervention was necessary to oppose a bargaining order. The Court rejected a similar claim in *Lopez*. 655 F. App'x at 863.

Purvis' remaining arguments in support of intervention are equally unavailing. Contrary to his claims (PBr. 26), the hearing concerned whether the Company unlawfully withdrew recognition (not whether the petition was valid); whether the Company (not Purvis) unlawfully assisted with the decertification effort; and whether the Company's violations warranted an affirmative bargaining order. And Purvis' interest in exercising his Section 7 rights by challenging the

Union’s majority status can only be vindicated through a representation proceeding, as the judge explained. That any such proceeding must await resolution of the unfair-labor-practice case does not render that proceeding irrelevant and insufficient, as Purvis insists. As the Court has recognized, an employee is free to “pursu[e] representation proceedings based on a decertification petition after the bargaining order expires, [and a] temporary delay in that process during the affirmative-bargaining period ‘is the inevitable by-product of the Board’s striking a balance between stability and employee free choice in labor relations, as it frequently must do.’” *Id.* (citing *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002)). Nothing in this withdrawal-of-recognition case will vindicate Purvis’ rights. He can vindicate them in a separate forum. And the Board’s decision does not saddle Purvis with what he claims is a “minority” union. He is free to try to rid himself and his coworkers of the Union; he just cannot do so by intervening in this unfair-labor-practice case.<sup>7</sup>

Lastly, to the extent that Purvis relies on (PBr. 28) General Counsel Memorandum 18-06, 2018 WL 3703870, the Court finds such reliance “rather silly.” *Chelsea Indus.*, 285 F.3d at 1077. The Court has recognized that the

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<sup>7</sup> Purvis’ remaining argument relating to whether his interest aligns with the Company’s (PBr. 30-33) is untethered to the decision denying his intervention. As Purvis recognizes (PBr. 30), the judge did not examine this factor. The Board therefore does not respond to this argument because it was not a basis for denial.

“General Counsel investigates and prosecutes unfair labor practices before the Board, *see* 29 U.S.C. § 153(d); he must also defend the decisions of the Board on review, regardless whether the Board adopted the view he expressed as a party before it. *See* National Labor Relations Bd., Organization & Functions § 202, 32 Fed Reg. 9588, 9588 (1967).” *Chelsea Indus.*, 285 F.3d at 1077.

## CONCLUSION

The Board respectfully requests that the Court deny the Company's and Purvis' petitions for review and enforce the Board's Order in full.

s/ Elizabeth Heaney

ELIZABETH HEANEY

*Supervisory Attorney*

s/ Barbara A. Sheehy

BARBARA A. SHEEHY

*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570  
(202) 273-1743  
(202) 273-0094

PETER B. ROBB

*General Counsel*

ALICE B. STOCK

*Deputy General Counsel*

RUTH E. BURDICK

*Acting Deputy Associate General Counsel*

DAVID HABENSTREIT

*Assistant General Counsel*

National Labor Relations Board

JULY 2020

# **ADDENDUM**

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

### **Section 3(d) (29 U.S.C. § 153(d))**

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

### **Section 7 (29 U.S.C. § 157)**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

### **Section 8(a)(1) (29 U.S.C. § 158(a)(1))**

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

### **Section 8(a)(5) (29 U.S.C. § 158(a)(5))**

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 8(d) (29 U.S.C. § 158(d))**

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

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

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

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

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any

strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

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

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

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

**Section 9(c)(1)(B) (29 U.S.C. § 159(c)(1)(B))**

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a), the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

**Section 10(a) (29 U.S.C. § 160(a))**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

**Section 10(b) (29 U.S.C. § 160(b))**

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

**Section 10(e) (29 U.S.C. § 160(e))**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively,

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

**Section 10(f) (29 U.S.C. § 160(f))**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the

court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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

LEGGETT & PLATT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Nos. 20-1060 & 20-1134
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM), AFL-CIO	)	
	)	
Intervenor	)	
	)	
	)	
KEITH PURVIS	)	
	)	
Petitioner	)	
	)	No. 20-1061
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 12,984 words of proportionally-spaced, 14-point

type, the word processing system used was Microsoft Word 365, and the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 31st day of July 2020

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

LEGGETT & PLATT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Nos. 20-1060 & 20-1134
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	Board Case Nos.
INTERNATIONAL ASSOCIATION OF	)	09-CA-194057
MACHINISTS AND AEROSPACE WORKERS	)	09-CA-196426
(IAM), AFL-CIO	)	09-CA-196608
	)	
Intervenor	)	
	)	
	)	
KEITH PURVIS	)	
	)	
Petitioner	)	
	)	No. 20-1061
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on July 31, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for

the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 31st day of July 2020