UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 18-73097 and Case No. 18-73305

DELTA SANDBLASTING COMPANY, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, DISTRCT COUNCIL 16 OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, Respondent-Intervenor.	Case No. 18-73097 NLRB Nos. 20-CA-176434 32-CA-180490
NATIONAL LABOR RELATIONS BOARD, Petitioner, DISTRCT COUNCIL 16 OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, Petitioner-Intervenor, v. DELTA SANDBLASTING COMPANY, INC., Respondent.	Case No. 18-73305 NLRB Nos. 20-CA-176434 32-CA-180490

PETITIONER-RESPONDENT DELTA SANDBLASTING COMPANY, INC.'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

ALAN S. LEVINS
COURTNEY O. CHAMBERS
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, California
94104
(415) 216-1940

Attorneys for Petitioner,
DELTA SANDBLASTING
COMPANY, INC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner/Employer certifies that DELTA SANDBLASTING COMPANY, INC. has no parent corporation and that there is no publicly held company that owns 10% or more of its stock.

Date: September 16, 2020

/s/ Alan S. Levins
ALAN S. LEVINS
LITTLER MENDELSON, P.C.

Attorneys for Petitioner,
DELTA SANDBLASTING COMPANY, INC.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

INTRODUCTION AND RULE 35(a) and (b) & RULE 40 (a) STATEMENT 1

BACKGROUND INFORMATION 3

REASONS FOR GRANTING THE PETITION 4

I. The Panel Decision Contradicts The Standard For Reviewing An Agency's Decision, Which Is A Standard Of Extraordinary Importance. 4

a. The Agency must have a "well-articulated basis" for its decision. 4

b. Enforcing the established standard of review of agencies' decision is of the utmost importance as it affects dozens of cases as well as guards the sanctity of the separation of powers. 10

II. The Panel's Decision Conflicts with Courts' in this Circuit, and Other Circuit Courts', Established Law Regarding Section 302 11

III. The Majority Overlooked Key Factual Issues Necessary to Determine Whether Schedule A Was Incorporated into the CBA. 14

CONCLUSION 15

FORM 11. CERTIFICATE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

Cases

Alvares v. Erickson,
514 F.2d 156 (9th Cir. 1975) 13

Andrzejewski v. FAA,
563 F.3d 796 (9th Cir. 2009) 6

Anja Engineering Corp. v. NLRB,
685 F.2d 292 (9th Cir. 1982) 6

Bricklayers, Masons and Plasterers Intern. Union of America, Local Union No. 15, Orlando, Florida v. Stuart Plastering Co., Inc.,
512 F.2d 1017 (5th Cir. 1975) 12

Carter v. CMTA-Molders & Allied Workers Health & Welfare Trust,
563 F. Supp. 244 (N.D.Cal. 1983).....12

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019).....9

Glendale Assocs., Ltd v. NLRB,
347 F.3d 1145 (9th Cir. 2003) 4

Healthcare Employees Union, Local 399, Affiliated With Serv. Employees Int'l Union, AFL-CIO v. N.L.R.B.,
463 F.3d 909 (9th Cir. 2006) 5

Hotel Employees & Restaurant Employees Union, Local No. 5, AFL-CIO v. Council of Hawaii Hotels,
889 F.2d 1095 (9th Cir. 1999) (unpublished opinion).....12, 13

Lee Lumber & Bldg. Material Corp. v. NLRB,
117 F.3d 1454 (D.C. Cir. 1997).....10

Local Joint Exec. Bd. v. NLRB,
309 F.3d 578 (9th Cir.2002) 4, 14

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Merrimen v. Paul F. Rost Elec., Inc.,
861 F.2d 135 (6th Cir.1988) 12

Moglia v. Geoghegan,
403 F.2d 110 (2nd Cir. 1968) 11

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....10

NLRB v. Reeces Rubber Co.,
153 F.2d 340 (9th Cir. 1946) 10

Or. Teamster Emp'rs Trust v. Hillsboro Garbage Disposal, Inc.,
800 F.3d 1151 (9th Cir. 2015) 11

Paddock v. Dave Christensen, Inc.,
745 F.2d 1254 (9th Cir. 1984) 12, 13, 14

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941).....6

Plaza Auto Ctr., Inc. v. NLRB,
664 F.3d 286 (9th Cir. 2011) 4, 7, 8

R.V. Cloud Co., Inc. v. W. Conference of Teamsters Pension Trust Fund,
566 F. Supp. 1426 (N.D. Cal. 1983).....12

SEC v. Chenery Corp.,
332 U.S. 194 (1947).....9

Servette, Inc. v. N. L. R. B.,
313 F.2d 66 (9th Cir. 1963) 14

Thurber v. W. Conference of Teamsters Pension Plan,
542 F.2d 1106 (9th Cir. 1976) 11, 13

TABLE OF AUTHORITIES
(CONTINUED)

PAGE

Todd Pac. Shipyards Corp. v. Dir., Office of Workers Comp. Programs,
914 F.2d 1317 (9th Cir. 1990) 5

Trustees of S. Cal. Int'l Bhd. of Elec. Workers-Nat. Elec. Contractors Ass'n Pension Plan v. DC Assocs., Inc., 381 F. App'x 650 (9th Cir. 2010) 12

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951).....7, 15

Statutes

29 U.S.C. § 186(a) 11

Administrative Practices Act, 5 U.S.C. § 557 (c).....6

National Labor Relations Act § 302(c).....*passim*

Pension Protection Act.....10

Other Authorities

9th Cir. R. 36-3(c).....12

Fed. R. App. 40(a).....2, 14

INTRODUCTION AND RULE 35(a) and (b) & RULE 40 (a) STATEMENT

Petitioner Delta Sandblasting Company, Inc. ("Delta") hereby seeks rehearing by the panel and/or by this Court *en banc*, as to the denial of Delta's petition for review of the decision of the National Labor Relations Board ("NLRB"), on the following grounds of extraordinary importance:

1. The majority — over the Judge Bumatay's dissent — violated the well-established rule that a court should only uphold an agency's action when there is substantial evidence articulated by the agency itself. The majority's failure to conduct the requisite review and hold the Board accountable for providing substantial evidence in support of its holding is a dereliction of the Court's duty and conflicts with well-established law. There is no evidence in the record, let alone substantial evidence, on which the Board could rely to conclude that Schedule A was made part of the collective bargaining agreement ("CBA") as required by § 302(c) of the National Labor Relations Act, as amended ("§302(c)(5)"). The majority should have denied the Board's order, or at the least, remanded the case for the Board to attempt to provide the requisite explanation for its holding.

2. The majority's duty to conduct the requisite review is critical to ensure the necessary check and balance of the Executive Branch. As the dissent points out, it is not this Court's duty to scour the record and apportion probative weight to the competing evidence. That is exactly what the majority did, crossing over to attempt

to remedy the NLRB's unfulfilled duties. The majority condoned the Board's failure and encroached beyond the Court's constitutional limitations.

3. *En banc* review is also necessary because the majority's decision conflicts with precedent cases. The majority, and the Board, improperly rely on the fact that Delta erroneously contributed to the fund at the improper higher rate. Section 302 does not provide exceptions to the written agreement requirement. Allowing the majority's decision to stand will have significant ramifications for thousands of companies by encouraging unlawful union conduct and unlawful fund contributions.

4. Finally, the majority overlooked numerous material matters of fact that, had they been considered, would have brought about a different result. Fed. R. App. 40(a). Such facts include: (1) the parties did not discuss pension rates during the last negotiations; (2) Schedule A was kept, and produced, as a document separate from the last CBA; (3) Union representative, Santana, admitted that the only issue in the last CBA was wages; and (4) Company representative asked Santana to initial the new Schedule A but did not do so himself. The majority also overlooked critical credibility issues, such as the fact that no adverse inferences were drawn from a failure to call a critical witness.

For each of the foregoing reasons, the panel majority erred by enforcing the Board's order. Due to the extraordinary importance of the issues at stake, and the issues created by the majority's opinion that is contrary to well-established law

regarding the standard of review of an agency's decision, a panel rehearing and/or rehearing *en banc* is necessary.

BACKGROUND INFORMATION

This case came before the Court on a Petition for Review filed by Delta seeking review of the Board's Decision and Order, and the Board's Application for Enforcement of the same matter. It arises out of an unfair labor practice charge filed by the International Union of Painters (the "Union") alleging Delta violated Sections 8(a)(1) and (5) of the Act by unilaterally decreasing the amount of its pension fund contributions. Delta sought review of the Board's order on the ground it obligated Delta to pay increased contribution rates in violation of Section 302 because there was no detailed, written agreement obligating Delta to pay the increased rate.

The panel erroneously held that substantial evidence supported the Board's decision regarding Schedule A (a rate sheet). The dissenting opinion did not accept the Board's conclusion because the Board failed to provide a reasoned explanation for its departure from the ALJ's findings. The dissent argued that the ALJ did not find that the Schedule A was incorporated into the contract and, thus, the Board owed a more thorough explanation as to why it disagreed with the ALJ's express findings. The dissent pointed out flaws in the evidence relied on by the majority and the Board and disapproved of the majority's attempt to balance the evidence in violation of the "well-established [rule] that an agency's action must be upheld, if at all, on the basis

of articulated by the agency itself." (Dissent at 32.) (citations omitted).

REASONS FOR GRANTING THE PETITION

I. The Panel Decision Contradicts The Standard For Reviewing An Agency's Decision, Which Is A Standard Of Extraordinary Importance.

a. The Agency must have a "well-articulated basis" for its decision.

In his dissent, Judge Bumatay correctly observed that the Board "owes a reasoned explanation" for its findings . . . ." (Dissent at 24.) A Board's order can only be upheld if its findings are supported by "substantial evidence." *Glendale Assocs., Ltd v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003). The Court's review must be more rigorous where the Board's findings are contrary to those of the ALJ. *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011). Delta demonstrated there is no evidence in the record, let alone substantial evidence, on which the Board could rely to conclude that Delta agreed to Schedule A. The majority's opinion demonstrates this by attempting to do what the NLRB should have done to establish substantial evidence. This violates the "well-established [rule] that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Local Joint Exec. Bd. v. NLRB*, 309 F.3d 578, 583 (9th Cir.2002) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

The Board disagreed with the ALJ's conclusion that Schedule A was not incorporated into the CBA. But, the Board completely failed to articulate how the "clear preponderance" of all the evidence showed the ALJ was wrong. Contrary to

a reasoned explanation, the Board resorted to one footnote. (Dkt: 28-1, Page 37, ER 35.) This Court has roundly criticized the Board for such "reasoning" explicitly stating the Board's meager summary of a few selective facts is not a reasoned explanation and "offers little insight into this otherwise fact-intensive case." *Healthcare Employees Union, Local 399, Affiliated With Serv. Employees Int'l Union, AFL-CIO v. N.L.R.B.*, 463 F.3d 909, 923-24 (9th Cir. 2006), citing *NLRB v. Special Mine Services, Inc.*, 11 F.3d 88, 89-90 (7th Cir. 1993) (bemoaning the "depressing pattern" of Board disposing of "hard" issues in cryptic footnotes, without any analysis or reasons for its decision). The Board's "explanation" in this case clearly does not meet the requisite standard as substantial evidence means "more than a mere scintilla." *Todd Pac. Shipyards Corp. v. Dir., Office of Workers Comp. Programs*, 914 F.2d 1317, 1320 (9th Cir. 1990).

In the cryptic footnote, the Board concluded that Schedule A was incorporated into the contract based on selective evidence, including testimony from Santana, a witness the ALJ discredited.[1] Likewise, the Board failed to recognize, let alone seek an explanation regarding, conflicting testimony from Santana where he said he inserted Wage Schedule A into the contract but also stated that he believed it "could be" interested into the contract. (Dkt: 28-1, Page 37, ER 35.) As the dissent points

[1] The Board relied on testimony from Santana regarding his insertion of the Wage Schedule A into the contract despite the ALJ's explicit discredit of other aspects of Santana's testimony.

out, the Board should have "rais[ed] this as a red flag" and not rely on the "possibility" that Schedule A was a *stand-alone document* that *could be* inserted into the contract. (Dissent at 29.) The Board also failed even to acknowledge the Company's representative, Sanders Jr.'s, direct, and credited, testimony that Schedule A was not incorporated into the CBA. *Anja Engineering Corp. v. NLRB*, 685 F.2d 292, 295 n.8 (9th Cir. 1982).[2] The Board's lack of "substantial evidence" and "reasoned explanation" left large gaps in its decision, as sampled above, and failed to satisfy this Court's duty to ensure substantial evidence supports the Board's conclusions.[3]

The Supreme Court has repeatedly made clear that the Board has a duty to articulate the basis of their decisions and, when they do not, their decisions must be reversed and the cases remanded. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). An agency must discuss all of the evidence on an issue, including conflicting evidence and inferences. This is the essence of "substantial evidence in the record as a whole." An agency may not come to a conclusion by reviewing the evidence that only supports its view and ignoring evidence that is contrary. Such approach does not comply with the Administrative Practices Act, 5 U.S.C. § 557 (c) ("APA").

---

[2] *cf. Andrzejewski v. FAA*, 563 F.3d 796, 799 (9th Cir. 2009) ("Where an ALJ chooses to credit one set of witnesses' version of events over another, he has made an implicit credibility determination to which the NTSB must defer 'in the absence of any arbitrariness, capriciousness or other compelling reasons.'")

[3] The majority unknowingly points out additional gaps in the evidence in footnote 11 when it states that there is no explanation in the record of why Delta's mistaken believe of paying into the fund did not also lead Sanders to sign Schedule A. We could argue it is because the payments were made by Delta's secretary, not Sanders; but, we do not want to speculate on facts not in the record. (Opinion at 13.)

Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951). The Supreme Court stated this the law:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice.

Id. at 487-88.

In this case, for instance, the Union's Administrative Assistant, an employee of the Union and a relative of the Union business agent, was not called to testify.[4] The ALJ, and the Board, refused to address the implication of the Assistant's absence from trial. Neither the ALJ, nor the Board, can ignore "inconvenient" evidence.

When, as here, the Board draws inferences and conclusions from factual and credibility findings that are different from the ALJ's, this Court is to engage in a more searching review of the record. *Plaza Auto Ctr., Inc.*, 664 F.3d at 291. The majority, however, took a diametrically opposed approach. The majority recognized that the ALJ "did not rule on whether Delta's pensions contributions . . . violated

[4] The Union's Administrative Assistant would have been a logical witness given that the General Counsel contends its version of Schedule A was included in the Collective Bargaining Agreement, but the Union's absent Administrative Assistant "forgot" to renumber the pages. (Dkt: 28-2, Page 253, ER 298.) The Union's Administrative Assistant would have known whether she merely "forgot" to renumber the pages of the Schedule A, which would bolster the General Counsel's position that that the Schedule A was intended to be included in the Collective Bargaining Agreement. No reason was given as to why the Union's Administrative Assistant was not called to testify. Under the circumstances, it was entirely appropriate for the Administrative Law Judge to draw an adverse inference.

Section 302's 'written agreement' requirement", and that "[i]n contrast to the ALJ, the Board considered and rejected Delta's defense that payment of pension contributions according to Schedule was unlawful pursuant to Section 302." (Opinion at 9.) Yet, the majority failed to hold the Board accountable for providing substantial evidence and well-articulated reasons in support of its holding. The majority admits that the ALJ "did not even mention, let alone make any findings concerning, Schedule A's incorporation into the contract." In other words, the majority held that the ALJ begged the key question in the case. That being so, it is not possible to hold that the Board relied on "substantial" and credible evidence, as determined by the ALJ's observation of the witnesses' and assessment of the documentary evidence. This conflicts with well-established law and this Court's "substantial evidence" standard. *Plaza Auto Ctr.*, 664 F.3d at 291.

Instead of explaining why it agreed with the Board's conclusions, the majority attempts to make the Board's case for it by relying on facts and inferences not relied on by the Board. This condones the Board's failure to fulfill its responsibilities and goes beyond the Court's constitutional role with respect to an administrative agency. The Board relied on only four perplexing "facts" to come to its conclusion.[5] It is not

[5] (1) Santana's testimony that the "inserted" the 2014 Schedule A into the contract; (2) Sanders Sr. executed it afterwards Santana interested into the contract; (3) Ms. Sanders testimony that she was "familiar" with the 2014 Schedule A and identified it as a "rate sheet"; and (4) 2014 Schedule A was a "standalone" document that "could be" inserted into the contract. (Dkt: 37, Pages 31-32, 46-47, and 65; SER 29-30; 44-45; 47; 65; Dkt: 28-1, Page 37, ER 35.)

this Court's function to supply a theory that the Board was unable to articulate. Yet, the panel majority did just that. It inappropriately relied on additional facts, such as Santana's testimony that Sanders Sr. told him to change the date on Schedule A and an email from Ms. Sanders referring to a new contract with a "new rate". (Opinion at 12 – 13.) The majority makes improper factual conclusions by implying the ALJ credited Santana's testimony that he inserted Schedule A into the CBA and that Sanders Sr. agreed to Schedule A at a December 2014 meeting. However, the ALJ did not credit such testimony – indeed, the ALJ did not even acknowledge this testimony. (Opinion at 12.) (Dkt: 28-1, Pages 3-17, ER 01 – 15.) The Court, as it has done here, "may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As recently emphasized by the Supreme Court, "[the court] cannot ignore [a] disconnect between the decision made and the explanation given. Our review is deferential, but we are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quotation marks and citations omitted).

b. Enforcing the established standard of review of agencies' decision is of the utmost importance as it affects dozens of cases as well as guards the sanctity of the separation of powers.[6]

As the dissent points out, it is "the *Board's* duty, not ours, to scour the record and apportion probative weight to the competing evidence." (Dissent at 31.) (Emphasis in original). *NLRB v. Reeces Rubber Co.*, 153 F.2d 340 (9th Cir. 1946). Here, the majority inappropriately engaged in the balancing act of weighing the evidence to conclude whether or not Schedule A was incorporated into the CBA. But, the majority engaged in mere speculation since the trier of fact did not, as the majority admits, engage in the balancing of evidence itself. As the Supreme Court stated, "the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Congress imposed a responsibility on courts for assuring that agencies keep within reasonable grounds. To avoid a determination that it has acted arbitrarily, "the Board . . . must provide a logical explanation for what it has done." *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1460 (D.C. Cir. 1997). Such standard is particularly important given the Board, unlike other major federal administrative

[6] The majority incidentally mentioned a point raised by Delta concerning the conflicting purposes, and requirements, of two federal laws – the Pension Protection Act and Section 302(c)(5). The Pension Protection Act requires pension funds to impose plan payment schedules where an employer and union do not adopt them voluntarily. However, Section 302 prohibits payment to a pension fund without a written agreement between a union and an employer. This statutory conflict is also of the utmost importance to companies and one the majority did not address.

agencies, promulgates most of its legal rules through adjudication rather than formal rulemaking. Consequently, the focus of the Board's decreed result is the rationality of its decision making process, meaning "it is well-established that [the Board's] action must be upheld, if at all, on the basis articulated by the agency itself." Indeed, the APA and the Taft-Hartley Act direct courts to assume more responsibility for the reasonableness of Board decisions. The majority abandoned that responsibility here. The majority's failure to hold the Board to the requisite standard will spread and manipulate the power given to agencies and, ultimately, conflate the judicial branch's duty to check and balance the executive's power. For these reasons, the Court should deny enforcement or rehear this matter.

II. The Panel's Decision Conflicts with Courts' in this Circuit, and Other Circuit Courts', Established Law Regarding Section 302.

Similar conflicts are created by the majority's treatment of Section 302. Section 302 was enacted to prohibit employee representatives from engaging in extortion against employers. 29 U.S.C. § 186(a). *Or. Teamster Emp'rs Trust v. Hillsboro Garbage Disposal, Inc.*, 800 F.3d 1151, 1157 (9th Cir. 2015). Section 302(c)(5) does not provide any exceptions to the written agreement requirement. *Thurber v. W. Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1108 (9th Cir. 1976). This Circuit, in *Thurber*, followed the lead decision in *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2nd Cir. 1968), and held that the policy underlying Section 302(c) mandates *rigid adherence* to its provisions. *Id.*

In determining whether there is a valid written agreement, one cannot rely on a party's course of dealing. *R.V. Cloud Co., Inc. v. W. Conference of Teamsters Pension Trust Fund*, 566 F. Supp. 1426, 1429-30 (N.D. Cal. 1983) (employers do not have a contractual obligation to make contributions to a trust fund when there is no valid written agreement, even if there is a past practice of making such payments). *See also Hotel Employees & Restaurant Employees Union, Local No. 5, AFL-CIO v. Council of Hawaii Hotels*, 889 F.2d 1095 (9th Cir. 1999) (unpublished opinion)[7]; *Carter v. CMTA-Molders & Allied Workers Health & Welfare Trust*, 563 F. Supp. 244, 246-47 (N.D.Cal. 1983) (following remand from the Ninth Circuit, the court held that an agreement implied from a course of dealing between the employer and the funds would "obviously not satisfy [§302(c)(5) requirement]").[8] Delta's conduct should not have been considered when determining whether Schedule A was incorporated into the CBA. However, the majority, and the Board, improperly and recurrently relied on this fact.[9] (Opinion at 16, 20.)

---

[7] Unpublished decisions "may be cited to this Court in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." 9th Cir. R. 36-3(c).

[8] *Bricklayers, Masons and Plasterers Intern. Union of America, Local Union No. 15, Orlando, Florida v. Stuart Plastering Co., Inc.*, 512 F.2d 1017 (5th Cir. 1975) (employer making some payments under collective bargaining agreement provision did not bind employer to make further payments to trust fund in absence of compliance with this section); *Merrimen v. Paul F. Rost Elec., Inc.*, 861 F.2d 135, 137 (6th Cir.1988) (rejecting an "adoption by conduct" argument where employer did not sign any document assenting to the labor agreements).

[9] The majority cites *Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254, 1263-64 (9th Cir. 1984) for the assertion that payments did not violation Section 302 where the collective bargaining agreement did not explicitly incorporate trust agreements but the employer's record of pension contributions demonstrated the intent of the parties to be bound by the trust agreements. The majority's reliance is misleading. In *Paddock*, there was a trust agreement between the parties to which the employer was paying pension contributions. Here, there is no trust agreement in the record. Rather, Delta was making the higher pension contributions pursuant to *no existing written agreement.* Moreover, there is no evidence in the record of Delta's "intent" for contributing the higher rates to the pension fund. *See Trustees of S.*

The majority's reliance on this extraneous fact is also in contradiction to the statute itself. Using conduct to justify payments subverts the purpose of Section 302 and render it meaningless. The explicit language of Section 302 provides no exceptions to the written agreement requirement. To the contrary, courts have repeatedly held that there must be a detailed, written agreement to permit payments. *See Thurber*, 542 F.2d at 1108

Indeed, Ninth Circuit case law conflicts with the majority's opinion. *Council of Hawaii Hotels*, 889 F.2d at 1-2* (changes were clearly incorporated into agreement where the union sent a letter stating the modifications and requiring the employer to indicate its agreement by signing the letter, which the employer did). The majority relies on other cases to demonstrate Delta's inflexible reading of Section 302 is wrong. (Opinion at 20.) But, these cases are distinguishable from this matter on a single, but significant, basis – those cases involved collective bargaining agreements *and* trust agreements. *Paddock*, 745 F.2d at 1263-64; *Alvares v. Erickson*, 514 F.2d 156, 161 (9th Cir. 1975). There is no such "trust agreement" in the record here. In fact, *Paddock* held if a CBA contains a "clear reference" to a trust agreement that details the basis on which payments are to be made, the demands

---

Cal. Int'l Bhd. of Elec. Workers-Nat. Elec. Contractors Ass'n Pension Plan v. DC Assocs., Inc., 381 F. App'x 650 (9th Cir. 2010) (Employer's conduct in submitting certified payroll reports for public works projects that listed base wage rates that were consistent with agreement regarding work performed by members of union locals for two counties did not establish an intention to be bound to that agreement for work performed in another county, given employer's statement that the reports were submitted only to demonstrate compliance with California's wage requirements).

of Section 302 are met. *Id.* at 1263-66.

The panel majority's decision has significant ramifications for thousands of companies. The effect of this decision will encourage unlawful union conduct and support unlawful pension fund contributions.[10]

III. The Majority Overlooked Key Factual Issues Necessary to Determine Whether Schedule A Was Incorporated into the CBA.

There are material facts that the majority overlooked, and which, had it been given consideration, would probably have brought about a different result. Fed. R. App. 40(a). *See Local Joint Exec. Bd.*, 309 F.3d at 583. *See also Servette, Inc. v. N. L. R. B.*, 313 F.2d 66 (9th Cir. 1963). Instead, the majority inappropriately engaged in the act of reviewing and balancing some of the evidence, but like the Board, failed to consider the record as a whole or the substantial countervailing evidence. For instance, the majority ignores facts that support the point that the parties only renegotiated *certain* terms in 2014, which did not include pension rates. (Dkt: 28-2, Pages 247-248, ER 292-293.) The majority relies on a December 2014 email referring to "new contract" with a "new rate" but evidence illustrates that this email refers to wage rates and not pension rates, such as the fact Delta was paying the same rate ($8.18) since April 2014 and thus there was no rate change for pension payments in December 2014. (Dkt: 37, Page 17, SER 15.) The majority ignores the fact that

[10] Notably, the majority misstates the purpose of Section 302 when it states that there is "no dispute concerning the Pension Fund's structure, management, or conformity" with Section 302. (Opinion at 22.) That is not the issue here – rather, the issue whether a valid written agreement exists obligating Delta to pay higher contribution rates.

Santana admitted the only real issue in the December 2014 agreement was wages, but the majority completely discounts Sanders Jr. testimony that pension rates were not part of that agreement. (Dkt: 28-2, Pages 247-248, 275; ER 292-293; 320.) The majority further relies on Ms. Sanders' identification of Schedule A as a sheet containing pension amounts; but Ms. Sanders did not bargain the contract. Likewise, this reliance on a selective aspect of Ms. Sanders' testimony dismisses the fact she also testified to receiving Schedule A separately from any agreed-upon agreement. The majority also disregarded the fact that Sanders Sr. asked Santana to initial the new Schedule A but did not do so himself. (Dkt: 37, Pages 27-29, SER 25-27.)

When you boil it down, the evidence is clear that Delta did not expressly agree to Schedule A. It is likewise clear that the Board did not meet the requirements of *Universal Camera Corp.*, 340 U.S. at 487-77 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.") These evidentiary flaws illustrate that the Board's decision cannot stand on its own.

CONCLUSION

For the reasons set forth above, Petitioner asks that the Petition for Enforcement be denied and/or its petition for rehearing be granted.

Respectfully submitted,

/s/ Alan S. Levins
ALAN S. LEVINS
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 11. Certificate of Compliance for Petitions for Rehearing or Answers

9th Cir. Case Number(s): 18-73097 and 18-73305.

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[ ] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: _____.**
(Petitions and answers must not exceed 4,200 words)

OR

[X] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature _*/s/ Alan S. Levins*_____ **Date** September 16, 2020____
Alan S. Levins
Littler Mendelson, P.C.

Attorney for Petitioner
DELTA SANDBLASTING COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 16, 2020

/s/ Alan S. Levins
ALAN S. LEVINS
LITTLER MENDELSON, P.C.

Attorneys for Petitioner,
DELTA SANDBLASTING COMPANY, INC.

4838-0684-5898.6 089969.1000