Nos. 20-1319 & 20-1328

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDT CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLIATION 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

WENDT CORPORATION	)	
	)	Nos. 20-1319
Petitioner/Cross-Respondent	)	20-1328
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	03-CA-212225, et al.
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Petitioner/Cross-Respondent Wendt Corportation was the Respondent before the Board in the proceeding below (Board Case Nos. 03-CA-212225, et al.). The Board's General Counsel was a party before the Board. Shopmen's Local Union No. 576 was the Charging Party before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Wendt Corporation on July 29, 2020, and reported at 369 NLRB No. 135.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit
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Dated at Washington, DC
this 16th day of February 2021

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GLOSSARY

Act	National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Wendt Corporation
D&O	Decision and Order
Exh.	Exhibit
GC	General Counsel
Tr.	Transcript from the underlying unfair-labor-practice hearing (Board Case Nos. 03-CA-212225, et al.)
Union	Shopmen's Local Union No. 576
Wendt	Petitioner/Cross-Respondent Wendt Corporation

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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

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Wendt Corporation to review, and the cross-application of the National Labor Relations Board to enforce, a Board Decision and Order issued against Wendt on July 29, 2020, and reported at 369 NLRB No. 135. (D&O1-35.)[1]

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[1] Record references are to the Board's Decision and Order ("D&O"), the hearing transcript ("Tr."), and the exhibits ("Exh.") from the hearing. References

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction and venue is proper under Section 10(f) of the Act, 29 U.S.C. § 160(f), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

Wendt's petition for review and the Board's cross-application for enforcement were timely. The Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portions of its Order corresponding to numerous uncontested unfair-labor-practice findings.

2. Whether substantial evidence supports the Board's findings that Wendt violated Section 8(a)(5) and (1) of the Act by unilaterally removing bargaining-unit work and implementing a temporary group-layoff.

3. Whether substantial evidence supports the Board's findings that Wendt violated Section 8(a)(3) and (1) of the Act by assigning a prominent union supporter to low-skill saw work upon his recall from layoff, and denying his overtime requests.

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preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Wendt's opening brief.

4. Whether substantial evidence supports the Board's finding that Wendt violated Section 8(a)(1) of the Act by compelling an employee to participate in a disciplinary interview without a requested union representative.

5. Whether the Court should summarily affirm the Board's findings that Wendt violated Section 8(a)(3), (5), and (1) of the Act by discriminatorily delaying employee evaluations and accompanying wage increases, and refusing to bargain over those matters, and uphold the corresponding remedies.

STATUTORY ADDENDUM

Pertinent statutes and rules are included in the Addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Wendt's Production and Maintenance Employees Select the Union as their Collective-Bargaining Representative; the Parties Begin Bargaining

Wendt designs and manufactures equipment for the scrap metal recycling industry. It operates a manufacturing facility in Cheektowaga, New York, where about 33 employees work in the production shop and warehouse. On June 23, 2017, following an election, the Board certified the Union as the employees' exclusive collective-bargaining representative. (D&O1,13;Tr.25-26,28,JointExh.1,GCExhs.1(aa)¶2,2,WendtExh.6.)

Wendt and the Union began bargaining the next month. They met over 35 times without reaching an agreement or overall impasse. The events detailed below occurred during the 2017-18 negotiations. (D&O1;Tr.26-28.)

B. Wendt Creates New Supervisory Positions, Promotes Three Employees, and Unilaterally Removes Their Work from the Unit; Wendt Foresees a Slowdown in Shop Work; Plant Manager Voigt Interrogates an Employee and Threatens To Discharge Union Supporters

Before the Union's certification, one or two foremen had supervised all shop employees. In August, Wendt decided to create new "shop supervisor" positions. It redesignated its existing foreman, Kenneth Schiedel, as a shop supervisor and re-defined his areas of oversight. It also promoted three bargaining-unit employees (Donald Fess, Americo Garcia, and Daniel Norway) to join Schiedel as shop supervisors with their own newly created areas of authority. (D&O6,7n.24,26-27;Tr.214-15,461-65,479-82,487-90,608,634,1158-65,GCExhs.26,30,45.)

Wendt did not hire employees to fill the vacated unit positions, nor did it redistribute that work to the remaining unit employees. Instead, Wendt required Fess, Garcia, and Norway to continue doing some of their unit work as supervisors, and it distributed the rest of the work they previously performed to temporary employees and contractors. Wendt did not bargain with the Union over these work-reallocations. (D&O6-7,27;Tr.84-89,360,534,700,1286-87,1522-23,1633-34,GCExhs.27-30.)

Meanwhile, around Labor Day, Wendt noticed a slowdown in incoming work orders. Managers discussed the issue among themselves, but did not mention it or any possibility of layoffs to the Union in bargaining. (D&O6;Tr.1199-1203.)

Around this time, Plant Manager Voigt asked employee Dale Thompson, a union supporter, if he would change his mind about the Union if there was a re-vote. Thompson said he feared Voigt would fire some of his coworkers if he changed his vote. Voigt replied, "[t]here's a lot of bad employees here, and I'd like to get rid of them in the shop." (D&O1n.4,13;Tr.29-30,345-47,GCExh.3.)

C. Wendt Summons Employee Fricano for Questioning About a Workplace Incident; It Refuses His Request for a Union Representative and Conducts a Disciplinary Interview

On October 23, 2017, employee John Fricano and others on the paint crew loaded an item onto a forklift and moved both into the paint booth. As Fricano prepared to paint the item, Operations Director Richard Howe asked him if he felt it was safe to paint with a forklift in the booth. Fricano, visibly surprised, removed the forklift. (D&O1,18;Tr.425-26,1247-49.)

Two days later, Voigt told Fricano to come to the office to answer questions about the incident. Fricano replied that he wanted a steward or representative to accompany him, but Voigt said that would not be necessary because they just had a few questions. In the office, a human resources official handed Fricano a disciplinary document that described Wendt's view of the incident and called for

Fricano to agree or disagree by checking a box and signing. The form also had space for comments. Fricano refused to sign or comment but checked the box indicating disagreement. He received a three-day suspension without pay. (D&O1-2n.6,18;Tr.426-31,436-37,GCExh.19.)

D. Wendt Refuses the Union's Request To Give Unit Employees Their Evaluations, While Granting Evaluations and Accompanying Wage Increases to Non-Unit Employees; Wendt Unilaterally Mandates Overtime

Wendt's employee handbook states that employees should receive evaluations annually. Although the exact timing varies from year to year, Wendt has historically provided them to all employees—whether in the shop, warehouse, or office—at approximately the same time. Employees typically receive a wage increase based on their evaluations. (D&O4,23-24;Tr.33-38,JointExhs.2(a),2(b),GCExhs.4-5,23.)

In November 2017, the Union, having learned that Wendt had previously issued evaluations in the fall, asked Wendt to proceed as usual and evaluate the unit employees. Wendt refused. Instead, it provided evaluations and accompanying increases only to non-unit employees. (D&O24;Tr.36-38,JointExhs.2(a),2(b),GCExhs.6-7.)

Wendt also mandated, in late November, that warehouse unit employees work overtime. Although overtime had previously been voluntary, and the parties were actively bargaining over mandatory overtime, Wendt did not seek the

Union's input before instituting the new requirement. (D&O31;Tr.69-73,646-48,651-56,957-62,GCExh.24.)

E. Wendt Suspends a Union Supporter

Wendt receives shipments from a German company in boxes labelled F.A.G. that employees re-use for various purposes. On December 21, 2017, employee Dennis Bush, an active union supporter who was wearing a union t-shirt, delivered a box to coworker Robert Domaradski, who had requested one. Bush told Domaradski, "here's your box," and the two laughed. (D&O2;Tr.29-31,527-28,669,800-06,826,845-50,857-62,968,GCExh.3.)

Plant Manager Voigt observed Bush deliver the box, snickered approvingly, and did nothing to caution Bush or otherwise intervene. Later, Wendt accused Bush of violating its anti-harassment policy and suspended him for three days without pay. (D&O2;Tr.859,862-70,GCExh.22.)

F. Plant Manager Voigt Threatens Union Supporters with Surveillance of Union Activity, Layoffs, and Other Retaliation

In January 2018, soon after employee Thompson blocked Voigt from his Facebook page, Voigt said he knew Thompson was "liking" the Union and did not want Voigt to see that, but it wouldn't work because Voigt could create a fake profile and see everything, as could office employees. (D&O13;Tr.347-49.)

Later that day, Voigt told Thompson he liked him, knew he had young children, and did not want to see him laid off. Voigt then confirmed that Wendt would be laying off union supporters. Revisiting Wendt's surveillance capabilities, he noted that Wendt had powerful on-site cameras that could pick up details down to the writing on a t-shirt. (D&O13-14;Tr.350-51.)

Separately, Voigt told employee Jeff George, who was wearing a union t-shirt, that he should remove or cover it, because "[t]hat's how guys get into trouble around here." George later told Voigt he had a family and did not want to lose his job. Voigt assured George he was safe because Wendt had a list of employees it could not afford to lose. When George inquired how he could be safe if layoff was by seniority, Voigt answered that Wendt would disregard seniority and had ways around it. (D&O14;Tr.269-72,GCExh.41.)

The same month, Voigt told George, who had a new Facebook profile picture with a prounion logo, that he and others in the office had noticed it. When George asked if they were spying on him, Voigt urged him to take the logo down, adding that George would "probably get in less trouble wearing that stupid shirt." (D&O14;Tr.277-81,GCExhs.41,42.)

G. Wendt Lays Off 10 Unit Employees, Including Leading Union Supporter and Top Welder Hudson; Upon Recall, Wendt Assigns Him Exclusively to Low-Skill Saw Work and Denies His Requests for Overtime

On January 24, 2018, Wendt announced in bargaining that it would have to lay off shop employees, citing the downturn in incoming work that it had noticed around Labor Day. It estimated that the layoff would begin around February 9 or 16 and affect 8 to 12 shop employees. The parties discussed the issue and exchanged proposals but had not reached any agreement as of February 8. Despite this and the absence of impasse in negotiations for an overall agreement, Wendt implemented a layoff of 10 employees that day. (D&O5-6,22;Tr.104-06,110-14,1199-1203,GCExh.40,WendtExhs.2,6,16.)

Among those laid off was William Hudson, a top welder who initiated the union drive and served as the Union's election observer. Hudson was a member of the Union's bargaining team at the time of the layoff. When Wendt recalled Hudson to work on April 6, it assigned him to work exclusively on the saw, one of the least skilled and most repetitive jobs in the shop. Wendt used every other recalled welder, along with temporary employees, to perform welding work, but Hudson remained on the saw through August 13. (D&O5,17;Tr.30-31,173-74,201,242,356,528-34,669,674-78,808-14,837-39,843-45,891-96,900-01,1406-15,1432-33,GCExhs.40,64.)

Observing that others were working overtime following the recall, Hudson asked if he, too, could have overtime. After Wendt repeatedly denied his requests, he stopped asking. Meanwhile, Wendt granted overtime to other welders and an employee on a short-term saw assignment. (D&O18;Tr.356-57,896-900.)

H. Wendt Belatedly Gives Unit Employees Their 2017 Evaluations; Voigt Threatens an Employee with Reprisals

In April 2018, Wendt issued the unit employees' long-overdue 2017 evaluations, following their return from layoff. In presenting Dmytro Rulov with his evaluation, Voigt pointed to a union pin on his shirt and said he should concentrate on his job and forget about any outside activities. Likewise, Rulov's written evaluation warned that he "need[ed] to focus more on the job at hand and worry less about non-work related activities." (D&O4,14;Tr.38-39,401-10,JointExh.2(a),GCExh.43-44.)

I. Wendt Agrees To Make Wage Increases Retroactive to Its Late Issuance of the Evaluations, With the Possibility of Further Retroactivity Through Bargaining; When the Union Requests Information for Such Bargaining, Wendt Says the Issue Is Resolved and Refuses To Provide Information

About one month after issuing evaluations, Wendt proposed to give unit employees a 3.42 percent wage increase, retroactive to April 8, when the evaluations were completed. The Union counter-proposed a 4 percent increase retroactive to October 2017. On May 24, Wendt reiterated its earlier offer in a

four-line document that stated retroactivity was a negotiated term and the offer would expire if not accepted by June 20. Given this deadline, Union Chief Negotiator Anthony Rosaci accepted the offer but said the Union still wanted to bargain for the greater increase and retroactivity to October 2017. Wendt Chief Negotiator Ginger Schroder answered: "Fair enough. You can bargain for that." (D&O24;Tr.39-42,GCExhs.8-9.)

Given Schroder's concurrence, in late May the Union requested information about the timing of wage increases associated with the non-unit employees' 2017 evaluations. On June 19, Schroder stated that the Union "does not represent the salaried workforce" and was not entitled to the information. (D&O24;Tr.43-45,GCExhs.10-11.)

In response, the Union clarified that it understood the unit employees had historically received their evaluation-based wage increases before the non-unit employees, and therefore the requested information was needed for bargaining about further retroactive wage increases for the unit. Schroder responded that the Union's understanding was incorrect and that the parties had already reached an agreement on retroactive wage increases. (D&O24-25;GCExhs.12-13.)

The Union replied that there was no final agreement on the matter because the Union had specifically reserved the right to bargain for further retroactive pay in accepting Wendt's May 24 offer. The Union added that Schroder had agreed the

Union could continue to seek more for the unit during the parties' discussions in May. The Union then reiterated its request for information relevant to the "live issue" of retroactivity. Wendt neither provided the information nor continued bargaining over retroactive pay. (D&O25;GCExh.14.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing credited facts, the Board (Chairman Ring and Members Kaplan and Emanuel) found, in agreement with the administrative law judge, and absent exceptions, that Wendt interrogated and threatened employees for their union support, and created the impression of surveillance, in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).[2] The Board found that Wendt further violated Section 8(a)(1) by implying in employee Rulov's written evaluation that he should focus on work rather than union activity, and by refusing employee Fricano's request for a union representative. (D&O1&n.6,15,21.)

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[2] In adopting the Section 8(a)(1) violations found by the judge, the Board inadvertently included two dismissed allegations: (1) that Wendt threatened Thompson with unspecified reprisals for wearing a union logo, and (2) implied it would increase his wages if he stopped supporting the Union. (D&O1n.4¶¶(b)&(c),15¶¶(f)&(g).) Wendt did not challenge these inadvertent errors in a motion for reconsideration or its opening brief on review.

Nevertheless, the Board requests that the Court enforce the Board's Order, as modified, to correct the corresponding portions of its Order and Notice by removing the inadvertently included references to the two dismissed allegations. To facilitate that correction, the Board can submit to the Court a proposed judgment at the conclusion of the case. *See* 29 U.S.C. § 160(e) (permitting court modification of Board remedial orders); Fed. R. App. P. 19.

The Board found that Wendt violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discriminatorily suspending employee Bush, assigning Hudson exclusively to low-skill saw work and denying his requests for overtime, and delaying unit employees' performance reviews and wage increases. (D&O2, 4-5.)

Finally, the Board found that Wendt violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally requiring overtime work, removing work from the bargaining unit, temporarily laying off employees, and delaying evaluations and wage increases from about November 2017 to April 2018; refusing to bargain over the retroactivity of wage increases conferred in 2018; and refusing to provide requested information relevant to retroactivity bargaining. (D&O5&n.17,6-7,25-26.)

The Board's Order requires Wendt to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (D&O8.) Affirmatively, the Order requires Wendt to: make employees whole for any lost earnings and benefits resulting from its unlawful conduct; compensate them for any adverse tax consequences of a lump-sum backpay award; expunge any reference in its records to the unlawful suspension of Bush; remove offending language from Rulov's evaluation; rescind

the removal of bargaining-unit work; notify the Union before implementing changes to employees' terms and conditions of employment, and bargain over any such changes on request; bargain, on request, over the retroactivity of wage increases conferred in 2018; furnish the requested information relating to retroactivity; and post a remedial notice. (D&O8-9.)

STANDARD OF REVIEW

This Court's review of Board decisions is narrow and deferential. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015). The Board's findings will be upheld unless they have no rational basis or are unsupported by substantial evidence. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); 29 U.S.C. § 160(e). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). Accordingly, the Court may not reject the Board's findings simply because other reasonable inferences are possible. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016). The Court also accepts credibility determinations adopted by the Board unless they are patently insupportable. *Id*. at 1072.

ARGUMENT SUMMARY

The Board found that Wendt violated the Act in numerous respects while bargaining with the Union over an initial collective-bargaining agreement. The

Board is entitled to summary enforcement of the portions of its Order corresponding to many of the violations, because Wendt forfeited any challenge either before the Board or this Court.

As for the remaining violations, substantial evidence supports the Board's findings that Wendt violated Section 8(a)(5) and (1) of the Act by unilaterally removing work from the bargaining unit and transferring it to non-unit employees and new supervisors promoted from the unit, and by temporarily laying off 10 employees based on a decrease in work orders. Contrary to Wendt, nothing in the circumstances preceding these changes justified unilateral action. In particular, the Board reasonably rejected Wendt's claims that the removal of unit work and layoffs merely continued established past practices. Nor can Wendt take shelter in its claims that the removal of three bargaining-unit positions was *de minimis*, and that it faced economic exigencies excusing unilateral action on the layoffs.

Substantial evidence likewise supports the Board's finding that Wendt violated Section 8(a)(3) and (1) of the Act by discriminatorily singling out Hudson—a leading union proponent—for adverse employment actions after his recall from layoff. Wendt reassigned Hudson, a top welder, to work exclusively on the low-skill saw, while assigning welding work to others, including temporary employees. Wendt also denied him overtime while granting it to others. This obviously disparate treatment, and Wendt's demonstrated animus towards union

advocates, amply support the Board's finding of unlawful motive. Wendt also fails to establish that the record compels acceptance of its defense that it would have taken the same actions against Hudson regardless of his union activity.

The Board also reasonably found that Wendt violated Section 8(a)(1) of the Act by denying employee Fricano's request for a union representative to accompany him to answer questions about a safety incident. Although Wendt asserts that the interview was purely to transmit discipline, substantial evidence supports the Board's finding that Wendt required Fricano to respond to the charge of wrongdoing on the disciplinary form it gave him, thus implicating his statutory right to a representative.

Finally, the Court should summarily affirm the Board's reasonable finding, which Wendt does not contest, that it violated Section 8(a)(3) and (1) of the Act by discriminatorily failing to provide timely evaluations and wage increases to unit employees in 2017 while doing so for non-unit employees. Likewise, the Court should summarily affirm the Board's finding that Wendt violated Section 8(a)(5) and (1) by refusing to bargain over those subjects. Wendt's sole claim on review—that under an inapposite contract-coverage analysis it was not required to bargain—fails because Wendt never raised it to the Board. The Court therefore lacks jurisdiction to consider that belated defense. Nor has Wendt met the high standard to overturn the Board's standard remedies for Wendt's discriminatory

failure to provide evaluations and wage increases and its refusal to bargain over those subjects. Contrary to Wendt's suggestion, it was not inconsistent for the Board to order make-whole relief and bargaining on request.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER CORRESPONDING TO MANY UNCONTESTED VIOLATIONS

Under Section 10(e) of the Act, "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). Appellate review of unfair-labor-practice findings is therefore foreclosed if no exception was taken to those findings before the Board. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979); *accord SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5 (D.C. Cir. 2012).

Wendt did not file exceptions to the administrative law judge's findings, which the Board accordingly adopted, that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- Interrogating employee Thompson about his union support, informing him that union supporters would be laid off, and threatening him with reprisals by implying he should not support the Union because he had a family to support;

- On multiple occasions, creating the impression that employees' protected activity was under surveillance;
- Informing employee George that prounion employees were targeted for layoff, and impliedly instructing him to remove union insignia and remove a prounion photograph from his Facebook page; and
- Threatening employee Rulov during his annual performance review.

(D&O1&n.4,12,14-15;GCExh.1(aa)¶5.)

Given Wendt's failure to except to these findings before the Board or show extraordinary circumstances for failing to do so, it cannot obtain appellate review of these violations. 29 U.S.C. § 160(e); 29 C.F.R. §§ 102.46(a)(1)(ii) and 102.46(f). Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to them. (D&O8.) *SFO Good-Nite Inn*, 700 F.3d at 5.

Similarly, this Court has held that when a party fails to challenge unfair-labor-practice findings in its opening brief, any arguments over those findings are abandoned, and the Board is entitled to summary enforcement of the corresponding portions of its Order. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011); Fed. R. App. P. 28(a)(8)(A).

Here, Wendt does not challenge the Board's finding that it violated Section 8(a)(1) by making a coercive statement in employee Rulov's written evaluation.

(D&O1,15.) It also does not contest the Board's finding that it violated Section 8(a)(3) and (1) of the Act by suspending employee Bush, a union supporter, on the pretext that he violated Wendt's anti-harassment policy. (D&O2-3.) Nor does it question the Board's findings that it violated Section 8(a)(5) and (1) of the Act by unilaterally mandating overtime work and failing to provide the Union with requested information relevant to bargaining over retroactive wage increases. (D&O5n.17.) Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to these unfair-labor-practice findings. *Wayneview*, 664 F.3d at 347.

Wendt's myriad uncontested violations do not disappear from the case, however. Instead, they remain, "lending their aroma to the context in which the contested issues are considered." *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 819 (7th Cir. 2005) (internal quotation marks and citation omitted).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT WENDT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY REMOVING BARGAINING-UNIT WORK AND IMPLEMENTING A TEMPORARY LAYOFF

A. An Employer Violates the Act by Unilaterally Changing Existing Terms and Conditions of Employment During Ongoing Negotiations for a Collective-Bargaining Agreement

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 his employees." 29

U.S.C. § 158(a)(5).[3] In turn, Section 8(d) of the Act defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet…and confer in good faith with respect to wages, hours, and other terms and conditions of employment…." 29 U.S.C. § 158(d).

These provisions mandate bargaining over "wages, hours, and other terms and conditions of employment," *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), and obligate the employer to maintain the status quo on those subjects, until the parties have negotiated to overall agreement or impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 742-43, 746-47 (1962). Thus, an employer violates Section 8(a)(5) and (1) of the Act "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.*, 501 U.S. at 198.

A re-allocation of "work previously performed by employees in the bargaining unit" to those outside the unit is a mandatory bargaining subject, particularly where the re-allocation merely changes the identity of the employees involved. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210, 215 (1964); *accord Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 311-12 (D.C. Cir.

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[3] A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

2003). Accordingly, "an employer may not 'unilaterally attempt to divert work away from a bargaining unit without fulfilling [its] statutory duty to bargain.'" *Int'l Longshore & Warehouse Union v. NLRB*, 890 F.3d 1100, 1108-09 (D.C. Cir. 2018) (quoting *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982)).

Under this rule, an employer not only is prohibited from unilaterally establishing a new pattern of "contracting out" unit work, *Fibreboard*, 379 U.S. 215, it also cannot unilaterally change the status quo of unit work in other ways—for example, by transferring work to managers, *Regal Cinemas*, 317 F.3d at 311-12, or promoting unit employees to newly created supervisory positions in which they "continue[] to perform former bargaining unit work." *Health Care & Retirement Corp. of Am. d/b/a Hampton House*, 317 NLRB 1005, 1005 (1995).

Likewise, layoffs to reduce labor costs "are not a management prerogative [but] a mandatory subject of collective bargaining." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). Indeed, such measures aimed at reducing labor costs are "peculiarly suitable for resolution within the collective bargaining framework." *Fibreboard*, 379 U.S. at 213-214. Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally laying off employees for economic reasons. *Regal Cinemas*, 317 F.3d at 307–08; *Pan Am. Grain Co. v. NLRB*, 351 NLRB 1412 (2007), *enforced*, 558 F.3d 22 (1st Cir. 2009).

B. Wendt Unlawfully Diverted the Work of Three Employees Away from the Unit

The record establishes that about two months after the Union's certification, Wendt decided to reorganize and increase its supervisory ranks. It created new "shop supervisor" positions and placed its shop foreman (Kenneth Schiedel) in one of those slots.[4] (D&O26-27;Tr.1158-64.) It also promoted three bargaining-unit employees—Donald Fess, Americo Garcia, and Daniel Norway—to join Schiedel as shop supervisors with their own areas of responsibility. (D&O27,28;Tr.1164,GCExhs.30,45.)

It is undisputed that following their promotions, Fess, Garcia, and Norway continued to do some of the same shop work they had previously performed as unit employees. (Tr.1286,1354-59,1498-1500,1526-29,1576.) Moreover, Wendt admittedly re-distributed their remaining unit work to temporary employees and contractors. (D&O7;Tr.534,1286-87,1307-08,1580,1634.) It also admittedly did not hire any unit employees to backfill the vacated positions. (D&O7,27;Tr.1286.) Instead, as the Board found, Wendt expected the unit to "do less production work" after the promotions. (D&O27;Tr.1286-87.)

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[4] Schiedel had previously supervised the entire shop, at times with the aid of an additional foreman. (D&O26-27;Tr.461-65,608,1158-60.) After the reorganization, his jurisdiction was limited to specific shop areas. (D&O27;Tr.634,1162-64.)

Wendt resisted bargaining over the amount of work that the unit stood to lose from the reconfiguration. (D&O27.) Thus, when the Union sought to pin down how much production work the new shop supervisors would be doing and under what circumstances, Wendt responded that it had a right to appoint supervisors, and claimed that historically its supervisors had done some production work. (D&O27;Tr.80-85,GCExh.27-28.)

Based on this largely undisputed evidence and Wendt's admissions, the Board had ample grounds for finding that Wendt unlawfully removed work from the bargaining unit without fulfilling its statutory duty to bargain over the change. (D&O6-7.) The Board applied the settled rule, unchallenged on exceptions, "that an employer must notify and offer to bargain with a union about removal of bargaining unit work before it may assign such work to newly created supervisory positions." (D&O6-7 (citing *Univ. of Pittsburgh Med. Ctr.*, 325 NLRB 443, 443 (1998), *enforced mem.*, 182 F.3d 904 (3d Cir. 1999).)

Wendt does not deny that it removed work from the unit and bypassed negotiation of the matter with the Union. (Br.41-47.) Instead, it claims it had no duty to bargain because established past practice allowed supervisors to perform production work. (Br.41-44.) It also asserts that the work was not significant enough to trigger unfair-labor-practice liability. (Br.44-47.) As shown below, the

Board reasonably rejected these meritless defenses, and the Court should do so as well. (D&O7.)

1. Wendt failed to establish a relevant past practice of eliminating the work of several unit employees at a time

As Wendt appears to acknowledge, the law forbids unilateral changes to the status quo of unit work.[5] (Br.42.) Accordingly, the Board appropriately focused its analysis on Wendt's transfer of work from the unit. And in evaluating Wendt's claim that its work-transfer did not constitute a change, but conformed to a prior pattern of work allocation between the unit and others, the Board of course considered the process by which the disputed work-transfer occurred—namely, Wendt's creation of new supervisory positions, its promotion of unit employees to those positions, and its admitted decision not to fill the resulting unit vacancies. (D&O6-7.) Contrary to Wendt's claims, it was entirely appropriate for the Board to consider those facts, which bear directly on the nature and magnitude of the

[5] Insofar as Wendt implies that it could freely remove unit work because the Board's certification did not describe the unit in terms of specific work, it is mistaken. (Br.41.) Whether the unit description speaks to the issue or not, the allocation of work to a bargaining unit is a mandatory subject of bargaining. *See Aggregate Indus. v. NLRB*, 824 F.3d 1095, 1103 (D.C. Cir. 2016) (work-transfer is a mandatory subject); *Local 666, IATSE v. NLRB*, 904 F.2d 47, 51-52 (D.C. Cir. 1990) (distinguishing work jurisdiction or what the unit does, a mandatory subject, from unit composition, a permissive subject).

work-transfer. In doing so, the Board did not shift the focus to issues of motive as Wendt suggests (Br.43).

Indeed, the *Raytheon* decision on which Wendt relies (Br. 42) affirmatively requires the Board to consider the precise contours of a change in evaluating its lawfulness. Under *Raytheon*, "when determining whether an employer's action constitutes a 'change'" for purposes of the unilateral-change doctrine, the relevant question is "whether the employer's action is similar in kind and degree to what the employer did in the past." 365 NLRB No. 161, slip op. 13 (2017). Only if the employer's action "did not materially vary in kind or degree from" past actions does a past-practice defense potentially apply. *Id*. But even then, the employer must prove not only similarity of kind and degree between current and past actions, but also a "practice [that] occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis." *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145, slip op. 3 (2019).

Here, as the Board found, the relevant action was the removal of "the work of three[] unit positions" from the bargaining unit, with the promotion of Fess, Garcia, and Norway to supervisory positions in which they continued to do some of their former unit work, and with the decision to divert their remaining unit work to non-unit employees. (D&O7.) Wendt, however, failed to produce "any

evidence of similar past conduct" that could possibly rationalize the sudden diminution of unit work in this manner. (D&O7.)

Although Wendt claimed below that its promotion-related removal of unit work conformed to a past practice under which supervisors have always performed unit work, the Board reasonably found that Wendt's claim failed to recognize the different order of magnitude involved in the work-transfer here. (D&O7.) There is no comparison between supervisors' occasional performance of unit work before September 2017 and the wholesale takeover of the work of three unit positions by new and additional supervisors, as well as non-unit employees.

In doggedly insisting otherwise, Wendt refuses to acknowledge not only the precise contours of its relevant conduct, but also the Board's specific findings. (Br.41-44.) The Board did not hold, as Wendt claims, that it "failed to demonstrate a past practice of non-unit employees performing [unit] work." (Br.41.) As the Board explained, "[t]he issue is not whether [Wendt] may continue a past practice of supervisors performing some unit work, but whether [Wendt], when it promoted the three shop employees to supervisory positions, effectively removed their work from the unit *entirely* and did not replace it." (D&O7(emphasis added).)

As the Board correctly found, Wendt failed to provide any evidence of a comparable prior removal of unit work, much less a regular and frequent practice of eliminating the work of several unit positions at a time and transferring it to

those outside unit. (D&O7&n.24.) *See Mike-Sell's*, 368 NLRB No. 145, slip op. 3-4. Accordingly, Wendt's misdirected arguments about past supervisory performance of unit work do not undermine the Board's reasonable finding that Wendt "failed to meet its burden of showing the significant criteria of similarity, regularity, and frequency set forth in *Raytheon* as requisite to establishing a past practice defense." (D&O7.)

2. The work that Wendt removed from the bargaining unit was material and substantial

Having failed to establish a past-practice defense, Wendt resorts to the incredible claim that its removal of unit work—the work of three unit positions—was not significant enough to violate Section 8(a)(5) and (1) of the Act. (Br.44-47.) The Board correctly rejected this claim. (D&O7.)

Although an employer's statutory bargaining obligation arises only where a change is "material, substantial, and significant," there can be no serious question that Wendt's unilateral work-transfer amply cleared this bar and implicated the statutory policy in favor of collective bargaining. (D&O7.) Indeed, on exceptions, Wendt acknowledged that "the three former unit employees, who are now statutory supervisors, still each perform unit work 22 percent of their work time, amounting to a loss of 1,372 man-hours from the unit annually." (D&O7;ExceptionsBr.33.) As the Board found, this translates into "more than 26 hours of unit work lost each week"—"plainly a significant loss of unit work" that "constitutes a material and

substantial change requiring bargaining." (D&O7.) *See New York Paving, Inc.*, 370 NLRB No. 44, slip op. 1 n.8, 24-25 (2020) (unilateral work-transfer was material and substantial where it resulted in a loss of three-to-four days of unit work per month for a four-person crew).

But there is more. As the Board noted, Wendt "does not dispute that it never filled the three vacated unit positions." (D&O7.) Thus, the loss to the unit was not simply the work hours that the three individuals continued to perform as supervisors, but *all* of the work hours they previously performed as unit employees. Significantly, as the Board noted, Wendt did not contend on exceptions that the rest of the work they previously handled was "permanently lost by [Wendt]." (D&O7.) Nor did Wendt claim that it was "redistributed in some fashion to the remaining unit employees (e.g., by use of overtime)." (D&O7.) On the contrary, Wendt's own senior managers (Vice President of Finance Joseph Bertozzi and Operations Director Richard Howe) and former supervisor Schiedel admitted that Wendt "compensated for the loss of three[] unit positions by adding nonunit temporary workers and subcontracting." (D&O7;Tr.534,1286-87,1307-08,1633-34.) Although Wendt now attempts to minimize their mutually corroborative testimony as "generalized" (Br.45-46), the inescapable fact of the lost unit positions, together with the managers' clear explanations as to what happened, and Wendt's admission that the promoted employees took considerable

work with them out of the unit, "fully support[] that [Wendt] removed from the unit the work of three[] unit positions." (D&O7.) *See Cincinnati Enquirer*, 279 NLRB 1023, 1023 n.4, 1032 (1986) (unilateral work-transfer was not *de minimis* where it eliminated the work of one unit position).

In other words, substantial evidence supports the Board's finding that Wendt's unilateral work-removal was significant and therefore violated Section 8(a)(5) and (1) of the Act. (D&O7.) Wendt does not detract from the substantiality of the evidence by suggesting ways to counter the cumulative impact of its admissions. (Br.46-47.)

C. Wendt Unlawfully Implemented a Temporary Layoff of 10 Unit Employees

The undisputed evidence shows that during the parties' January 24, 2017 bargaining session, Wendt announced its intent to lay off 8-12 shop employees, on or about February 9 or 16, 2018, due to a downturn in incoming work orders. The parties subsequently bargained over the criteria that would be used to select employees for layoff and recall. But on February 8, while these negotiations—as well as bargaining for an overall agreement—were underway, Wendt implemented the layoff using its desired criteria.

Applying settled law to these undisputed facts, the Board correctly found that Wendt's unilateral layoff violated Section 8(a)(5) and (1) of the Act. As the Board explained, where, as here, parties are negotiating for a collective-bargaining

agreement, the "'employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain'" over planned changes. (D&O5n.18 (quoting *Bottom Line Enters.*, 302 NLRB 373, 374 (1991), *enforced sub nom. Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994)).) It also "'encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.'" (D&O5n.18 (quoting *Bottom Line Enters.*, 302 NLRB at 374).) Substantial evidence supports the Board's finding that Wendt breached this duty by unilaterally implementing a temporary layoff while the parties were still actively negotiating the terms of an overall collective-bargaining agreement.

In challenging the Board's amply supported finding, Wendt again argues that its conduct was privileged by past practice, and also claims it was entitled to act unilaterally because of an economic exigency. (Br.29-37.) The Board reasonably rejected both arguments, as shown below.

1. Wendt failed to establish a past practice of temporarily laying off shop employees in response to work fluctuations

Before the Board, Wendt based its past-practice claim on three group-layoffs that took place in the 17 years before the group-layoff here. (Tr.1617.) But as the Board correctly found, one of the prior layoffs, in 2015, "is not an appropriate comparator" because it was *permanent* and therefore "different in kind and degree

than the temporary layoffs in 2018." (D&O6n.20;Tr.1633.) *See Raytheon*, 365 NLRB No. 161, slip op. 13, 16.

Wendt gains no more ground by relying on the two other previous layoffs, in 2009 and 2001, to show a "longstanding past practice" of temporarily laying off groups of shop employees based on work fluctuations.[6] (D&O5.) As the Board correctly found, the 2009 layoff "was different in kind" from the 2018 layoff, because the 2009 layoff affected "nonunit office and unit shop employees in equal numbers." (D&O5;Tr.1625-26,1629.) By contrast, the 2018 layoff only involved shop employees.

Thus, "the last time [Wendt] temporarily laid off only [its] shop employees was 17 years previously," in 2001. (D&O5-6;Tr.1620-23,WendtExh.25.) But as the Board explained, a single instance occurring 17 years ago "falls well short of establishing a regular and consistent [past] practice sufficient to privilege unilateral action." (D&O 5.) Indeed, even "one instance, almost 2 years before the alleged unilateral change, neither amounts to an established practice nor defines the status quo." *Vanguard Fire & Supply Co.*, 345 NLRB 1016, 1027 (2005), *enforced*, 468 F.3d 952 (6th Cir. 2006).

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[6] Although Wendt makes a passing (Br.32) reference to layoffs in 2002 and 2003, Vice President Bertozzi admitted at the unfair-labor-practice hearing that there were no "sizeable" or group layoffs in those years. (Tr.1631-32,WendtExh.27.)

Moreover, even assuming that the intervening 2009 layoff is an appropriate comparator—which it is not—the Board reasonably found that Wendt "comes nowhere near meeting its burden of proving an established past practice that would have justified unilateral action" with just "two temporary layoffs in 17 years." (D&O6.) *Cf. Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145, slip op. 3 (employer's unilateral sale of driver routes 51 times over 17 years established a past practice).

On review, Wendt protests that it did "what it had always done when faced with a lack of work," and "what it informed employees it would do in the employee handbook." (Br.33.) Tellingly, however, it does not identify the past instances that show what it has "always" done. (Br.29-34.) And understandably so. The universe of *temporary* group-layoffs includes, at most, two prior incidents that were remote in time from the layoff here and do not establish a regular and consistent pattern over 17 years.

Nor can Wendt belatedly compensate for this dearth of evidence by adverting to policy statements in its employee handbook (which in any event could not make up for its failure to show an actual pattern of comparable layoffs). Wendt never argued on exceptions before the Board that its handbook was relevant to its past-practice defense (*see* ExceptionsBr.3-5), nor does it show extraordinary circumstances to excuse its failure. Accordingly, the Court lacks jurisdiction to

consider Wendt's handbook defense. *See* 29 U.S.C § 160(e), and cases cited above p. 17.

2. Wendt failed to demonstrate an unforeseen economic exigency

Alongside its failed claim that temporary group-layoffs were a regular and expected feature of employees' working conditions, Wendt also claims, somewhat inconsistently, that an unusual, unforeseen economic exigency prompted the 2018 layoffs. (Br.34-37.) The Board appropriately rejected this claim, finding that Wendt failed to carry its "heavy burden" of demonstrating the claimed exigency. (D&O6.)

To be sure, there is an exception to the general rule precluding an employer from making unilateral changes during negotiations absent overall impasse—namely, if the employer can meet its burden of proving that "economic exigencies compel prompt action." *Bottom Line Enters.*, 302 NLRB at 374. In *RBE Electronics*, the Board clarified that some exigencies are not so dire as to obviate bargaining altogether, but still require prompt action and warrant relaxation of the general rule against unilateral changes. 320 NLRB 80, 81 (1995). The Board held that an employer faced with such a lesser exigency may act unilaterally after giving the union "notice and an opportunity to bargain over the changes it proposes to respond to the exigency and…bargaining to impasse over the particular matter." *Id.* at 81-82.

However, in providing this additional avenue for addressing economic exigencies, the Board emphasized that the employer still must prove a circumstance that qualifies as an exigency under *Bottom Line. RBE Electronics*, 320 NLRB at 82. "[N]ot every change proposed for business reasons would meet [the] *Bottom Line* limited exception." *Id*. Accordingly, the employer must prove that it faced a situation in which "time [was] of the essence and which demand[ed] prompt action," that "its proposed changes were compelled," and "that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *Id*.

As the Board correctly found, Wendt failed to meet its burden. To begin, it did not show that time was of the essence and prompt action was necessary. (D&O6.) Instead, Wendt "knew more than 5 months before the layoff of the expiring contracts for shop work," and thus had ample time to discuss the matter with the Union beginning around Labor Day 2017, when managers first noted the looming problem. (D&O6,22.) "This long gap between the time when [Wendt] first raised the issue…and the time it implemented the[] [layoffs] refutes that [Wendt] faced an economic exigency in which time was of the essence." (D&O6.)

Further, Wendt failed to establish that "external events," matters "beyond [its] control," or unforeseen circumstances *compelled* its unilateral action on February 8, 2018. *RBE Electronics*, 320 NLRB at 82. As the Board noted, there is

no evidence that Wendt was in "financial distress" or faced "contemporaneous pressure from creditors or compelling financial liabilities" in the months preceding the layoff. (D&O6.) On the contrary, its "dominant design and engineering division remained busy," and it instituted no layoffs there or anywhere else, so far as the record shows. (D&O6.) Instead, it appears that Wendt elected to layoff shop employees to realize a relatively small labor-cost savings. (D&O6&n.21;Tr.1636.)

As the Board found, Wendt's "desire for cost savings is certainly an appropriate topic for bargaining, but it does not constitute an economic exigency justifying piecemeal bargaining" under *RBE Electronics*. (D&O6.) This is particularly the case where, as here, the decline in incoming work for the shop was "entirely foreseeable," Wendt's "economic health [wa]s not even asserted to be in question," and Wendt merely sought a modest "monetary savings." (D&O6.)

Contrary to Wendt's claim, it is irrelevant that its "need for the layoff" purportedly did not "become *certain* until late December of 2017." (Br.35 (emphasis added).) The drop in work for the shop was "reasonably foreseeable," *RBE Electronics*, 320 NLRB at 82, well before December 2017. Indeed, Operations Director Howe admitted that he and other managers noticed the looming problem and were discussing it around Labor Day. (Tr.1199-1202.) Accordingly, there was no unforeseen exigency that suddenly arose in late

December and necessitated prompt action. Instead, there was only a months-old awareness of a temporary lull in work orders that would foreseeably affect work-levels in the shop.

Wendt also errs in contending it was improper for the Board to focus on the absence of any threat to its financial well-being in evaluating its economic-exigency defense. (Br.36.) Wendt never claimed an exigency other than the decline in work orders. Accordingly, it was reasonable for the Board to consider how that decline might affect Wendt's overall business, and whether that possible effect constituted an economic exigency. *See RBE Electronics*, 320 NLRB at 82 ("not every change proposed for business reasons" is an exigency).

In holding that Wendt failed to show it faced "straitened financial circumstances," the Board did not underestimate the urgency of cost-cutting as Wendt claims (Br.36&n.2). Instead, the Board appropriately upheld the Act's requirement that, absent a true exigency, an employer must bargain over measures to save labor costs and refrain from unilaterally changing the status quo unless and until the parties reach an overall bargaining impasse. (D&O6.) Substantial evidence supports the Board's finding that Wendt breached these obligations by unilaterally laying off employees in 2018, and thus violated Section 8(a)(5) and (1) of the Act.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT WENDT VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ASSIGNING UNION SUPPORTER WILLIAM HUDSON, A TOP WELDER, EXCLUSIVELY TO LOW-SKILL SAW WORK FOLLOWING HIS RETURN FROM LAYOFF, AND DENYING HIS REQUESTS FOR OVERTIME

A. An Employer Violates the Act by Adversely Changing an Employee's Terms and Conditions of Employment Because of His Union Activity

Section 7 of the Act guarantees to employees the right to "form, join, or assist labor organizations" and "bargain collectively through representatives of their own choosing…." 29 U.S.C. § 157. Section 8(a)(3) of the Act enforces these rights by making it an unfair labor practice for an employer to "discriminat[e] in regard to…any term or condition of employment to…discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).[7] An employer violates this provision "by taking an adverse employment action…in order to discourage union activity." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In determining whether an employer acted with that unlawful motive, the Board applies the test set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). Under that test, if substantial

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[7] A Section 8(a)(3) violation produces a derivative violation of Section 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

evidence supports the Board's finding that protected activity was a "motivating factor" in the adverse action, it is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-03.

As direct evidence of employer motivation is generally scarce, circumstantial evidence alone may establish unlawful motivation. *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988). Such evidence includes the employer's knowledge of the employee's protected activity and its hostility toward such activity, as shown by factors such as express statements and Section 8(a)(1) violations, *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996), disparate treatment, *DHSC, LLC v. NLRB*, 944 F.3d 934, 938 (D.C. Cir. 2019), and the absence of a credible explanation for the adverse action, *Southwest Merchandising Corporation v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995). Ultimately, because motive is a question of fact implicating the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

B. Hudson's Protected Union Activities Were a Motivating Factor in Wendt's Decisions To Assign Him Exclusively to Low-Skill Saw Work and Deny Him Overtime

Substantial evidence supports the Board's finding that Wendt's hostility towards protected union activity "was a motivating factor in its decision[s]" to

"assign[] highly-skilled welder and prominent union activist William Hudson exclusively to low-skilled saw work upon his return from layoff" in April 2018, and to deny him "any opportunity to work overtime." (D&O3.) As the Board found and Wendt does not dispute, Hudson initiated the effort to organize Wendt's shop and warehouse employees by contacting the Union. (D&O17.) Thereafter, he personally organized employees, displayed union insignia at work, attended union demonstrations outside the facility, served as the Union's designated election observer, and participated in collective bargaining as a member of the Union's team. (D&O17,20.)

Hudson's close association with the Union earned him the nickname "The President" among employees, and Wendt's managers were well aware of his leaderhship role. (D&O17&n.16.) Even before Hudson sat on the Union's side of the bargaining table, Wendt recognized that he was "a union initiator" and placed his name in boldface on a roster of employees slated to attend meetings with company consultants about the organizing drive. (D&O17;Tr.180-81.) His longtime supervisor, Schiedel, and Operations Director Howe also admitted that he was a known, active union supporter. (D&O17;Tr.528,1237-38.)

Against this background, Wendt's disparately harsh treatment of Hudson after he returned from the unlawful February 8 layoff is striking. As the Board found, Wendt "singled him out" from other returning welders on April 6 to work

exclusively on the saw, a far lower-skilled job than the welding he had previously performed, and indeed one of the least-skilled jobs in the shop. (D&O4.) Wendt then kept him in that position for months—despite an abundance of welding work including overtime welding, and despite Hudson's status as one of the best welders in the company. Compounding this adverse action, Wendt denied his requests for overtime of any kind while granting it to others not only for welding but also for the saw. The Board readily discerned that Wendt's disparately harsh treatment of Hudson—in both respects—constituted "clear[]" circumstantial evidence of unlawful motivation.[8] (D&O4.)

As the Board found, Wendt's numerous uncontested unfair labor practices (*see* above pp. 17-19) also strongly support an inference of unlawful motive. The violations include unlawful threats "to target union supporters for layoff and to get rid of 'a lot of' shop employees" who had participated in the organizing campaign,

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[8] Although Wendt expresses doubt that it denied Hudson overtime (Br.50), the Board credited his testimony that Supervisor Norway denied his overtime requests in the weeks after he returned from layoff. (D&O18;Tr.896-900.) The Board also credited the testimony of other employees that there was overtime available, including on the saw. (D&O1n.2,18;Tr.356-57,677-78,809-10,838-39.) The documentary evidence to which Wendt refers (Br.22,50, citing GCExh.64) does not refute this credited testimony. *See Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 7, 10 (D.C. Cir. 2016) (credibility determinations stand unless patently unsupportable). As Operations Director Howe admitted, the documents show only that Hudson worked more than eight hours on certain days post-recall, not that he earned *overtime*, which Wendt defines as time beyond 40 hours per week. (Tr.1271-72, explaining GCExh.64.)

and unlawful statements creating the impression that Wendt was surveilling employees' union activities. (D&O3-4.) As the Board reasonably found, the violations were not only numerous, they also targeted all union supporters generally, even though they were uttered to individual employees. Accordingly, they amply establish Wendt's animus towards employee support for the Union. (D&O4.) That animus extends *a fortiori* to Hudson, who was not merely a union supporter but "a union initiator" in Wendt's eyes. (D&O4,17.) Considering Wendt's obvious disparate treatment of Hudson and its animus-laden statements, the Board found the evidence "more than sufficient to support a reasonable inference of a causal relationship between Hudson's union activities and [Wendt's] adverse actions against [him]." (D&O3.)

Wendt erroneously argues that it did not single out Hudson, pointing to its reassignment of other employees upon their return from layoff. (Br.50.) But as the Board correctly found, none of those reassignments approached Hudson's in severity. (D&O21.) The other employees continued their welding work in addition to new skilled assignments. Thus, recalled welder Dennis Bush became a fitter/welder; recalled welder Mario Rojas began welding larger structures in a different area of the shop; and recalled welder Zachery Krajewski took on painting alongside welding. (D&O17-18;Tr.1405-10,1432-33.) Hudson, on the other hand,

was the only welder removed from welding altogether and placed in decidedly low-skilled saw work.

There is likewise no merit to Wendt's claim that an inference of unlawful motive is unwarranted because it contemporaneously granted overtime to another union supporter. (Br.50.) "An employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them." *Handicabs, Inc.*, 318 NLRB 890, 897-98 (1995), *enforced*, 95 F.3d 681 (8th Cir. 1996); *accord Union Tribune Publ'g Co. v. NLRB*, 1 F.3d 486, 492 n.3 (7th Cir. 1993).

Wendt also errs in arguing that, to infer unlawful motivation, the Board had to cite evidence "linking" Wendt's numerous unlawful statements "to the decision made to reassign Hudson and deny him overtime." (Br.49-50.) As this Court has explained, no such "nexus" is necessary because the "anti-union [statements] act[] as the link between an employer's knowledge of an employee's union activities and reprisals taken against that employee." *Parsippany Hotel*, 99 F.3d at 424; *accord Tschiggfrie Properties*, 368 NLRB No. 120, slip op. 8 (2019) (employer statement that it would fire anyone who engaged in union activity could support an inference of a causal relationship between protected activity and adverse action).

Contrary to Wendt's further claim, it was entirely appropriate for the Board to consider Wendt's unlawful September 2017 and January 2018 statements as

providing a motivational "link" to the April 2018 actions against Hudson. (Br.49-50.) Indeed, in the months after the initial unlawful threats and continuing through April 2018, Wendt committed a host of additional unfair labor practices that laid bare its ongoing contempt for employees' statutory rights in bargaining and otherwise. Moreover, the same plant manager (Voigt) who flagrantly threatened and coerced employees in September 2017 and January 2018 remained in charge of the plant in April 2018. Indeed, that very month—contemporaneously with the adverse actions against Hudson—he unlawfully threatened yet another employee (Rulov) with unspecified reprisals for his union support. *See* above pp. 10, 18. In these circumstances, Wendt cannot credibly claim that its long-demonstrated hostility towards employees' union activity had somehow dissipated by April 2018, and did not inform its decisions to assign Hudson exclusively to low-skill saw work and to deny his requests for overtime.

C. Wendt Failed To Prove that It Would Have Taken the Same Actions Regardless of Hudson's Union Activity

Where, as here, substantial evidence establishes unlawful motivation, "the Board must find a violation…unless the employer can show that 'it would have taken the [same] action[s] regardless of the existence of such animus.'" *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 NLRB 645, 651 (D.C. Cir. 2003) (citation omitted). As the Board correctly found, Wendt failed to establish this affirmative defense. (D&O4,21.)

Specifically, although Wendt argued that it assigned Hudson to the saw to give him an opportunity to expand his skills, it presented no evidence that it gave anyone else this so-called opportunity to specialize in low-skilled work. To the contrary, "of the other four employees who were given new assignments after the layoff, three were afforded opportunities to enhance their skills as welders," and a fourth "was given the opportunity to work in the paint department." (D&O21;Tr.1406-07,1432-33.) Moreover, those who began as welders "continued to perform at least some welding work," unlike Hudson who was consigned to the saw. (D&O21;Tr.1406-07.)

As the Board noted, "if [Wendt] wanted to give Hudson a wider range of skills to enhance his abilities as an employee," it could have assigned him to another type of skilled work—as it did with the welder assigned to the paint department—"not the least-skilled work in the shop." (D&O21.) Significantly, Wendt failed to explain how Hudson's assignment *solely* to the saw was consistent with a genuine desire to enhance his skills. Likewise, Wendt failed to establish any connection between its denial of available overtime to Hudson, either in welding or on the saw, and its stated goal of giving him opportunities to enhance his skills.

Wendt does not overcome these deficiencies by simply reciting additional possible reasons for its actions, namely Hudson's complaints about Wendt's dim

view of his abilities on the saw, or the departure of the regular saw operator. (Br.51.) *See Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984) (employer cannot simply assert a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that it would have taken the same action regardless of the employee's union activities). Moreover, on review, the Board's findings of fact must be upheld unless the record compels acceptance of Wendt's claim that it would have assigned Hudson to the saw and refused his requests for overtime regardless of his protected union activity. *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016). Wendt utterly fails to meet that high standard. Accordingly, there is no reason to disturb the Board's well-supported finding that Wendt violated Section 8(a)(3) and (1) of the Act by discriminatorily "singl[ing] [Hudson] out from other laid-off welders by denying only him any welding work and any overtime work opportunities, and instead making him the sole welder assigned exclusively to the low-skill saw." (D&O4.)

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT WENDT VIOLATED SECTION 8(a)(1) OF THE ACT BY COMPELLING EMPLOYEE FRICANO TO PARTICIPATE IN A DISCIPLINARY INTERVIEW WITHOUT REQUESTED REPRESENTATION

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256, 261 (1975), the Supreme Court upheld the Board's view that Section 7 of the Act, which entitles employees to engage in concerted activities for mutual aid or protection, "creates a statutory

right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." Once an employee invokes his right to representation, the employer must either "grant the request, end the interview, or offer the employee the choice between having an interview without a representative or having no interview at all." *Bellagio, LLC v. NLRB*, 854 F.3d 703, 708 (D.C. Cir. 2017) (citing *Weingarten*, 420 U.S. at 258-59). The employer cannot compel an employee to proceed without requested assistance. 420 U.S. at 257. Such compulsion "serious[ly] violat[es]" employee rights, *id.*, and constitutes an unfair labor practice under Section 8(a)(1) of the Act, which prohibits employer "interfere[ence] with, restrain[t], or coerc[ion] [of] employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Substantial evidence supports the Board's finding that Wendt violated Section 8(a)(1) when it interviewed employee John Fricano about a safety incident without honoring his requests for representation. Fricano properly invoked his *Weingarten* right based on a reasonable belief that the questioning for which he was summoned could result in discipline. In this regard, Fricano already knew, from comments made by Operations Director Howe during the incident, that Howe regarded as potentially unsafe Fricano's attempt to complete a paint job with a forklift inside the paint booth.

In response to Fricano's clear requests for a steward or representative, Plant Manager Voigt flatly and misleadingly said he "did not need that because they were just going to ask him a few questions about what had happened." (D&O18.) Voigt then took Fricano to an office where a human resources official was waiting for him. (D&O18.) That official handed Fricano a disciplinary notice containing a narrative of what Wendt believed Fricano had done wrong during the incident. The document called for Fricano to either agree or disagree with the narrative, add any comments, and sign his name.

The Board reasonably found that the demand for Fricano to admit, deny, or defend himself against the charge of wrongdoing was "sufficient to convert" what might otherwise have been a meeting to impose discipline "into a *Weingarten* interview." (D&O2.) As the Board explained, an employee's right to representation attaches not only during an investigative interview where the employer "seeks facts or evidence in support of a disciplinary action," but also "during a meeting to issue predetermined discipline"—if, as here, the employer seeks to have the employee "'admit his alleged wrongdoing or…sign a statement to that effect.'" (D&O1-2 n.6. (quoting *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).)

Contrary to Wendt's claims, the bare fact that it had already determined to discipline Fricano does not nullify his objective perception that he faced a less

definite situation in which a representative could assist him. *See Southwestern Bell Telephone Co.*, 338 NLRB 552, 552 (2002). Indeed, in directing Fricano to come to the office, Voigt did not indicate that a disciplinary notice awaited him there. Rather, he said Fricano was needed to "answer questions" about the incident. (D&O18.) Nor did Wendt's conduct in the office dispel Fricano's reasonable belief or invalidate his already stated desire for assistance. On the contrary, Wendt only solidified the need for a representative by soliciting Fricano's written reaction to its view of the incident. *See PAE Aviation & Technical Servs. LLC*, 366 NLRB No. 95, slip op. 1-2 (2018) (employee's written response to discipline may itself become the subject of further discipline).

Accordingly, Wendt's insistence that its meeting with Fricano was purely disciplinary and not investigatory is to no avail. Regardless of those characterizations, if the employer "engages in any conduct beyond merely informing the employee of a previously made disciplinary decision," the rights guaranteed in *Weingarten* are implicated, *Baton Rouge Water Works*, 246 NLRB at 997, and the employee's request for a representative must be honored. *See Bellagio*, 854 F.3d at 708. The Board therefore was amply justified in finding that Wendt violated Section 8(a)(1) of the Act by compelling Fricano to go forward with the disciplinary interview without a *Weingarten* representative.

V. THE COURT SHOULD SUMMARILY AFFIRM THE BOARD'S FINDINGS THAT WENDT VIOLATED THE SECTIONS 8(a)(3), 8(a)(5), AND 8(a)(1) OF THE ACT BY DISCRIMINATORILY DELAYING EMPLOYEE EVALUATIONS AND ACCOMPANYING WAGE INCREASES, AND REFUSING TO BARGAIN OVER THOSE MATTERS, AND UPHOLD THE CORRESPONDING REMEDIES

The record establishes that, before the Union's certification, Wendt issued annual evaluations to all employees at approximately the same time, and provided wage increases with each evaluation cycle. Thus, in the fall of 2016, Wendt gave evaluations and accompanying wage increases to the employees who now comprise the bargaining unit, as well as nonunit employees, within the same timeframe. Following the Union's certification in June 2017, however, Wendt changed course.

While providing evaluations and wage increases to nonunit employees that year, Wendt unilaterally withheld the unit employees' evaluations and wage increases for about six months, until April 2018. The credited evidence also shows that although Wendt promised—after the fact, in May—to bargain over neutralizing the effect of the delayed evaluations by making employees' wage increases retroactive to 2017, it reneged on that commitment in June and refused to bargain over retroactivity to any date before the issuance of unit evaluations in April 2018.

On this record, the Board reasonably concluded that Wendt discriminatorily delayed the unit employees' evaluations and wage increases, in violation of

Section 8(a)(3) and (1) of the Act, and denied the Union any opportunity to bargain over evaluations and wage increases between about November 2017 and April 2018, in violation of Section 8(a)(5) and (1). (D&O4,5n.17,25-26.) The Board further found that Wendt violated Section 8(a)(5) and (1) by refusing to continue bargaining over retroactive wage increases after agreeing to limited retroactivity to the date of the delayed evaluations. (D&O25-26.)

In its opening brief, Wendt does not challenge the Board's well-supported findings that it discriminatorily delayed the unit employees' evaluations and wage increases out of animus towards their protected union activity, and failed to afford the Union any opportunity to bargain over those terms and conditions of employment between about November 2017 and April 2018. Accordingly, Wendt has forfeited judicial review of those unfair-labor-practice findings, and the Board is entitled their summary affirmance. *See* authorities cited above p. 18.

This leaves Wendt with the limited claims presented in its opening brief—that under *MV Transportation*, 368 NLRB No. 66 (2019), it was not required to bargain over retroactive wage increases after May 2018, and that the Board's Order is improper insofar as it relates to the wage increases. Both claims fail, as explained below.

A. The Court Lacks Jurisdiction To Consider Wendt's Claim that Under *MV Transportation*, It Lawfully Refused To Bargain Over Retroactive Wage Increases

On review, Wendt argues for the first time that the Board should have applied *MV Transportation* to find that it had no duty to continue bargaining over retroactivity after May 24, 2018, because its bargaining proposal on that date allegedly constituted a contract that settled all retroactivity questions. (Br.37-39.) The Court, however, lacks jurisdiction to consider this "contract coverage" argument (Br.37) because Wendt never raised it to the Board. *See* 29 U.S.C. § 160(e) and cases cited above p. 17.

MV Transportation issued on September 10, 2019, several months after Wendt filed its exceptions, but over 10 months before the Board issued its decision in this case. In those intervening 10 months, Wendt could have made the argument it makes here, but did not do so. Thus, Wendt did not file a letter pursuant to *Reliant Energy*, 339 NLRB 66 (2003), which permits parties to "submit post-brief letters, not to exceed 350 words," to call the Board's attention to "'pertinent and significant authorities.'" *United Bhd. of Carpenters & Joiners of Am., Local Union No. 623*, 351 NLRB 1417, 1417 n.2 (2007) (quoting *Reliant Energy*, 339 NLRB at 66). Nor did Wendt file a motion for reconsideration after the Board issued its Decision and Order, to raise the Board's allegedly "clear error" (Br.38) in failing to apply *MV Transportation*. *See* 29 C.F.R. § 102.48(c). Having failed

to take these steps, Wendt cannot secure judicial review of its belated *MV Transportation* argument. *See Spectrum Health–Kent Community Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011); *NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1162 n.3 (8th Cir. 2017) (barring argument on a post-exceptions issue not raised in a *Reliant Energy* letter or motion for reconsideration).

Implicitly recognizing that it did not specifically raise *MV Transportation* below, Wendt suggests it nevertheless made a contract-coverage argument by mentioning "fundamental principles of contract law" in its exceptions. (Br.38n.3.) But the supporting brief it filed on exceptions makes clear that it deployed contract-law principles only to attack the administrative law judge's credibility-based factual finding that the parties had left the issue of retroactivity open for further bargaining after May 24, 2018. (ExceptionsBr.18.) Wendt never made a contract-coverage defense, which it easily could have done by citing the longstanding *court* precedent on contract coverage now featured in its opening brief (Br.37-39). Accordingly, there is no merit to Wendt's suggestion that it adequately raised and preserved a contract-coverage defense. *See Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 49 (D.C. Cir. 2020) (critical question is whether the Board received adequate notice of the basis for the objection); *Collective Concrete, Inc. v. NLRB*, 786 F. App'x 266, 266-67 (D.C. Cir. 2019) (general statement in

exceptions held insufficient to put the Board on notice of a specific argument not made with citation to relevant authorities in the brief in support of exceptions).

In any event, Wendt has no viable contract-coverage defense on the facts here. As this Court explained in *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993), the defense applies "when [an] employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement" that "fixes [their respective] rights" and "create[s] a set of rules governing their future actions." *Accord MV Transp.*, 368 NLRB No. 66, slip op. 1, 11. Where such a comprehensive agreement exists, "there is no continuous duty to bargain during the term of the agreement with respect to a matter covered by [it]." *Postal Service*, 8 F.3d at 836; *accord MV Transp.*, 368 NLRB No. 66, slip op. 11.

Here, it is beyond dispute that the parties had not executed an overall collective-bargaining agreement when Wendt refused to continue bargaining over retroactivity. Accordingly, there is no contract, within the meaning of the relevant court and Board cases, to which the contract-coverage doctrine could apply.

Wendt nevertheless suggests its May 24, 2018 *proposal* during contract negotiations may qualify as a contract for purposes of the contract-coverage doctrine. But Wendt cites no authority or rationale for this novel suggestion. *Cf. Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1120 (D.C. Cir. 2018) (rationale for applying contract-coverage doctrine "evaporates" when employer argues its

bargaining duties "have been displaced not by a bargained-for contract," but by an employer-developed handbook).

Furthermore, even assuming a proposal could, in some circumstances, qualify as a collective-bargaining agreement, the credited evidence forecloses any theory that Wendt's proposal here "fixe[d] the parties' rights" and "create[d] a set of rules governing their future actions" with regard to retroactive wage increases. *Postal Service*, 8 F.3d at 836. The four-line May 24 proposal merely reiterated Wendt's previous offer of a 3.42 percent wage increase retroactive to April 8 and asserted that "[r]etroactivity is a negotiated term" and that the offer would expire if not accepted by June 20. (GCExh.9.) As the credited testimony of Union Chief Negotiator Rosaci shows, the Union orally accepted Wendt's proposal with the caveat "that the Union still wished to bargain for the increased amount and retroactivity to October 2017." (D&O24;Tr.41-42.) In response, Wendt's chief negotiator, Schroder, said, "[f]air enough," and the Union "can bargain for that."[9] (D&O24;Tr.41-42.) Consistent with Rosaci's credited testimony, two other union witnesses who were present during that exchange "testified that retroactivity was

[9] Although Wendt asserts in the facts section of its brief that the credited testimony is "garbled and contradictory" (Br.14-15), it fails to argue, much less establish, that the Board's credibility rulings should be overturned as hopelessly incredible, self-contradictory, or patently unsupportable. *Consol. Commc'ns*, 837 F.3d at 7, 10; *see PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 438 F.3d 1184, 1196 (D.C. Cir. 2006) (reference in facts section to the factual basis for a possible argument does not preserve the argument for review).

left open for further negotiations," and the Union proceeded to make information requests in reliance on Schroder's statement. (D&O24;Tr.906-07,968-71.)

In sum, Wendt's contract-coverage claim based on *MV Transportation* is jurisdictionally barred. Further, even if it were properly before the Court, it would fail, not only as a matter of law for the reasons stated above, but also because the credited testimony shows its May 24 proposal did not constitute an agreement that "fully define[d]" the parties' rights on retroactive wage increases. *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). Given the absence of any proper challenge, the Court should summarily affirm the Board's finding that Wendt violated Section 8(a)(5) and (1) of the Act by denying the Union an opportunity to bargain over retroactive wage increases after May 2018.

B. The Board Acted Well Within Its Broad Discretion in Providing Make-Whole and Bargaining Relief for the Violations

Section 10(c) of the Act provides that the Board, upon finding an unfair labor practice, "shall issue…an order requiring [the perpetrator] to cease and desist…and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). This provision confides to the Board "the task of devising [appropriate] remedies" for unfair labor practices. *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346 (1953). Judicial review is accordingly limited. *Phelps*

Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Board-ordered remedies must stand unless they represent "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The Board acted well within its discretion in ordering make-whole and bargaining relief adapted to the violations found. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938). First, it was entirely appropriate for the Board to order that Wendt "[m]ake employees who were not timely provided their performance evaluations and wage increases…whole for any loss of earnings and other benefits suffered as a result of [Wendt's] unlawful conduct," which violated not only Section 8(a)(3) of the Act, but also Section 8(a)(5) and (1). (D&O8.) As the Supreme Court has recognized, "[m]aking [] workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge*, 313 U.S. at 197.[10]

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[10] There is no basis for Wendt's suggestion that the Board's traditional make-whole remedy is improper because Wendt could have lawfully suspended wage increases pending bargaining over the issue. (Br.40.) As the Board found and Wendt does not dispute, Wendt flouted its obligation to bargain over evaluations and wage increases between November 2017 and April 2018. (D&O4,5n.17.) Accordingly, any safe harbor that the law provides for a party to defer wage increases pending good-faith bargaining over them cannot apply to Wendt. Contrary to Wendt (Br.40), *Winn-Dixie Raleigh, Inc.*, 267 NLRB 231, 235-36 (1983)—a case that, unlike the instant one, did not involve an unlawfully motivated employer delay in

Likewise, the Board appropriately ordered that Wendt, "[o]n request, bargain with the Union regarding the retroactivity of pay increases conferred in 2018"—in recognition of its unlawful failure to do so. (D&O8.) As the Supreme Court has recognized, such "measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice" vindicate the policies of the Act. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976) (internal quotation marks and citation omitted).

Wendt's argument that these standard remedies cannot coexist appears to be based on its misreading of the Order as *mandating* bargaining on the same retroactive wage increases that the Board requires Wendt to provide under its make-whole remedy. (Br.39-40.) The Order does no such thing. Rather, it provides that Wendt must bargain "[o]n request" over retroactivity, and the mere possibility of bargaining created by this provision does not undermine the make-whole relief provided elsewhere in the Order.[11]

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providing wage increases or a refusal to bargain over the matter—also provides no support for Wendt's position. *See* above pp. 49-50.

[11] To the extent Wendt suggests the parties could reach a resolution in bargaining that obviates the need for separate make-whole relief, the time to address that circumstance would be in the compliance phase of this case. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) ("compliance proceedings provide the appropriate forum" for parties "to offer concrete evidence" relevant to backpay). If a dispute thereafter arises as to whether Wendt has fulfilled its make-whole obligation under the Order, Wendt can fully litigate its claims before the Board, *see* 29 C.F.R. §§ 102.52, 102.54-102.59, and the Board's ultimate order in the

Nor does make-whole relief render possible bargaining meaningless. Indeed, the Union may request bargaining as a vehicle for securing make-whole relief or more, and Wendt may agree to additional relief in exchange for other concessions. In other words, there is no inherent inconsistency between the Board's make-whole and bargaining remedies as Wendt claims (Br.39-41), and no basis to disturb those standard remedies intended to restore the status quo that would have obtained but for Wendt's unfair labor practices.

---

compliance proceeding would be judicially reviewable under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Wendt's petition for review and enforcing the Board's Order, as modified.[12]

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February 2021

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[12] See p. 12 n.2 above (explaining requested modification).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WENDT CORPORATION	)	
	)	Nos. 20-1319
Petitioner/Cross-Respondent	)	20-1328
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	03-CA-212225, et al.
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 12,922 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 16th day of February 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner/Cross-Respondent	)	20-1328
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	)	
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Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 16th day of February 2021

ADDENDUM

UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner	)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et seq.

Section 7 (29 U.S.C. § 157) 2
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29 C.F.R. § 102.59 12

Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-60:

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] 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 [section 157 of this title];
>
> ***
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

***

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

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

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

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

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

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

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

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

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

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

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] 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. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant Provisions of the National Labor Relations Board's Rules and Regulations, Part 102, 29 C.F.R. § 102

Sec. 102.46. Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.

(a) Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of

exceptions and briefs is subject to the filing requirements of paragraph (h) of this section.

(1) Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

***

(f) Failure to except. Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

***

§102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

***

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

***

§102.52. Compliance with Board order; notification of compliance determination. After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director will seek compliance from all persons having obligations under the order. As appropriate, the Regional Director will make a compliance determination and notify the parties of that determination. A Charging Party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

***

§102.54. Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to §102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

§102.55. Contents of compliance specification.
(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the

backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

§102.56. Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

§102.57. Extension of date of hearing.
Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

§102.58. Withdrawal of compliance specification.
Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

§102.59. Hearing and posthearing procedures.
After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§102.24 through 102.51 will be followed insofar as applicable.