

No. 10-2934

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WHITESELL CORPORATION

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Decision and Order of the Board issued against Whitesell Corporation (“the Company”). The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has

jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Washington, Iowa, where the Company does business.

The Board's initial Decision and Order was issued on August 29, 2008, when the Board's membership had dropped to only two members. It is reported at 352 NLRB No. 138. (A. 880-96.)¹ The Board filed its application for enforcement, and the case was fully briefed and argued. Thereafter, on June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635 (2010), holding that a three-member group delegated all the Board's powers does not have authority to issue decisions after the group's (and the Board's) membership falls to two. 130 S. Ct. at 2640-42. On June 25, 2010, this Court issued a brief per curiam opinion, the analysis of which states, in its entirety:

In *New Process* . . . the Supreme Court held that a two-member group may not exercise delegated authority when the total Board membership falls below three because "the delegation clause [in section 3(b)] requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board." Accordingly, we deny the NLRB's application for enforcement.

¹ "A." references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

(A. 900-02 (citation omitted).) The Board then filed a motion for remand in light of *New Process Steel*, or in the alternative, for clarification. (A. 904-11.) On July 9, the Court denied the Board's motion without explanation, and issued its mandate. (A. 932-33.)

The Board informed the parties by letter dated July 22 that it had “decided to consider the [Company's] exceptions . . . and to issue a decision and order resolving the complaint allegations.” (A. 934.) The Company then filed with this Court a petition for writ of mandamus or prohibition to direct the Board to cease from exercising any further jurisdiction over this case, on the ground that the Board was clearly acting contrary to the Court's July 9th mandate. The Court denied that petition. *In re Whitesell Corp.* (8th Cir. No. 10-2688 September 10, 2010.)

On August 26, the Board (Chairman Liebman, and Members Schaumber and Pearce), issued a Decision and Order, reported at 355 NLRB No. 134 (A. 936). The decision affirmed the judge's recommended order “to the extent and for the reasons stated in” its earlier decision. The Board incorporated its prior decision by reference. (A. 936.)

The Board then filed its application for enforcement on August 29. The Board's application is timely because the Act places no time limit on filing for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board retained jurisdiction to resolve the merits of the alleged unfair labor practices in this case after the Supreme Court held that the two-member Board was without authority to issue decisions.

Bailey v. Henslee, 309 F.2d 840 (8th Cir. 1962).

Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475 (Fed. Cir. 1998).

2. Whether the Board is entitled to summary enforcement of the portions of its order remedying uncontested findings.

NLRB v. MDI Commercial Services, 175 F.3d 621 (8th Cir. 1999).

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by, without having reached an impasse in its collective-bargaining negotiations, unilaterally implementing certain provisions of its final contract offer; by terminating its collective-bargaining agreement and changing terms and conditions of employment without giving proper notice to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act; and by refusing to supply the Union with information on its vacation proposal.

Newcor Bay City Division, 345 NLRB 1229, *enforced mem.*, 219 Fed. Appx. 390 (6th Cir. 2007).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 359 (“the Union”), the Board’s General Counsel issued a consolidated unfair labor practice complaint alleging that the Company committed several violations of the Act. (A. 884; 526-28.) After a hearing, an administrative law judge sustained some of the complaint’s allegations and issued a recommended order. (A. 884-96.) Reviewing the Company’s exceptions, two Board members issued its Decision and Order affirming, as modified, the judge’s findings. (A. 880-84.) After the Court denied enforcement of that Order because of the Supreme Court’s finding that the two-member Board had no authority to issue the decision, a properly constituted panel of the Board issued a Decision and Order that affirmed the judge’s recommended order as set forth in its earlier decision. (A. 936.)

STATEMENT OF FACTS

A. Background; the Existing Contract Agreement; the Company’s Proposal for a New Agreement

On approximately January 1, 2005, the Company purchased the assets of Fansteel Washington Manufacturing, Inc., a wire form manufacturer in Washington, Iowa, with approximately 90 production and maintenance employees.

(A. 885; 7, 9, 20, 60-61, 529.) Upon the purchase, the Company recognized the Union that had represented the production and maintenance employees at the facility for over 40 years, and assumed the existing collective-bargaining agreement that ran through June 12, 2006. (A. 885; 9, 20-21, 60-62, 161, 379-80, 529, 532-64.) The Company also operates facilities in 16 other states. The 400 to 500 employees at those facilities do not have union representation. (A. 44-45, 81, 354, 379, 401-02.)

The expiring bargaining agreement provided for dues checkoff, required “just cause” for discipline, based layoff and recall on seniority, and based vacation on years of service. The agreement also included a 25-cent-per-hour wage increase for each year of the contract, 10 paid holidays, a defined pension plan, medical coverage, group life insurance, and a voluntary supplemental accident fund. In addition, the workweek was defined as Monday to Friday, with overtime on Saturday and Sunday; new employees had a 60-day probationary period. (A. 888, 890; 84, 144-45, 533-49.)

On March 2, 2006, Cris Libera, the Company’s then human resources manager, by letter to the Union expressed the Company’s “intent to terminate” the parties’ collective-bargaining agreement upon its June 12 expiration. (A. 885, 887; 10, 21, 33-35, 62-63, 529, 565.) Attached to the letter was a copy of an undated F-7 form that the Company was statutorily required to file (Section 8(d)(3) of the

Act; 29 U.S.C. § 158(d)(3)) with the Federal Mediation and Conciliation Service (“FMCS”) within 30 days of providing notice to the Union of its intent to terminate the contract. (A. 49, 566.)

By letter dated April 17, chief company negotiator Robert Janowitz informed the Union that “[w]hile the Company is willing to consider some language from the current agreement, [it] intend[s] to negotiate a new agreement from start to finish.” (A. 885; 529, 583.) Additionally, the letter stated, “[t]he Company is not interested in extending negotiations past the expiration date of the current Agreement.” (A. 885; 75-76, 583.) In an April 25 letter, Janowitz reiterated that the Company had no intention of “extending the agreement beyond its expiration date.” (A. 586-87.)

On May 1, Janowitz provided chief union negotiator, Dale Jeter, with the Company’s initial proposal. (A. 59-60, 79-80, 529, 778-85.) Compared to the current agreement, the Company’s proposal:

- Eliminated clauses on dues checkoff, discrimination, picket line recognition, and union representation at disciplinary hearings;
- Changed language in clauses on recognition, limitation of agreement, no-strike/lockout, probationary period, and rules and regulations;
- Adopted, without explanation, existing companywide policies on a variety of terms and conditions such as overtime, holidays, vacation, bereavement

pay, rest periods, sick leave, group insurance, jury duty, drug testing, safety glasses, and retirement benefits;

- Relied on factors other than seniority for layoff and recall, and placed the burden on the Union for establishing that the Company “acted arbitrarily” when issuing discipline rather than requiring the Company to prove “just cause”;
- Left open wage rates and the night differential, and having a shop committee.

(A. 532-49, 778-85.)

The proposal also included a clause titled “Rules and Regulations” that set forth the Company’s right to modify policies or procedures to the same extent that the modifications affected other company employees. (A. 787.)

B. The Parties’ Negotiations for a Successor Agreement

1. May 26 bargaining session

During their first negotiating session on May 26, the parties discussed ground rules, but did not engage in substantive bargaining. The Union agreed with the Company’s desire to resolve non-economic issues first. (A. 85-87, 423-25, 466-67, 530.) During the session, company chief negotiator Janowitz stated that the Company:

- Was negotiating a new agreement in which it intended to have the same terms and conditions of employment for unit employees as for those employees at its other facilities;
- Intended to present a final offer by June 8 or June 9;
- Had no interest in bargaining past expiration of the agreement.

(A. 885, 893; 76-77, 81-82, 86, 162-63, 423-24, 465-66.)

The Union offered an initial proposal covering both economic and non-economic terms that was based on the expiring agreement. It proposed increased pay rates of \$1 per hour for each year of the contract, added 2 holidays, and increased other benefits involving the defined pension plan, and the weekly sickness and accident benefit. The proposal also added a new section to the discrimination clause, and lowered the probationary period from 60 to 30 days.

(A. 87, 593-96.)

2. June 6 bargaining session

At the beginning of the second bargaining session on June 6, the Union presented its second proposal, which essentially tracked its first proposal. The proposal also noted that the Union could not respond to the Company's intent to follow numerous companywide policies until it saw the specific language of those policies. (A. 88, 530, 597-600.) In response, the Company presented the specific

economic and non-economic companywide policies that were referred to in its initial proposal. (A. 93, 601-53.)

Acceptance of the companywide policies that the Company was urging would have caused extensive changes to employees' existing terms and conditions of employment. For example, employees would have a 401(k) pension plan instead of the existing defined pension; employees would move to medical coverage where the premiums for employees with fewer than 10 years seniority would increase by 4 or 5 times; there would be an increase in the number of years of service required for certain employees to earn their vacation benefits; and there would be a decrease in paid holidays from 10 to 8. (A. 84-85, 131, 534-64, 601-53.) In addition, instead of receiving overtime for weekend work, employees would receive overtime only if they worked over 40 hours during a work week defined from Sunday to Saturday. (A. 541-42, 602.) A company counterproposal revised language on its right to fill vacancies. (A. 809.)

The Union objected to the proposed increase in medical premium costs. (A. 892; 281-83.) The Union also informed the Company that it estimated that approximately one-third of the bargaining unit would lose vacation benefits under the Company's vacation proposal. The Company replied that the Union's estimate was not quite accurate, and it rejected a union proposal to grandfather those employees who would lose vacation. (A. 890; 96-98, 165-67, 295-96, 320-24.)

During the session, the parties also discussed the Company's opposition to dues checkoff. (A. 467-69.) In addition, the Company reiterated its desire to rely on factors other than seniority for layoff and recall. (A. 888; 94-96.)

3. June 7 bargaining session

At the third bargaining session on June 7, the Union made its third proposal. The Union adhered to some of its earlier positions, rejected imposition of some companywide polices, but indicated it was still considering accepting other companywide policies. (A. 98-99, 530, 654-58.) The Company, in turn, presented its first wage proposal, a merit-wage system in place at its other facilities. Under the system, employees would not, as set forth in the current agreement, receive annual set wage increases. Instead, each employee would receive an annual performance evaluation based on 15 traits, with each trait receiving a numerical rating from 1 to 4. (A. 889 & n.7; 550-53, 659-63.) The parties discussed the Company's wage and retirement plans. (A. 98-101, 106-07, 168-69, 382-84, 471-72.) The Company also gave the Union a copy of its drug-testing policy. (A. 102, 664-72.)

During the session, the parties tentatively agreed on clauses covering the scope of agreement, limitation of agreement, and safety. The Company dropped its opposition to the shop-committee, discrimination, and picket-line-recognition

clauses. The parties also reached partial agreement on the preamble, recognition, no-strike/lockout, and discipline clauses. (A. 723-26, 735-36.)

4. June 8 bargaining session

At the fourth bargaining session on June 8, both Jeter and Janowitz commented that it was unusual that neither of them had been contacted by the FMCS prior to the commencement of the negotiations. (A. 887; 115.) Janowitz also presented the Company's "Comprehensive Counter Proposal" that:

- Combined the proposals made on June 6 and June 7;
- Included the costs to employees for participation in the various company benefit programs;
- Renamed the "Rules and Regulations Clause" as the "Applicability of Personnel Policies";
- Added language to many of the specific clauses to make them subject to the "Applicability of Personnel Policies" clause.

(A. 108-09, 111-12, 677-89.)

The Union's counterproposal made some modification to its earlier proposals on the probationary period, bereavement leave, and safety policy. (A. 112-13, 690.)

At the end of the session, Janowitz asked the Union to review the Company's offer, and to make a final offer. Janowitz also asked when the Union

wanted the Company's final offer. The Union responded that it would not make a final offer, that the timing of the Company's final offer was up to the Company, and that no impasse existed. (A. 114-15, 120, 172, 227, 471.) Janowitz agreed that no impasse existed. (A. 893; 114, 120, 172, 227, 471.)

5. June 9 bargaining session

During the fifth bargaining session on June 9, the Company made its second comprehensive proposal. The proposal added a 25-cent wage increase for the first year of the contract, increased the shift differentials on the second and third shifts, and permitted union representation during employee evaluations. The proposal stated that, to pay for the wage increase, the Company would eliminate money given to employees for uniforms. (A. 115-16, 278-79, 530, 691-704.) During the session, the Company also made a counterproposal on vacation. (A. 833.)

In a written counterproposal, the Union requested information regarding the Company's vacation proposal; asked that the current bargaining agreement be extended until July 16 to provide the Union with more time to understand the Company's proposals, and stated that it would consider a mutual request for a federal mediator. (A. 890; 117-20, 705-06.) The Company declined to extend the current bargaining agreement past June 12. (A. 114.)

During the session, the parties agreed to adopt the Company's proposal to extend the probationary period from 60 to 90 days. They also reached agreement

on rest periods, grievances, jury duty, military leave, tuition reimbursement, and the term of the agreement, and on part of the recognition, discipline, and protective-equipment clauses. (A. 723-24, 726, 730-32, 735, 737, 739, 834-36.)

6. June 10 bargaining session

During the parties' sixth session on June 10, the Company made a "Comprehensive Counter Proposal" that incorporated previously agreed upon language. (A. 530, 707-21.) In addition, Janowitz informed the Union that the proposed "Applicability of Rules and Regulations" clause was an "extremely important" part of the Company's proposal because the Company wanted to treat all of its employees the same and it did not want to lose that flexibility during the contract term. (A. 471-74.) The Union proposed lowering its wage demands to \$1 for the first year and 50 cents the next 2 years, and expressed a willingness to consider a merit-pay plan in conjunction with a base increase in wages. (A. 894; 277-79.) The Union also asked the Company to consider retaining a defined pension plan. (A. 275.)

During the session, the parties completed agreement on the contract's preamble, and protective-equipment clauses. They also reached agreement on the bereavement-pay, witness-duty, and credit-union clauses. (A. 723, 730, 732, 735, 737.)

7. June 11 bargaining session

During the seventh bargaining session on June 11, the parties completed agreement on the recognition, no-strike/lockout, “Applicability of Personnel Policies,” holidays, vacation (absent grandfathering), drug-policy (as long as it complied with Iowa law), successor, and dues-checkoff clauses. (A. 894; 128-31, 139, 475-83, 487-90, 725-30, 733, 736, 738, 842-45, 847-52.) To reach agreement on this “package,” the Company yielded on its opposition to dues checkoff in exchange for concessions by the Union on holiday, vacations, funeral leave, and successor language. (A. 128-30, 133, 139, 475-76.) The parties also reached two letters of understanding regarding bereavement and union leave, and the Union withdrew language it wanted regarding the Company’s neutrality as to whether new employees joined the Union. (A. 492-94, 600.) In addition, the Company made a counterproposal on seniority. (A. 894; 489, 851.)

C. After the June 12 Bargaining Session, the Company Declares Impasse and Stops Collecting Union Dues

The parties met for the eighth and last time on June 12, the date the collective-bargaining agreement expired. After meeting from 8:30 a.m. to 8:45 a.m., the parties caucused until noon. They then met from noon until 12:30 p.m. The Union agreed to use the Company’s group health insurance plans. (A. 139, 495-97, 530, 732.) At approximately 12:30 p.m., the Company presented its “Final Offer and Tentative Agreements.” (A. 892; 124-25, 497, 722-39.) The Union

replied that it would not present the offer to the union membership. The Company negotiators then left. (A. 134, 174.)

Around 3:00 p.m., Jeter held a union-membership meeting where he explained that the Union was dissatisfied with the Company's offer and would not hold a ratification vote. Jeter expressed his concern that the employees would reject the offer and go on strike. (A. 229, 318-19.) Around 9:00 p.m., the Union faxed the Company a letter stating that it had "advised our members to continue to work without a collective bargaining agreement. The Union wishes to continue to negotiate in an attempt to reach satisfactory agreement." (A. 134-35, 676.) In addition, the Union denied that impasse was reached, expressed its intent to "continue consideration of the Company's final offer" and offer counterproposals at the next bargaining meeting. (A. 676.)

At 10:00 p.m., the Company faxed a letter to the Union from its "[c]ontract [n]egotiation [t]eam." In the letter, the Company "rejected[ed]" the Union's "assertion that no impasse was reached," and "reject[ed]" continued negotiations. The Company also asserted that it had complied with all outstanding information requests. (A. 135-37, 741.) Around the same time, Robert Wiese, the Company's chief operating officer, who had attended most of the negotiating sessions, emailed Jeter stating the Company is "sorry you did not want to continue any effort at negotiations and have abandoned that effort at noon today." (A. 378, 381, 742.)

The email also criticized the Union for not submitting the Company's offer to the union membership for ratification. (A. 742.)

After June 12, the Company stopped collecting union dues. (A. 894 n.10; 141.)

D. The Company Implements Portions of Its Final Offer and Ends the Supplemental Accident Fund; the Company Declines To Process Grievances

By letter dated June 13, Janowitz acknowledged to the Union that the bargaining had resulted "in about 30 [t]entative [a]greements." (A. 885 n.3, 892; 140, 745.) Janowitz also stated that impasse existed, and that the Company intended to implement various provisions of its final offer. (A. 892; 745.)

In a June 20 letter, the Company informed employees who had contributed to the voluntary accident program that it was discontinuing the program and refunding the money that employees had contributed. (A. 892; 753). The Company's "final offer" had not mentioned the program. (A. 56-57, 146-47.) Thereafter, in a June 21 letter to the Company, Jeter again denied that impasse existed, and "state[d]" the Union's "intentions to present changes in its position relative to unresolved issues at the next bargaining meeting." (A. 754-55.)

On June 29, Union President Georgia Fort filed a series of grievances protesting the Company's failure to maintain the status quo since June 12 on a variety of terms of employment. (A. 893; 148-49, 181-83, 233-34, 766-71.) By

letter dated July 7 to Fort, Chief Operating Officer Wiese characterized the grievances as “complaints” and offered to discuss them if Fort wanted to pursue them further. (A. 893; 772.)

E. The Company Files F-7 Form with the FMCS; the Union Requests Information and Files Additional Grievances; the Company Refuses To Allow the Union To Post Information on Company Bulletin Boards

On July 10, Jeter contacted the FMCS to request a mediator. The FMCS informed Jeter that it had no knowledge of the dispute. (A. 887; 63-64, 66-68, 257-60, 567-69.)

On July 17, the Union submitted a six-page letter to the Company addressing concerns about the Company’s proposed evaluation system and asking for a variety of information about the proposal, including copies of evaluations of bargaining-unit employees and of employees at other facilities, so that it could make a counterproposal. (A. 889; 102-03, 667-73.)

On July 18, Union President Fort filed two additional grievances that Wiese subsequently characterized as complaints. (A. 150, 181-84, 773-75.)

On July 27, Fort asked Human Resources Manager Betsy Milam whether she could post a union notice about an upcoming union meeting on the Company’s bulletin boards. Milam subsequently informed Fort that she could not. Prior to that time, employees had unfettered access to the two bulletin boards and had

posted notices without seeking permission. (A. 886-87; 185-87, 190, 194, 249-52, 515-17.)

In July and August, the Company began moving employees to another facility. (A. 891; 154-55, 157-58, 199-200, 244-45.) In an August 9 letter, Jeter requested information about those assignments. (A. 891; 776.)

In an August 10 letter, Jeter informed the Company that the FMCS had told him that it had not received the required F-7 notice. Jeter asked the Company to provide proof that it had properly and timely filed the required notice with the FMCS. (A. 887; 68, 570.) On August 14, the Union received a letter from the FMCS stating that the Company had filed the F-7 notice (A. 576) on August 11 (A. 578) and that the FMCS had assigned a mediator (A. 576). By letter dated August 17, David Tomlinson, the Company's general counsel, informed Jeter that the Company had provided the required notice to the Union on March 2, and had simultaneously filed the notice with the FMCS by depositing it in the United States mail. Tomlinson further apprised Jeter that on August 10, the Company had sent a courtesy copy of the March 2 letter and notice to the FMCS. (A. 887; 571.) In a fax dated August 22, Tomlinson sent the FMCS another copy of its August 10 letter, and the F-7 notice. (A. 887; 805-07.) On August 28, Jeter sent a letter to Janowitz requesting bargaining. (A. 71, 577.)

By letter dated September 21, the FMCS notified the Board that it had no record of receiving an F-7 notice from the Company on or about March 2006. The FMCS also informed the Board that it had received two F-7 notices from the Company dated August 11 and 22. (A. 887; 578.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board adopted the judge's recommended Order as set forth in its earlier decision, which it incorporated by reference. (A. 936.) The Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by terminating its collective-bargaining agreement with the Union and making unilateral changes in terms and conditions of employment without giving the proper notice required by Section 8(d)(3) of the Act, and by implementing certain provisions of its final contract without having first bargained with the Union until a good-faith impasse was reached. The Board also found that the Company violated Section 8(a)(5) by unilaterally discontinuing its supplemental accident insurance fund, refusing to accept and process grievances filed by the Union in accordance with the procedures set forth in the expired 2006 bargaining agreement, and by refusing to provide necessary and relevant information to the Union concerning vacation, merit pay, and assignment of unit employees to the Company's new facility. In addition, the Board found that the Company violated Section 8(a)(1) by

prohibiting employees from distributing union-meeting notices in the plant during the breaktime, and by implementing a policy prohibiting the employees from posting union materials on the facility's bulletin boards. (A. 880-83, 887, 891, 893-94.)

The Board's Order requires the Company 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 the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 883.)

Affirmatively, the Board ordered the Company, on request, to bargain in good faith with the Union; rescind the unlawful changes it made in terms and conditions of employment since June 13, 2006, until the parties sign a new agreement or until good-faith bargaining leads to a valid impasse; make employees whole for any loss of earnings and other benefits; reimburse the Union, with interest, the membership dues that the Company failed to withhold and transmit to the Union prior to September 10, 2006; process, on request, the grievances filed by the Union; and supply the Union with the information it had requested. The Board also ordered the Company to post and mail to employees copies of a remedial notice. (A. 884.)

SUMMARY OF ARGUMENT

Following the principle that a mandate should be construed reasonably, the Board found that this Court's denial of enforcement of the Board's initial Decision and Order did not prevent the Board from resolving the merits of the unfair labor practice allegations in this case. This Court, in denying enforcement, relied solely on the Supreme Court's decision in *New Process*, and held only that the two-member Board lacked authority to decide the case. The Court did not discuss the merits of the unfair labor practices found by the Board. Accordingly, the Board reasonably interpreted the Court's mandate as not prohibiting a properly constituted Board from addressing and resolving the merits of this case. This view is supported by the many other courts that have permitted a properly constituted Board to address the merits of the unfair labor practice allegations in further proceedings after *New Process*.

Regarding the merits, substantial evidence supports the Board's finding that the Company failed to carry its burden of establishing that the parties were at a genuine impasse when the Company broke off negotiations. Thus, after the Company bought a unionized facility it sought to drastically change the current terms and conditions of employment in its first collective-bargaining negotiations. Even though those negotiations made steady progress, the Company had set an arbitrary deadline that allowed for only a limited number of bargaining sessions

once the bargaining began. When that deadline was reached, even though the parties had continued to agree to numerous provisions right up until the end of negotiations, and even though the Union had requested that bargaining continue, the Company broke off negotiations and unilaterally implemented many of the terms of its final offer. In finding that the parties were not at impasse, the Board applied settled principles that required the Company to bargain with the Union until the parties either reached a new agreement or a genuine impasse.

The Board separately found that the Company failed to give notice of the labor dispute to the FMCS, as required by Section 8(d)(3) of the Act, before terminating the provisions of the preexisting contract, and ordered the Company to adhere to those provisions until September 10, 2006, 30 days after the Company did notify the FMCS. The practical effect of this remedy is to extend the life of the dues checkoff contractual provision—from June 12 to September 10—because the remedy the Board ordered for failing to bargain to a genuine impasse had the effect of extending the other provisions of the contract because they all qualify, unlike dues checkoff in the Board's view, as terms and conditions of employment under Section 8(d) of the Act.

ARGUMENT

I. THE BOARD HAD JURISDICTION TO RESOLVE THE MERITS OF THE UNFAIR LABOR PRACTICE ALLEGATIONS IN THIS CASE

The *Supreme Court* held in *New Process Steel, L.P. v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635 (2010), that a two-member Board lacked authority to decide cases. This Court, based solely on that holding, denied enforcement of the earlier two-member Board order then pending enforcement, and denied, without further comment, the Board's motion that the Court clarify its order to specify that the case was remanded to the Board for further processing.

The Board, construing (A. 936 n.2) the Court's decision and mandate in light of the principle that a "mandate is 'to be interpreted reasonably and not in a manner to do injustice,'"² concluded that the Court's decision was not a final resolution of the unfair labor practice issues litigated before the administrative law judge and should not be interpreted as terminating further proceedings before the Board. The Company (Br. 24-30) argues, as it did in its mandamus petition, that the Court's order denying enforcement deprived the Board of jurisdiction to decide this case with a properly-constituted Board panel. As we show below, the Board

² *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (per curiam) (quoting *Wilkinson v. Mass. Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)); accord *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947).

properly construed the mandate as permitting it to resolve the unfair labor practice allegations.

An appellate mandate is reasonably construed to govern only what “was actually decided.” *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998). Here, this Court denied enforcement of the two-member order solely because of the Supreme Court’s holding in *New Process Steel* that “a two-member group may not exercise delegated authority when the total Board membership falls below three” (A. 900-02.) As the Board explained (A. 936 n.2), the Court’s opinion and judgment “neither discussed nor decided the merits of the unfair labor practices found by the two Board Members, some of which the Company, see below p. 32, had not contested before the court.” Because all that this Court actually decided was that the two-member Board lacked authority to decide the case before the Court, the Board correctly concluded that the Court’s mandate did not terminate further proceedings before the Board.

Also supporting the reasonableness of the Board’s reading of the mandate are the post-*New Process* decisions of the Second Circuit, including one where “enforcement denied” was not viewed as terminating further proceedings before the Board. One of that court’s initial decisions, *NLRB v. Talmadge Park*, No. 09-2601, 2010 WL 2509132 (2d Cir. June 23, 2010) (per curiam), simply denied enforcement on the basis of *New Process*. Subsequently, the court granted the

Board's motion for remand. *NLRB v. Talmadge Park*, No. 09-2601 (2d Cir. July 27, 2010) (order granting remand). Even prior to its July 27 order, however, the Second Circuit cited *Talmadge Park* as consistent with the Board's conducting further proceedings. For example, in *NLRB v. Domsey Trading Corp.*, No. 08-4845, 2010 WL 2649813, at *1 (2d Cir. June 30, 2010), the Second Circuit, citing *Talmadge Park*, denied enforcement without a remand, while suggesting that, under *New Process*, court review of decisions issued by only two members was "premature" and that the court would hear the case "[i]f, after further proceedings before the NLRB, a new petition for enforcement or petition for review is filed." *Id.*

In addition to being reasonable, the Board's interpretation of the Court's mandate is proper because it does not result in "injustice." *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (per curiam). In the original proceeding, as in its brief here, the Company did not contest before this Court numerous unfair labor practice violations that the Board found. The Board's interpretation of the Court's mandate avoids injustice to the parties and to the employees whose rights are at issue. As this Court has noted in another case involving enforcement of the Act, "[t]he interest of the . . . employees in having the issue resolved on an appropriate theory of law is an important one." *Laclede Gas Co. v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970). *Cf. NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969)

(consequences of Board's internal delay should not fall on victims of unfair labor practices).

The Company's construction of the Court's mandate, by contrast, would result in injustice by terminating this unfair labor practice proceeding on the basis of the procedural error that *New Process* identified and that Board has since corrected. So cutting off the employee rights at issue would be contrary to the great weight of authority of other circuits establishing the propriety of a properly-constituted Board's resolving unfair labor practice cases that were pending in court when *New Process* issued, including in two-member Board cases that had been argued and even decided.³ In addition, the Company's construction of the Court's

³ See, e.g., *County Waste of Ulster, LLC v. NLRB*, 2010 WL 2679831 (2d Cir. July 1, 2010) (granting review, denying enforcement, vacating and remanding); *NLRB v. Windstream Corp.*, Case Nos. 09-2207, 09-2394, 09-2208, 09-2395 (3d Cir. July 1, 2010) (remanded); *Fola Coal Co. v. NLRB*, 2010 WL 2725595 (4th Cir. July 2, 2010) (denying enforcement, vacating, and remanding); *Bentonite Performance Mineral LLC v. NLRB*, 382 Fed. Appx. 402 (5th Cir. June 22, 2010) (after argument, vacating and remanding); *Galicks, Inc. v. NLRB*, 2010 WL 2640306 (6th Cir. June 24, 2010) (remanded); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426, 09-2468 (7th Cir. July 8, 2010) (remanded); *NLRB v. UFCW Local 4*, Case No. 09-70922 (9th Cir. June 30, 2010) (remanded); *Teamsters Local No. 523 v. NLRB*, Case Nos. 08-9568, 08-9577 (10th Cir. October 29, 2010) (after decision, vacating and remanding); *CSS Healthcare Services, Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010) (remanded); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (ordering "the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum"), *cert. denied*, 130 S. Ct. 3498 (June 28, 2010) (No. 09-377).

mandate unjustifiably attributes to the Court an intent to depart from the normal and usual course of judicial proceedings in circumstances where the decision below was rendered by an improperly constituted panel.⁴

The Board properly determined, contrary to the Company's contention (Br. 25-28), that the Court's denial of the Board's motion for remand or clarification was not "a significant factor in [its] construing the court's decision and mandate." As the Board explained (A. 936 n.2), courts have held that "no inferential weight should be ascribed to summary denials of postjudgment motions for rehearing or clarification, given the myriad reasons that the denials could represent." *See, e.g., Exxon Chemical Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479-1480 (Fed. Cir. 1998) (motion for clarification); *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621-622

The First Circuit remanded in *Northeastern Land Service v. NLRB*, No. 08-1878 (July 30, 2010), and denied enforcement in *NLRB v. Metro Mayaguez*, No. 09-1344 (July 30, 2010), in light of *New Process*. The Board construed the latter order, as it did this Court's order here, as not precluding a properly-constituted Board from deciding the case. *Metro Mayaguez*, 355 NLRB No. 215, slip op. 1 n.1 (2010).

⁴ *See Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; "it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel"). *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 364 (6th Cir. 1976) (remanding case for "complete consideration by a duly constituted panel of the Board"); *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 307 (2d Cir. 1974).

(11th Cir. 1991) (petition for rehearing en banc). That is particularly appropriate here, where the Court gave no reason for denying the Board's motion to remand, and where nothing in the Court's judgment or mandate explicitly precluded further proceedings.

In arguing that this Court's enforcement denied order terminated the entire case, the Company (Br. 26-27) relies on readily distinguishable cases where a court, after considering and ruling on the merits, had previously set aside or enforced a final order issued by the full Board or a properly-constituted panel of the Board. *See, e.g., Int'l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent proof of fraud or mistake, the Board is not entitled to have a court-enforced order vacated almost 2 years later so that it can enter a new remedial order that in retrospect it decides is more appropriate); *NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996) (Board not entitled to continue processing representation case after court explicitly denied enforcement on the merits); *W.L. Miller v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (once court enforces Board order on the merits, Board lacks authority to reopen proceeding to award additional relief); *Service Employees Int'l. Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate claim, the merits of which were implicitly rejected by earlier court decision).

The cited cases are distinguishable from this case in two significant respects. First, those cases are premised on “the Board’s” having issued an order. In contrast, the Supreme Court’s decision in *New Process* established that, in the prior proceeding, no decision and order of a properly-constituted Board was before the Court for review. It is undisputed that where, as in the cited cases, courts have set aside a final order issued by the full Board or a panel lawfully delegated the Board’s powers, the term “enforcement denied” can have the legal consequences of terminating further proceedings. Those cases, however, do not resolve the controlling issue here of the meaning of the Court’s decision and mandate in the unique circumstances of this case.⁵

Second, unlike in the cases cited by the Company, in the prior proceeding the Court’s denial of enforcement was based solely on a threshold procedural issue--*New Process*’s holding that the Act did not authorize a two-member Board

⁵ As the Board observed (A. 936 n.2), in light of the Supreme Court’s holding in *New Process*, “there is a serious question whether the court [in the prior proceeding] had jurisdiction either to decide any dispute on the merits or to terminate further proceedings before the Board in this case.” Under the Section 10(e) and (f) of the Act, a court of appeals has jurisdiction to review only a “final order of the Board.” 29 U.S.C. § 160(e) and (f). Notwithstanding that the Board’s brief in the prior case, *NLRB v. Whitesell Corp.*, No. 08-3921, at p. 2, linked the Court’s jurisdiction to the question of whether the order entered by the two Board members constituted a final order of the Board, this Court “made no finding that the order issued by two Board members who lacked authority to issue that order constituted a ‘final order’ under the Act.” (A. 936 n.2.) Given that unresolved issue, the Board’s reading of the mandate avoids the serious jurisdictional

to issue orders. The Court did not reach the merits of the unfair labor practice issues, including the alleged violations that were uncontested before the Court. *See generally Costello v. United States*, 365 U.S. 265, 285 (1961) (“dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim.”); *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (“An order has no res judicata significance unless it is a final adjudication of the merits of an issue.”).⁶

In sum, interpreting the Court’s mandate as not terminating further proceedings before the Board, as the Board did, fully comports with principles governing interpretation of mandates. Moreover, it best respects the division of authority that Congress made between administrative agencies and reviewing courts. Thus, as a general rule, an appellate court’s finding of legal error does not “foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *accord S. Prairie Constr. Co. v.*

questions that would arise if the mandate were read as precluding a properly-constituted Board from deciding the unfair labor practice allegations.

⁶ The Company’s argument (Br. 24-25) based on the filing of the record does not advance its case. While filing the record vests exclusive jurisdiction in a court of appeals, the issue here is the meaning of the Court’s order and mandate at the conclusion of the case. Because, as demonstrated above, the Court did not intend to terminate further proceedings before the Board, its mandate relinquished its exclusive jurisdiction and enabled the Board continue processing the case.

Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 803-06 (1976); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901).

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER REMEDYING THE UNCONTESTED FINDINGS

The Company's brief fails to contest the Board's finding that that the Company violated Section 8(a)(1) of the Act by prohibiting an employee from distributing union-meeting notices in the plant during the employee's breaktime, and by promulgating a policy that prohibited employees from posting union materials on the facility's bulletin boards. The Company's brief also fails to contest the Board's finding that that the Company violated Section 8(a)(5) and (1) of the Act by refusing to accept and process grievances, and by refusing to furnish information about merit pay and the assignment of employees to a new facility. Accordingly, the Board is entitled to summary affirmance of these findings and summary enforcement of the corresponding portions of its remedial order. *See NLRB v. MDI Commercial Services*, 175 F.3d 621, 624 (8th Cir. 1999).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY COMMITTED VIOLATIONS OF SECTION 8(a)(5) AND (1) OF THE ACT

A. By Not Having Bargained To Impasse, the Company Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing Certain Provisions of Its Final Contract Offer

1. Applicable principles and standard of review

An employer commits an unfair labor practice under Section 8(a)(5) of the Act when, without having negotiated to impasse, it makes unilateral changes in wages, hours, and other mandatory subjects of collective bargaining. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Accord United Paperworkers Int’l v. Champion Int’l Corp*, 81 F.3d 798, 801-02 (8th Cir. 1996).⁷

The Supreme Court has observed that a stalemate in negotiations is deemed a good-faith impasse only when “the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless” *Laborers Health and Welfare Trust Fund v. Advanced Light Weight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citation omitted). *Accord American Fed’n of Television and Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968), *affirming Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (“*Taft*”) (genuine impasse in negotiations exists when “there [is] no realistic possibility that continuation of discussion at that time would have been fruitful”). The burden of establishing an impasse rests with the party asserting it, here the Company. *See Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.2d 187, 196 (4th Cir. 2000);

⁷ A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See St. John’s Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

Latrobe Steel Co. v. NLRB, 630 F.2d 171, 180 (3d Cir. 1980).

There is no “mechanical definition” for determining whether a valid impasse exists. *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972).

Instead, the Board considers a number of factors, including “[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations”

Taft, 163 NLRB at 478.

The Board does not require that all of the *Taft* factors militate in favor of a finding of impasse. “[O]f central importance” is “the parties’ perception regarding the progress of the negotiations.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Hence, there can be no impasse unless “[b]oth parties believe that they are at the end of their [bargaining] rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced* 836 F.2d 289 (7th Cir. 1987). *Accord Teamsters Local Union No. 639*, 924 F.2d at 1084; *Huck Mfg. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole. *See Duffy Tool & Stamping v. NLRB*, 233 F.3d 995, 997-99 (7th Cir. 2000).

The determination of whether an impasse exists is a question of fact, and “because of the subjectivity involved in deciding when an impasse has occurred, its

existence is an inquiry ‘particularly amenable to the experience of the Board as a fact finder.’” *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (citation omitted). *Accord Teamsters Local Union No. 639*, 924 F.2d at 1083.

The Board’s factual findings are conclusive if supported by substantial evidence on the record as a whole (29 U.S.C. § 160(e)); 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). *Accord NLRB v. Rockline Ind., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005).

2. Substantial evidence supports the Board’s finding that the parties were not at impasse when the Company refused to continue bargaining and unilaterally implemented portions of its final offer

The Company does not dispute that, upon expiration of the bargaining agreement, it unilaterally implemented certain provisions of its final offer. Accordingly, the Company violated Section 8(a)(5) and (1) of the Act unless it demonstrates that the parties were at a genuine impasse at the time. Here, the bargaining history—the Company’s imposition of an arbitrary deadline on reaching its first agreement with the Union, seeking substantial changes in the existing terms and conditions of employment in a very short span of negotiations, and declaring impasse on the date of that arbitrary deadline despite exchanging

proposals and reaching agreement with the Union on numerous issues right up until the very end of their negotiations—provides substantial evidence to support the Board’s finding (A. 881-82, 893-94) that the Company failed to prove that the parties were at a genuine impasse.

As an initial matter, the Company, as the Board found (A. 881), placed an “arbitrary deadline on negotiations.” Thus, although negotiations did not begin until May 26, company chief negotiator Janowitz emphasized in two letters that the Company had no intention of extending negotiations beyond the June 12 expiration of the existing bargaining agreement. Thereafter, during the negotiations, Janowitz repeatedly reiterated that position. (A. 464.) In addition, Janowitz acted to preclude any negotiations past the agreement’s June 12 expiration by stating that the Company intended to present a final offer by the third or fourth negotiation sessions held on June 8 or June 9, and by seeking the Union’s final offer as early as the third session on June 8. The Company’s arbitrary deadline on ending negotiations suggests that the Company was determined to implement changes upon expiration of the agreement regardless of the status of the negotiations. *See Dust-Tex Serv., Inc.*, 214 NLRB 398, 405 (1974), *enforced mem.*, 521 F.2d 1404 (8th Cir. 1975).

Moreover, as the Board explained (A. 894), the Company “never gave any reasons to the Union” for rejecting its request to temporarily extend the contract

until July 16, and “never revealed any economic exigencies that required it to complete negotiations on or before June 12.” *Cf. Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (absent impasse “an employer may act unilaterally if faced with an economic exigency justifying the change.”)⁸ Nor, as the Company asserts (Br. 47), was its June 12 deadline a mere “estimate” of when it “hoped negotiations” would conclude. Instead, as chief negotiator Janowitz acknowledged (A. 424-25), the arbitrary deadline was a negotiating ploy “[t]o make sure the Union put its best efforts at negotiating a new agreement in a timely manner.”

Moreover, the Company set the arbitrary deadline, and repeatedly reiterated that deadline, even though it is undisputed that, as the Board found (A. 881, 894), the Company was negotiating its first agreement with the Union and was seeking substantial changes from the Union’s existing agreement. Thus, the Company, as the new owner of the facility and negotiating with its only unionized facility, sought an entirely new agreement under which employees would share the same terms and conditions of employment as employees at the Company’s nonunion facilities. Agreeing to those terms and conditions of employment would have

⁸ An employer can also act unilaterally absent impasse “if a union engages in dilatory tactics to delay bargaining.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000). No such claim was made here.

meant significant concessions from the Union because employees would lose many benefits accumulated over the previous 40 years. Thus, the Company sought to eliminate regular wage increases, two paid holidays, dues checkoff, overtime pay for weekend work, “just cause” protection from discipline, seniority rights for layoff and recall, and a defined pension plan, and it sought to extend the probationary period. In such circumstances, the Company’s arbitrary deadline flew in the face of the reasonable expectation that reaching agreement on such sweeping changes might take a bit more than 2 weeks of negotiations.

Nevertheless, the Company held to its arbitrary deadline even though, as the Board explained (A. 881), it “engaged in only a limited number of bargaining sessions [8,] before declaring impasse[.]” Moreover, the first and last negotiation sessions were not substantive, leaving only six sessions to reach an agreement that was essentially being written from scratch.

During those six sessions, it is undisputed that the parties spent much of the time caucusing (A. 894; 180-81), something that Janowitz acknowledged (A. 448-49) was typical in negotiations and “extremely important.” In addition, consistent with the Company’s desire to first resolve non-economic matters, the Company did not provide complete details of the various companywide policies that it was urging until the second session on June 6. Indeed, it did not offer a wage proposal until the third bargaining session on June 7, or offer a full comprehensive proposal until

the fourth session on June 8. Accordingly, the Company left only a few bargaining sessions to reach an agreement on its entire contract before its arbitrary June 12 deadline. In these circumstances, the Company is in no position (Br. 48) to characterize the Union's bargaining request that the agreement be extended until July 16 as "not a reasonable request" that was "proposed simply to create delay." Rather, the Company's rejection of the Union's offer, with no explanation or counteroffer, demonstrates that the Company planned to hold steadfastly to its arbitrary deadline regardless of the status of the negotiations.

Finally, notwithstanding the Company's arbitrary deadline and the major contractual changes that it sought, the parties made steady progress toward negotiating a new agreement. Indeed, when the Company declared impasse, the parties were continuing to reach agreement on various provisions. Overall, the parties, as Janowitz acknowledged (A. 892; 745), reached agreement on about 30 items.

Thus, on June 7, the parties reached tentative agreement on clauses covering the scope of agreement, limitation of agreement, shop committee, discrimination, picket-line recognition, and safety. They also reached partial agreement on the preamble, recognition, no-strike/lockout, and discipline clauses. Thereafter, on June 8, the parties agreed they were not at impasse. Then, on June 9 the parties reached agreement on clauses concerning the probationary period, rest periods,

grievances, jury duty, military leave, tuition reimbursement, and the term of the agreement. They also reached agreement on part of the recognition, discipline, and protective-equipment clauses. The next day, June 10, the parties completed agreement on the preamble and protective-equipment clauses. They also reached agreement on the bereavement-pay, witness-duty, and credit-union clauses.

Substantial progress continued on June 11, the last day of bargaining. The Company made counterproposals on overtime and seniority. Significantly, the Union acquiesced to the Company's "Applicability of Personnel Policies" clause, which Janowitz had earlier characterized as an "extremely important" (A. 474) part of the Company's proposal. In addition, the parties completed agreement on the recognition, no-strike/lockout, holidays, vacation (absent grandfathering), drug-policy (as long as it complied with Iowa law), successor, and dues checkoff clauses, and reached two letters of understanding. In sum, on June 11, Janowitz acknowledged (A. 475) that the parties had agreed to a "very significant package proposal" on "significant" issues that, up until that point, were in dispute.

The next day, June 12, the parties resolved what Janowitz acknowledged (A. 496-97) were "important" issues regarding the Company's benefit plans. Yet, the Company, as the Board explained (A. 881-82), "declared impasse even though the parties exchanged proposals and reached agreements the day before and the day of the impasse declaration." As the Board concluded (A. 882), "[u]nder similar

circumstances, the Board [with court approval] has declined to find that a lawful impasse existed.” *See Newcor Bay City Division*, 345 NLRB 1229, 1238-39 (2005), *enforced mem.*, 219 Fed. Appx. 390 (6th Cir. 2007) (no impasse where the employer sought drastic changes, yet imposed the contract-expiration date as an artificial deadline for negotiations, bargained for only a short period, and declared impasse at a time when the parties were reaching agreement on bargaining issues); *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1063-64 (2006) (no impasse where employer sought changes that “far exceeded” those sought in prior negotiations, yet imposed an arbitrary deadline and declared impasse, despite the fact that the parties were making progress toward reaching an agreement).

3. The Company’s contentions that the Board erred in finding that the parties were not at impasse are without merit

As an initial matter, contrary to the Company’s suggestion (Br. 36-37), the mere fact that the Board did not find that the Company acted in bad faith by setting an arbitrary deadline to complete negotiations, and by refusing to make concessions on key terms, does not undermine the Board’s finding that the parties had not reached impasse. Rather, the good faith of the parties is simply one of a multitude of factors that the Board considers when determining whether they have reached impasse. Here, the Board found no impasse by objectively evaluating all of the facts particular to the negotiations in this case.

Indeed, the Board did not, as the Company suggests (Br. 48-49), find no

impasse based on any single factor, such as the number of bargaining sessions.

Although the Board considered the number of sessions, it did so in the context of the Company's imposition of an arbitrary deadline on negotiations, despite the fact that in that short period of time the Company was seeking major contractual concessions and the parties were continuing to make progress.⁹

The evidence also does not support the Company's position (Br. 39-45) that the parties were at the end of their rope on June 12, or had a contemporaneous understanding that they were at impasse. As shown, both parties agreed that they were not at impasse on June 8. Thereafter, they continued to reach agreement on numerous clauses. Consistent with such progress, the Company even sought, and the Union agreed, to bargain over the weekend of June 10 and 11. (A. 448.) In fact, as shown above, on June 11, the parties reached agreement on clauses that the Company conceded were significant. Yet, despite reaching agreement on matters that were not inconsequential, the next day, the day of the Company's arbitrary deadline, it rejected the Union's desire for continued negotiations, declared

⁹ As the Company concedes (Br. 32), the number of bargaining sessions is a factor to consider. Although the number of meetings is not controlling, the likelihood of a valid impasse increases with more meetings. *NLRB v. Powell Elec. Mfg.*, 906 F.2d 1007, 1011-12 and n.2 (5th Cir. 1990). Numerous cases exist in which impasse was not reached despite significantly more sessions than in the instant case. See, e.g., *Teamsters Union Local No. 639*, 924 F.2d at 1083 (12 meetings in 1 month); *Beverly Farm Found. v. NLRB*, 144 F.3d 1048, 1051-52 (7th Cir. 1998) (19 meetings over 1 year); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1564 (10th Cir. 1993) (13 sessions over 6 months).

impasse, and accused the Union of abandoning negotiations.

The fact that the parties continued to make revisions and reach agreement on various significant provisions also undermines the Company's claim of a contemporaneous understanding that impasse existed. *See Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991) (union disagreed that impasse had been reached and stated it had "more movement to make"); *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (that "changes were being made, revisions were being offered" indicated that negotiations were not "static" and that parties, therefore, were not at impasse); *Powell Elec. Mfg.*, 906 F.2d at 1012-13 (union made counteroffers just prior to employer's declaration of impasse and was willing to negotiate). Therefore, the fact that the parties had not yet reached an overall agreement by June 12 does not demonstrate that further negotiations would have been futile.

That finding is not undermined by the fact that the parties had, as the Company states (Br. 37-39), unresolved issues, particularly those that were economic in nature. As noted, consistent with the Company's ground rules, the parties first turned to resolving non-economic matters, and they had just resolved such major non-economic issues as drug testing and dues checkoff when the Company declared impasse. Although the Company may have wanted the negotiations to proceed more rapidly, the Company was seeking major economic

concessions from a union that was attempting to defend the benefits it had secured.

For instance, the Company's healthcare proposal would have meant a substantial cost increase for the less senior employees. Yet, just hours before the Company declared impasse, the Union had agreed to use the Company's health care plan, a concession that Janowitz characterized as "important" (A. 496).

That the Union declined to immediately extend its concession to adopt the Company's proposed phase in of new rates, hardly proves that there was no realistic possibility that the parties would not have made further proposals or further concessions regarding the implementation of those rates.

Similarly, with respect to wages, the Company offered a merit pay plan that would not provide automatic wage increases, a plan that Janowitz characterized as "unique" (A. 509), and "fairly extensive and new to the Union" (A. 470). That "unique" proposal led, as Janowitz acknowledged (A. 470-71), to the Union caucusing a lot and having many questions in an effort to try to understand the proposal. Indeed, after the Company declared impasse, the Union submitted a six-page information request—which the Company admits it unlawfully failed to respond to—seeking information about how the Company administered the merit-pay program at its other facilities. Likewise, the Company's shift from a defined pension plan to a 401(k) plan led to numerous union questions about rollover and the status of loans under the defined benefit plan. The Board found (A. 881) that

the Company had also not answered these questions until long after it had declared impasse.

Moreover, even when the parties are not yet close to agreement, an employer is not relieved of its duty to bargain even where only a “little hope exist[s] for an agreement” *NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112, 1117 n.2 (6th Cir. 1989). *See also WPIX, Inc.*, 906 F.2d at 901-02 (fact that parties were far apart did not justify declaration of impasse); *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 48 (5th Cir. 1974) (employer required to continue bargaining even if it considers union’s proposals “ridiculous”). Accordingly, the Company’s attempt to prove impasse (Br. 43-44) is not aided by the fact that the Union initially reacted negatively to some of its proposals and to its final offer. *See NLRB v. Plymouth Stamping*, 870 F.2d at 1117 n.2. Collective bargaining often involves zealous, passionate advocacy, including vociferous protests as to the unacceptability of proposals, impasse is not proved by such words alone. *NLRB v. Beverly Enter.-Massachusetts*, 174 F.3d 13, 27 (1st Cir. 1999); *NLRB v. WPIX, Inc.*, 906 F.2d at 902 (no impasse despite union dismissal of employer proposals as “ridiculous” and a “slap in the face.”) The fact remains that the Union expressed a desire to continue bargaining and to make a counteroffer.

Nor, as the Company suggests (Br. 44-45), was the Union required to offer some specific concession, or immediate change in position, in response to the

Company's declaration of impasse. In the first place, union negotiator Jeter preferred (A. 77-78) to exchange proposals in person, as evidenced (A. 265) by his waiting until the first negotiation session to submit a proposal. Moreover, in *Colfor, Inc. v. NLRB*, 838 F.2d 164, 166, 167 (6th Cir. 1988), the Sixth Circuit agreed with the Board that the parties were *not* at impasse even though the union representative, in response to the employer's declaration of impasse, said: "[I]t looks like we're at impasse. I guess we'll have to meet again."

Likewise, in *Grinnell Fire Protection*, 236 F.3d at 199, the Fourth Circuit upheld the Board's finding that the parties were not at impasse where, in response to the employer's declaration of impasse, the union sought further bargaining without offering any specific concessions. The court stated that "we can hardly conceive of better evidence of a party's willingness to satisfactorily negotiate further than its clear statement to that effect." *Id.* at n.15. And in *Grinnell*, the union did not indicate that, in future bargaining, it would compromise further, nor did the Union have any basis for believing that the employer would modify its proposal. Instead, the union told the employer that it hoped to convince the employer to alter its position on wages. *Id.* at 199. Moreover, the court recognized that, even assuming the employer had established that it was unwilling to further modify its proposal, the employer had not demonstrated that the union was unwilling to compromise further. *Id.* In sum, as the court noted in *Grinnell*, the

Board properly requires that “futility, rather than mere frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse.” *Id.*

In addition, notwithstanding the Company’s purported “final offer,” such offers, even when presented as incapable of modification—often are followed by further bargaining. *See Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1508 (7th Cir. 1991) (“final offer was followed . . . by bargaining followed by another final offer followed by more bargaining,” continuing for a year and a half). Thus, even though an employer may characterize an offer as its “final offer,” such a characterization sheds little light on whether a genuine impasse exists. *See Lapham-Hickey Steel*, 904 F.2d at 1185 (despite the employer’s “take-it-or-leave-it” ultimatum and refusal to discuss further modifications or tradeoffs, there was no impasse); *Teamsters Local No. 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986).

The Company’s heavy reliance (Br. 3, 32-36, 45-48, 50) on *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), where the D.C. Circuit found that the parties had reached impasse, is misplaced. As an initial matter, the court there recognized that “merely labeling an offer as ‘final,’ as the Company did here, is not dispositive.” *Id.* at 1115. Moreover, the court found impasse based on several factors not present here.

First, the employer there was facing “economic exigencies,” and had already made significant concessions. *Id.* Although the employer’s exigency had not prompted it to impose terms absent impasse, see above p. 37, the combination of that exigency and its concessions led the Court to find that the employer had a reasonable basis to believe that no further movement by either party was possible. Here, the Company never claimed economic exigencies and declared impasse based on an arbitrary deadline, after refusing to budge from its opening position of implementing companywide terms and conditions of employment.

Second, the employer’s final offer in *TruServ* came at the conclusion of 6 weeks of negotiations, during which the employer had earlier “advised the [u]nion that when it had reached the limits of its bargaining, it would call its final proposal its ‘last, best, and final’ offer.” *Id.* at 1115-16. Here, at a time when the negotiations had barely started, the Company sought to have the Union make its final offer and evaluate the Company’s final offer for no apparent reason other than to meet its arbitrary deadline for reaching an agreement.

Third, the court in *TruServ* emphasized that its refusal to second guess the employer’s position that no further compromise was possible was “especially appropriate,” in part, because the relationship between the union and the employer had “spanned more than a decade.” *Id.* at 1116. That long-term relationship stands in sharp contrast to this case where the Company, was negotiating its first

collective-bargaining agreement with the Union, and was seeking to dramatically alter the benefits the Union had acquired over a span of 40 years.¹⁰

The other cases where impasse was found, and that the Company relies on (Br. 3, 45, 48-50), have similar distinguishing characteristics, such as an economic exigency, or lengthier negotiations. *See NLRB v. H&H Pretzel Co.*, 831 F.2d 650, 651 (6th Cir. 1987) (employer faced economic exigency); *ACF Industries, LLC*, 347 NLRB 1040, 1040-42 (2006) (employer faced economic exigency and had bargained for well over 2 months, continuing to bargain after contract expiration, after employees had rejected the employer's final offer, and after meeting with a mediator); *E.I. Du Pont De Nemours & Co.*, 268 NLRB 1075, 1075-76 (1984) ("long, hard" negotiations over 14 months and 47 sessions between parties who had a 30-year relationship); *George Banta Co.*, 256 NLRB 1197, 1211-12 (1981) (parties engaged in 23 bargaining sessions over 2 months); *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1361-66 (1981) (faced with employer's economic exigency, union refused to alter its offer and expressed indifference to the

¹⁰ The court in *TruServ* declined to consider several factors contested by the employer because the Board had not relied on those factors. Several of those factors are not only present here, but were relied on by the Board, and are not seriously disputed by the Company before this Court. Thus, the Company, as the employer was alleged to have done in *TruServ*, rejected "out-of-hand" most of the Union's proposals, proposed "radical departures" from the existing agreement, and did not make a complete economic proposal until shortly before declaring impasse. *See TruServ. Corp.*, 254 F.3d at 1115 n.9.

employer's bankruptcy) *affirmed sub. nom. Sheet Metal Workers Int'l Ass'n, Local No. 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982) (table); *Bi-Rite Foods, Inc.*, 147 NLRB 59, 60, 63 (1964) (parties engaged in over 20 bargaining sessions during a 4-month period).¹¹

B. By Not Giving Proper Notice to the Federal Mediation and Conciliation Service until August 11, as Required by Section 8(d)(3) of the Act, the Company Violated Section 8(a)(5) and (1) of the Act by Terminating Its Collective-Bargaining Agreement Before September 10

1. Applicable principles and standard of review

Section 8(d) of the Act (29 U.S.C. § 158(d)), which defines the duty to bargain, provides that no party to an existing collective-bargaining 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 ;

¹¹ After reaching a good faith impasse, an employer can make unilateral changes that are reasonably contemplated by the employer's final offer. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 81 F.3d 798, 802 (8th Cir. 1996); *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1326 (6th Cir. 1995). Here, the Company offers no evidence that elimination of the supplemental accident fund was part of the Company's final offer. To the contrary, Human Resources Manager Libera admitted that it was not. (A 57-58.) Accordingly, even if impasse was reached, the Company's unilateral elimination of that program was, as the Board found (A 892), unlawful.

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute ;

4) continues in full force and effect . . . 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 notice requirements of Section 8(d)(3) ensure the participation of qualified mediation services in labor disputes before the terms of a collective-bargaining agreement are modified. That participation constitutes “an important and principal policy interest embodied in Section 8(d)” *United Artists Communications, Inc.*, 274 NLRB 75, 76 (1985), *affirmed sub nom. IATSE v. NLRB*, 779 F.2d 552 (9th Cir. 1985). *Accord United Furniture Workers of America, Local 270 v. NLRB*, 336 F.2d 738, 740 (D.C. Cir. 1964). To serve that interest, the “initiating party who gives untimely Section 8(d)(3) notice to the Federal Mediation and Conciliation Service commits an unfair labor practice by resorting to . . . [a] unilateral modification within thirty days of such notice even when the action occurs more than 60 days after notice to the other party.” *See NLRB v. Weathercraft Co. of Topeka, Inc.*, 832 F.2d 1229, 1232 (10th Cir. 1987) and cases cited. *Accord NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 968 (8th Cir. 1967).

2. The Company's untimely Section 8(d)(3) notice

Here, the Company sent a letter to the Union on March 2, 2006 to terminate the existing collective-bargaining agreement. As the initiating party, the Company was required by Section 8(d)(3) of the Act to notify the FMCS within 30 days of the March 2 letter to the Union. The FMCS, however, did not receive notification of the labor dispute within the 30 day time frame. Instead, as set forth in a letter from the FMCS to the Board, it received its earliest notice from the Company on August 11. Having failed to timely comply with Section 8(d)(3) of the Act, the Company was required, as the Board explained (A. 880, 882 & n.10, 888), to continue in full force and effect the terms of the parties' existing collective-bargaining agreement until September 10, 30 days after the FMCS received notice from the Company.¹²

In this case, the practical effect of requiring the Company to continue the terms of the contract until September 10 is limited. Because the Company is already obligated to restore the status quo in terms and conditions of employment as the remedy for having changed them before bargaining to a genuine impasse,

¹² Contrary to the Company's suggestion (Br. 50-51) the Board did not find that the Company's failure to provide timely 8(d)(3) notice precluded the Company from terminating the contract; it only found (A 882 n.10) that the Company was required to maintain the terms of the contract until that notice was provided. *See Petroleum Maintenance Co.*, 290 NLRB 462, 464 n.3 (1988).

the only additional feature of the remedy for the Section 8(d)(3) violation is requiring the Company to reimburse the Union, until September 10, for dues it should have withheld from employees if it had continued to honor the contractual dues-checkoff provision. (A. 882 n.10.) This is because the Board views the right to dues checkoff as being a creature of contract that is not also a term and condition of employment. *See Hacienda Hotel Inc.*, 351 NLRB No. 32 (2007), 2007 WL 2899736, *remanded sub nom. Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

The Company asserts (Br. 52-54) that it mailed the FMCS letter on March 2, the same day that it notified the Union that it intended to terminate the bargaining agreement, and that it was entitled to a presumption that the notice was timely received. The Board, however, as it noted here (A. 888), “has held . . . that to be effective such notice must actually be received.” *See Freeman Decorating Co.*, 336 NLRB 1, 3-4, 39 n.26 (2001), *enforcement denied on other grounds, Int’l Alliance of Theatrical Employees v. NLRB*, 334 F.3d 27, 31-36 (D.C. Cir. 2003); *Ohio Oil Co.*, 91 NLRB 759, 761 (1950). *See also NLRB v. Vapor Recovery Sys. Co.*, 311 F.2d 782, 785 (4th Cir. 1962). Therefore, as the Board explained (A. 881), even assuming that the letter to the FMCS was mailed on March 2, the FMCS stated in its letter to the Union that no notice was received until August 11 and this “rebutts any presumption that the [FMCS] timely received the notice.”

Moreover, as the Board found (A. 881), the Company “did not produce any probative evidence establishing actual delivery of the notice to the FMCS.” To the contrary, it is undisputed that, as the Board found (A. 887-88), the Company did not send the notice by certified or registered mail, or by return receipt requested.

In these circumstances, the Company’s claim (Br. 48) that the weight of the evidence establishes that the FMCS received timely notice in March rings hollow. As the Board explained in *Chauffeurs Local 572 (Dar San Commissary)*, 223 NLRB 1003, 1007 (1976), even assuming that notice was timely sent, an FMCS letter that such notice was not on file, “coupled with [the employer’s] inability to produce probative evidence of actual delivery of the notice, whether by means of a signed return receipt or by other reliable means . . . reasonably warrant[s the inference] that the notice was not received.”

Although the Board has excused some untimely Section 8(d) notices, the examples the Company relies on (Br. 52-54) have, unlike here, probative evidence that the original mailing was received, albeit untimely. For example, in *Bio-Medical Applications of New Orleans, Inc.*, 240 NLRB 432, 433 (1979) (Br. 52-53), and *United Electronics Institute of Iowa*, 222 NLRB 814, 815 (1976) (Br. 53), there was probative evidence of timely mailing by certified or registered mail, and evidence that the Post Office erred by failing to timely deliver the notice. Here,

there is simply no probative evidence that the FMCS received the March 2 notice, albeit untimely.¹³

Finally, there is no merit to the Company's claim (Br. 56-57) that notice to the FMCS occurred on July 10—making the 30-day period end August 9—when the Union sought clarification from the FMCS as to whether it had received notice of the labor dispute. In the first place, the Union informed the FMCS that any inquiry was for informational purposes only and did not constitute Section 8(d)(3) notification by the Union. (A. 567-69.) Moreover, the case law unambiguously places the burden of providing Section 8(d) notice on the party who reopens negotiations, a burden that does not shift. *See Weathercraft Co.*, 832 F.2d at 1232. Accordingly, although the FMCS may have learned of the dispute through the Union, that does satisfy the Company's obligation, as the initiating party, to notify the FMCS. *See Mar-Len Cabinets, Inc.*, 262 NLRB 1398, 1398-99 (1982) (mistaken reliance on the union's supplying the Section 8(d)(3) notice was not a defense to the employer's failing to notify the FMCS as the initiating party); *Amax Coal Co. v. NLRB*, 614 F.2d 872, 877, 889 (3rd Cir. 1980), *reversed on other*

¹³ Any presumption that something mailed was delivered (Br. 54-56) is overcome by a "credible and unequivocal denial of receipt." *See U.S. Serv. Ind., Inc.*, 315 NLRB 285, 292 (1994). Here, in sharp contrast to the Company's cited cases (Br. 55), the FMCS' letter to the Board constituted a credible denial that the FMCS had received the original notice.

grounds, 453 U.S. 322 (1981) (the fact that FMCS had knowledge of dispute did not relieve the union, as the initiating party, of its obligation to notify the FMCS).

C. By Not Supplying the Union With Information It Requested on the Company's Vacation Proposal, the Company Violated Section 8(a)(5) and (1) of the Act

1. Applicable principles and standard of review

An employer's statutory duty to bargain in good faith under Section 8(a)(5) of the Act 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). *Accord WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 514 (8th Cir. 1988). The employer's duty to provide information includes both information requested in order to administer an existing collective-bargaining agreement and information requested to facilitate the negotiation of a new collective-bargaining agreement. *See WCCO Radio*, 844 F.2d at 514; *Acme Indus. Co.*, 385 U.S. at 435-36. The failure to provide relevant information upon request is a breach of an employer's duty to bargain in good faith, and therefore violates Section 8(a)(5) of the Act. *See Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

The Supreme Court has adopted a liberal, "discovery-type" standard by which the relevance of requested information is to be judged. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437 & n.6. *Accord Supervalu, Inc.-Pittsburgh Div. v.*

NLRB, 184 F.3d 949, 952 (8th Cir. 1999). Under that standard, it need not be shown that the requested information would resolve any dispute between the parties. *Procter & Gamble Mfg.*, 603 F.2d at 1315. Instead, the employer must provide the union the information if there is a “probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Acme Industrial Co.*, 385 U.S. at 437. *Accord Procter & Gamble Mfg.*, 603 F.2d at 1315 (employer must provide information “unless it is clearly irrelevant”). An employer may rebut the presumption that information is relevant if it demonstrates that the information is irrelevant or that it was requested in bad faith. *See WCCO Radio, Inc.*, 844 F.2d at 514.

The duty to furnish information ultimately “depends on the particular facts in each case.” *Procter & Gamble Mfg.*, 603 F.2d at 1315. Accordingly, the scope of review “is very narrow,” and the Court “must affirm the Board’s decision if it is substantially supported by the evidence and reasonably based in law.” *WCCO Radio, Inc.*, 844 F.2d at 514.

2. Substantial evidence supports the Board’s finding that the Company failed to provide the Union with information relevant and necessary to its collective-bargaining obligation

The Company does not dispute that it proposed a vacation policy that would cause some employees to lose 1 week of vacation. Nor does the Company dispute

that it characterized, as not accurate, the Union's estimate that one-third of the bargaining unit would suffer an adverse impact. In these circumstances, the Union's request for a list of employees who would lose vacation time so that it could have an accurate list was relevant to its bargaining duties. As union negotiator Jeter testified (A. 324), and as the Board found (A. 890), being told by the Company that its estimate was wrong "was the predicate that caused the Union to request accurate information so Jeter could independently respond to each member of the bargaining unit who might inquire about their individual entitlement under the [Company's] vacation proposal." Accordingly, the Board reasonably found (A. 891) that the Company's failure to provide that information violated Section 8(a)(5) and (1) of the Act.

Contrary to the Company's claim (Br. 5-59), the Board's finding is not undermined by the fact that the Company had supplied the Union with a seniority list. The Union had used that list to make the very estimate that the Company had deemed inaccurate. Therefore, the Union was entitled to the list that the Company was asserting was accurate. Nor, given that the Union twice requested a list from the Company after being told that its estimate was not accurate, would the Company have any reason to "reasonably conclude[]" that the Union was satisfied with the Company's initial response (Br. 59), or that the Union's request (Br. 59) was "casual."

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter enforcing the Board's order in full.

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NATIONAL LABOR RELATIONS BOARD

NOVEMBER 2010

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WHITESSELL CORPORATION

Respondent

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* No. 10-2934

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* 18-CA-18134

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,760 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (02/28/2010 rev. 5). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
this 12th day of November, 2010

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FOR THE EIGHTH CIRCUIT

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Petitioner	* No. 10-2934
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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