FINAL BRIEF

Nos. 06-1089, 06-1163, 06-1168

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DU PONT DE NEMOURS AND COMPANY,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1-6992, Intervenors.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1-6992, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

E.I. DU PONT DE NEMOURS AND COMPANY, Intervenor.

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITIONS 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 petitions of E.I. DuPont de Nemours and Company ("the Company") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and its affiliate, USW Local 1-6992 (collectively, "the Union"), to review an order of the National Labor Relations Board ("the Board"), and on the cross-application of the Board for enforcement of its order against the Company.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, 160(a). The Board's Decision and Order (D&O 1-41)[1] issued on February 27, 2006 and is reported at 346 NLRB No. 55. The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which allows a party aggrieved by a final order of the Board to file a petition for review in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

[1] Record references in this proof brief are to the original record; references are abbreviated as set forth in the Glossary. When a reference contains a semicolon, references preceding the semicolon are to findings of the Board, and references following the semicolon are to the supporting evidence.

The Union filed its petition for review in the United States Court of Appeals for the Second Circuit on March 6, 2006. The Company filed its petition for review in this Court on March 9, 2006. On March 27, 2006, the Judicial Panel on Multidistrict Litigation consolidated these cases in this Court. The Board filed its cross-application for enforcement in this Court on May 12, 2006. The petitions and the cross-application were timely because the Act places no time limit on filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its numerous uncontested unfair labor practice findings against the Company.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by (a) failing to provide information relevant to its proposal to subcontract its milling and finishing work, and, given that failure, (b) by implementing its proposal in the absence of a valid impasse in negotiations.

3. Whether the Board acted within its broad remedial discretion by ordering the Company to restore the terms and conditions of employment that obtained before it unlawfully implemented its subcontracting proposal, while at the same time allowing the Company to demonstrate in compliance proceedings that the order would be unduly burdensome.

4. Whether substantial evidence supports the Board's finding that the Company did not violate Section 8(a)(5) and (1) of the Act by insisting that negotiations over its proposal to subcontract its finishing operation be separate from bargaining over the collective-bargaining agreement.

5. Whether substantial evidence supports the Board's finding that the Company did not violate Section 8(a)(5) and (1) of the Act by implementing its proposal for sharing healthcare costs after bargaining to impasse.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union against the Company, the Board's General Counsel issued a complaint, twice amended, alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), in numerous respects. (GCX 1mm.) After a 15-day hearing, a Board administrative law judge issued a recommended decision and order finding that the Company violated the Act as alleged. (D&O 13-43.)

The Company timely filed exceptions to the judge's recommended decision and order. The Board concluded that the Company violated the Act in certain respects, upholding some, but not all, of the judge's unfair-labor-practice findings and entering a remedial order against the Company. The Company has petitioned

for review of the finding that it violated the Act by implementing a subcontracting proposal, and the Union has petitioned for review of the Board's dismissal of certain charges. The Board has cross-applied for enforcement of its order against the Company.

The pertinent facts, and a more detailed summary of the Board's conclusions and order, follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Company's Operations and Its Longstanding Bargaining Relationship with the Union

At its Tonawanda, New York, facility, the Company manufactures two products: Tedlar, a material used in a number of industrial settings, and Corian, which is used to make countertops, sinks, and basins. Corian "shapes" (sinks and basins) are manufactured in a two-step process. First, company employees cast the shapes in molds. Second, after the shapes are removed from their molds, they are milled and finished. In that part of the process, millwrights remove outer flanges and drill drain and faucet holes into the shapes, which are then sanded and polished by finishers. From 1985 until 1995, the Company subcontracted the milling and finishing work, shipping the cast shapes off-site, to non-union subcontractors. As detailed further below, the Company brought that work on-site from 1995 until 2001. (D&O 1-3, 14-15; TR 98, 113-15.)

The Company's production and maintenance employees at the Tonawanda facility have had continuous union representation for some 60 years. From the 1940s until 1999, the Buffalo Yerkes Union ("BYU"), an independent union, was their certified bargaining representative. In 1999, the BYU affiliated with the Paper, Allied Industrial, Chemical and Energy Workers, International Union ("PACE"), which chartered BYU as its Local 1-6992. The Company recognized PACE as the bargaining representative, and the bargaining relationship continued seamlessly through this change in affiliation. (D&O 2, 15; TR 97, 99, 102-03.)[2]

The last collective-bargaining agreement ("CBA") in force between the parties was executed by the Company and the BYU in 1977. The contract contained an "evergreen clause," pursuant to which the contract, rather than having a set expiration date, remained in effect from year to year, unless one or the other party (a) on 60 days' notice, modifies the agreement; or (b) on 120 days' notice, terminates the contract. (D&O 2, 33-34; GCX 46A, 46B.)

From 1977 to 1993, the parties kept the CBA as a whole in place, while periodically opening it for modification on specific issues. Pursuant to the evergreen clause, the parties renegotiated wages at regular yearly intervals. They renegotiated other issues, such as those pertaining to benefits, on an ad hoc basis.

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[2] After the events at issue here, PACE merged with the United Steelworkers of America, AFL-CIO, CLC, thereby forming the USW. USW chartered the local as USW Local 1-6992.

One such negotiation, relevant here, occurred in 1991, when the parties agreed to add an employer-sponsored, self-insured benefit program—the "Beneflex Flexible Benefits Plan"—as a supplement to the then-existing options for health coverage provided by outside insurers. (D&O 6, 33-34; TR 103, 122, GCX 46A, 46B.)

B. 1993-94: The Company Terminates the CBA and the Parties Engage in Their First Phase of CBA Negotiations, Without Success

In September 1993, the Company announced that it intended to terminate the CBA. The parties thereupon began bargaining over a successor agreement. Two principle issues divided the parties. First, the Company wished to eliminate the practice of doubling overtime through "pyramiding," which required the payment of overtime for all hours worked in excess of 8 hours per day as well as all hours worked in excess of 40 hours per week. Second, the Company was keen to bring down its healthcare costs by removing insurance options other than the Beneflex plan and instituting a cost-sharing formula that would over time equalize the share of healthcare costs borne by the Company and the plan's participants. (D&O 7, 33-34; TR 104, 108-09, 1558, 1560, RX 58.)

The parties bargained for a year, meeting 58 times, without reaching an agreement. The Company declared an impasse in September 1994 on the overtime and healthcare issues. The Company then implemented its final offer, eliminating overtime pyramiding, removing all insurance options other than those provided

through Beneflex, and instituting a cost-sharing formula according to which the employee share would increase over time to 50 percent. (D&O 7, 33-34; TR 105, 108-09, 1528, 1562-63, GCX 47, RX 58.)

In late 1994, the Union filed unfair labor practice charges with the Board challenging the Company's actions. Upon the filing of those charges, the parties suspended CBA negotiations completely. As detailed further in Part I.D below, that state of affairs continued for nearly 4 years before the parties reached a settlement and resumed bargaining. (D&O 2, 14; TR 105, 109-10, 740, 1569-71.)

C. 1995: While CBA Negotiations Are Stalled, the Company Decides to Bring Milling and Finishing Work On-Site and the Parties Successfully Conclude a Separate Finishing Agreement

In 1995, while negotiations over the terminated CBA remained suspended, the Company informed the Union that it was interested in bringing the milling and finishing work on-site, using bargaining-unit employees, rather than continuing to subcontract the work as it had been doing for the preceding decade. The Company's decision was prompted by problems that it was encountering with its contractors, in particular, poor quality control and theft. (D&O 2, 14; TR 114-15, 129.)

The Company and the Union then successfully negotiated an agreement governing the finishing work to be performed at the facility ("the Finishing Agreement"). In entering the Finishing Agreement, the Union acceded to the

Company's demand that employees performing finishing work be paid at a significantly lower hourly rate than the lowest rate recognized in the CBA. The Union gained employment from the agreement, as the Company in turn agreed to perform at least 85 percent of its finishing work on-site. The in-house finishing operation thus added approximately 50 employees to the bargaining unit. (D&O 2, 14; TR 113-17, GCX 3.) The Finishing Agreement had its own duration/ termination clause. That clause provided that the agreement would remain in force for one year, after which either party could terminate the agreement on 120 days' notice. (D&O 2, 14; TR 130, GCX 3.)

D. 1997-2000: The Parties Settle the 1993 Unfair Labor Practice Charges and Resume CBA Bargaining, Without Success

In the meantime, CBA negotiations remained suspended. But in February 1997—2 years after entering into the Finishing Agreement and nearly 4 years after the parties suspended CBA negotiations—the Company and the Union entered into a settlement of the Union's 1993 unfair labor practice charges, which opened the way toward further CBA bargaining. Of relevance here, the parties agreed that, until such time as the parties reached an agreement or a lawful impasse, (1) the Company would rescind the overtime changes; and (2) the Beneflex plan would remain the sole benefits option, but the employee share of health premium contributions would be frozen at the 1996 level of 20 percent. (D&O 2, 14, 3-34; GCX 4; TR 1569-70, 1571-74.)

The parties then re-commenced CBA negotiations. In December 1998, the Company presented a "final offer," seeking once again to eliminate the doubling of overtime payments through "pyramiding" and to unfreeze the 80/20 health-care-cost-payment ratio set by the 1997 settlement agreement. (D&O 2, 14; TR 117, 1575-77, RX 59.)

The Union put the Company's offer to a membership vote, and the membership rejected the offer by a substantial margin. (D&O 1, 15; TR 115-17, 1575-77, RX 59.) The Union informed the Company during a bargaining session that the "two most important issues" motivating the membership were "the increase in cost of healthcare and the loss of double [over]time." (TR 1578.)

The parties resumed negotiations in early 1999; the parties held more than 61 bargaining meetings before the talks finally broke down in 2001. (D&O 2, 14; TR 117, 1579, CPX 1.) Throughout this period, the overtime and healthcare cost-sharing issues remained the chief focus, and the chief sticking point, in negotiations. (TR 1579, 1582-83, RX 60(b).)

E. January-March 2001: The Company Submits a Final CBA Offer and Terminates the Finishing Agreement

In January 2001, the Company presented another final CBA offer. In it, the Company once again sought to eliminate the double-payment of overtime and to unfreeze the percentage of the employees' contribution to healthcare costs under the plan. More specifically, the Company's healthcare-cost-sharing proposal

provided that future increases in the cost of benefits would be shared equally between the Company and plan participants and that the Company was authorized to allocate the employees' share of those expenses among the different components of the plan's design (i.e., premiums, co-payments, and the like). (D&O 7, 34; GCX 18A.)

In connection with that January offer, the Company also proposed a supplemental agreement amending the terms of the Finishing Agreement. Through that supplemental agreement, the Company proposed a modest increase in the wage rate for finishing employees accompanied by an elimination of the Company's commitment to perform a set percentage of its finishing work in-house. The Company informed the Union that it was investigating new technology that might eliminate—or at least significantly curtail—the need for milling and finishing work. (D&O 2, 15; GCX 18(c), RX 61.)

On February 28, 2001, the Company notified the Union that it was terminating that agreement, effective June 29, 2001. By way of explanation, the Company reiterated that it was continuing to explore technology that might eliminate that work. (D&O 2, 15; GCX 21.) Approximately 3 weeks later, the Company withdrew its outstanding proposals as to the Finishing Agreement, stating that it hoped to eliminate milling and finishing work entirely by the following January. At the same time, the Company insisted that discussions

pertaining to the milling and finishing work be separate from negotiations for a successor CBA. The Union responded that it would "give that some thought." (D&O 2-3, 16; GCX 52.)

At a March 23 bargaining session, the Union submitted a proposal—the so-called "helping hands proposal"—designed to help alleviate a bottleneck in the milling and finishing process that the Company had previously identified. The Company rejected the proposal on the ground that it expected to eliminate the milling and finishing operation in the near future. The Union's spokesman, James Briggs, requested an update regarding the Company's pursuit of such technological changes. The Company responded that an update would be forthcoming, but not at the next contract negotiation. Briggs then stated: "This is part of contract." The Company reiterated that it was willing to discuss milling and finishing issues but would only do so separately from negotiations over a successor CBA. (D&O 2-3, 16; GCX 27.)

F. April-May 2001: The Company Proposes to Subcontract the Milling and Finishing Work; the Union Attempts to Secure Information Needed to Respond to the Company's Subcontracting Proposal; the Company Declares Impasse and Implements its Final Offers

1. The Company announces its intention to subcontract milling and finishing work, prompting the Union to request information

In early April 2001, the Company announced a corporation-wide cost-cutting plan. The Company advised the Union and the employees that it was exploring the use of new technology in the casting process and that it also was conducting a feasibility study to determine whether it would derive a business advantage from subcontracting the milling and finishing work. (D&O 5, 16; GCX 28.)

At an April 5, 2001 bargaining session, the Company proposed subcontracting the milling and finishing work, informing the Union of a feasibility study (GCX 34) concluding that the Company could save $1 million in a 12-month period by subcontracting the milling and finishing work. The Company said that unless the Union could present a proposal that would provide for a comparable savings in labor costs, it would subcontract the milling and finishing work on June 29, 2002 (subsequently changed to July 1). In response, the Union requested information regarding the Company's overall cost-cutting directives and the feasibility study. (D&O 3, 16; GCX 31.)

2. The Company announces an impasse in CBA negotiations and implements its final CBA offer

On April 12, 2001, the Company declared that CBA negotiations were at an impasse over the issues of overtime pay and healthcare costs, and announced that it would implement its January 12, 2001 final offer (less the proposed supplement to the Finishing Agreement) on April 23, 2001. The Company followed up with an April 30 letter to the Union explaining the steps it was taking to implement the final offer. The Company thereby eliminated overtime pyramiding and also implemented its healthcare cost-sharing proposal. (D&O 3, 16; GCX 37, 40.)

3. The Union attempts to secure information relevant to the subcontracting proposal; the Company fails to fully respond, declares impasse, and implements its subcontracting proposal

In the meantime, the parties had continued to negotiate over the Company's subcontracting proposal. During an April 16 negotiation session, the Company announced that it had moved the date on which it would begin subcontracting by two months—from July 1 to May 1, 2001. In so doing the Company left the Union with only two weeks in which to formulate a counterproposal in the face of the Company's demand that it match the Company's $1 million cost-saving estimate. (D&O 3, 5, 16; GCX 38B, RX 16.)

On April 23, the Union made a request for information to substantiate the cost-saving claims set forth in the feasibility study and to otherwise formulate a counterproposal (some of which overlapped with requests the Union had made

earlier in the month but that had not been satisfactorily answered). Of relevance here, the request sought the following seven items:

(a) actual, hard costs of health, pension, and life benefits, and disability insurance for milling and finishing employees;

(b) actual labor costs for supervision in the milling and finishing operation;

(c) the total number of bowls finished since 1997, listed by style number and color, and the location where the finishing was performed;

(d) rates of damage for finishing onsite and finishing by subcontractors from 1994-2000;

(e) subcontracts for milling and finishing work from 1994-2000;

(f) compensation schedules for contractor Jaco from 1997-1999; and

(g) a copy of a subcontracting quote that the Company relied upon at the April 16, 2001 session [(D&O 5, 20; RX 17.)]

The Union had made it clear that the information it sought was necessary for it to "properly evaluate DuPont's basis for its decision to outsource and/or eliminate the milling and finishing jobs," and that information regarding in-house milling and finishing labor costs as well as information regarding subcontracts was "essential to the Union's ability to properly determine the extent to which labor costs are a factor in DuPont's decision." (D&O 6; GCX 31.)

On April 30, the Company notified the Union that it was eliminating the 53 milling and finishing positions and that in the absence of a union proposal to save

the Respondent $1 million, subcontracting of the milling and finishing work would begin the following day. (D&O 23; GCX 41.) At the same time, the Company responded to the Union's April 23 information request. The Company claimed that it had already provided the information "that was used to formulate [its] proposal" and complained that the Union's April 23 request "does no more than rehash the previous information provided" and that the Company did "not know how information back to 1994 could be relevant to the union's proposal." The letter closed by stating that the Company had "not received any proposals from the union on how to save $1 [million] over the next 12 months" and declared the Company's determination "to move forward [with its subcontracting proposal] on May 1." (D&O 23; GCX 42.)

On May 1—less than one month after making its subcontracting proposal—the Company declared that bargaining over the subcontracting was at an impasse and implemented its proposal. (GCX 43.) By that time, the only information responsive to the above requests that the Company had supplied to the Union was two subcontracts, each of which was incomplete. (D&O 23-26; TR 1426-28, RX 56, 57.) The Company did not respond more thoroughly to the Union's information request until November 2001—shortly after the Board contacted the Company regarding the Union's charges, and long after the Company had declared

an impasse and subcontracted the work—and it was not fully responsive. (D&O 23; RX 19.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board made three determinations of relevance here. *First*, the Board (Chairman Battista and Members Liebman and Schaumber) unanimously ruled that the Company unlawfully declared an impasse in the negotiations over its proposal to subcontract the milling and finishing work. The Board found that the Company, in violation of its duty to bargain in good faith, had failed adequately to respond to the Union's requests for information relevant to that proposal. The Board further concluded that that failure prevented a lawful impasse, rendering the Company's implementation of its subcontracting proposal unlawful. The Board also affirmed a number of other violations found by the administrative law judge to which the Company filed no exceptions. (D&O 1, 5-6.) As a remedy, the Board directed the Company to cease and desist from the unfair labor practices found, and to cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the order directs the Company (1) to restore the milling and finishing work (subject to the employer's right to show, in compliance proceedings, that the remedy is unduly burdensome) and to reinstate with backpay the bargaining unit employees who were laid off due to the subcontracting; (2) to

grant union representatives access to the facility for a reasonable time to investigate potential grievances; (3) to provide the Union with relevant requested information; and (4) to post a remedial notice. (D&O 6 n.10, 9.)

Second, the Board (Chairman Battista and Member Schaumber, with Member Liebman dissenting) found that the Company did not violate its duty to bargain in good faith by insisting on separate negotiations over its proposal to subcontract the milling and finishing work. The Board stressed that the parties had historically conducted separate negotiations over that work, ever since the Company's 1995 decision to bring that work in-house. The Board held, in the alternative, that even if the bifurcation of negotiations was improper, it did not taint the Company's declaration of impasse, inasmuch as the impasse resulted from persistently unresolved disputes regarding overtime and healthcare costs. (D&O 1-5.)

Third, the Board (Chairman Battista and Member Schaumber, with Member Liebman dissenting) ruled that the Company's post-impasse changes to its employee healthcare plan did not confer the kind of open-ended discretion that may not be implemented upon impasse under *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997). (D&O 6-8.)

SUMMARY OF ARGUMENT

I. Because the Company failed to contest a number of the Board's unfair-labor-practice findings, those findings should be enforced summarily.

II. Substantial evidence supports the Board's findings that (a) the Company failed adequately to respond to seven union requests for information relevant to the Company's subcontracting proposal, and (b) that failure precluded any lawful impasse on the subcontracting issue. The record shows that the Company proposed to subcontract its milling and finishing work—based on a study purporting to show that it would save $1 million per year by doing so—and challenged the Union to make a counterproposal with comparable savings. The Union then requested information going to the subcontracting proposal—and in particular to the basis for the Company's $1 million cost-saving estimate—to which the Company supplied no adequate response.

Given the nature of the Company's proposal, the record amply supports the Board's finding that each of the requests at issue was relevant to the principal issues in contention and that by failing to provide the information, the Company prevented a full exploration of the subjects on which the Union would have to concede to formulate a counterproposal. That being so, under settled Board and court precedents, it follows that the Company unlawfully implemented its proposal in the absence of a lawful impasse.

There is no merit to the Company's contention that the Board failed to meet its putative "rigorous burden of proof" to show a causal relationship between the unfulfilled information requests and the impasse. Under the relevant case law, the necessary causal connection is supplied where, as here, the Board properly finds that the unfulfilled requests are pertinent to the key issues dividing the parties. Nor does the record support the Company's suggestion that the evidence compelled a Board finding that the Union had no genuine interest in bargaining.

III. The Company's somewhat token "undue burden" challenge to the Board's remedy should be rejected because it is premature and, in any event, lacking in record support. The Board reserved for compliance proceedings the issue of whether the order to restore the subcontracted work would constitute an undue burden. The Board's caution was well warranted because the Company's presentation on this issue was thin, and the relevant facts were in flux at the time of the hearing.

IV. Substantial evidence supports the Board's finding—based on a detailed review of the parties' bargaining history and past practice—that issues concerning the Company's milling and finishing operation were historically separate and that the Company did not violate the Act by insisting that such negotiations remain separate.

V. Substantial evidence supports the Board's conclusion that the Company did not violate the Act by implementing a healthcare-cost-sharing provision because it did so only after bargaining to impasse in negotiations for a new agreement. Although the Board, in *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997), articulated a narrow exception to the implementation-upon-impasse rules for contract provisions that grant employers unfettered discretion, the record amply supports the Board's finding that the clause at issue here was not such a provision. Rather, the clause set a fixed cost-sharing ratio and granted the Company discretion only to allocate how the employees will bear their share of annual inflation in the cost of medical benefits.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED VIOLATION FINDINGS

The Company has not contested the Board's findings that it violated its duty to bargain under Section 8(a)(5) and (1) of the Act by: (1) delaying its production of information responsive to the Union's September 28, 2000 request regarding milling and finishing work until March 12, 2001 (D&O 1 n.1, 29-30); (2) failing adequately to respond to the Union's January 19, 2001 requests for information regarding gifts and incentives and regarding a disciplinary investigation (D&O 1 & n.1, 30-31); and (3) denying union representatives access to certain facilities to investigate potential grievances and refusing to bargain over visitation of jobsites where bargaining unit work was being performed (D&O 1 n.1, 30-33). Nor has the Company contested the Board's finding that it violated Section 8(a)(1) of the Act by threatening union representatives with discipline if they failed to leave the Tonawanda facility. (D&O 1, 31-32.)

By not contesting the foregoing unfair labor practice findings, the Company has waived any defenses to them. The Board is therefore entitled to summary affirmance of those findings and enforcement of the related portions of the Board's Order. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED THE ACT BY FAILING TO PROVIDE RELEVANT INFORMATION TO THE UNION AND BY UNILATERALLY IMPLEMENTING ITS SUBCONTRACTING PROPOSAL

A. Governing Legal Principles and Standard of Review

Section 8(a)(5) and (1) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the collective-bargaining representative of its employees. An employer fails to meet its statutory obligation to bargain in good faith when, absent a lawful impasse in negotiations, it unilaterally changes employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

It is well settled that an employer's duty to bargain in good faith includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967). The critical question in determining whether information must be produced is that of relevance. A "discovery-type standard" is applied, pursuant to which "[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation ... to provide it." *Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000) (citation and quotation marks omitted).

As this Court has recognized, the duty to provide information relevant to the issues on the bargaining table is a "fundamental obligation" that is critical to the collective-bargaining process. *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). To put the matter country simple, "[a] party to good-faith collective bargaining—whether it be employer or union—cannot reasonably expect the other party to buy a pig-in-[a]-poke." *Beyerl Chevrolet, Inc.*, 221 NLRB 710, 721 (1977). *Accord Acme*, 385 U.S. at 438 n. 8 (noting that to deny a union information relating to bargaining proposals is to "'require[e] it to play a game of blind man's bluff'" (citation omitted)); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1065 (7th Cir. 1988) (noting that disclosure obligations are designed to minimize "bluff, guesswork, and sheer gambling" that characterize negotiations). Consequently, the Board, with court approval, has long recognized that a lawful "impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co.*, 301 NLRB 729, 740 (1991). *See also United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 448 (4th Cir. 1969).

The Board's factual findings are "conclusive" under Section 10(e) of the Act if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e).

Under this standard, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Board's judgment on the question of relevance "is entitled to 'great deference,' because '[d]etermining whether a party has violated its duty to "confer in good faith"' is 'particularly within the expertise of the Board.'" *Crowley Marine Serivces*, 234 F.3d at 1297 (citation omitted). Similarly, whether a valid impasse exists "is a question of fact involving the Board's presumed experience and knowledge of bargaining problems"; consequently, "few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems." *Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 246 (D.C. Cir. 1992) (citation omitted).

B. The Record Amply Demonstrates that the Union's Information Requests Were Relevant and the Company's Responses Were Deficient

As detailed in the Statement of Facts (at p. 13 above), the Company's April 5, 2001 proposal to subcontract the milling and finishing work was predicated on the Company's feasibility plan, which purported to demonstrate that the Company could save $1 million per year by subcontracting. Indeed, the gist of the

Company's bargaining position was its demand that the Union present a proposal that would provide comparable cost savings. Faced with this challenge, the Union requested information, including the seven items at issue here, in order to evaluate the Company's claims and formulate a counterproposal.

Given the nature of the Company's proposal, the Board reasonably concluded that the information the Union sought was "clear[ly] relevan[t]" to the issues on the table and necessary "[i]n order to assess the accuracy of the [Company's cost-saving] claims." (D&O 6.) Further, the record amply supports the Board's finding (D&O 5-6) that the Company's response to these requests was wholly inadequate. We address the relevance of each of the seven requests at issue, and the deficient company responses and arguments on appeal, in turn.

(a) Actual benefit costs for milling and finishing employees

The Union's request for "actual, hard costs" for employee benefits in the milling and finishing operation could hardly be more relevant. As the Board reasonably found, that request "is relevant and essential to the Union's ability to assess the [Company's] assertion that such costs constituted 40 percent of its labor costs, a figure that the Union disputes." (D&O 6.)

It is settled that the relevance of information concerning bargaining-unit employees' benefits is presumed. *See DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 439, 443 (D.C. Cir. 2002). Such information is obviously of critical

importance here, where the Union sought to verify (or debunk) the employer's claim that subcontracting would yield specific cost savings. Further, the Union had legitimate grounds to question the estimate—which it shared with the Company—based on its knowledge that many of the health benefits at issue were self-insured and that the pension plan was significantly overfunded. (TR 1504.)

It is undisputed that the Company never supplied the actual costs for milling and finishing employees' benefits. Nor did the Company supply any of the data on which it based its 40-percent-of-labor-costs estimate or endeavor to break down the estimate by benefit type, as the Union requested. (D&O 24; TR 939-40.)[3] Instead, the Company simply insisted (TR 1501-03), as it continues to do (Co Br 55), that the feasibility study's gross estimate (that benefits *company-wide* constituted some 40 percent of its payroll costs) was all that it was required to supply.

Given the clear relevance of the information requested, and the Union's informed doubts as to the accuracy of the Company's estimate, the Union was not required to take the Company's estimate at face value. *See Ormet Aluminum Mill Products Corp*, 335 NLRB 788, 802 (2001) ("[T]he [union] is entitled to the original documents, not just to unverified summaries made by [company] officials.

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[3] The Company's "lead bargainer," Deborah Brauer, admitted that after receiving this request she never had any discussions with her superiors about, or otherwise sought to ascertain, what the 40-percent figure was actually based on. (TR 1501-05.)

… [T]he [union] is entitled to the base line information ….”); *Merchant Fast Motor Line*, 324 NLRB 562, 563 (1997) (“The [u]nion was not required to accept the [company’s] declaration that there were no profits to fund the [pension] plan; nor was it required to accept only the summary financial information offered by the [company] during limited negotiations to amend the plan.”).[4]

(b) Actual labor costs for supervising the milling and finishing work

The Company’s feasibility study used overall “average,” “bundled” supervisory costs as part of the basis for its cost-saving claims. (TR 1506-07.) As part of its effort to independently assess the reliability of the feasibility study’s

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[4] The Company tries to suggest (Co Br 55) that it was incapable of providing actual benefit costs, citing its belated, self-serving representation to the Union on *November 2, 2001* that it did not “track individual benefit costs per hour.” (RX 19.) This *post hoc* defense, if defense it is, fails at the outset because the Company did not raise it in its exceptions to the administrative law judge’s decision. Under Section 10(e) of the Act this defense is waived and the Court thus has no jurisdiction to entertain it. *See* 29 U.S.C. § 160(e) (“[N]o objection that has not been urged before the Board ... shall be considered by the court.”); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 887 (D.C. Cir. 1997). In any event, the Company’s carefully parsed claim that benefit costs are not “track[ed] … per hour,” even if timely proffered, would have raised more questions than it answered. That the Company does not “track” such costs “per hour” does not preclude other ways of calculating actual benefit costs, or at least providing the data underlying the 40-percent-of-labor-costs estimate. And the Company’s admissions (TR 1726-27) that it records pension payments and hires an outside organization to track health claims suggest that it could have provided actual benefit costs (as one would expect of a sophisticated multinational corporation such as the Company). At all events, the Company had the obligation “to make a reasonable effort to secure the requested information and, if unavailable, explain [to the union] the reasons for the unavailability,” *Rochester Acoustical Group*, 298 NLRB 558, 562 (1990), which it did not do.

calculations and conclusions, the Union requested the actual labor costs for supervision in the milling and finishing portion of the Company's operation. (RX 17.) The Company provided no such information prior to declaring impasse and implementing its proposal. (RX 19.)

Because this request pertains to compensation information for non-unit staff, it is not presumptively relevant, but must nonetheless be disclosed if the Union "demonstrates the relevance of information about non-union employees." *United States Testing*, 160 F.3d at 19. The Board (D&O 6, 24) reasonably found that the Union did so here. The costs associated with supervising in-house finishing are an important factor in any comparison of subcontracting versus in-house production, as the Company at least implicitly conceded by including average, bundled supervisory costs in its feasibility study. And, as with other relevant costs, the Union was entitled to look behind the Company's "average," "bundled" figures.[5] *See id.* at 20 (medical claims information regarding non-unit employees relevant where employer justified proposed employee contribution hike on rising healthcare costs, "necessarily put[ting] on the table the experience under the current plan"). And, as shown above, summary or average figures are not sufficient. *See Ormet*, 335 NLRB at 802; *Merchant Fast*, 324 NLRB at 563.

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[5] And, as it turns out from information the Company divulged much later, its supervisory cost estimate was off by some $30,000.00. (D&O 23-24; TR 1508, RX 19, 22.)

The Company's sole defense is its claim (Co Br 56) that the supervisory salary information that the Union sought is confidential. But, as the Board found (D&O 1, 24; TR 1509, RX 19, 22), and as the undisputed evidence shows, the Company never raised this objection with the Union and never offered an accommodation by, say, providing redacted compensation information or placing restrictions on disclosure of the information.[6] That failure dooms the Company's defense.

It is well settled that an employer who claims confidentiality is not only required to make that objection known to the union at the time of the request, but is also required to offer an accommodation that would satisfy the union's need for information while preserving any legitimate confidentiality concerns. *See United States Testing*, 160 F.3d at 20-22. *Accord Norris, a Dover Resource Co. v. NLRB*, 417 F.3d 1161, 1169-71 (10th Cir. 2005). The Company did neither. Consequently, where, as here, the Company "made no effort to accommodate the Union's request … by redaction or otherwise, the Board was not required to decide whether a particular form of accommodation was sufficient and did not unduly

[6] Indeed, the Company's *post hoc* claim that confidentiality concerns prohibited such disclosure is belied by the fact that the Company eventually *did* disclose its actual supervisory costs, albeit long after it had already implemented its subcontracting proposal. (RX 22.)

restrict the information that the Union requested." *United States Testing*, 160 F.3d at 22.

(c) Number of bowls finished, by style, number, and color

The Union's request for information on the style and color of the shapes that were finished on-site and off-site was based on the Union's understanding that the finishing of certain styles and colors was more labor-intensive, and that the Company had been finishing those more labor-intensive products on-site, while contracting out the other products. (D&O 6, 26; TR 210, 658-60.) The Board thus reasonably found (D&O 6) that this request was relevant to that assertion.

The Company misses the point in dismissing this request as being of "marginal relevance" (Co Br 56), because it sought to subcontract all bowls, regardless of style and color. As the administrative law judge cogently explained, the Union's request was predicated on its view that the Company's estimates for in-house finishing were skewed upward because the Company had been finishing the more labor-intensive items in-house: "Thus, in order for the comparison [of subcontracting versus in-house finishing costs] to be valid it was necessary to

ensure that the style and color of the bowls being compared was similar." (D&O 26.)[7]

(d) Damage rates for in-house and outsourced finishing work

As the Board reasonably concluded (D&O 6, 26), the Union's request for damage rates on finishing work from 1995-2000 was relevant because the Union sought to determine whether quality-control costs from subcontracting were not properly accounted for in the Company's cost-savings estimate. This request was especially pertinent in light of the undisputed fact that Company's experience of high damage rates from subcontractors was a primary reason motivating the Company to bring the finishing work in-house in 1995. (TR 114-15, 129.) There is no question but that the Company failed to provide the Union with any damage information or make any effort to obtain it. (TR 1471-72.)

The Company does not challenge the relevance of the request, but instead offers the excuses that "damage rates are shared daily with bargaining unit employees" and that a single subcontract that the Company had produced limited

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[7] The Company's further assertion (Co Br 56) that it was under no obligation to respond to this request because the "Union members knew the bowl styles and colors outsourced" borders on the frivolous. The actual records and figures for outsourced products were uniquely in the hands of the Company, not the unit employees. As the administrative law judge found, the union representative's conversations with unit employees concerning outsourced products formed the basis for the request, but, for obvious reasons, were "not sufficient to satisfy the relevant information that was needed and requested." (D&O 26; TR 658-60.)

the Company's liability for damage to 3 percent. (Co Br 56.) The former excuse fails because unit employees can hardly be expected to keep detailed records of whatever information the Company might have "shared" with them from day to day, while the Company did in fact track damaged product in the ordinary course of business (TR 1741-42). At any rate, the Company certainly did not share *subcontracting* damage rates with unit employees, and without that data no intelligent comparison could possibly be made.

As to the latter excuse, the fact that a single agreement contained a liability limitation does not answer the question of the Company's damage exposure across the full range of its subcontracting relationships—especially since, as shown below, the Company's production of relevant subcontracts was particularly deficient.

(e) Subcontracts for finishing work from 1994-2000; and
(f) Compensation schedules for subcontractor Jaco covering 3 years

The Union sought copies of the Company's subcontracts for finishing work from 1994-2000. (RX 17.) As the Board correctly concluded (D&O 6), this request sought documents of obvious relevance which were "necessary to track the long-term cost of subcontracting and compare the actual costs of offsite work with

work performed on-site."[8] The subcontracts would thus have constituted the most fundamental evidence of subcontracting costs, which lay at the heart of the Company's cost-saving claim and were therefore essential for the Union to substantiate (or debunk) the Company's claims and prepare an informed response.

The Company supplied only two documents responsive to this request: a then-recent subcontract with Jaco Custom Grinding and another with TFI. (RX 56, 57.) The Board reasonably found (D&O 1, 24) that this very selective production was inadequate. The Company provided no earlier contracts, and its production was deficient even as to then-current contracts: it is undisputed that at least two recent contracts with another contractor were not produced to the Union (although the Company did manage to produce those contracts later, in response to a Board subpoena). (D&O 24; TR 1818-21, GCX 66, 67.) And the two contracts that the Company did disclose to the Union, as the administrative law judge noted (D&O 24), were incomplete. *Compare* RX 57 (contract produced to the Union before declaration of impasse) *with* GCX 65 (contract produced much later pursuant to Board subpoena).

The Company offers in defense only the conclusory declaration (Co Br 56) that it provided what it asserts to be "the two most relevant documents," *viz.*, the

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[8] More specifically, the Union sought to determine whether the Company adequately accounted for annual increases in the cost of contracting. (D&O 24; TR 840.)

two incomplete subcontracts. But given the unquestioned relevance of the request for all then-current contracts and for all contracts going back 5 years (and the absence of any claim of undue burden or any other defense), it is simply no answer to say that a *subset* of relevant documents was produced. A collective-bargaining party's "duty to supply information … is not satisfied by furnishing only the documents it deems are sufficient." *Silver Bros. Co.*, 312 NLRB 1060, 1070 (1993).

Relatedly, as noted above, one of the two (partial) contracts that the Company had produced to the Union was a then-recent service agreement with Jaco, attached to which was a compensation schedule. (RX 56.) For the same reasons that it sought subcontracts more generally, the Union also made a specific request for similar compensation schedules for a 3-year period. The Company refused to provide the information, making the claim—contradicted by the document itself and later acknowledged by the Company to be untrue—that the request was irrelevant because Jaco did not perform finishing work. (D&O 26; RX 19, TR 1522, 1760-62.)[9] This demonstrably false response displays a failure to exercise the most basic diligence in responding to the Union's legitimate request.

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[9] Company official Casinelli's explanation that he had somehow "interpreted" the document as not relating to finishing work when preparing the Company's response (TR 1760-62) is curious for a number of reasons, not the least of which is that if the Company truly believed at the time that the Jaco contract was irrelevant, it would have had no reason to produce that contract to the Union in the first place.

(g) Contractor quote used in feasibility study

In the course of the April 16 bargaining session over subcontracting, company official Brauer told union representatives that the figures in the feasibility study were based in part on a price quote the Company received from a particular vendor. (D&O 25; RX 17.) Accordingly, the Union made a specific request for that price quote. (RX 17.) This request was plainly relevant, as it was prompted by the Company's own representation that it used a particular price quote in the feasibility study. The Company failed to produce that quote or explain why it failed to do so. (TR 1523, GCX 42.) The Company does not contest the relevance of the request. And again the Company's repeated, pat assertion (Co Br 56) that it had provided "current subcontracting costs" (in the form of the two incomplete subcontracts) does nothing to mitigate its failure to provide any response to this reasonable request.

* * *

In sum, the Board reasonably concluded that "[i]n light of the [Company's] failure to provide substantial and necessary information that related directly to the bargaining issues at hand, the [Company] 'prevented a full exploration of the subjects on which the Union would have to concede in order to present useful alternatives.'" (D&O 6 (citation omitted).) The Company's failure to supply relevant information essentially required the Union to simply accept the

Company's bargaining claims on faith—something no responsible negotiator would do and that the Act does not require.

C. The Board Reasonably Found that the Company's Unlawful Failure To Provide Information Relevant to Its Subcontracting Proposal Precluded a Lawful Impasse over the Subcontracting Issue

As previously shown in Part I.A above (pp. 22-25), it is well settled that a lawful impasse in bargaining cannot exist where an employer has failed to satisfy its statutory obligation to provide information relevant to the matters on which the parties are divided. *See, e.g., United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999). And, in Part I.B above (pp. 25-36), we demonstrated that the record amply supports the Board's further conclusion (D&O 6) that "[t]he Union's information requests dealt specifically with" the central issues on the bargaining table—namely, the Company's "assert[ion] that subcontracting milling and finishing work would save $1 million over a 12-month period," its "expedited plan to eliminate milling and finishing work through subcontracting," and its concomitant "challenge[to] the Union to provide for similar savings without subcontracting."

All this being so, it follows ineluctably that the Company implemented its subcontracting proposal in the absence of a lawful impasse. *See United States Testing*, 160 F.3d at 22 (holding that employer's "unlawful refusal to supply the requested medical claims information precluded the [employer] from declaring an

impasse" in negotiations over proposed healthcare-premium hike); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 448 (4th Cir. 1969) ("Because the Company refused to furnish requested relevant information, a reasonable opportunity to bargain by the Union, required before a legally cognizable impasse can be reached and unilateral action taken, was not present.").

Against all this, the Company nevertheless insists (Co Br 37) that what it delicately calls its "failure to more fully respond to" the Union's information requests did not preclude a lawful impasse. The Company offers two arguments in support of this proposition: (1) that the Board failed to find a "causal connection" between the unfulfilled information requests and the negotiations (Co Br 35-46, 61-65); and (2) that the Board "ignored" evidence purportedly showing that the Union had no intention of substantively bargaining [the Company's] subcontracting proposals" and that the Union's information requests were nothing more than a ploy to forestall impasse (Co Br 46-51). We address each claim in turn.

(1) There is no merit to the Company's claim (Co Br 35-46, 61-65) that the Board failed to find the necessary causal relationship between the Company's failure to disclose relevant information and an adverse impact on the process of bargaining.

As an initial matter, the case law (including this Court's precedent) is clear that where a party violates the Act by failing to fulfill information requests bearing on the issues on which the parties are divided, no lawful impasse on those issues can exist. *See, e.g.*, *United States Testing*, 160 F.3d at 22; *Cone Mills*, 413 F.2d at 448. In other words, the necessary causal connection is supplied where, as here, the Board properly finds that the unfulfilled information request is pertinent to the key issues in contention between the parties. No further, heightened "rigorous burden of proof," such as that postulated by the Company (Co Br 44), is required.

The error in the Company's approach is perhaps best illustrated by this Court's decision in *United States Testing*. In that case, the employer, citing rising healthcare costs, sought in contract bargaining to increase the healthcare contributions made by unit employees. The union then requested claims information for all employees, even those outside the unit, to evaluate the employer's claim and formulate a response. 160 F.3d at 20. The employer did not supply that information—although it provided summaries as well as other related information—and declared an impasse. *Id.* This Court, after reviewing the Board's detailed relevance findings, had little difficulty concluding that the impasse was unlawful:

> In light of the foregoing [analysis of the relevance issue], this court can quickly dispose of the [employer's] other contentions. Its unlawful refusal to supply the requested medical claims information precluded the [employer] from declaring an impasse. Because no

> genuine impasse was reached, the [employer] could not lawfully implement the terms of its final offer. [*Id.* at 22.]

This is not to say, however, that *any* unfulfilled information request will preclude an impasse. If the unfulfilled requests are "unrelated to the core issues separating the parties," then the failure to supply such information—although an independent unfair labor practice—will not prevent a lawful impasse on those core, disputed issues. *Sierra Bullets*, 340 NLRB 242, 243 (2003). Consequently, *Sierra Bullets*, on which the Company places great weight (Co Br 40-41, 45-46, 51), only serves to highlight the fact that the proper analysis focuses on the relevance relationship between the unfulfilled requests and the "core issues separating the parties." Indeed, the Board took pains to explain the causal connection that the Company asserts was lacking when explaining why *Sierra Bullets* is not controlling here:

> [In *Sierra Bullets*] [t]he union's information request concerning overtime work did not relate to the four issues over which the parties were at impasse. …. Here, by contrast, the [Company] presented the Union with an expedited plan to eliminate milling and finishing work through subcontracting. The Union's information requests dealt specifically with that issue. In these circumstances, had the [Company] provided such information, it is at least possible that the parties could have achieved some movement on the proposals at issue. [(D&O 6.)]

In discussing what might have transpired had the Company complied with its obligation under the Act, the Board was not engaging in "conjecture," as the Company claims (Co Br 58-59). It is in the very nature of an information-request

violation that it short-circuits the bargaining process, preventing it from running its natural course.[10] Hence, the Board quite properly focuses on what course the bargaining might have taken had the Company not flouted its statutory duty. That this inquiry is not necessarily easy or straightforward does not make it "conjecture." As this Court observed, when considering whether a past violation exerts a continuing effect that taints later negotiations, "[i]t may not always be easy to differentiate between an unremedied ULP that contributes to a deadlock and one that does not. This is a quintessential question of fact which is appropriately left to the Board to resolve in each case in light of its expertise." *Alwin*, 192 F.3d at 139.

(2) The Company fares no better in its contention (Br 28-29, 46-50) that the record compels a finding that the Union had no genuine interest in bargaining.

The Company first claims (Br 47) that the Union showed intransigence by insisting on the disclosure of relevant information as a precondition for bargaining. But there is nothing improper about a collective-bargaining party insisting on its

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[10] For this reason, the Company errs (Co Br 36-37) in relying on this Court's admonitions against "presumption[s]" in *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982), and "*per se* rule[s]" in *Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133 (D.C. Cir. 1999). Those cases addressed claims that unfair labor practices arising *prior* to negotiations, and not directly related to the negotiations, exerted a continuing effect that contributed to an impasse. In each of those cases, the Court considered whether a unilateral change in employment terms *during the term of a CBA* affected subsequent negotiations occurring *after the CBA expired*. Here, of course, the unlawful refusal to provide information occurred in negotiations, it went directly to the bargaining process itself, and it was ongoing at the time the Company declared impasse.

right, under the Act, to receive relevant, requested information. Moreover, such statements certainly do not suggest that the Union would have refused to formulate a counterproposal even if the Company had supplied the information sought; indeed, they convey the opposite message.[11]

In a similar vein, the Company (Br 49) seeks to make much of a rather opaque remark by union representative Briggs reflected in bargaining notes—"it was an issue of subcontracting more than money"—arguing that it evidences an irremediable, hidebound opposition to subcontracting "as a matter of principle." But again, whatever this remark means (which is entirely unclear) it simply does not bear the weight that the Company would put on it.

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[11] There is no substance to the Company's speculative contention (Co Br 47-48) that even if it *had* provided information responsive to the seven items at issue here, the Union would not have made a counterproposal because of the Company's failure to provide information responsive to *other* information requests (as to which the Board found no violation). As an initial matter, the Company's record citations simply do not bear out its absolutist interpretation of the Union's position. *See, e.g.*, TR 612 ("A lot of it [*i.e.*, requested information] was still outstanding"; the outstanding requests were "[a] big part of" the Union's inability to formulate a counterproposal); TR 614 ("[W]e felt that information was necessary."). Further, any alleged overbreadth in the Union's requests is beside the point. "[T]he mere fact that a Union's request encompasses information which the employer is not legally obligated to provide does not automatically excuse him from complying with the Union's request to the extent that it also encompasses information which he would be required to provide if it were the sole subject of the demand." *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 361 (D.C. Cir. 1983).

Moreover, even if the Union's remarks could be interpreted as reflecting an opposition to subcontracting "on principle," this hardly constitutes evidence that the Union was incapable of considering a compromise on the question of subcontracting. Bargaining—particularly under concessionary circumstances such as those here—inevitably requires parties to compromise, in the interest of pragmatism, on matters that a party might have an objection to on principle. As this Court has recognized,

> The mere fact that [a party] refuses to yield does not mean it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede from the outset. Effective bargaining demands that each side seek out the strengths and weaknesses in the other's position. To this end, compromises are usually made cautiously and late in the process.

Local 13, Detroit Newspaper, Printing and Graphic Communications Union v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1989).

Finally, there is no merit to the Company's claim (Co Br 48) that the Union's information requests were nothing more than a ploy to delay negotiations. The Board—having found the Union's requests to be relevant and necessary to formulate counterproposals—quite properly gave this argument short shrift (D&O 5-6). Given that the Company declared an impasse on subcontracting and began implementation less than one month after announcing the proposal—and failed adequately to respond to the Union's request for relevant information in the interim—the facts leave no room for the Company's assertion that the information

requests were a delaying tactic. Indeed, the facts suggest that if there was any manipulation of the bargaining schedule, it was certainly not the Union that was doing the manipulating. *See Cone Mills*, 413 F.2d at 450 (rejecting argument that union's request for information was made to impede bargaining where "the urgency surrounding the need for approval of this plan by the Union was created by the Company itself, so as to pressure acceptance").[12]

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING A RESTORATION REMEDY WHILE RESERVING FOR COMPLIANCE PROCEEDINGS THE QUESTION WHETHER THE REMEDY IS UNDULY BURDENSOME

The Company (Co Br 66-68) also mounts a somewhat token challenge to the Board's order that the Company restore the milling and finishing work as a remedy for the Company's unlawful implementation of its subcontracting proposal. As we now show, this challenge should be rejected because it is premature and, in any event, lacking in record support.

[12] The Company (Co Br 46) tries to suggest that the Board itself found that the Union had no genuine interest in bargaining over the subcontracting issue by taking out of context the Board's statement that "there is no evidence that the Union attempted to offer contract proposals that would affect the milling and finishing work or vice versa." This argument is disingenuous. That passage is from the portion of the decision dealing with the *bifurcation* issue (the subject of Part IV below) and in its context it demonstrates only that the Union bought into—or at least did not seriously contest—the Company's position that the CBA negotiations and the subcontracting negotiations were distinct.

In Section 10(c) of the Act, Congress granted the Board, upon finding a violation of the Act, the authority to order an employer "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). As the Supreme Court made clear, the discretion to craft remedies is "committed to the Board, subject to limited judicial review," because "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

That discretion clearly extends to Board orders requiring that an employer restore unlawfully transferred or subcontracted work, as such orders are, by definition, reasonably calculated to restore the status quo ante. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1963); *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 211-12 (D.C. Cir. 2003). Accordingly, where, as here, an order seeks to restore jobs that the employer unlawfully eliminated, it must be upheld unless the employer can show that restoration would impose "an undue or unfair burden." *Vico*, 333 F.3d at 212. To do so, an employer must "demonstrate by a preponderance of the evidence that it faces capital investment that is disproportionate to its resources or that it faces substantial and continuous losses." *Id.*

Here, the Board entered a restoration order but clearly deferred consideration of the question of the undue burden issue, stating: "Should the [Company] wish to argue that such a remedy is unduly burdensome, it may do so during the compliance portion of these proceedings." (D&O 6 n.10.) That being the case, the Company's challenge is quite simply premature and should be rejected on that ground alone. *See Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006) ("[I]f the Board reserves the issue for later consideration, [a party's] opportunity [to petition for review] will necessarily be deferred until the Board resolves the issue in a subsequent order.").

In any event, the Board's cautious approach was well warranted because the record on this issue was poorly developed. This is evidenced by the thinness of the Company's presentation on appeal, which merely shows that restoration would be costly (requiring $4 million in investment), but does nothing to suggest, let alone prove by a preponderance, that the necessary capital outlay would be "disproportionate to [the Company's] resources"[13] or that the order would result in "substantial and continuous losses," *Vico*, 333 F.3d at 212. Restoring the status quo where an operation has been shuttered is by its very nature costly. That is why

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[13] While the Company adduced no evidence of its resources, the most recent publicly available financial information shows that it holds more than $34 billion in assets, with nearly $720 million in cash or cash equivalents. *See* http://www.sec.gov/Archives/edgar/data/30554/000089322006002328/w26591e10vq.htm#104.

the Board requires a specific showing not just that the order would create a financial burden, but also that the burden is "undue." The Company did not come close to making such a showing.

In addition, as the Company's own presentation makes clear, deferral of the issue was warranted because important matters relating to the remedy were still in flux at the time the record was created. As the Company acknowledges (Co Br 67), it "was still investigating and implementing new Shapes techniques well into 2002, through the time of trial before the ALJ." Thus, the Company's long-promised technological changes (those that would obviate or curtail the need for milling and finishing), were still in progress at the time of the hearing.

In sum, the Board acted well within its discretion—and indeed did the Company a substantial favor—by concluding that a restoration order is warranted, while at the same time reserving judgment on the issue of undue burden pending further development of the record in compliance proceedings.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DID NOT VIOLATE THE ACT BY INSISTING THAT NEGOTIATIONS OVER THE COLLECTIVE-BARGAINING AGREEMENT REMAIN SEPARATE FROM NEGOTIATIONS OVER THE MILLING AND FINISHING WORK

In its petition for review, the Union challenges the Board's finding that the Company did not violate the Act by insisting that CBA negotiations remain separate from negotiations concerning the milling and finishing work. As we now

show, the Board's conclusion is supported by substantial evidence and therefore should be affirmed.

A. The Board Reasonably Found, Based on Bargaining History and Past Practice, that it Was Lawful for the Company to Insist that Bargaining Over the Milling and Finishing Work Remain Separate from CBA Negotiations

As a general matter, with respect to mandatory subjects of bargaining, a collective-bargaining party has the right to insist on negotiating an entire contract rather than engaging in piecemeal negotiation over particular issues. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Visiting Nurse Services, Inc. v. NLRB*, 177 F.3d 52, 59 (1st Cir. 1999). Here, however, the Board reasonably found (D&O 4), based on the parties' extensive bargaining history, that the parties had firmly established a practice of separate bargaining over the Company's milling and finishing operation. As the Board stressed, separate bargaining over that operation was established in 1995, when the Company brought the milling and finishing work in-house, at which point the parties "proposed, negotiated, and implemented" an agreement governing that work "separate and apart from the rest of the contract." (D&O 2, 4; TR 113-17, GCX 3.) Indeed, at the time that the parties entered into the Finishing Agreement, the CBA was terminated, and negotiations over a successor CBA were completely suspended. (D&O 4; TR 113-17, GCX 3.) Hence, the Finishing Agreement owed its very existence to the parties' mutual decision to engage in separate bargaining.

The terms of the Finishing Agreement further reinforce the parties' separate treatment of the milling and finishing operation. The agreement had its own distinct wage rate, which was significantly lower than the lowest rate recognized in the CBA, and also had its own duration/termination clause, distinct from the CBA's evergreen clause. (GCX 3.)[14] Consequently, although, to be sure, fragmented bargaining comes with certain costs, it is clear that the Union gained benefits from negotiating a separate agreement as well. Most fundamentally, the Union was able to secure some 50 jobs, and have a voice in setting the terms and conditions of those jobs, precisely because the parties negotiated the Finishing Agreement on its own. And the separate termination clause was included at the Union's behest because it wished to have a means cutting off any effort by the Company to use the Finishing Agreement's lower wage tier as a new wage benchmark in the CBA. (D&O 2, 14; TR 130, GCX 3.) Having thus secured certain benefits through separate bargaining, the Union will not be heard now to complain that its embrace of separate bargaining entails costs as well. *Cf. Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1072 (D.C. Cir. 1986) ("Equity

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[14] As the Board pointed out (D&O 4), it is also relevant that the CBA specifically permitted the parties to open the contract for renegotiation on discrete issues, and that the parties did so on a regular basis for the life of the agreement. This history further underscores that, as a general matter, piecemeal bargaining was not an alien concept in this bargaining relationship and thus that the Company did not introduce that concept 2001 by insisting that the subcontracting negotiations should be separate from the CBA.

does not move in favor of one whose own conduct or action has brought upon it misfortune or pecuniary loss. …. [The regulated party] has crafted its own clause, and it now must take the bitter with the sweet.”).

Finally, as the Board reasonably found (D&O 4-5), in the face of the Company’s insistence that bargaining over its subcontracting proposal remain separate from CBA negotiations, the Union “never protested on the ground that the negotiations were separate.” And, although the Union endeavored to preserve the milling and finishing work in negotiations over the subcontracting proposal (an endeavor that was of course frustrated by the Company’s failure to disclose relevant information), the Union never conveyed to the Company that it intended to submit a merged proposal, nor of course did it actually do so. (D&O 4-5.)

In sum, the bargaining history and the terms of the Finishing Agreement fully support the Board’s finding that the parties had voluntarily engaged in separate bargaining over the milling and finishing work, and thus that, in the absence of any clear protest by the Union, the Company’s declaration of impasse in the separate CBA negotiations was lawful.

B. The Board Reasonably Found, in the Alternative, that Bifurcation of Bargaining Over the Milling and Finishing Work Had No Effect on the Impasse in CBA Negotiations

As the Board further found (D&O 4), even assuming that “the bifurcation of bargaining was unlawful, it did not taint the bargaining impasse that was reached

on general contract issues." That is because the impasse in CBA talks had foundered for 8 years over two core issues—the doubling of overtime and the sharing of healthcare costs. Consequently, as the Board reasonably concluded (D&O 4), the bifurcation of the subcontracting issue "had little, if any, bearing on" the issues causing the impasse.

The record evidence of the parties' nearly decade-long stalemate over those two issues amply supports the Board's alternative holding. The record is clear that from the first phase of CBA negotiations in 1993-94 (before the Company even brought the milling and finishing work on-site), to the Company's 2001 impasse declaration, CBA talks persistently stalled over the overtime and health-care-cost-sharing issues. The Union's rejection of the Company's 1993 proposal on those issues led to the Company's first (subsequently withdrawn) declaration of impasse. And, after negotiations re-opened in 1997, talks once again broke down over the same two issues in 1998. Indeed, the Union admitted that the membership's rejection of the Company's 1998 proposal—which was the same as that implemented in 2001—was based on the members' dissatisfaction with the Company's position on those issues. And it is equally clear that the third phase of negotiations, from 1999-2001, likewise broke down over those issues. *See* pp. 7-12, 14 above.

In the face of all this, it cannot be seriously contended that—after 8 years in which negotiations foundered on the issues of overtime and health-care-cost sharing—the Company's insistence in 2001 on separate negotiations over subcontracting the milling and finishing work had any appreciable impact on the impasse in CBA negotiations.

The Union's primary argument in support of its petition (U Br 41-43) is the contention that the Board's decision here is inconsistent with a prior precedent involving another company facility, *E.I. DuPont de Nemours (Dupont Spruance)*, 304 NLRB 792 (1991), which concluded that the employer violated the Act by insisting on separate bargaining over two job categories (service operator and technical assistant). Contrary to the Union, the Board properly concluded (D&O 5) that that decision does not control here, as we now show.

Two key features of the *DuPont Spruance* case are critically different from the case at bar. *First*, and most fundamentally, the employer's insistence on fragmented bargaining in *DuPont Spruance* did not occur against a lengthy bargaining history in which the parties had negotiated those job categories separate and apart from the CBA. The unique, lengthy, and well-documented bargaining history in this case was critical to the Board's reasoning here and clearly sets this case apart from *DuPont Spruance* and the general run of fragmented-bargaining cases.

The Union's only effort to deal with the bargaining history here comes in the midst of a page-long footnote (U Br 42) in which it asserts that the bargaining history should not count because the negotiations prior to 1999 involved "another labor organization," i.e., the BYU. This argument is simply fatuous. When the BYU affiliated with PACE, PACE became the successor union, and the Company immediately recognized it as the bargaining agent for the unit. Little changed other than the name of the organization; the executive board of the BYU became the executive board of PACE Local 1-6992, and continued to conduct negotiations. (TR 123.) Indeed, if the BYU's decision to affiliate with PACE were to have effected the kind of fundamental change that the Union now suggests it did, then continued bargaining without a new election would have been *unlawful*, thus mooting the case. *See NLRB v. Financial Inst. Employees of America, Local 1182*, 475 U.S. 192, 200 (1986) ("If the organizational changes accompanying affiliation [are] substantial enough to create a different entity, the affiliation raise[s] a 'question concerning representation' which could only be resolved through the Board's election procedure.").[15]

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[15] The Union further suggests (U Br 42) that the fact that the Company from time to time made (or rejected) finishing proposals alongside CBA proposals and "admitted" that the Finishing Agreement was a "supplement" to the CBA somehow negates the bargaining history. But, even taking the Union's characterizations at face value, there is nothing in these actions that is logically inconsistent with maintaining the position that the issues are separate and refusing to link them together for the purposes of bargaining.

Second, in *DuPont Spruance*, the union clearly and actively voiced opposition to the employer's insistence on separate negotiations and put forward proposals that clearly linked issues concerning the service operator and technical assistant jobs with overall CBA issues. 304 NLRB at 793-99. Here, as the Board found (D&O 4, 5), the Union "never protested on the ground that the negotiations were separate" and never "attempted to offer contract proposals that would affect the milling and finishing subcontracting issues or vice versa."[16]

Finally, there is no merit to the Union's alternative argument (U Br 43-50) that, even assuming that bifurcation was lawful, the Company's declaration of CBA impasse was nonetheless unlawful. Here, the Union attempts to leverage the Board's one violation finding—that the Company failed adequately to respond to the Union's requests for *subcontracting* information—into a rationale for concluding that the Company's declaration of impasse in *CBA negotiations* was

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[16] The Union (U Br 42) tries to counter the first finding by relying on the dissent's statement that the Union voiced "express and unequivocal" opposition to the separation of the issues (D&O 11). But the only record basis offered in the dissenting opinion for that characterization (D&O 10, 11) is the Union's March 19 statement—in response to the Company's insistence on discussing finishing issues apart from CBA issues—that "this is part of contract." This is hardly the stuff of vigorous protest, as the Board majority found. (D&O 4.)

As to the second finding, the Union contends (U Br 40) that it "did attempt [to] offer a contract proposal to affect the milling and finishing subcontracting issue" in the form of its March 23, 2001 "helping hands" proposal. Although that proposal was indeed made, and rejected, in the course of CBA bargaining, there is nothing about the proposal suggesting that it was linked to general contract issues; it simply suggested a way to relieve a bottleneck within the finishing process.

unlawful. This argument is a non-starter because no such theory was pled or litigated by the General Counsel, and it is settled that a charging party cannot expand the scope of the General Counsel's complaint. *See American Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004); *West Virginia Baking Co.*, 299 NLRB 306, 306 n.2 (1990). But in any event, the Union's attempt to suggest that the Company's failure adequately to respond to requests for information regarding *subcontracting* somehow affected the Union's ability to negotiate on the issues tying up CBA talks (overtime and health-care costs) fails on the merits: The Board found a violation as to the subcontracting talks precisely because the Union's information requests focused closely on the subcontracting proposal. And the Board found no information-request violations that were germane to the issues dividing the parties in the CBA negotiations.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DID NOT VIOLATE THE ACT BY IMPLEMENTING ITS HEALTH CARE PROPOSAL AFTER IMPASSE

Finally, the Union also challenges the Board's dismissal of the allegation that the Company violated the Act by implementing its health-care cost-sharing proposal.

A. Governing Principles and Standard of Review

As a general matter, an employer is entitled to implement its contract proposals unilaterally once the parties have reached a lawful impasse. *See NLRB v.*

Katz, 369 U.S. 736, 745 & n.12 (1962). In order to preserve the integrity of the collective-bargaining process, however, the Board has recognized "a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals ... that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay." *McClatchy Newspapers, Inc*., 321 NLRB 1386 (1996), *enforced,* 131 F.3d 1026 (D.C. Cir. 1997).

The Board held in *McClatchy* that a merit pay proposal giving an employer complete discretion to determine the timing, amount, and criteria for awarding merit pay, would, if implemented, be "inherently destructive" of the fundamental principles of collective bargaining. 321 NLRB at 1391. In enforcing *McClatchy*, the Court agreed with the Board that "where the employer has advanced no substantive criteria for its merit pay proposal[,] ... implementation might well irreparably undermine [the union's] ability to bargain," and that implementation of such "inherently destructive" proposals could be prohibited by the Board in the face of a genuine bargaining impasse. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1033 (D.C. Cir. 1997).

The Board applied the *McClatchy* principle to an employer's post-impasse implementation of healthcare-plan changes in *KSM Industries, Inc.*, 336 NLRB 133 (2001), *modified in part*, 337 NLRB 987 (2002). In that case, the employer

implemented a new healthcare-plan clause that "reserved to it sole discretion '… to change the method and/or means for providing … benefits, which includes, the plan design, the level of benefits and the administration thereof" and that also allowed the employer to make changes to deductibles and coinsurance limits, up to a stated dollar amount. 336 NLRB at 135. The Board concluded that this clause, vesting in the employer the right to change, *inter alia*, "the provider, plan design, [and] the level of benefits," was akin to the merit pay system held unlawful in *McClatchy*, inasmuch as the health-plan clause "nullified the [u]nion's authority to bargain over the existence and terms of a key term and condition of employment." *Id.* The Board accordingly found implementation of the proposal inimical to the post-impasse bargaining process and therefore unlawful. *Id.*

B. The Board Reasonably Found that the Company Did Not Violate the Act by Implementing Its Healthcare Cost-Sharing Proposal

As shown above, the Company implemented a health-plan provision governing how the costs of healthcare benefits will be shared, as between the Company and the plan's participants. Specifically, the new plan language is as follows:

> Participants will pay for premiums, co-pays, co-insurance and deductibles established for a particular plan year. (The projected du Pont participant cost share for year 2001, based on actuarial analysis, is 75/25.) Projected increases for future plan years will be shared equally between du Pont and participants, provided, however, such increases may be allocated to premiums, components of plan design, or any combination thereof. [(D&O 7, 34; GCX 18A.)]

The Board reasonably found (D&O 7-8) that implementation of this provision does not run afoul of the *McClatchy* principle. Unlike the clause at issue in *KSM*, this provision is not an unfettered and open-ended grant of authority to make fundamental changes to healthcare benefits. It simply provides that future increases in the cost of providing healthcare benefits will be shared on an equal basis as between the Company and the participants, thus allowing the healthcare-cost-sharing ratio to regress over time to a 50-50 split. It does not permit the Company to change the "equal allocation" requirement with respect to cost increases or to change the substance of the medical services and procedures the plan covers.

The only discretion granted by this clause is to determine, from year to year based on actuarial projections, in what form the employees will bear their equal share of annual increases in healthcare costs, as between premium increases or increases in, say, deductibles, copays, coinsurance, and the like—i.e., "the elements of plan design." Consequently, the Board correctly held that the clause "did not accord the [Company] the unfettered discretion to change the cost-share percentage" but only provided that future increases be "shared equally between [the Company] and participants." *See Detroit Typographical Union No. 18*, 216 F.3d 109, 227 (D.C. Cir. 2000) (reversing Board's finding of *McClatchy* violation

where employer's unilaterally imposed merit pay system set specific percentages for merit pay increases and tied such increases to employee evaluations).

The Union's challenge to the Board's finding (U Br 52-59) relies entirely on *KSM*. But as we have seen, the clause at issue in *KSM* gave the employer complete control over the actual substantive medical benefits available to employees, and thus over whether, and in what form, the employees would have medical coverage. The clause at issue here, by contrast, sets a fixed cost-sharing ratio and permits the Company only to allocate how the employees will bear their share of annual inflation in the cost of medical benefits.

In its effort to analogize this case to *KSM,* the Union plays something of a shell game by quoting out of context a passage from the Board's decision stating that "as in *McClatchy* and *KSM*, the Respondent's Beneflex healthcare plan contains a broad provision that, on its face, permits the Respondent to make changes in the plan, including prices and level of coverage." (U Br 55.) But what the Union omits to mention is that the "broad provision" referred to in this passage did not change the healthcare plan, and thus was not alleged to violate *McClatchy.* Rather, as the Board pointed out (D&O 8), this provision was part of the original Beneflex plan document (GCX 46A), which the collective-bargaining parties negotiated in 1991, and which the parties kept in place ever since, notwithstanding the parties' periodic amendments to the plan.

In sum, the Board correctly ruled that the Company's implementation of its healthcare-cost-sharing proposal did not "reserve to itself 'the manner, method, and means of providing medical … benefits during the term of the contract.'" (D&O 8 (quoting *KSM*, 336 NLRB at 135).)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment denying the petitions for review filed by the Company and the Union, and granting the Board's application for enforcement of its order in full.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	:	Nos. 06-1089, 06-1163
Petitioner/Cross-Respondent	:	06-1168
	:	
v.	:	Board Case No.
	:	3-CA-22854
NATIONAL LABOR RELATIONS BOARD	:	
	:	
Respondent/Cross-Petitioner	:	
	:	
	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,852 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 1st day of February 2007

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	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's final brief in the above-captioned case have this day been served by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 1st day of February, 2007