

Nos. 20-1009, 20-1029

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

AMERICAN SECURITY PROGRAMS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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

AMERICAN SECURITY PROGRAMS, INC.)	
)	
)	
Petitioner/Cross-Respondent)	Nos. 20-1009, 20-1029
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	05-CA-211315
)	
Respondent/Cross-Petitioner)	
)	
)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, Amici

American Security Programs, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Union of Patriots Plaza (“the Union”) was the charging party before the Board. The Company and the Board’s General Counsel appeared before the Board in case number 05-CA-211315. There were no intervenors or amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on December 16, 2019, reported at 368 NLRB No. 151.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/ David Habenstreit

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Dated at Washington, DC
this 19th day of November 2020

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GLOSSARY

A.	Joint appendix
Act	National Labor Relations Act
Br.	Company's opening brief
CBA	Collective-bargaining agreement
Company	American Security Programs, Inc.
FPS	Federal Protective Service
NASPSO	National Association of Special Police and Security Officers
SCA	Service Contract Act
Union	Union of Patriots Plaza

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

American Security Programs, Inc. (“the Company”) petitions for review of, and the National Labor Relations Board cross-applies to enforce, a Board Order (368 NLRB No. 151) issued on December 16, 2019. (A. 1-17.)¹

¹ References preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). The Company’s petition and the Board’s cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

The Company unilaterally implemented its last proposal during negotiations for a collective-bargaining agreement. That implementation violated Section 8(a)(5) and (1) of the Act, unless the Company proved, as an affirmative defense, that a valid bargaining impasse existed at the time of implementation. The issue before the Court is whether substantial evidence supports the Board’s finding that the Company failed to prove that defense.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Union of Patriots Plaza (“the Union”) filed charges and, following an investigation, the General Counsel issued a complaint, alleging that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last contract offer in the absence of a valid bargaining impasse. Following a hearing,

the administrative law judge found that the Company violated the Act as alleged. On review, the Board found no merit to the Company's exceptions and adopted the judge's findings and recommended order, as modified.

II. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations and Collective-Bargaining History

The Company provides security services to the federal government at locations throughout the Washington, D.C. area. It contracts with the Federal Protective Service ("the FPS"), a federal agency. (A. 7; A. 122-23, 168-70, 203-04, 212.)

Under the Service Contract Act (41 U.S.C. § 6701 *et seq.*), a contracting employer like the Company must pay its employees no less than the applicable minimum wage and benefits rates established in "wage determination orders" issued by the United States Department of Labor. (A. 7; A. 123-24, 155-57.) A contractor is free, however, to pay higher compensation. (A. 7, 14; A. 124, 155-57, 166.) By default, the FPS will reimburse a contracting employer at the minimum wage-determination rates. If, however, the contractor has a collective-bargaining agreement with higher compensation, then the FPS usually will reimburse the employer at those higher rates. (A. 7; A. 123-25, 155-56, 163-64.)

This case involves the Company's security officers assigned to 395 and 375 E Street S.W., Washington, D.C., also known as Patriots Plaza I and II. In 2011,

the FPS awarded the Company a service contract for those buildings. That contract was scheduled to expire on September 30, 2016. (A. 7; A. 43-45, 126, 203-04, 212, 350.)

Between 2013 and 2016, the security officers at Patriots Plaza I and II were represented by the National Association of Special Police and Security Officers (“NASPSO”). The Company-NASPSO collective-bargaining agreements for each of the two buildings were effective through September 30, 2016. (A. 7-8; A. 46, 127-29, 136, 276-344, 350-58.)

In 2016, bargaining-unit employees dissatisfied with NASPSO decided to form a new labor organization to represent themselves. They formed the Union, which, after prevailing in a Board-certified election, became the security officers’ exclusive representative beginning in September 2016. (A. 8, 13; A. 41-48, 127, 150-51, 203-05, 212-13, 363.)

Also in September 2016, the FPS extended the Company’s service contract for one year, through September 30, 2017. The Company assured the FPS that it would continue paying the employees the same wage and benefit rates under the soon-to-be-expired NASPSO collective-bargaining agreements, which were higher than the minimum wage-determination rates. The FPS agreed to continue reimbursing the Company at the NASPSO rates. (A. 7, 13; A. 130, 139, 171-73, 276-344, 350-58.)

B. The Parties Bargain Noneconomic Terms in Person and Reach Tentative Agreement on All of Them

In May 2017, the Company and the Union began negotiations for a first collective-bargaining agreement. (A. 8; A. 49-51, 130-31, 484-86.) Mark Phinney, the Company’s vice president of government operations, and an experienced bargaining representative, was the Company’s lead negotiator. (A. 8, 12 n.40; A. 122-23, 130, 203-05, 212-14, 484-86.) The Union’s president, Rondell Cropper, and its shop steward, David Harris, led negotiations on behalf of the Union. Cropper and Harris—like all of the Union’s officers and negotiators—were bargaining-unit security officers with no prior experience serving as union leaders or engaging in collective bargaining. (A. 8 & n.8, 13; A. 41-50, 57, 89, 113-14, 130, 484-86.) When bargaining commenced, the employees were being paid the hourly rates under the expired NASPSO agreement, as follows:

<u>Patriots Plaza I:</u>		<u>Patriots Plaza II:</u>	
Wage:	\$25.34	Wage:	\$21.48
Health & Welfare:	\$5.00	Health & Welfare:	\$3.81
Pension:	\$1.11	Pension:	\$0.45

(A. 7-8; A. 151-52, 276-79, 284, 304-12, 317, 337-44, 350-58.)

Prior to the first bargaining session, Phinney told Cropper that the security officers were “facing wage determination” and that he wanted to have a collective-bargaining agreement by September 19. (A. 8 n.12; A. 53, 87-88.) On several subsequent occasions, Phinney mentioned this and other purported wage-

determination or bargaining deadlines. The Union, however, never agreed to complete or to cease bargaining by a particular date. (A. 13-15; A. 74-75, 87-88, 91-93, 100-01, 103-04.)

On May 19, the parties held their first bargaining session at the Company's office. The Company agreed to use the Union's model three-year agreement as a template for negotiations. (A. 8; A. 51-55, 217-46, 484-86.) That model proposed specific annual wage and benefit rates, which reflected increases from the status-quo rates. The parties, however, did not discuss these or any other substantive proposals. (A. 8, 13; A. 51-55, 87-88, 130-31, 242-45.)

The parties met again on May 26, June 30, and August 3 and 18. During these bargaining sessions, they discussed noneconomic provisions and reached agreement on several of them. The Company also agreed to the Union's initially proposed health-and-welfare rate. (A. 8 & n.10; A. 57-66, 130-31, 242-45, 247-75, 364-67, 484-86.) On August 21, Harris sent Phinney a collective-bargaining agreement for a comparable building to show the market rates and support the Union's initial economic proposal. (A. 8; A. 60, 72-73, 368-407.)

On August 31, the FPS awarded the Company a new service contract, scheduled to commence on December 1, for Patriots Plaza I and II as well as several additional buildings. (A. 7; A. 126-27, 408-12.) Later that day, Phinney emailed Cropper a document that referenced the new FPS service contract. (A. 8;

A. 125, 133-34, 163-64, 408-12.) Phinney stated that the attachment showed that Patriots Plaza I and II “are at . . . Wage Determination.” He also mentioned the parties’ collective bargaining and asserted that, “from the above attachment[,] we are running out of time,” but he made no specific economic proposal. (A. 8-9, 13; A. 133-34, 408.)

On September 1, the parties held their last in-person bargaining session. By the end of the meeting, the Company and the Union had agreed upon all contract terms other than wage and pension rates. The Company still had not made an initial proposal concerning those rates. (A. 8 & n.10, 9, 13; A. 59-71, 114, 135, 217-75, 413-14, 484-86.) At the end of the session, Phinney stated that the parties no longer needed to meet and could instead communicate by email. (A. 9, 13; A. 67.)

C. The Parties Negotiate Economics by Email with Each Side Proposing Increased Compensation; the Government Extends the Company’s Service Contract Through March 2018

On September 8, the Company emailed the Union its first economic proposal. (A. 9, 13; A. 135-36, 413-14.) The Company offered annual wage increases, though they were substantially smaller than those in the Union’s initial proposal. (A. 9; A. 413-14.) As to the health-and-welfare benefit, although the Company had previously agreed to the Union’s proposed increase, it now proposed

lesser increases at Patriots Plaza II and maintaining the status-quo rate at Patriots Plaza I. It also offered modest increases to pension rates. (A. 8-9; A. 413-14.)

On September 11, the Union counteroffered, lowering the wage rates from its initial proposal for each contract year. (A. 9; A. 75-77, 415-16.) In emailing the Union's offer, Harris stated: "if we need to get a mediator involved to resolve these wage issues please let us know asap." (A. 9; A. 415-16.) The Union had consulted with a mediator and understood that mediation would mean resuming in-person bargaining with the Company and a mediator. (A. 9 & n.18, 15; A. 76-90, 94-100, 108-10, 120.)

Phinney emailed a counterproposal later the same day, increasing the Company's wage offer. (A. 9; A. 80, 417-18.) He did not respond to the Union's suggestion that the parties engage a mediator. (A. 9; A. 80-81, 417-18.)

On September 12, the Union sent another counterproposal. Although it increased the proposed wage rates from its prior proposal by between 13 and 47 cents, these newly proposed rates were still lower than the rates in the Union's initial proposal. (A. 8-9; A. 81-84, 242-45, 419-21.) Harris explained in the email that the Union's revised proposal was based on a comparison of the wages paid to security officers at nearby buildings. He attached a chart listing 11 locations and showing an average wage of \$29.94 as of October 2016. Harris offered to supply the Company with copies of the collective-bargaining agreements referenced in the

Union's chart. (A. 9; A. 81-84, 137-38, 419-21.) He also noted that bargaining-unit employees had not received any wage increase in recent years. Finally, Harris stated that if the Union and the Company could not "resolve these minor wage issues and come to some type of agreement on [their] own," the Union did not object to "seeking the help of a federal mediator." (A. 9 & n.20; A. 82-83, 419.)

Phinney replied later that day. He stated that the Company was "trying to bring [Patriots Plaza II] up as fast as [it could]." Phinney also said that he would look at the Union's information, but again did not comment on the Union's suggestion to engage a mediator. (A. 9; A. 84, 87, 422.)

On September 13, Harris replied, stating: "Since we have come to a stalemate as far as wages are concerned, and you do not want to meet us halfway. I ask you once again; Mr. Phinney do you need [the Union] to contact a federal mediator provided through The Department of Labor to step in and help us resolve this minor issue we are having with you concerning wages?" (A. 9-10; A. 84-87, 423.)

On September 14, the Company made a new counterproposal. It raised each of the proposed annual wage increases from its prior offer. Phinney asserted in the email that this was the Company's "best and final offer." Once again, he did not acknowledge the Union's mediation proposal. (A. 10; A. 424-25.) On September 16, Phinney followed up, stating: "Please remember we have to have a CBA by

September 19 in order [to] get the CBA to FPS for them to recognize it.” (A. 10; A. 426.)

On September 19, Harris replied. He disputed Phinney’s claim that the Company’s September 14 proposal was its “best and final” offer. (A. 10; A. 88-91, 427.) Harris additionally complained that the Company had not tried “to meet [the Union] halfway,” and had “disregard[ed],” without explanation, the information that the Union had provided comparing security-officer wages at nearby buildings. (A. 10; A. 427.) Harris also remarked: “So I guess at this moment we are at a[n] impasse.” (A. 10; A. 88-91, 427.)

Phinney responded a few hours later and made another proposal. He revised the Company’s September 14 “best and final” offer by proposing to further increase the first-year wage at Patriots Plaza I to \$26.10, to grant the previously offered first-year wage increase at Patriots Plaza II to \$23.20, and to renegotiate wages and benefits in one year. (A. 10; A. 91-92, 141-42, 424-25, 428.) Phinney stated that “if we don’t sign a CBA by [close of business] today,” the Company would not be able to timely present new rates to the FPS and would cut employees’ compensation “to wage determination.” (A. 10; A. 163-64, 428.) The Union did not respond to the Company’s September 19 proposal. (A. 10; A. 91-92, 428-29.)

Around the same time as that proposal, the Company and the FPS had been discussing a six-month extension of the 2011 service contract, which was

scheduled to expire at the end of the month. (A. 7, 10; A. 173-84, 345-48, 350-61.)

On September 26, the Company assured the FPS in writing that, during the extension, it would continue paying the security officers at the status-quo compensation rates. Specifically, the Company affirmed that it would “honor the economic terms (wages and fringe benefits to include [health and welfare], pension, . . . etc.)” of the most recent expired NASPSO collective-bargaining agreements “for the entire duration” of the “Six Month Extension period starting 10/1/2017.” (A. 7, 10; A. 359.) Later that day, the FPS granted the Company’s request, extending the 2011 service contract through March 31, 2018. The contract modification provided that, during the “six month extension,” Patriots Plaza I and II “will remain covered” under the rates set forth in the NASPSO agreements, which were “incorporated into” the extended service contract. The FPS thus agreed to continue reimbursing the Company at the status-quo rates through March 31, 2018. (A. 7, 10-11 & n.30, n.34, 14 & n.41, 15; A. 142, 159-60, 173-84, 345-48, 359.)

D. Email Negotiations Continue; the Company Claims that the Government Will Reduce Reimbursement Rates on December 1, 2017 if Deadlines Are Not Met; the Company Makes a Regressive Offer Proposing Economic Cuts and New Noneconomic Terms, Then Unilaterally Implements that Offer

The Company never informed the Union of its September 26 agreement with the FPS to continue status-quo compensation and reimbursement through March

31, 2018. Instead, on multiple occasions in October and November, the Company affirmatively misrepresented to the Union that if a collective-bargaining agreement was not reached by certain deadlines, then the FPS would reduce reimbursement rates on December 1, 2017—and that the Company would correspondingly reduce compensation rates based on the purportedly anticipated FPS reduction. (A. 10 n.28, 11-14; A. 429, 431-83.)

On October 21, Phinney emailed the Union, claiming that Patriots Plaza I and II “will go to SCA wage determination as of 12.1.2017 if we don’t have a CBA in place as of 10.31.2017.” He invited the Union negotiators to contact him if they “want[ed] to proceed.” (A. 11; A. 92-93, 429.) Phinney did not explain why the deadline had purportedly moved from September 19 to October 31. (A. 11; A. 92-93, 429.)

On October 23, Cropper responded, suggesting an alternative approach. Unlike the Union’s prior offers of escalating wage rates over three years, Cropper proposed a flat wage rate that would “not escalate” over the agreement’s term. The proposal was more expensive than the Union’s two prior wage offers, although still less expensive than its initial proposal. Cropper advised that the Union would “love to have the CBA ratified by” October 31, and that it “hope[d] to come to a prompt resolution.” (A. 11; A. 92-94, 430.)

The Company did not reply until November 15, when Phinney emailed the Union. (A. 11; A. 100-01, 431-33.) Without explaining what happened to the supposed October 31 deadline, Phinney now claimed that the Company had “heard from [the] FPS,” and that “they have stated that if we do not reach an agreement by” November 17, then Patriots Plaza I and II “will revert to wage determination” on December 1. (A. 11; A. 100-01, 431-33.) Phinney did not directly acknowledge the Union’s October 23 proposal, although he stated that, “[a]t this time,” the Company and the Union were “too far from an agreement on wages to establish a CBA.” He proposed that, by November 17, just two days later, the parties enter into a memorandum of understanding that would not address noneconomic terms but would maintain the status quo as to wages and benefits “as [the parties] continue to work on resolving the wage issue.” (A. 11; A. 431-33.)

The Union did not respond to Phinney’s November 15 email by November 17. (A. 11; A. 100-03, 431-34.) On that date, Phinney emailed the Union a new bargaining proposal, which he called the Company’s “revised Last, Best and Final offer.” (A. 11-12; A. 103, 434-57.) This offer dramatically changed the Company’s bargaining position. For the first time, the Company proposed *cutting* employees’ wages, health-and-welfare, and pension benefits. Specifically, it proposed reducing those rates to \$20.57, \$4.27, and \$0.00, respectively, for all unit employees—rates equal to the wage-determination minimums established by the

Department of Labor. This proposal represented a 18.8% and 4.2% wage cut for Patriots Plaza I and II, respectively, compared to the Company's November 15 status-quo proposal; and it was 21.2% and 11.3% lower than the wages offered in the Company's next most recent proposal—which, like all of its prior proposals, had offered to *increase* status-quo wages. (A. 12-14; A. 102-03, 107-08, 146, 155-57, 434-57.) The Company's "revised Last, Best and Final offer" also set forth new proposals on a number of additional topics upon which the parties had previously agreed—including temporary employees, gear-up and gear-down time, paid breaks, jury duty, firearms licensing and qualification, holidays, building closures, and full-time employee status. (A. 8 & n.10, 9, 12, 14-15; A. 60-71, 103-07, 114, 247-75, 434-57.)

Phinney gave no explanation for the Company's sudden and dramatic change in bargaining position. He stated that the new proposal "shall be rescinded" at 5:00 p.m. on November 20—less than 72 hours later. Phinney did not explain that deadline, or why the purported November 17 deadline had moved, other than claiming that the "FPS has reiterated" that "unless they receive a signed agreement by" that time on November 20, employees' compensation rates "would be at wage determination" as of December 1. (A. 12, 14; A. 103-08, 434-57.)

In a telephone conversation later on November 17, Cropper told Phinney that the Union did not agree to the Company's latest proposal. Cropper again

urged the Company to agree to bargain with the assistance of a mediator.

Phinney's only reply was that he just wanted to confirm that Cropper had received his email. (A. 12 & n.37; A. 108, 483.)

On November 20, Phinney re-sent the Company's November 17 offer. On November 28, the Company unilaterally implemented the terms of that offer. In its email announcing the implementation, the Company referenced the November 20 deadline it had previously set. It stated that it would inform the unit employees of "this change to wage determination." The terms of the Company's November 17 offer, including the proposed reductions in employees' wage and benefit rates, went into effect on December 1. (A. 1 n.2, 12-13; A. 108, 147-48, 153-55, 212-14, 434-86.)

On December 3, Cropper emailed Phinney, objecting to the Company's unilateral action. He also requested, once again, that the parties engage a mediator to help them resolve their contract dispute. (A. 12; A. 108-10, 483.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Ring and Members McFerran and Kaplan) issued its Decision and Order finding, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its last offer in the absence of a valid bargaining impasse. The Board's Order directs the Company to cease and desist from the violation found. Affirmatively, the Order

requires the Company, among other things, to rescind the unilateral changes; make employees whole for any losses suffered as a result of the Company's unlawful action; notify and, on request, bargain with the Union before implementing any further changes in employees' terms and conditions of employment; and post a remedial notice.

SUMMARY OF ARGUMENT

The issue is whether the parties were at a valid bargaining impasse when the Company unilaterally implemented its last contract offer on November 28, 2017. Substantial evidence supports the Board's determination that the Company—which bore the evidentiary burden—failed to prove impasse under the established multifactor analysis.

First, the parties' relationship was nascent. The Union was newly created and certified, and the parties were negotiating an initial contract.

Additionally, the record does not support the Company's claim that it consistently demonstrated good faith and a desire to reach an agreement. The Company professed the desire to conclude an agreement on economic terms by a series of tight, ever-changing deadlines. Although it could only reasonably expect to do so if it sped negotiations up, the Company instead slowed them down—initiating a change to email-only bargaining. When the Union suggested an alternative approach that might have re-accelerated negotiations—in-person bargaining with a mediator's assistance—the Company repeatedly ignored the Union's suggestions without providing any explanation. It also failed to explain to the Union why the purported deadlines kept shifting. And it tied the last three deadlines to a false claim that the government would reduce the reimbursement rates it paid to the Company on December 1, 2017, if the deadlines were not met.

In reality, the government had agreed to continue paying status-quo reimbursement rates through March 31, 2018.

Moreover, the length of the negotiations was insufficient to exhaust the prospects of agreement. Most notably, negotiations were severely limited with respect to the economic issues—the primary topics upon which the Company premised the purported impasse. The Company did not make its first economic proposal until September 8. And the parties never negotiated in person over economic issues—rather, such negotiations were confined entirely to emails. Further, the Company acted on an artificial deadline when it unilaterally implemented changes and made them effective December 1. It specifically based that action on the claim that the government would reduce reimbursement rates on December 1 because a collective-bargaining agreement was not reached by November 20. Even if that were so, that would not establish that a valid bargaining impasse existed at the time. And in any event, the government had agreed to continue status-quo reimbursements for four additional months beyond December 1.

Furthermore, the Company's last contract offer was radically different from its prior proposals. With respect to vitally important wage and benefit rates, the Company had previously proposed increases but now sought dramatic cuts. It also injected new noneconomic proposals into the negotiations. Notwithstanding its

regressive sea change in bargaining position, the Company implemented the offer without ever meeting with the Union, or even explaining or substantively discussing the changed terms.

Finally, the parties did not understand at the time of implementation that further discussions would be fruitless. The Company's last offer was the latest in a series of proclamations claiming other "final" offers and other purportedly fixed deadlines. And the Union had consistently conveyed flexibility on the economic issues, including through its repeated suggestions for mediation. Further, the parties had never even discussed the newly introduced noneconomic proposals.

STANDARD OF REVIEW

This Court's review of Board decisions is "narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73, 80 (D.C. Cir. 2015) (quotation marks omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence on the record as a whole. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). This Court will not reverse the Board for lack of substantial evidence unless it determines that the record is "so compelling that no reasonable factfinder could fail to find to the contrary." *Id.* (quotation marks omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING ITS LAST BARGAINING PROPOSAL IN THE ABSENCE OF A VALID IMPASSE

It is undisputed that the Company unilaterally implemented its last bargaining proposal—and thereby changed unit employees’ terms and conditions of employment, including wages and benefits—on November 28, 2017. The Company could not lawfully take that action unless it could prove that a valid bargaining impasse existed at the time. Ample evidence supports the Board’s finding that the Company failed to meet that burden and that its unilateral implementation was therefore unlawful.

A. Applicable Principles

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5).² An employer violates Section 8(a)(5) by unilaterally changing union-represented employees’ terms and conditions of employment when bargaining is not at impasse. *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 198 (1991).

² An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). *NLRB v. Ingredion Inc.*, 930 F.3d 509, 513 (D.C. Cir. 2019); *see also* 29 U.S.C. § 158(a)(1).

Impasse is an affirmative defense, with the burden of proof resting on the party asserting it. *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1089 (D.C. Cir. 2012); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011). Genuine impasse exists only when “good-faith negotiations have exhausted the prospects of concluding an agreement,” and there is “no realistic possibility that continuation of discussion would be fruitful.” *Monmouth*, 672 F.3d at 1088 (quotation marks, brackets, and ellipses omitted); *accord Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991). “Futility” must be shown; not mere “frustration, discouragement, or apparent gamesmanship.” *Daycon Prod. Co.*, 357 NLRB 1071, 1081 (2011) (quotation marks omitted), *enforced*, 494 F. App’x 97 (D.C. Cir. 2012). There can be no impasse unless “both parties” in good faith believe “that they are at the end of their rope.” *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 444 (D.C. Cir. 2017) (quotation marks omitted); *accord Teamsters Local 639*, 924 F.2d at 1084. Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole. *Wayneview*, 664 F.3d at 349-50.

Determining the presence or absence of a valid impasse is a “highly fact-dependent” inquiry. *Monmouth*, 672 F.3d at 1092-93. The Board considers a variety of factors, including “[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues

as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Id.* at 1088-89 (quoting *Taft Broad. Co.*, 163 NLRB 475 (1967), *affirmed sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)). There is no requirement, however, that any one of these factors, or any particular number of them, support the Board’s impasse determination. *Teamsters Local 639*, 924 F.2d at 1083-84 (noting factors do not form “fixed” test and cannot be applied “mechanically,” holding evidence regarding length of negotiations and union’s contemporaneous understanding was, “on its own, sufficient to justify the Board’s finding of no impasse”).

Even if negotiations do reach impasse, it is only a “temporary” state, which “in almost all cases is eventually broken.” *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (quotation marks omitted). “Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse.” *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983); *accord Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996). Once an impasse is broken, the duty to bargain revives. Thus, an employer’s unilateral change in employment terms is unlawful if there is no valid impasse at the time of the change—regardless of whether an impasse may have existed at some earlier time. *Hotel Bel-Air*, 358 NLRB 1527, 1527, 1533

(2012), *adopted by* 361 NLRB 898 (2014), *enforced*, 637 F. App'x 4 (D.C. Cir. 2016).

The Court's review is "particularly" limited regarding the Board's findings about whether an impasse existed. *Monmouth*, 672 F.3d at 1089. It "ordinarily defers" to such findings, not only because they concern a question of fact, *id.* (quotation marks omitted), but also because of the Board's "accumulated expertise in the area." *Teamsters Local 639*, 924 F.2d at 1083. Indeed, the Court has consistently observed that, "in the whole complex of industrial relations," few issues are "*less* suited to appellate judicial appraisal" than the evaluation of a bargaining impasse, or "*better* suited to the expert experience of a board which deals constantly with such problems." *Monmouth*, 672 F.3d at 1089 (quotation marks omitted) (emphasis added).

B. The Company Failed to Establish that a Valid Bargaining Impasse Existed on November 28

The Board applied the traditional *Taft* factors and found that, under the totality of the circumstances, the Company failed to prove its affirmative defense that a valid bargaining impasse existed when it unilaterally implemented its last contract proposal on November 28, 2017. (A. 1 & n.2, 12-15.) Substantial evidence supports that Board finding, as demonstrated below.

There is no merit to Company's contrary contentions, which ignore that it had the burden of establishing an impasse and disregard the Board's recognized

expertise in resolving this factual question. Additionally, although the Company acknowledges the *Taft* factors (Br. 31), it fails to apply them, and it offers no analysis purporting to demonstrate why the Board, in balancing those factors, reached an impermissible conclusion under the totality of the circumstances.

1. Bargaining history: the parties were negotiating an initial contract

Parties negotiating a first contract are “presented with special problems” not implicated in more established bargaining relationships. *Ingredion, Inc.*, 366 NLRB No. 74, slip op. at 29 (May 1, 2018), *enforced*, 930 F.3d 509 (D.C. Cir. 2019). Accordingly, the Board affords such parties “the fullest opportunity” to effect an initial agreement, and recognizes that their lack of bargaining history “militat[es] against jumping to any conclusions that difficulties in bargaining signal the existence of a true impasse.” *Stein Indus., Inc.*, 365 NLRB No. 31, slip op. at 4 & n.9 (Feb. 10, 2017) (quotation marks omitted).

Here, when negotiations began in May 2017, the Company and the Union were embarking on their first attempt to bargain a contract together. (A. 13.) Further, the parties had “no” relationship prior to September 2016, when the Union—which had only just been created—was selected as the security officers’ representative. (A. 13.) “The result was that the parties’ negotiators had no experience or familiarity with one another and no feel for one another’s approach to the bargaining process.” *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 596

(1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). Thus, ample evidence supports the Board’s determination that “the lack of a bargaining history between the parties” weighs against impasse. (A. 13, 15.) *Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 196 (4th Cir. 2000).

Moreover, in its opening brief to the Court, the Company does not challenge that determination. For this additional reason, the Court should affirm it. *See New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012) (summarily affirming uncontested findings).

2. The record undermines the Company’s claim of consistent good faith

As the Board determined, the Company’s assertion that it consistently demonstrated good faith and a desire to reach an agreement is only “partially correct.” (A. 13.) Thus, as the Board acknowledged, the record indicates that the Company bargained with a good-faith desire to reach agreement when negotiating over noneconomic matters through the September 1 bargaining session. (A. 13.) But the record undermines the Company’s claim that it continued on that course during the remainder of bargaining—the period most proximate to the Company’s unilateral implementation. (A. 13-15.) *Cf. Carey Salt Co. v. NLRB*, 736 F.3d 405, 416-17 (5th Cir. 2013) (employer’s conduct “fell short of good faith during the

week leading up to” implementation, notwithstanding its “good-faith efforts throughout most of [the] negotiation[s]”).

a. The Company decelerated bargaining, ignored mediation requests, failed to explain shifting deadlines, and misrepresented anticipated FPS action

To begin, the Board observed (A. 12-15) that the Company’s conduct appeared to contradict its “professed” desire to “achiev[e] a deal on the economic issues prior to any of the shifting deadlines” that it communicated to the Union. (A. 12-13 & n. 40.) *See NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 485-88 (1960) (good-faith bargaining “presupposes” sincere desire to reach agreement). Thus, as the Board found, the Company had “no reason to believe” on September 1—when the parties reached tentative agreement on all noneconomic provisions—that the negotiations over wages and benefits “would be accomplished quickly or by a certain date” unless the Company “accelerated” bargaining. (A. 13.) After all, the Company was engaged in first-contract negotiations with “a newly created labor organization operated entirely by unit employees.” (A. 8 & n.8, 13.) And the Company had not yet provided any counteroffer to the Union’s initial economic proposal. (A. 13-14.)

In these circumstances, the Company claimed that it wanted to reach agreement on economics—the “most important” and likely “most difficult” negotiations—by September 19. Yet the Company chose to “*decelerate*[.]” the

bargaining process starting on September 1 rather than accelerate it. (A. 13-14 (emphasis added).) Specifically, it decided “to forgo [additional] in-person meetings,” asserting that they were unnecessary, “and, instead, [to] bargain with the inexperienced Union representatives by email.” (A. 13.) As the Board found, “[u]nder the circumstances,” the Company’s decision was “a recipe for failure.” (A. 13.) The Company then waited an additional week, until September 8, to email its initial economic proposal. (A. 13-14.) And it continued bargaining over the economic terms exclusively by email through its September 19 and later deadlines. (A. 13.)

Further, after the Company thus decelerated negotiations, it “repeatedly ignored [the Union’s] requests for mediation,” an alternative bargaining method that might have sped up resolution of the parties’ dispute. (A. 12-14 & n.40.) Thus, the Union—“[c]ognizant of the Company’s expressed desire to wrap up negotiations” by tight deadlines—suggested on September 11, 12, and 13, and again on November 17, “that the parties seek the assistance of a mediator.” (A. 12-14.) But the Company repeatedly failed to acknowledge the Union’s suggestions, or to offer “even the briefest of explanations” for why it would not try this more expeditious avenue. (A. 12-14 & n.40.)

Moreover, as the Board additionally found, the Company’s announcements of those “short, ever-changing deadlines” for executing a collective-bargaining

agreement further undermine its assertion of consistent good faith. This is particularly true with respect to its three announcements after September: its October 21 claim of an October 31 deadline; November 15 claim of a November 17 deadline; and November 17 claim of a November 20 deadline. (A. 11-14 & n.30, n.34, n.41.) To begin, the Company failed to adequately explain to the Union why these purported deadlines kept changing—even after the Company blew past the October 31 deadline by failing to respond to the Union’s October 23 proposal until November 15; and even as the Company paired its November 15 and November 17 declarations with significant new proposals, including its dramatically regressive last offer. (A. 11-14.) Good-faith bargaining demands “that parties justify positions taken by reasoned discussions.” *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969), *enforced sub nom. Amalgamated Clothing Workers of Am. v. NLRB*, 432 F.2d 1341, 1343 (D.C. Cir. 1970). Thus, a party’s failure to sufficiently explain its bargaining positions may undercut its claim of consistent good faith—particularly where, as here, the positions involve regressive reductions or other significant changes. *NLRB v. Hardesty Co.*, 308 F.3d 859, 866 (8th Cir. 2002), *enforcing Mid-Continent Concrete*, 336 NLRB 258, 260 (2001); *Ingredion*, 366 NLRB No. 74, slip op. at 24-26, 29.

Furthermore, as the Board also found, the Company specifically tied each of its three shifting post-September deadlines to a patently false assertion—namely,

that if the deadline was not met, then the FPS would reduce reimbursement rates to the wage-determination minimums on December 1, 2017. (A. 10-15 & n.30, n.34, n.41; A. 429, 431, 434.) As the Company well knew (A. 11 n.30), those assertions were simply “not true” because the FPS had “extended the Company’s contract until March 31, 2018” and “agreed to [continue] reimburs[ing] the Company at the expired CBA wage and benefit rates through [that date].” (A. 14-15.) “Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.” *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); accord *United Steelworkers of Am. v. NLRB*, 390 F.2d 846, 850-52 (D.C. Cir. 1967). The Company’s repeated contravention of that basic requirement strongly supports the Board’s finding that the record only “partially” substantiates the Company’s assertion of good faith throughout bargaining. (A. 13.) *See, e.g., NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598, 600 (8th Cir. 1999) (employer’s “misrepresentations” showed lack of good faith).

b. The Company’s challenges are unavailing

Before the Court, the Company raises several contentions, none of which has merit. First, the Company is plainly wrong in asserting that “the Board found that [the Company] bargained *at all times* in good faith.” (Br. 32 (emphasis added).) As explained, the Board found that the evidence undermines the Company’s claim of consistent good faith. Moreover, the Board properly observed that it is

“inconsequential” that the General Counsel’s complaint did not allege a lack of good-faith bargaining as a separate violation distinct from the Company’s unilateral change in the absence of a valid impasse. (A. 13.) That observation (A. 13) fully accords with the Board’s finding that under the multi-factor analysis for evaluating the Company’s impasse defense, the record does not substantiate the Company’s claim that it consistently exhibited good faith. (A. 13-15.) *See NLRB v. Katz*, 369 U.S. 736, 742-43, 747-48 (1962) (unilateral change absent impasse may violate Section 8(a)(5) “without also finding the employer guilty of overall subjective bad faith”); *Cf. Teamsters Local 639*, 924 F.2d at 1084 (upholding no-impasse determination, declining to reach bad-faith finding); *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 2, 20 (Oct. 11, 2017) (conduct evaluated under good-faith factor supported no-impasse determination although complaint did not allege conduct as unlawful nor allege bad-faith bargaining violation), *enforced*, 770 F. App’x 1 (D.C. Cir. 2019).

The Company erroneously contends that, although it admittedly “propos[ed]” the change from in-person to email-only bargaining and thereafter bargained exclusively by email, the Board could not reasonably interpret that conduct as undercutting its purported good-faith desire to reach an agreement. (Br. 40-42.) The Company does not dispute (Br. 40-42) the Board’s finding that this significant change in bargaining procedure predictably, and actually, “decelerated”

the negotiations. (A. 13.) It simply contends that its conduct in initiating and adhering to the change is immaterial because the Union “did not oppose” it. (Br. 40-42.) But it was the Company, not the Union, that repeatedly urged the need to rush to conclude an agreement by impending deadlines. Thus, its admitted conduct, which greatly reduced the likelihood of meeting those deadlines, undermines the Company’s professed good-faith desire to do so. Additionally, there is no support for the Company’s suggestion that it proposed the change in “an effort to accommodate” the Union negotiators by eliminating their need to travel. (Br. 40-41.) Phinney did not testify as to why he proposed the change, and there is no evidence that the Union negotiators ever experienced or expressed any difficulties in traveling to the Company’s office.

For similar reasons, there is no merit to the Company’s arguments regarding its resolute silence in the face of the Union’s repeated mediation requests. First, the Board faulted the Company not because it never agreed to the Union’s requests (Br. 27), but because it “repeatedly ignored” them “without even the briefest of explanations.” (A. 12 n.40.) The Company counters that because a “request for mediation is a ‘permissive’ subject of bargaining,” the Company had a “legal right to ignore” the requests. (Br. 37-39.) But context is everything. Here, the Board properly relied on the Company’s steadfast and totally unexplained refusals even to acknowledge the Union’s mediation requests *in the context of* the Company’s

insistence on pressing deadlines and its deceleration of the bargaining process. (A. 12-14 & n.40.) In context, those refusals suggest that the Company was not exhibiting the “spirit of sincerity and cooperation” that good-faith bargaining demands. *NLRB v. W. Coast Casket Co.*, 469 F.2d 871, 875 (9th Cir. 1972); *see also NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 410 (1952) (the “statutory standard [of] ‘good faith’ can have meaning only in its application to the particular facts of a particular case”).

Additionally, there is plainly no support for the Company’s claims that the Union “insisted on mediation as a prerequisite” for further bargaining, or “stated an unwillingness” to make additional wage proposals “unless [the Company] agreed to [mediation].” (Br. 27, 38-40.) The Union repeatedly suggested mediation, but never insisted or made it a “prerequisite.” To the contrary, it continued to bargain—including making new wage proposals—although the Company ignored its suggestions. And, in any event, the Company’s claims in this regard are not properly before the Court, because it never raised them before the Board. *See* 29 U.S.C. § 160(e), as discussed at pp. 54-55, *infra*.

There likewise is no merit to the Company’s contentions concerning its statements and omissions with respect to the FPS contracting process and the purported bargaining deadlines. The Company appears to concede (Br. 19-20, 25, 45, 48-50), as the Board found and the record shows, that on September 26, 2017,

the FPS extended its 2011 service contract for six months and agreed to continue reimbursing the Company at the status-quo rates through March 31, 2018. The Company also admits (Br. 28, 45-50) that it never informed the Union of this extension, and did not explain to the Union why the purported bargaining deadlines kept shifting after September. It defends this obviously less-than-forthcoming behavior by asserting that the affirmative representations it made to the Union were nevertheless “accurate[.]” and/or by faulting the Union for “accept[ing]” its representations “at face value” rather than scrutinizing them to test the Company’s good faith. (Br. 45-50.) Boiled down, the argument is that the Union should have sussed out the Company’s deception.

The Company completely ignores its repeated affirmative misrepresentations to the Union. Most starkly, it overlooks that it continually misrepresented the purported consequence of its three asserted post-September deadlines—falsely claiming that the FPS would cut reimbursement rates on December 1, 2017, if the deadlines were not satisfied. The Company erroneously suggests that these post-September claims were supported by the “new” FPS service contract that the Company was awarded in August 2017, which was scheduled to include an initial “contract year covering December 1, 2017 to November 30, 2018.” (Br. 25-26, 46-50.) As discussed, the Company admits that in September 2017, *after* that new service contract was awarded, the FPS extended the 2011 service contract and

committed to continuing status-quo reimbursements through March 2018. Thus, the “new” service contract is irrelevant and does not validate the Company’s post-September misrepresentations.

Moreover, the Company also affirmatively misrepresented at least October 31 and November 17 as external deadlines fixed by the FPS or by the government-contracting process. The Company’s brief writes the November 17 deadline out of the facts (Br. 48), and, with respect to the October 31 deadline, it erroneously claims that Phinney merely “stated his belief” that the parties needed to have a deal by that date so that they could “draft, finalize and submit” an agreement to the FPS “before the definite November 20 deadline.” (Br. 46-47.) In his communication with the Union, Phinney presented October 31 as a hard, external cutoff for finalizing a contract—not as a suggested goal that the Company believed prudent for reaching an agreement in principle. (Br. 46-47.)

Additionally, contrary to the Company, it further misled (Br. 50) the Union by its omissions and failures to explain concerning the FPS extension and shifting bargaining deadlines. Thus, the Company disregards that it specifically tied those alleged deadlines to the FPS contracting process and repeatedly portrayed that process as critically important to the parties’ collective bargaining—*both before and after* the FPS granted the six-month extension that the Company never

revealed to the Union. Further, the Company ignores that it coupled some of its unexplained, shifting deadlines with significant new bargaining proposals.

3. The length of negotiations was insufficient to exhaust the prospects of agreement

Substantial evidence also supports the Board’s finding that the length of the parties’ bargaining militates against impasse, as it shows that they had not “exhaust[ed] all avenues” of reaching agreement. (A. 13-14.) As a general rule, “the more meetings the parties have held, the better the likelihood” of establishing a genuine impasse. *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1012 & n.2 (5th Cir. 1990). And, as the Board here noted (A. 13), the number of meetings addressing the specific topic or topics upon which the alleged impasse is premised may be particularly significant. *Teamsters Local 639*, 924 F.2d at 1081-83; *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1052-53 (7th Cir. 1998).

a. The parties held relatively few meetings and negotiated economics purely by correspondence; the Company acted on an artificial deadline

Here, as the Board found, the length of bargaining was “remarkably short.” (A. 13-14.) The parties met just six times between May 19 and September 1, with the first meeting “essentially a meet and greet” where no substantive proposals were discussed. (A. 13.) *See Monmouth*, 672 F.3d at 1090-91 (seven sessions constituted “relatively short bargaining timeline” and supported no impasse);

Hendrickson, 365 NLRB No. 139, slip op. at 7 n.4, 22 (six sessions insufficient to support impasse).

Moreover, the negotiations concerning wages and benefits—the primary topics upon which the Company founded the purported impasse—were severely limited. (A. 13-14.) Although the Union submitted an initial written economic proposal (without any discussion) at the May 19 meeting, the Company’s first economic proposal came on September 8—more than 3.5 months later. (A. 9, 13-14.) Furthermore, the parties did not hold a single bargaining session addressing wages or benefits. (A. 13-14.) The Company’s first economic proposal, and all of the parties’ subsequent counterproposals, were conveyed exclusively by email. (A. 13.) Thus, the parties “did not even meet in person to bargain over economic terms at any time” before the Company’s unilateral action. (A. 13.) *Cf. Teamsters Local 639*, 924 F.2d at 1081-83 (wages bargained only during single all-day meeting where several counterproposals exchanged with mediator’s assistance); *U.S. Testing Co.*, 324 NLRB 854, 860-61 (1997) (initial economic proposals exchanged at fourth of six meetings, and economics negotiated in detail only at fifth and sixth meetings), *enforced*, 160 F.3d 14 (D.C. Cir. 1998).

The Board reasonably accorded (A. 13) only limited weight to the parties’ email exchanges in evaluating whether they truly had “fully explore[d]” the issues and “exhausted the possibilities” of reaching agreement such that additional efforts

would have been fruitless. *Teamsters Local 639*, 924 F.2d at 1083 (quotation marks omitted). As the Board has long held, “[i]t is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table.” *Fountain Lodge, Inc.*, 269 NLRB 674, 674 (1984) (quoting *United States Cold Storage Co.*, 96 NLRB 1108 (1951), *enforced*, 203 F.2d 924 (5th Cir. 1953)); *accord Chemung Contracting Corp.*, 291 NLRB 773, 784 (1988). It is for this very reason that the Act imposes the duty to bargain in person if requested, rather than, for example, by written correspondence. *Fountain Lodge*, 269 NLRB at 674; *Chemung*, 291 NLRB at 784. Accordingly, the Board properly determined (A. 13) that the unusual circumstances here—in which the negotiations concerning critically important economic issues were confined to written correspondence, without the salutary effects of face-to-face discussions—weigh against a finding of impasse. *See Hendrickson*, 365 NLRB No. 139, slip op. at 7 n.4, 22 (parties’ “correspondence and exchange of proposals without any discussion or meeting” did not constitute bargaining sessions and were not counted toward negotiations’ length for impasse analysis).

Additionally, as the Board further found, the record shows that the Company impermissibly “curtail[ed] bargaining” and unilaterally implemented its last offer “based on an artificial deadline.” (A. 13-14.) Impasse is not shown where the evidence indicates that an employer was determined to implement unilateral

changes by a particular date “regardless of the state of negotiations”—such action is based on an “artificial deadline” rather than a valid bargaining deadlock.

Newcor Bay City, 345 NLRB 1229, 1238-40 (2005), *enforced*, 219 F. App’x 390 (6th Cir. 2007); *accord Mike-Sell’s Potato Chip Co. v. NLRB*, 807 F.3d 318, 322 n.2 (D.C. Cir. 2015) (making unilateral changes upon expiration of labor contract “irrespective of the state of negotiations” would be “obvious” violation) (quotation marks omitted); *Grinnell*, 328 NLRB at 598.

Here, as discussed, the Company unilaterally implemented its November 17 contract proposal and made its terms effective on December 1. The Company specifically based that unilateral action, and its timing, on the non-execution of a collective-bargaining agreement by November 20—a deadline that the Company falsely claimed was necessary because the FPS would reduce reimbursement rates on December 1 if the deadline was not met. (*See* pp. 11-15, 28-29, 32-34.) (*See also* A. 142-48.) To the contrary, the Company and the FPS had committed to status-quo compensation and reimbursement through March 2018—a full four months beyond December 1. Thus, ample evidence supports the Board’s finding that the Company acted on an artificial deadline. (A. 14.)

Moreover, as the Board also found, the Company’s deadline would still be artificial for purposes of unilateral implementation even if it were tied to a true FPS threat to reduce reimbursement rates on December 1. (A. 14.) As Phinney

readily admitted (A. 124, 155-57, 166), and the Board observed, the Company was “free,” under the Service Contract Act, to pay unit employees at rates higher than those that the FPS paid to the Company. (A. 14.) *See Mgmt. Training Corp.*, 317 NLRB 1355, 1356-58 (1995).

Even more significantly, the fact that the Company contracted with the government pursuant to the Service Contract Act did not negate or diminish its obligations under the National Labor Relations Act—including its obligation to refrain from implementing unilateral changes in compensation and other employment terms in the absence of a valid bargaining impasse. (A. 14.) *Mgmt. Training*, 317 NLRB at 1356-58; *Williams Servs., Inc.*, 302 NLRB 492, 502-03 (1991); *Dynaelectron Corp.*, 286 NLRB 302, 302-05 (1987). And an employer contravenes that statutory obligation by proceeding to unilateral implementation based on a predetermined deadline irrespective of the state of negotiations—even if the deadline is linked to a genuine wish to avoid or alleviate undesirable financial circumstances. *See Mike-Sell’s*, 807 F.3d at 320, 322 & n.2, 325 (employer under “financial squeeze” that had “los[t] almost \$5.5 million over four years” could not impose unilateral cuts upon expiration of labor contract “without regard” to bargaining’s status, because contract expiration “does not have bargaining significance”); *Newcor*, 345 NLRB at 1238-40 & n.18; *cf. Williams*, 302 NLRB at 502-03 (employer violated bargaining obligation by unilaterally “reduc[ing] the

rate of pay for [unit employees] to conform to the reduced amount the [employer] was being reimbursed” by the government). Thus, even if the FPS would have cut reimbursement rates on December 1, that would not itself be relevant to impasse, and the Company’s unilateral action would still be impermissibly founded on an artificial deadline. (A. 14.)

b. The Company cannot show that the negotiations were lengthy enough to exhaust avenues to agreement

The Company’s arguments concerning the length of negotiations are meritless. It contends that the parties engaged in “an extensive bargaining effort” from May to November that consisted of “19 negotiation-related interactions” consisting of the email exchanges and the six meetings. (Br. 28, 42-43.) To start, this contention ignores that the parties did not negotiate economics at any of the meetings, and that the Company did not make its first economic proposal until September 8. Moreover, there is no support for the Company’s suggestion that the Board was compelled to give each “negotiation-related” email the same weight as an in-person bargaining session. (Br. 43.) The Board did not “ignore” (Br. 28, 42) the emails but appropriately decided to accord them only limited weight for purposes of the impasse analysis, given their inherent lesser effectiveness, as compared to face-to-face discussions, in realizing productive collective bargaining. Additionally, the Company’s citation (Br. 41) to *Appel Corporation* is inapposite. 308 NLRB 425 (1992). That case addresses issues concerning the location where

in-person bargaining should take place—not the substitution of written correspondence for such face-to-face bargaining. *Id.* at 425-26.

The Company also challenges the Board’s finding that it acted on an artificial deadline, primarily contending that November 20, 2017, carried genuine significance. (Br. 25-26, 47-49.) Specifically, it appears to contend that pursuant to its “arrangement” with the FPS, once a new collective-bargaining agreement was not submitted by November 20, the FPS would have (in the absence of granting a further extension) reduced reimbursement rates on April 1, 2018. (Br. 25-26, 47-49.) But, as explained above (pp. 28-29, 32-34, 38), even assuming that is correct, it would not justify implementing unilateral changes on November 28, effective on December 1—a full four months before reimbursement rates would have decreased.

Equally irrelevant are the Company’s claims concerning when *after* March 31, 2018 the FPS *next* would have reimbursed the Company at rates higher than the wage-determination minimums *if* “hypothetically” the Company had refrained from making unilateral changes and the parties had reached an agreement in or after December 2017. (Br. 25-25, 49.) Once again, even assuming the Company’s claims are accurate (and it has not supported them), what might have been *after* March 2018 has no bearing on whether a valid bargaining impasse existed on November 28, 2017.

The Company also asserts that, under its “arrangement” with the FPS, the government would continue paying the status-quo reimbursement rates through March 2018 *if* the Company chose to continue paying the employees those same rates, but the Company was not “required” to continue doing so for the full six-month extension period. (Br. 25, 48-49.) This assertion is plainly contradicted by the evidence—most notably, the Company’s written assurance to the FPS that it would continue paying the status-quo rates “for the entire duration” of the six-month extension, and the extension document itself, which provided that the buildings “will remain covered” under those rates during that extension period. (A. 345-48, 359.) (*See also* pp. 10-12.) In any event, regardless of what was “required” by the FPS contract, the Company was required by the Act to maintain the employees’ status-quo employment terms in the absence of a valid bargaining impasse, and it ceased doing so when no such impasse existed—at a time when, as it now admits, the FPS would have continued status-quo reimbursements for four additional months.

4. The importance of the issues and the parties' contemporaneous understanding weigh against impasse

a. The Company rushed to implement unprecedented regressive economic cuts and new noneconomic terms; the parties did not understand that further discussions would be futile

Substantial evidence likewise supports the Board's finding that the importance of the issues—both economic and noneconomic—over which the parties disagreed at the time of implementation militates against an impasse. (A. 13-15.) It is “undisputed” that wage and benefit rates, over which there was disagreement, were of “paramount importance” to the parties. (A. 14.) As the Board observed, given such importance, as well as the reality that the parties were engaged in initial-contract bargaining concerning 18 rates—consisting of wage, health-and-welfare, and pension rates for two locations over three years—these economic negotiations were always likely to be “long and arduous.” (A. 14.) *See Grinnell*, 328 NLRB at 596-97.

In the midst of these negotiations, the Company presented a November 17 offer that veered sharply and suddenly from its prior bargaining positions concerning these “vitaly important” economic terms. (A. 15.) Thus, as the Board explained—although the Company had previously proposed *increasing* employees' wage and benefit rates—its starkly “regressive” November 17 offer abruptly proposed *decreasing* them. (A. 13-14.) This new proposal for “drastic reductions”

in employee compensation was “so different from [the] proposals [previously] on the table that further bargaining was clearly required before impasse could be reached.” *Herman Bros., Inc.*, 307 NLRB 724, 724, 726-27 (1992); *accord Centinela Hosp. Med. Ctr.*, 363 NLRB No. 44, slip op. at 3 (Nov. 24, 2015) (employer’s “eleventh-hour changes” to proposal on “centrally important” issue weighed strongly against impasse); *EIS Brake Parts*, 331 NLRB 1466, 1492-93 (2000).

Yet the Company asserted that its startling, regressive offer would be rescinded in less than 72 hours, and it unilaterally implemented the offer just 11 days after it was made, without meeting with the Union or substantively discussing the offer’s changed terms. (A. 13-14.) “This pell-mell rush to artificial impasse did not create the genuine exhaustion of the bargaining process which would privilege unilateral implementation.” *Herman*, 307 NLRB at 727; *accord U.S. Testing*, 324 NLRB at 861.

Moreover, the Company’s November 17 offer also suddenly introduced several new noneconomic proposals, despite the parties’ prior agreements on those very topics. (A. 12, 14-15.) (*See* pp. 6-7, 14.) The Company “obliterated any chance of a quick [contract] resolution” by adding these significant new proposals on top of its newly proposed economic cuts. (A. 14.) *See NLRB v. WPIX, Inc.*, 906 F.2d 898, 900-02 (2d Cir. 1990) (bargaining effectively “began anew” when

employer made new proposal several months into process that raised significant items “for the first time”) (quotation marks omitted). In these circumstances, rather than take the time and expend the effort necessary to “give the collective-bargaining process a chance,” the Company jumped to “precipitous” unilateral action in the absence of a valid impasse. *Herman*, 307 NLRB at 727; *accord WPIX*, 906 F.2d at 900-02 (many proposals in new offer were “never discussed” before unilateral implementation).

Substantial evidence also supports the Board’s finding that on November 28 the parties “did not have a contemporaneous understanding that further bargaining would be futile.” (A. 14.) First, the Company’s revised “final” offer of November 17, and its accompanying assertion of a November 20 deadline, were merely the latest “in a series of similar [Company] pronouncements”—including those made on September 14 and 19, October 21, and November 15—that conveyed other purportedly final offers and other supposedly hard deadlines. (A. 14.) *See Mike-Sell’s*, 807 F.3d at 324 & n.5 (observing that an employer’s announcement of a “last offer” would “[o]f course . . . not be credible” if the employer had “repeatedly claimed different positions as a ‘last offer’”).

Thus, although the Union did not accept the Company’s prior “final” offers, “the parties [thereafter] continued to exchange proposals,” even after the purported deadlines had come and gone. (A. 14.) These proposals included: the Company’s

September 19 proposal, which offered an additional wage increase; the Union’s October 23 proposal, which suggested the alternative tack of negotiating over a flat wage rate rather than escalating rates; and the Company’s November 15 proposal to continue status-quo economics for ten months “as [the parties] continue to work on resolving the wage issue” (A. 431). (A. 14-15.) Moreover, prior to the Company’s November 17 offer, the Union “consistently conveyed flexibility on the economic issues,” including by repeatedly “suggest[ing] bargaining through mediation.” (A. 15.) *See Grinnell*, 236 F.3d at 194, 199 & n.14 (union’s “suggest[ion] that the parties possibly resort to federal mediation” supported that it “remained open and willing” to compromise); *Powell Elec. Mfg. Co.*, 287 NLRB 969, 969 (1987) (union “clearly intended to continue bargaining and saw room for movement,” as “evidenced by [its] solicitation of [mediator’s] assistance”), *enforced*, 906 F.2d 1007 (5th Cir. 1990).

It was against this backdrop that, on November 17, the Union received yet another supposedly “final” Company offer with yet another shifting deadline. (A. 14-15.) Although the Union rejected this latest Company offer—which diverged radically from the Company’s prior positions, in part by proposing economic cuts—the Union did not withdraw its October 23 economic proposal, which it had never characterized as final, and did not express that it was unwilling to engage in further bargaining or make new economic concessions. (A. 15.) To the contrary,

the Union on November 17 “still sought to bargain” and expressed its “continued flexibility” by, once again, suggesting mediation. (A. 15; A. 96-103, 108-10, 483.) *See Grinnell*, 236 F.3d at 194, 199 & n.14 (union rejected employer’s “final” rate proposal, but “did not say that [it] would not lower [its] proposed [rates],” stated its intention to be flexible, requested additional bargaining, and suggested mediation); *see also Teamsters Local 639*, 924 F.2d at 1081, 1084 (after each party rejected other’s “final” offer, union disagreed with employer’s impasse declaration and subsequently “stated [that it] had more movement to make” without expressing specifics).

Moreover, as discussed, the Company’s November 17 offer “resurrected several noneconomic issues”—making new proposals on topics such as temporary employees, gear-up and gear-down time, paid breaks, jury duty, firearms licensing and qualification, holidays, building closures, and full-time employee status. (A. 15.) “If anything, the piling on of a host of noneconomic issues onto outstanding economic issues at the eleventh hour presented a new platter of options for the parties, negating the notion that further bargaining would have been futile.” (A. 15.) Collective bargaining, after all, “does not take place in isolation,” and “a proposal on one point serves as leverage for positions in other areas.” *Anderson Enter.*, 329 NLRB 760, 770 n.31, 772 (1999) (quotation marks omitted), *enforced*, 2 F. App’x 1 (D.C. Cir. 2001). One “customary avenue of compromise,” in

particular, is “trading economic proposals for noneconomic proposals.” *Teamsters Local Union No. 122*, 334 NLRB 1190, 1254 & n.81 (2001) (quotation marks omitted).

The Board acknowledged that on September 13 and 19, Harris, “an inexperienced unit employee serving as a Union negotiator,” referenced the parties being at “stalemate” or “impasse” on the economic issues. (A. 15.) But it is well established that parties’ use of such words, even if relating to the overall status of negotiations, “does not necessarily imply that future bargaining would be futile.” *PRC Recording Co.*, 280 NLRB 615, 635, 639-40 (1986), *enforced*, 836 F.2d 289, 293 (7th Cir. 1987). And here, the Board reasonably determined that Harris’s comments did not show an understanding that an impasse existed in September. (A. 10 n.22, 15.) First, Harris’s lack of collective-bargaining experience lessens the comments’ significance. (A. 15.) *Colfor, Inc.*, 282 NLRB 1173, 1173-74, 1180-81 (1987) (“untutored” union negotiator’s use of term “impasse” without “legal precision” does not support existence of true impasse), *enforced*, 838 F.2d 164, 168 (6th Cir. 1988). Second, the comments occurred in the context of the Union’s requests to continue bargaining with a mediator. (A. 15.) And third, Harris’s remarks “were followed by subsequent counteroffers and indications of flexibility”—including the Company’s proposals on September 14 and 19 as well as on November 15, and the Union’s proposal on October 23. (A. 10 n.22, 15.)

See id.; *Monmouth*, 672 F.3d at 1091. Accordingly, it was eminently reasonable for the Board to conclude that Harris’s isolated remarks did not establish that a genuine impasse existed at the time they were made. (A. 10 n.22, 12-15.)

Moreover, the ultimate question is whether an impasse existed not in September but at the time of the Company’s unilateral implementation on November 28. And the Board reasonably determined that, even if the parties were at impasse at the time of Harris’s comments, “they broke that impasse by continuing to bargain after that time.” (A. 15.) *See PRC*, 280 NLRB at 635-36, 640. (*See also* cases cited at pp. 22-23.) Indeed, on exceptions before the Board, the Company expressly conceded that it “broke the [purported September impasse] by continuing to negotiate” after Harris’s remarks. (Exceptions Brief p. 25.) (*See also* Exceptions Brief p. 5, Exceptions Reply Brief pp. 2, 5.)³ *Cf. Prime Healthcare Servs.-Encino LLC v. NLRB*, 890 F.3d 286, 295 (D.C. Cir. 2018) (refusing to consider argument employer “abandoned” before Board). *See also* 29 U.S.C. § 160(e), as discussed at pp. 54-55, *infra*.

Accordingly, the record supports that at the time of implementation “neither [party] had a reasonable belief that they were at impasse.” (A. 15.) As the Board also properly found, however—because “both parties must believe that they are at

³ The Company’s Exceptions Brief and Exceptions Reply Brief are not part of the administrative record. The Board has therefore filed, simultaneously with this brief, a motion to lodge them with the Court.

the end of their rope” for an impasse to exist—“the Union’s conduct reflecting *its* belief that further negotiations could be fruitful” was alone “enough to forestall a finding of impasse.” (A. 15 (brackets and quotation marks omitted, emphasis added).) *See Teamsters Local 639*, 924 F.2d at 1084.

b. The Company’s challenges are meritless

The Company raises a number of meritless arguments challenging the Board’s findings concerning the issues over which there was disagreement and the parties’ understanding at the time of implementation. In doing so, the Company fails to fully acknowledge the starkly regressive and eleventh-hour nature of its last offer. For example, the Company states that it “increased its wage offers multiple times between September 1 and November 28,” without mentioning that its November 17 offer—the one that it unilaterally implemented—drastically *decreased* wages as well as benefits. (Br. 34.) Additionally, at various points in its brief (Br. 25, 33-34, 43), the Company asserts that at the time of implementation, “the only unresolved topic of bargaining was wage and benefit levels.” (Br. 25.) That is incorrect because, as explained, the Company’s November 17 offer advanced a number of new noneconomic proposals. Those proposals were never discussed, let alone “resolved,” prior to implementation.

Elsewhere in its brief, the Company recognizes that its last offer introduced new noneconomic proposals but misconstrues the record and disregards its burden

of proof. (Br. 43-44.) For example, there is no evidence to support its characterization of those proposals as “inadvertent.” (Br. 23, 43-44.) No Company witness testified about why the new proposals were introduced, and there is no evidence that the Company ever withdrew them. To the contrary, the Company broadly stipulated that it “implemented” *all* of the “terms” of its final offer, which then “went into effect.” (A. 485.) The Company notes that when Cropper objected to the implementation, he did not expressly reference the changed noneconomic proposals. (Br. 23-24, 43-44.) But that does not establish that he had not noticed them or thought they were unimportant. And although Cropper did not testify as to when he noticed the new noneconomic proposals (Br. 23-24, 43-44), he was not asked that question, and the Company had the evidentiary burden.

Moreover, the Company erroneously downplays the significance of the changed noneconomic proposals. (Br. 43-44.) Both the Company and the Union previously deemed the same topics as sufficiently important to warrant their efforts in hammering out tentative agreements addressing them. There is no support for the Company’s bald claim that the last-minute introduction of these significant new proposals “did not have any bearing on whether an impasse existed” on November 28. (Br. 44.) Additionally, while the Company emphasizes the primacy of the

economic issues (Br. 44), it overlooks the potential for tradeoffs between economic and noneconomic provisions. (A. 15.)

Contrary to the Company’s additional suggestion (Br. 26-27, 34), the Board properly found that the Union consistently conveyed flexibility on economics—including on the two occasions that it increased a prior wage proposal. As the Company acknowledges (Br. 16), the Union explained why its September 12 wage proposal was higher than its immediately prior proposal, supplied the Company with relevant market-wage-comparison information, and offered to provide additional documentation. (*See* pp. 8-9.) It also expressed eagerness to “resolve these minor wage issues” and, for the second (but not the last) time, suggested seeking a mediator’s assistance to do so. (A. 419-21.) The Union likewise conveyed flexibility in its October 23 proposal, when, as the Board noted, Cropper suggested a “change in approach”—bargaining over flat wages rather than annually escalating rates. (A. 11, 15.) *Cf. Stein*, 365 NLRB No. 31, slip op. at 3 (union demonstrated flexibility when, rather than presenting revised proposal, it “attempted to explore a different approach to moving the negotiations forward”). Also, the flat rate was less expensive than the Union’s initial wage proposal. Thus, the proposal evidenced the Union’s ongoing flexibility by suggesting that the parties “tr[y] to do something a little bit creative” (A. 93-94) and explore flat

wages, in an effort to, as the Union told the Company, “come to a prompt resolution.” (A. 430.)

“Rather than explore the possibilities raised” by the Union’s October 23 proposal, the Company failed to respond for more than 3 weeks (blowing past one of its alleged deadlines in the process), then quickly issued two proposals within a span of two days and “rushed to [unilaterally] implement” the second one—its unprecedented, regressive last offer. *Newcor*, 345 NLRB at 1238. Thus, although the Company notes that the parties were “far apart on wages and benefits” at the time of implementation (Br. 34, 44), it ignores that the collective-bargaining process was not given a sufficient chance “to lessen that distance.” *WPIX*, 906 F.2d at 902; *accord Grinnell*, 328 NLRB at 597-98. “It [was] for the parties through earnest, strenuous, tedious, frustrating, and hard bargaining to solve their mutual problem—getting a contract—together, not,” as the Company chose, to prematurely “quit the table and take a separate path.” *Powell*, 287 NLRB at 974; *see also WPIX*, 906 F.2d at 901 (citing *AFTRA*, 395 F.2d at 628); *Local 13, Detroit Newspaper Printing & Graphic Commc’ns Union v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979) (“compromises [in collective bargaining] are usually made cautiously and late in the process”).

* * *

The Board reasonably concluded that the totality of the circumstances—considered in light of the *Taft* factors—does not support the Company’s affirmative defense that a valid impasse existed at the time of unilateral implementation. (A. 15.) Although there was no allegation that the Company engaged in overall bad-faith bargaining, the evidence undermines its claim that it consistently demonstrated good faith and a desire to reach agreement. In addition, “the evidence establishe[s] that the parties bargained an insufficient length of time over the vitally important economic issues and there was no contemporaneous understanding in their new relationship that they were at impasse.” (A. 15.) Before the Court, the Company provides no grounds to disturb the Board’s expert assessment of the relevant circumstances as a whole.

C. The Company’s Remaining Contentions Are Unavailing

There is no merit to the Company’s other contentions, most of which are also jurisdictionally barred because the Company did not raise them before the Board and/or waived because the Company has failed to adequately brief them before the Court. Section 10(e) of the Act provides in relevant part: “No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Courts thus “lack[] jurisdiction

to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313-16 (D.C. Cir. 2015). Moreover, even if a party preserves an argument for judicial review, the Court will refuse to consider it if the party’s opening brief presents the argument in only a cursory or undeveloped fashion. *See New York Rehab.*, 506 F.3d at 1076; *Seattle Opera v. NLRB*, 292 F.3d 757, 763 n.8 (D.C. Cir. 2002).

In its opening brief, the Company identifies “three exceptions to the rule that there must be an overall impasse before an employer may” unilaterally implement a contract proposal: (1) when the union’s conduct frustrated agreement; (2) when one critical issue precluded agreement; and (3) if economic exigencies compelled prompt action. (Br. 32.) The Company then contends that all three exceptions apply here, setting forth just three short sentences (one for each exception) to support that contention. (Br. 33.) This cursory briefing is woefully inadequate to prove those fact-intensive exceptions, and the Company has waived any argument that any exception applies in this case. Moreover, the Company’s claims regarding the first and third exception also are jurisdictionally barred from the Court’s consideration. Before the Board, the Company only mentioned those exceptions as legal principles in its exceptions brief; it never applied them to the facts or even

asserted that either exception was met in this case. (*See* Exceptions Brief pp. 13-14.)

Additionally, the Company contends that the Board’s decision “departs from existing precedent by *sub silentio* establishing a different standard of impasse law for employers who are negotiating with inexperienced [u]nion representatives.” (Br. 28, 51.) This contention is meritless. There is “no fixed definition of an impasse,” *Teamsters Local 639*, 924 F.2d at 1083 (quotation marks omitted), and the inquiry is thus “highly” fact dependent. *Monmouth*, 672 F.3d at 1092-93. Here, the Board did not depart from precedent or establish a new standard. Rather, it properly applied relevant precedent to the facts of this case, which include the union negotiators’ inexperience—one relevant consideration, among many others. It is well established (pp. 24-25) that negotiating an initial contract takes more time and effort and that a union’s newly certified status therefore militates against impasse. As the Board here reasonably recognized, the teachings of that settled precedent carry particular force when the union not only is newly certified, but also is newly created and run exclusively by unit employees with no prior collective-bargaining experience. The Company may have preferred to deal with “experienced professional negotiators” (Br. 28), but it was bound to deal with the representative that its employees chose.

Finally, contrary to the Company’s claims (Br. 32, 50-51), this case is nothing like *Phillips 66*, 369 NLRB No. 13 (Jan. 31, 2020). Among other stark contrasts, in that case: the evidence showed that the employer consistently acted in good faith; the parties held 11 in-person bargaining sessions, which “quickly focused” on the key subjects of disagreement; the employer “took the necessary time” to explain its positions and to understand and respond to the union’s positions; there were no shifting or artificial deadlines; and the employer presented only one “final” offer, which consistently “tracked its fundamental positions throughout negotiations.” *Id.*, slip op at. 2-9. Additionally, to the extent that the Company suggests (Br. 32, 50-51) that *Phillips 66* modified the legal standard for proving impasse, it is mistaken. The Company cites (Br. 51) language from *Phillips 66* concerning changed circumstances, which addressed whether an already-established valid bargaining impasse had been broken. Here, the Board reasonably determined that the Company failed to prove a valid impasse ever existed. And it reasonably found, in the alternative, that even if an impasse existed in September, circumstances had, indeed, sufficiently changed to break that impasse prior to unilateral implementation—a point that, as explained, the Company conceded below.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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November 2020

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

AMERICAN SECURITY PROGRAMS, INC.)	
)	
)	
Petitioner/Cross-Respondent)	Nos. 20-1009, 20-1029
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	05-CA-211315
)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 12,693 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365.

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Dated at Washington, DC
this 19th day of November 2020

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding 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 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. . . . 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 Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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 court a written petition praying that the order of the Board be modified or set aside. . . . 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 . . . 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.

