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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

VALERIE HARDY-MAHONEY, Regional Director of the Thirty-Second Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board **Petitioner** **v.** **NEVADA GOLD MINES LLC DBA NEVADA GOLD MINES** **Respondent** **and** **NEWMONT USA LIMITED DBA NEWMONT MINING CORP** **Party-In-Interest**	**Case Number** **3:20-cv-00331-LRH-WGC** **Hearing Date:** **Hearing Time:** **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S REQUEST FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)]**

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Statutes

29 U.S.C. SECTION 160(j) 1

I. STATEMENT OF THE CASE

Respondent has stripped employees of their 50-year bargaining representative and hard-earned benefits gained through decades of collective bargaining. The Board does not take requesting temporary injunctive relief lightly and rarely does so. Nevertheless, the Board authorized Petitioner to request injunctive relief in this case, as it has long recognized the irreparable harm caused by a withdrawal of recognition. Absent interim relief, which only this Court can grant, Respondent will succeed in its unlawful objective by the mere passage of time.

II. THE STANDARDS UNDER WHICH INJUNCTIVE RELIEF IS GRANTED

Temporary injunctive relief is warranted based upon consideration of the following elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) the balance of equities tips in the Board's favor, and (4) an injunction is in the public interest. *Frankl v. HTH Corp.*, 650 F.3d 1332, 1355 (9th Cir. 2011), *cert. denied*, 566 U.S. 904 (2012). These elements are evaluated on a sliding scale in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131-1134 (9th Cir. 2011). Here, at the height of the scale because of the devastating and irreparable harm to employees' Section 7 rights that inevitably results from withdrawal of recognition, Petitioner's required showing as to a likelihood of success on the merits decreases. However, Petitioner has demonstrated a high likelihood of success on the merits under any standard.

A. Petitioner is Likely to Establish that Respondent Unlawfully Withdrew Recognition from the Union

A likelihood of success on the merits is established by showing that the Board will likely find that Respondent committed the alleged unfair labor practices. *Frankl*, 650 F.3d at 1355; *see also Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011). The standard

reflects the deferential treatment of NLRB determinations by the courts of appeals and factors in "the district court's lack of jurisdiction over unfair labor practices." *Frankl*, 650 F.3d at 1356 (quoting *Miller v. California Pacific Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994)). The Court is not the arbiter of facts, and "[a] conflict in evidence does not preclude the Court from granting the requested Section 10(j) injunctive relief." *Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 662 (9th Cir. 2001).

Petitioner need not prove that Respondent committed the alleged unfair labor practices by a preponderance of the evidence, *see id.*, as such a standard would "improperly equat[e] 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). Rather, Petitioner need only produce "some evidence" along with "an arguable legal theory" to make a showing of likelihood of success on the merits. *Small*, 661 F.3d at 1187 (quoting *Frankl*, 650 F.3d at 1356); *see also Scott*, 241 F.3d at 662 (the Regional Director need only show "a better than negligible chance of success"). Therefore, the Court should sustain Petitioner's factual allegations if they are "within the range of rationality" and, [e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Frankl*, 650 F.3d at 1356. Here, Petitioner's legal theory is based on settled Board principles, and there is ample evidence to support Petitioner's showing as to the likely merits of its theory.

1. Respondent was required to continue to recognize the Union and uphold the CBA because it was a single employer with Newmont during the lease period

Based on undisputed facts and Respondent's own documents, Petitioner has demonstrated a "better than negligible chance of success" of establishing that a single employer relationship existed between Respondent and Newmont USA Limited dba Newmont Mining

Corp (Newmont)[1] from July 1 until December 22, 2019. *Scott*, 241 F.3d at 662. Petitioner has produced substantial evidence as to each of the single employer elements: 1) centralized control of labor relations; (2) interrelation of operations; (3) common management; and, (4) common ownership or financial control. *See, e.g., NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924, 928 (9th Cir. 1980), *cert. denied*, 448 U.S. 919 (1980).[2] Thus, as a single employer, Respondent was bound to the CBA for its full term and barred from withdrawing recognition from the Union, even after the termination of the single employer status at the end of the lease period. "A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract … if it may be said to constitute a single employer with that company." *See Ad-Art, Inc.*, 290 NLRB 590, 604 (1988), quoting *Kiewit Sons' Co.*, 206 NLRB 562, 562 (1973). Once bound to the CBA and the bargaining relationship with the Union, Respondent cannot shirk its obligation under the Act to bargain with the Union over the terms and conditions of employment of the unit. *See NLRB v. San Luis Trucking, Inc.*, 479 Fed. Appx. 743, 744-45 (9th Cir. 2012) (affirming that single employer was responsible for bargaining with union over decisions affecting a unit) (citing *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 80-81 (1995)).

i. Respondent and Newmont shared centralized control of labor relations

There is considerably more than "some" evidence of Respondent's and Newmont's centralized control of labor relations, which the Board views as a critical factor. *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986) (the Board places particular emphasis on

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[1] Though Party-In-Interest Newmont submitted its own Response, Petitioner's Reply encompasses any arguments raised therein. Petitioner does not seek to enjoin any conduct of Newmont, as following the expiration of the lease period, Newmont no longer acts as a single employer of the unit with Respondent.

[2] All four factors need not be present to establish single employer status. *Transcendence Transit II, Inc.*, 369 NLRB No. 101 (June 10, 2020), citing *Bolivar-Tees*, 349 NLRB 720 (2007).

centralized control of labor relations when evaluating a single employer claim). Indeed, Respondent's high-level executives acted on behalf of Newmont and Respondent simultaneously during the lease period regarding labor matters. For example, Hilary Wilson, Newmont's General Counsel, assured the Union that Respondent would adopt the CBA, and discussed Respondent's decisions to close an employee parking lot and alter employee health plans with the Union. Despite Wilson's representations in her declaration that she only served as Respondent's General Counsel as of December 23, 2019, the undisputed documentary evidence establishes that she held this role much earlier. Wilson Decl. ¶ 3.[3] Wilson's communications to the Union regarding the decision of "management" to close the parking lot contained an email signature stating that she was Respondent's General Counsel as early as July 12, 2019. App 3 Ex 21 p. 84-85. Likewise, Wilson was listed as Respondent's General Counsel in the employee lease agreement that Respondent states was entered into on July 1, 2019. App 1 Ex 1 p. 203; Opp p. 4. Similarly, Respondent admits that its counsel, Anthony Hall, represented Newmont during the lease period, when he acted to further the interests of both entities, and negotiated the MOU to Respondent's explicit benefit. In his October 30, 2019 communication to the Union (to schedule a series of meetings which ultimately resulted in Respondent's withdrawal of recognition from the Union), Hall wrote that he was working on obtaining his "client's availability," in reference to Lisa Boman, Newmont's Senior Human Resources Business Partner and head of Respondent's Business Human Resources department. App 1 Ex 2 p. 235; Boman Decl. ¶¶ 3-4, 8. Despite Boman's representation in her declaration that her role with Respondent began on December 23, 2019, she signed the letter withdrawing recognition

[3] Reference to the Appendix of Index of Exhibits attached to Petitioner's Memorandum in Support of the Petition for Injunction is "App"; to the Exhibit is "Ex"; and, to the page number is "p". "Name Decl. ¶" references are to the declarations in support of Respondent's Opposition. "Opp" references are to Respondent's Opposition.

from the Union as "Head, Business HR" for "Nevada Gold Mines" on November 29, 2019, and she represented Respondent in earlier meetings with the Union. Boman Decl. ¶¶ 3, 8; App 1 Ex 1 p. 75-76; App 1 Ex 2 p. 224-226. Not only did these high-level representatives act on behalf of both entities concerning labor relations with the Union and unit employees, but lower level human resources personnel also worked for both Newmont and Respondent. App 2 Ex 3 p. 3-4; App 2 Ex 9 p. 139; App 2 Ex 9 p. 142; App 2 Ex 12 p. 200-205. Thus, to the extent that Respondent and Newmont now endeavor to starkly differentiate the conduct of Respondent and Newmont, these key actors took no such pains when dealing with the Union and the employees contemporaneously as the events in this case were unfolding.

It is undisputed that the employee lease agreement explicitly gave Respondent control over employment policies and practices, and Respondent does not deny that it utilized those powers. Further, Respondent exercised control over labor relations even prior to the execution of this lease agreement by issuing the May 10, 2019 welcome letter to unit employees. It is disingenuous for Respondent to claim confusion as to how a letter from Greg Walker could be attributed to Respondent given the uncontroverted document evidence showing that Walker referred to himself as a Nevada Gold Mines (NGM) executive. Walker signed as "Executive Managing Director, Nevada Gold Mines, LLC," and the letter was printed on NGM letterhead, with NGM's website, and attached NGM employee standards and an NGM employee benefits summary. App 1 Ex 1 p. 60-61. Walker's letter explicitly welcomed employees to "Nevada Gold Mines, LLC (the "JV")" and advised that employees' "work with our new company will start July 1, 2019." *Id.* Walker's letter invited employees to attend informational meetings where employees would sign an acknowledgement. *Id.* He further explicitly assured employees that the Union's collective-bargaining status was secure: "[t]he JV has agreed to adopt the labor

agreement between Operating Engineers Local No. 3 and Newmont and will continue to work with the Union and honor its terms for those who are covered under the labor agreement."[4] *Id.* Notably, the letter also stated in bold: "**Your compensation and benefits will not change while the labor agreements are in place unless the JV and the Union mutually agree otherwise."** *Id.* During the informational meetings discussed in the letter, Newmont supervisors, managers, and human resources personnel acted on behalf, and at the direction of, Respondent in obtaining signed acknowledgments from all Newmont unit employees of having received Respondent's employee standards, which also stated that "in the event of any conflict or inconsistency between the terms of this Acknowledgment or the Standards, the terms of the CBA will prevail." App 1 Ex 1 p. 62; App 2 Ex 7 p. 104-105; App 2 Ex 8 p. 119-122; App 2 Ex 9 p. 135-136; App 2 Ex 10 p. 157-158; App 2 Ex 13 p. 218. Plainly, Petitioner has met the showing as to this most critical element.

ii. Respondent and Newmont's operations were so closely interrelated that Respondent could not have operated without Newmont

Respondent's sole argument regarding the interrelations of operations factor—that Newmont did not have any operations to interrelate with Respondent as of July 1, 2019—is untenable. The change to the Carlin operations on July 1, 2019 was nominal, as the former Newmont mines operated on July 1, 2019 just as they had on June 30, 2019. Unit employees consistently testified that following July 1, 2019, they rode the same Newmont-contracted busses from the same Newmont parking lots, reported to the same jobsites, changed into the same uniforms at the same facilities, worked under the same supervisors, and utilized the same tools and equipment to perform the same work as they always had. App 2 Ex 5 p. 72, 74, 77;

[4] Walker's letter also makes plain that Respondent's claim that the Union "knew that NGM held itself out as non-union" is false.

App 2 Ex 6 p. 81-86, 88; App 2 Ex 7 p. 94-100; App 2 Ex 8 p. 116, 122; App 2 Ex 10 p. 151-155; App 2 Ex 11 p. 169-172; App 2 Ex 12 p. 197; App 2 Ex 14 p. 234-238. Respondent fails to confront the fact that as demonstrated by the employee lease agreement, transition services agreement, and other corporate documentation, that Respondent was wholly dependent upon Newmont to provide all labor for the former-Newmont facilities, as well as a host of other financial and operational services including any identified after the fact as "essential to the operation." App 1 Ex 1 p. 136-142. Without Newmont, Respondent would not have had the workforce or the support to operate a large percentage of its highly-profitable, newly-acquired facilities. *Vance v. NLRB*, 71 F.3d 486, 493 (4th Cir. 1995) (operating both companies "in such a manner that the exigencies of one would be met by the other" supports a finding of single employer) (citing *Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987)). While Newmont does not even disclaim interrelation of operations, Respondent provides only general and conclusory statements from Respondent's highest-level managers that hardly touch upon actual operational interrelation.

iii. Respondent and Newmont shared common management of the unit

To be sure, the agreements executed by Newmont and Respondent gave Respondent full managerial authority over all of Newmont's leased employees including hiring, assigning job duties or discipline, exercising lay-offs, and modifying employment practices or policies. App 1 Ex 1 p. 194; App V Ex 25 p. 106. However, Respondent ignores Newmont's actual control over the unit employee's day-to-day work in arguing against a finding of common management. Indeed, the Board is likely to find this element has been met, as it is not merely concerned with nominal authority, but "actual or active control over the day-today operations or labor relations of the other entity." *In re Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001). Thus,

Respondent's argument that no single employer relationship existed because it had a contractual right of control over the unit employees from Newmont is fundamentally flawed. While Respondent had contractual authority over the unit employees, the individuals who *exercised* the "actual" and "active control" over the day-to-day working conditions were supervisors and managers employed by Newmont, who exercised this control by disciplining, supervising, and assigning and directing work of the unit employees. Newmont supervisors and managers exercised such control subject to the directives of Respondent, not only pursuant to Respondent's authority from the written agreements, but also on a day-to-day basis from the directives of Respondent's managers who oversaw the workforce on a local level, including Duncan Bradford and Paul Wilmot. App 2 Ex 6 p. 81; App 2 Ex 9 p. 145; App 2 Ex 11 p. 169-169. The fact that Barrick Gold Corporation (Barrick) managers were leased to Respondent to serve in a managerial capacity on behalf of Respondent does not alter the single employer relationship between Newmont and Respondent during the lease period. In addition, Newmont's (and now Respondent's) Security Manager, Don Neff, installed "No Trespassing" and "No Solicitation" signs in Newmont unit employee parking lots in September 2019 to comply with and implement Respondent's new policies. Neff Decl. ¶ 5. Thus, Newmont and Respondent shared control over the unit subject to their contractual agreements and the terms and conditions of the CBA, establishing their common management of the unit employees.

Further, Newmont's executives on Respondent's Board shared managerial decision-making power, demonstrating common management. *See Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964) (concluding that "overall [shared] control of critical matters at the policy level" demonstrates common management). Indeed, major decisions concerning the management and operation of Respondent's facilities—such as restructuring,

dissolving, or merging the company—require unanimous consent from the Board. App 4 Ex 1 p. 113. Moreover, while Newmont's highest-ranking executives—its CEO and Executive Vice President—served on Respondent's Board of Directors, another senior executive, Blake Rhodes, also served as a Vice President of Newmont and as an officer of Respondent simultaneously. *See Pathology Institute*, 320 NLRB 1050, 1061-1062 (1996) (finding overlap between high-ranking corporate officers supports single employer finding), *enforced mem.* 116 F.3d 482 (9th Cir. 1997), *cert. denied*, 522 U.S. 1028 (1997). Rhodes' simultaneous signing of multiple agreements on behalf of both entities, App 1 Ex 1 p. 174-175, 205, reveals "an absence of an arm's-length relationship" between the two companies, supporting a finding of single employer status. *See Big Bear Supermarkets*, 640 F.2d at 928.

iv. Respondent and Newmont share common ownership

Less emphasis is placed on common ownership in comparison to other factors. Here, despite Respondent's claims, Newmont's undisputed 38.5% interest in Respondent establishes common ownership and financial control between Newmont and Respondent. *See Sakrete*, 332 F.2d at 907 (recognizing common financial control as synonymous with common ownership in the Board's single employer analysis), *cert. denied*, 379 U.S. 961 (1965). The fact that Barrick owns a larger interest in Respondent does not preclude Newmont from sharing common ownership and financial control with Respondent. Moreover, Newmont shares additional financial oversight of Respondent. Newmont appoints two—currently Newmont's CEO and Executive Vice President—of the five managers serving on Respondent's Board of Directors, which is responsible for managerial and financial oversight including approving or modifying all programs, budgets, funding plans, life of mine plans, and contracts in excess of $25 million. App 4 Ex 1 p. 2, 110-113.

In sum, Petitioner has easily satisfied the requisite showing as to the likely merits of the single employer relationship during the lease period. Petitioner has further shown that under established Board precedent, Respondent was bound to the CBA and the bargaining relationship with the Union. Respondent's duty to continue to bargain with the Union and honor the CBA survives the lease period and the single employer relationship and extends for the full term of the contract. This is not a novel or untested theory but a matter of well-established precedent. As such, Respondent was not privileged to withdraw recognition without objective evidence that the Union lost majority support of the unit employees.[5]

2. Respondent cannot assert the MOU as a defense to its unlawful conduct

There is significantly more than "some evidence" along with "an arguable legal theory" that the Board will likely not view the MOU as a waiver. *Small*, 661 F.3d at 1187 (citations omitted). Under Board law, in order to be enforceable, a union's waiver of a statutory right must be "clear and unmistakable." *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 694 (1983). An employer claiming waiver of a such a right must demonstrate that the issue was "fully discussed" and the union "consciously yielded or clearly and unmistakably waived" its right. *See Local Joint Executive Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 (9th Cir. 2008). Contrary to Respondent's selective parsing, the MOU does not constitute a clear and

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[5] Respondent's claims that the Union's withdrawal of recognition charge is time-barred and that the Board lacks jurisdiction are baseless. Respondent's November 15, 2019 withdrawal of recognition is well within the six-month limitations period of the Union's January 2, 2020 charge. Respondent's claim that Newmont's filing with the SEC triggers the limitations period is false. The SEC filing plainly does not constitute constructive or actual notice to the Union that Respondent would not recognize the Union. Further, the Union was unaware of the SEC filings until Newmont notified it of their existence in December 2019. App 1 Ex 1 p. 13, 179. In any event, the Board does not assert jurisdiction prior to the occurrence of any violation as to do so would prematurely deprive employers of due process. Lastly, Respondent plainly met the definition of an employer as of the November 2019 violations at issue. Thus, Petitioner has established that the Board is likely to reject these lackluster claims.

unmistakable waiver of the Union's right to represent the historical bargaining unit. Indeed, "it would be irrational for the union to agree that, based on a change in corporate ownership, it will give up its fundamental right to represent employees." *See TransMontaigne, Inc.*, 337 NLRB 262, 263 (2001) (concluding that a union's contractual waiver of a successor-employer's adoption of a collective-bargaining agreement would not be read as a waiver of the union's statutory right to represent unit employees).

Moreover, contrary to Respondent's claim, Petitioner is not barred from presenting evidence regarding the context of the MOU and Hall's contemporaneous representations to the Union. The presentation of such extrinsic evidence is clearly contemplated by Board law when it concerns a union's waiver of a statutory right, requiring the employer's presentation of evidence of discussions between the parties to show a union unmistakably and consciously waived its right. *See Local Joint Executive Bd.*, 540 F.3d at 1079. Even generally, parole evidence is admissible when the language of an agreement, as is here, is ambiguous. *See Crockett & Myers, Ltd. V. Napier, Fitzgerald & Kirby, LLC,* 440 F. Supp. 1184, 1191 (D. Nev. 2006) (parole evidence is admissible to clarify ambiguous terms); *see also Ringle v. Bruton,* 120 Nev. 82, 85-86, 93 (2004) (when "contract language is ambiguous and incomplete," "extrinsic evidence may be admitted to determine the parties' intent, explain ambiguities, and supply omissions"). Again, even if the Court were not required to give deference to Petitioner's view of the facts and legal theory, the evidence reveals that Respondent informed the Union that the intent and purpose of the MOU was to preserve the status quo—that the former Newmont employees would remain represented by the Union and covered by the CBA, while the former Barrick employees would remain unrepresented.

Respondent seeks to preclude the Union from arguing any legal theory or relying upon any fact occurring during the lease period, yet it fails to apply any of the MOU's purported constraints to itself. To this end, since as early as November 15, 2019, Respondent has claimed (incorrectly) that the unit employees had merged with the non-unit Barrick employees and that the groups are "inextricably intertwined." App 1 Ex 1 p. 75-76. Respondent cannot assert a valid accretion argument under Board law, although it attempted to do so even when the MOU was still in effect. Respondent can't have it both ways. If the MOU were to prevent the Union from asserting any successorship argument, it would also preclude Respondent from asserting any accretion argument.

Respondent incorrectly asserts that Petitioner is barred from arguing Respondent was a single employer with Newmont by application of the MOU. However, the Board is not a party to the MOU and nothing in the agreement prevents it from fulfilling its statutory duty to prosecute violations of the Act in accordance with federal law and the public interest. *See NLRB v. General Motors Corp.*, 1176 F.2d 306, 317 (7th Cir. 1940); *Schuykill Metals Corp.*, 218 NLRB 317 (1975). Respondent cannot induce the Union to sign the MOU on September 9, 2019 and then claim a vacuum of time and fact exists between July 1, 2019 and December 22, 2019, upon which no entity, including the Board or indeed this Court, can ever rely. *See NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959); *BCI Coca-Cola Bottling Company of Los Angeles*, 361 NLRB 839, 843 n.11 (2014).

3. The historical unit remains intact and Respondent cannot establish accretion

Petitioner has met her burden to show that the Board will likely find the long-standing historical unit remains intact and the bargaining unit employees have not been accreted into the group of former Barrick employees. Respondent simply cannot rely upon minor operational

changes to sustain its heavy burden to establish accretion. A historical unit does not simply suddenly become inappropriate—it only does so in certain narrow circumstances, such as when it is lawfully absorbed or "accreted" into another group of employees. Indeed, "a preexisting bargaining unit remains presumptively appropriate after a change in the employing enterprise," and the "employer has the burden of rebutting this presumption." *See AM Property Holding Corp.*, 365 NLRB No. 162, slip op. at 7 (Dec. 15, 2017), *citing Van Lear Equipment*, 336 NLRB 1059 (2001). As discussed below, Respondent has utterly failed to meet the heavy accretion burden. Respondent ignores controlling Board law and relies instead upon generic testimony, devoid of concrete facts, in an attempt to avoid its bargaining obligation.

The party alleging accretion in light of a long-standing history of bargaining in separate units has the burden of establishing "compelling circumstances," such as a fundamental change in the scope and direction of the employer's enterprise. *PCMC/Pacific Crane Maintenance Co.*, 362 NLRB No. 120 (June 17, 2015), *affirming*, 359 NLRB 1206, 1210-12 (2013) (*Noel Canning* Board decision), (citing *AG Communication*, 350 NLRB 168 (2007), *petition denied*, 563 F.3d 418 (9th Cir. 2009)). In these circumstances, it must be determined whether these employees will be unreasonably disenfranchised regarding union membership if they are "accreted" into another group. *See NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 386-387 (9th Cir. 1979). Respondent has wholly failed to show that the functional integration between operations is "so substantial as to negate the separate identity of the single-facility unit." *See AM Property Holding Corp.*, 365 NLRB, slip op. at 6.

Further, accretion involves a fact-intensive balancing of multiple factors, including bargaining history; functional integration of operations; types of work, skills, and education of employees; common control of labor relations; interchange between the two groups of

employees; common day-to-day supervision; and physical or geographic proximity. *See Ryder Integrated Logistics, Inc.*, 329 NLRB 1493, 1499 (1999). Moreover, the presence of a joint venture, alone, does not mean that historically separate units have lost their identity, or that one has accreted into the other. *See California Pacific Med. Center v. NLRB*, 87 F.3d 304, 309 (9th Cir. 1996) (enforcing finding of single-facility unit following hospital merger where other facility had no history of representation among its nurses and nurses at two facilities had limited interchange). The analysis as to whether the historically separate units at issue here have lost their identity is a matter wholly reliant on the facts. In addition, the Court must sustain Petitioner's factual assertions as they are "within the range of rationality." *Frankl*, 650 F.3d at 1356. Here, not only are Petitioner's facts accorded deference, but Respondent has utterly failed to present the fact-rich evidence necessary to make out its claim of accretion, providing only general and conclusory information with exceedingly scant evidence of the two most important factors—employee interchange and common day-to-day supervision. *E. I. Du Pont Inc.*, 341 NLRB 607, 608 (2004), (citing *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001)).

In particular, Respondent's evidence is largely vague as to the dates it implemented any allegedly integrating changes to employees working conditions. To the extent Respondent relies on any changes that took place *after* the lease period, Respondent is barred from relying on such evidence to make out any argument of accretion. Respondent's argument that the two groups of employees are subject to the same pay and rules is entirely a result of its unlawful repudiation of the CBA. Indeed, Respondent cannot rely on *any* changes that were unilaterally implemented after it withdrew recognition from the Union on November 15, 2019. It is well-settled Board law that employers cannot rely on unlawfully implemented changes without notice and bargaining with the Union to prove any accretion argument. *See, e.g., Holly Farms Corp.*, 311

NLRB 273, 279 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1995), *affirmed*, 517 U.S. 392 (1996). Otherwise, employers would be incentivized to engage in unlawful conduct and reap the benefits of their unfair labor practices, just as Respondent seeks to do here.

By contrast, Petitioner has provided detailed testimony from unit employees regarding their working conditions and the criteria relevant to accretion. The testimony establishes that there was no fundamental change in the scope and direction of the employer's enterprise, as unit employees continued to perform the same work at the same locations and facilities as they did under Newmont, with identical duties, the same job classifications, using the same exact tools and equipment, commuting on the same busses, changing into the same uniforms in the same locations, and attending the same pre-shift meetings led by the same supervisors as they always had. App 2 Ex 5 p. 72, 74, 77; App 2 Ex 6 p. 81-86, 88; App 2 Ex 7 p. 94-100; App 2 Ex 8 p. 116, 122; App 2 Ex 10 p. 151-155; App 2 Ex 11 p. 169-172; App 2 Ex 12 p. 197; App 2 Ex 14 p. 234-238. Indeed, employee testimony demonstrates that they continued to be supervised and trained by former Newmont managers, entirely separately from the former Barrick employees. App 2 Ex 10 p. 164-165; App 2 Ex 13 p. 226-227; App 2 Ex 14 p. 234-238. Moreover, the testimony reveals only scant evidence of employee interchange—affecting a small number of drivers and mechanics comprising a very small percentage of the roughly 1,350-employee unit. In fact, despite Respondent's claims, apart from limited interchange of equipment, raw materials, and very few employees at some former Newmont surface mines and processing mills, the operations have not been functionally integrated. In sum, Petitioner has produced ample evidence that she is likely to succeed before the Board in establishing that the unit has not lost its separate identity and that it remains intact, and thus, Respondent cannot avoid the ramifications of its unlawful withdrawal of recognition.

B. Injunctive Relief is Just and Proper to Prevent Irreparable Harm to Employees' Rights and Preserve the Board's Remedial Order

In applying traditional equitable principles to a Section 10(j) petition, courts must consider the matter in light of the underlying purpose of Section 10(j), which is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Miller*, 19 F.3d at 459-60. In evaluating the likelihood of irreparable harm to the Act's policies and in considering the balancing of equities, district courts must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Miller*, 19 F.3d at 459-60; *see also Small*, 661 F.3d at 1191; *Frankl*, 650 F.3d at 1362.

1. Absent interim relief, the irreparable harm attendant to Respondent's unlawful conduct will continue until it achieves its unlawful objective

Section 10(j) injunctive relief is necessary to prevent the nullification of the Board's final order.[6] The Ninth Circuit has recognized that the failure to bargain in good faith likely causes irreparable harm sufficient to justify issuance of a Section 10(j) injunction. *See Coffman v. Queen of the Valley Medical Center*, 895 F.3d 717, 728 (9th Cir. 2018) (unlawful withdrawal of recognition warranted injunction under Section 10(j)). Indeed, "the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether." *See Frankl*, 650 F.3d at 1362; *see also Small*, 241 F.3d at 667 (failure to

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[6] Thus, Respondent's assertion that the matter would be definitively resolved following the administrative hearing previously scheduled for July 27, 2020 disregards the fact that it is the Board's final order that is dispositive, not the decision of the administrative law judge. Further, the Director issued an Order postponing the hearing 8 weeks to September 21, 2020 due to continuing health and safety concerns posed by the worsening COVID-19 pandemic and the Board's evolving ability to effectively hold remote hearings through videoconferencing technology.

bargain is likely to cause irreparable harm; monetary damages will not make employees whole since the value of union representation is "immeasurable in dollar terms once delayed or lost").

Here, without interim relief, Respondent's withdrawal of recognition and repudiation of the CBA deprives employees of the benefits of collective bargaining, which will undermine employee support for the Union, especially as more time passes and the Union is unable to halt Respondent's continuing unilateral conduct. *See Coffman v. Queen of the Valley Medical Center*, 895 F.3d at 728; *Frankl*, 650 F.3d at 1362; *see also Small*, 241 F.3d at 667. The unilateral changes to job protections, pensions, shift differentials, paid time off (PTO), seniority, premium pay, etc. are adversely impacting employees. Over time, without an injunction requiring interim recognition and compliance with the CBA, these harms will be irreparable, and the Board's final remedial order will be futile. Respondent will succeed in permanently depriving its employees of Union representation, obstructing the Act's intent.

Petitioner's mere five-month delay after the filing of the initial charge to the filing of the Petition does not render interim relief ineffective. Egregious allegations, such as those at issue here, require thorough investigation in order to protect the rights of charged parties. This is especially true as Respondent did not provide any evidence during the Board's investigation. Moreover, delay in seeking injunctive relief is only relevant if it precludes a district court from restoring the lawful status quo or renders restoration of the status quo unnecessary. *See Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988), *overruled on other grounds, Miller*, 19 F.3d 449 (9th Cir. 1994). Thus, courts are not required to consider delay; rather, the appropriate inquiry is whether the return to status quo ante is necessary and still possible. *See Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987); s*ee also Aguayo*, 853 F.2d at 750. To that end, the Ninth Circuit has ordered injunctive relief in cases involving greater passage of

time between the violation and the petition. *See HTH*, 650 F.3d at 1363-1365 (9th Cir. 2011) (Section 10(j) petition filed almost three years after first unfair labor practice charge); *see also, Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 2999 (7th Cir. 2001); *Overstreet ex rel. NLRB v. El Paso Disposal, LP*, 625 F.3d 844, 856 (5th Cir. 2010) (19-month passage of time between complaint and 10(j) petition); *Spartan Mining Co.*, 570 F.3d 534, 544–545 (4th Cir. 2009).

2. The balancing of the equities decidedly tips in favor of injunctive relief

The balance of hardships strongly favors injunctive relief. Respondent's withdrawal of recognition from the Union that has represented the unit employees for over 50 years will irreparably undermine employee support for the Union, deprive them of the benefits of collective bargaining through their lawfully chosen representative, and render ineffective the Board's final order. Respondent's exaggerated arguments regarding any harm to Respondent should be afforded little, if any weight. If Respondent's hyperbole were ever in doubt, there is no need to look further than Hall's June 12, 2020 Declaration, which represented that the impact of an injunction on Respondent would be in excess of $100 million. Hall Decl. ¶ 9. In just two weeks the new estimate shrank to roughly $35 million, after Respondent "more carefully analyze[d] the impact." Opp. 35, fn 26. This number also appears grossly inflated and is actually triple the "quantifiable" number of over $11 million that Respondent presents. Even this figure is not limited to the alleged direct harm to Respondent but includes asserted financial harm to unit employees. Respondent admits that the only estimates of direct costs to *Respondent* involve the pension, estimated at over $2 million, and the payroll system, estimated at $200,000. Respondent acknowledges a $470 million annual savings attributed to its joint venture. Walker Decl., ¶ 9. Even if Respondent's $2.5 million estimate of the costs of restoring the status quo is accurate, this sum hardly seems like a hardship given the scale of savings.

Not only does Respondent misunderstand the purpose of the proposed interim relief—which is injunctive and not monetary in nature—but Respondent also purposefully misleads the Court regarding the alleged monetary impact on employees. Here, the Petition requests the Court order Respondent to immediately recognize the Union and comply with the CBA. The Petition does not contemplate any make whole remedy, as monetary relief is not the purpose of an injunction. If the harms at issue here could be remedied with monetary relief alone, the harm would not be irreparable, and the Board would not have authorized the filing of the instant Petition. The terms of the proposed injunction require Respondent to prospectively comply with the CBA—not recoup employees for any wages already earned.

Further, the requested relief specifically states that Respondent need only rescind changes to the terms and conditions of unit employees "[u]pon request of the Union." Contrary to Respondent's claims, Opp. P. 32, the remedies available to the Board are not limitless and this type of rescission order has long been recognized by the courts as the appropriate remedy where unlawful unilateral changes may include favorable as well as detrimental changes. *See California Pacific Medical Center*, 87 F.3d at 311 (and cases cited). Respondent is under no obligation to rescind any benefit, including disability insurance. Respondent also misleads the Court regarding the monetary costs to employees of losing the protection of the CBA. Despite receiving a wage increase, employees suffered substantial monetary losses as a result of Respondent's repudiation of the contract in the form of premium pay, bonuses, night shift differentials, health care, and pension plan contributions. As Respondent and Newmont are in sole possession of employee payroll records, Petitioner relies on the direct testimony of affected employees. One employee estimated his financial losses in pension contributions to be $600 a month. App 2 Ex 7 p. 108. Another estimated an annual loss of $8,000 due to the loss of

overtime provisions in the CBA. App 2 Ex 13 p. 227. Other employees testified that Respondent has tightened production goals causing employees to lose their production bonus. App 2 Ex 13 p. 225-226. Unit employees suffered huge losses as a result of being forced to have their paid time off (PTO) paid out. One employee testified that he was compensated only 20-30 cents on the dollar, receiving roughly $7,000 gross instead of $12,000. App 2 Ex 10 P. 162. Employees lost not only the ability to use their accrued PTO, but also the employer's contributions to their pensions, healthcare, and benefits that they otherwise would have received if they had been able to utilize their PTO as they did under the CBA.

3. The public interest is best served by granting injunctive relief

The Ninth Circuit has recognized that an injunction is "sought for the protection of the public interest in aid of a policy which Congress, itself, has made plain." *Brown v. Pacific Telephone & Telegraph Co.*, 218 F.2d 542, 544 (9th Cir. 1954). The presence of the Union has elevated the Elko community for over 50 years—bringing industrial peace and stabilizing benefits for hundreds of employees. The restoration of the collective-bargaining relationship and the contractual benefits is unquestionably in the public interest. Otherwise Respondent's illegal conduct threatens irreparable harm to national labor policy encouraging good-faith collective bargaining, the unit employees' right to free choice, employee support for the Union, and the efficacy of the Board's ultimate remedial order.

III. CONCLUSION

Contrary to Respondent's Opposition, Petitioner has demonstrated that temporary injunctive relief is just and proper. Therefore, Petitioner respectfully urges the Court to grant the injunctive relief sought in this matter.

DATED AT Oakland, California, this 6th of July, 2020.

Respectfully submitted,

/s/ Coreen Kopper_____
Coreen Kopper