Nos. 16-2026, 16-2080

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner/Cross-Respondent

v.

COLUMBIA COLLEGE CHICAGO
Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

KELLIE ISBELL
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-2482

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases -Cont'd Page(s)

TABLE OF AUTHORITIES

Cases -Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases -Cont'd Page(s)

TABLE OF AUTHORITIES

Cases -Cont'd Page(s)

TABLE OF AUTHORITIES

Cases -Cont'd Page(s)

TABLE OF AUTHORITIES

Cases -Cont'd **Page(s)**

Statutes:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Regulations:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 16-2026, 16-2080

NATIONAL LABOR RELATIONS BOARD
Petitioner/Cross-Respondent

v.

COLUMBIA COLLEGE CHICAGO
Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

The jurisdictional statement provided by Columbia College Chicago is incomplete. This case is before the Court on the application of the National Labor Relations Board to enforce and the cross-petition of Columbia College Chicago to review, a Board Order issued against the College. In its Order, the Board found that the College violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by failing to bargain with the Part-Time Faculty Association at Columbia College Chicago–IEA/NEA ("the Union"), which

represents its part-time faculty, over the effects of the College's decision to reduce the number of credit hours awarded for certain courses; by engaging in overall bad-faith bargaining; by setting unlawful preconditions to bargaining; by failing to meet and bargain with the Union for a successor agreement; and by failing and refusing to provide the Union with requested information. The Board further found that the College violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by notifying Union president Diana Vallera that she faced discipline for engaging in protected activity and discriminating against Vallera in teaching assignments; and violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining an overbroad work rule. (A. 1.)[1]

The Board's Decision and Order issued on March 24, 2016, and is reported at 363 NLRB No. 154. (A. 1-59.) The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices were committed in Illinois. Both the Board's application for enforcement and the College's cross-petition for review are timely;

[1] "A." references are to the appendix filed by the College. "SA" references are to the supplemental appendix filed by the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

the Act places no limit on the time for filing actions to enforce or review Board orders.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's rules and regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of the portions of its Order remedying the College's uncontested violations?

2. Does substantial evidence support the Board's finding that the College's failure to bargain with the Union over the effects of its decision to reduce course credit hours violated Section 8(a)(5) and (1) of the Act?

3. Did the Board abuse its discretion by awarding bargaining expenses to the Union to remedy the College's numerous unfair labor practices, including its failure to bargain in good faith?

STATEMENT OF THE CASE

I. Statement of Facts

A. The Union Represents the College's Part-Time Faculty; the College and the Union Begin Bargaining for a Successor Contract

The College is a private, independent college specializing in arts, communication, and media. It employs approximately 360 full-time faculty and

1,250 part-time faculty. The part-time faculty teaches about 75 percent of the courses offered by the College. (A. 16; SA 24, 39, 40.)

The Union has represented the College's part-time faculty since 1998. (A. 16; A. 228.) Diana Vallera, a part-time professor in the photography department, is the Union's president. (A. 17; SA 1.) The parties' most recent collective-bargaining agreement expired in 2010, and the College and Union agreed to continue the terms of that agreement while they bargained for a successor contract. (A. 17; A. 225, SA 21.)

The collective-bargaining agreement contains a broad management-rights clause under which the College has the right, among other things, to establish, terminate, modify, and implement "all aspects of educational policies and practices," including curricula, staffing, and courses. (A. 18; A. 229.) Under the management-rights clause, the College has the right to assign the number of credit hours for each course. (A. 2 n.8.) From time to time, the College adjusts the course credit hours as a result of, for example, changes in curriculum. (A. 23; SA 34-35.)

Wage rates for part-time faculty are set out in the collective-bargaining agreement. Those wages are based on the credit hours assigned to each course and on the total number of credit hours the faculty member has taught at the College. (A. 23 & n.16; A. 240, SA 2, 16.)

In addition, the contract contains an "entire agreement" provision, commonly known as a zipper clause,[2] which states that the parties "each had the right and opportunity to make demands and proposals on any subject or matter not removed by law," and that the Agreement represents "the sole Agreement between the parties regarding wages, hours, and other terms and conditions of employment." (A. 242.) Under this provision, the parties could agree to negotiate "a significant issue" that was "not discussed during the negotiations." (A. 242.)

B. The College Fails to Bargain in Good Faith During Negotiations for a Successor Agreement

In January 2010, the College and the Union began bargaining for a successor agreement and used the services of a mediator from the Federal Mediation and Conciliation Service. (A. 17; SA 6.) They reached a tentative agreement on academic freedom, but the College was not willing to make other tentative agreements because it wanted to retain the ability to "horse trade" once agreement on the entire contract was reached. (SA 27, 42.) At the mediator's suggestion, the parties began keeping track of provisions that were not in dispute ("NID") rather than use the term tentative agreement. (A. 4 n.16, 17, 18 n.6; SA 22, 28-29, 42, 238.)

---

[2] A zipper clause is a common provision precluding one party from requiring the other to bargain about any additional topics during the life of the agreement. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. & its Local 547*, 765 F.2d 175, 180 (D.C. Cir. 1985).

In July 2010, the Union filed an unfair-labor-practice charge over the College's refusal to bargain the effects of its decision to reduce course credit hours in the photography department. The parties settled that case on October 22. (A. 54 n.71; SA 30-31, 51-57.) As part of that settlement, the College agreed to bargain over the effects of changes to credit hours in the photography department and affirmed that it would not "in any similar way" violate the Act in the future. (SA 54.) On October 27, 2010, the College sent a written "proposal for negotiations" that included a modified management-rights clause. (A. 18; SA 58, 62.) The existing management-rights clause gave the College the authority to make decisions about its educational, fiscal, and employment policies. (A. 18; A. 229.) The October proposal added language reserving to the College rights and responsibilities regarding educational, fiscal, and employment policies, "including the effects or impact of [the College's] decision to exercise such rights and responsibilities. . . ." (SA 62.)

At the next bargaining session on October 29, Vallera expressed concern about the new language that would have the Union waive the right to effects bargaining. She explained that it seemed regressive because the parties had just settled a case in which the College refused to bargain about the effects of changes to course credit hours in the photography department. The College's general counsel, Annice Kelly, responded that the College did not want to have an effects bargaining

dispute arise in the future. Although the Union did not agree to the effects bargaining waiver, the College continued to maintain that proposal throughout the bargaining. (A. 18; SA 4-5, 17-18, 73-83.)

On March 30, 2011, the College submitted a comprehensive written proposal to the Union, which included the same effects bargaining waiver first proposed by the College the previous October. (A. 18; SA 7-8, 84-101.) Over the next few months, the parties were able to set aside several topics as NID, including the College/Union relationship (article IV), governance (article VI), grievance procedures (article IX), and the policy statement for performance evaluations. (A. 18; SA 102-37.)

On the recommendation of the federal mediator, in the latter half of 2011, the parties switched from traditional bargaining to small group bargaining. In the small group bargaining format, only one or two representatives from each side participated instead of the entire bargaining team. (A. 18-19; SA 6-7.) Discussions in the small groups were intended to be off the record, and no notes were taken. (A. 19; SA 26-27, 43.) In addition, Louise Love, vice president for academic affairs and interim provost, was replaced by Len Strazewski, interim associate provost, as a member of the College's bargaining team. (A. 19; SA 23, 25, 41.) Strazewski was not told by Love or other members of the College's bargaining team about the specific provisions the parties had already agreed were NID. (A. 19; SA 47.)

On October 6, 2011, the College received a copy of an unfair-labor-practice complaint issued by the Board's General Counsel.[3] The next day, the College and the Union met for a small group bargaining session. At that meeting, Strazewski rejected one of the Union's proposals in its entirety and told the Union that the College was resubmitting its March 30 proposal. When asked by the mediator whether he was aware of the various proposals the parties had exchanged and the NID items the parties had reached since March, Strazewski replied that he was not aware. He was, he said, simply the "messenger" conveying the views of General Counsel Kelly. (A. 19; SA 9-11, 47.)

On October 21, Vallera emailed Love to express the Union's concern that the College was engaging in regressive bargaining and asked her to clarify the College's position. (A. 19; SA 152.) Love's response asserted that Vallera, by emailing her, had broken the ground rules of the small group bargaining, and the College would "have to rethink whether the [small group] is the best format for it to negotiate." (A. 19; SA 153-54.)

[3] The complaint alleged that the College unlawfully issued a warning to Vallera for asking to see the evaluations in her file; refused to provide information about a change limiting the number of classes part-time faculty could teach each semester; refused to bargain about effects of that change; and threatened to stop meeting informally with the Union to discuss individual matters because of the grievances and charges the Union had filed. (A. 19; SA 138-51.) These allegations are not involved in this case.

The parties' bargaining teams met again on October 28. They could not agree on a bargaining format; the College no longer wanted to continue the small group bargaining format, while the Union did. The mediator, after meeting separately with each side, withdrew because he felt he could no longer be helpful. (A. 19; SA 12, 220.)

The College then decided it would submit a new written proposal before the parties resumed face-to-face negotiations. (A. 19; SA 44-46, 48-49, 157.) On November 10, 2011, Love notified Vallera by email that the College was preparing a revised comprehensive proposal and did "not see the need to meet" until the proposal was ready in mid-December. (A. 19-20; SA 157.)

On December 19, the College sent the new contract proposal to the Union for its review. (A. 20 & n.12; SA 167-75.) The new proposal wiped away months of bargaining by rejecting all language the parties had agreed was NID unless that language was consistent with the College's March 30 proposal. Like the March 30 proposal, it deleted language from the original contract that would require the College to try to find replacement classes for senior part-time faculty whose classes were cancelled or dropped; eliminated the requirement that disciplinary action would be based on just cause; and modified the zipper clause so that the College had no obligation to bargain about any matter, including past practices, while the agreement was in effect. (A. 20-21; A. 235-36, 239, 242, SA 13-14, 169, 174, 196.)

In addition, the new proposal strengthened the effects-bargaining waiver proposed on March 30 by adding language stating that the provision "is intended to constitute a clear and unmistakable waiver of any rights [the Union] might otherwise have to bargain over managerial rights and/or the effects or impact on unit members of the College's decisions with respect to such rights." (A. 22; SA 161.)

On February 13, 2012, the Union asked to resume face-to-face bargaining. (A. 22; SA 181-82.) The College responded that "the actions of [the Union] led to the bargaining moving to the exchanging of proposals" and that the Union should either provide the College with comments on its December proposal or provide a counter-proposal of its own. (A. 22; SA 183.) After that, the Union periodically asked to resume face-to-face bargaining, and the College responded that the bargaining would take place in writing. (A. 22; SA 185-94.)

On April 24, 2012, the Union renewed its request to bargain but also said that it would respond to the December 2011 proposal at a face-to-face meeting. (A. 22; SA 195.) On June 13, the College contacted the Union to schedule a bargaining session. The parties resumed in-person meetings on June 25. (A. 22; SA 222-29.)

C. The College Reduces Course Credit Hours; the Union Requests Effects Bargaining; Between February and May 2012, the College Refuses to Bargain

As discussed above, in 2010 the College reduced, from four to three, the credit hours for about 15 classes in the photography department. (A. 23; SA 50, 206-07.) The Union requested bargaining over the effects of the change, and the College refused. After the Union filed an unfair-labor-practice charge, the parties reached a settlement in which the College agreed to bargain over the effects of the credit hours reduction. (A. 23; SA 51-57, 240-41.)

Following a review of the curriculum, the College's school of fine and performing arts decided to reduce the credit hours of 10 courses beginning in the 2011-2012 school year.[4] (A. 24, 26 n.23; SA 36-38, 198.) Similarly, the school of media arts reduced the credit hours for two courses in the journalism department. (A. 24 n.19; SA 32-33, 198.) On May 2, 2011, the College notified part-time faculty of their course assignments for the fall 2011 semester, which included assignments to courses with reduced credit hours. (A. 24; SA 208-19.) The College did not officially notify the Union of the credit hour reductions. (SA 15.)

[4] During negotiations regarding the reduction in credit hours in the photography department, the College informed the Union that it intended to reduce the credit hours for an additional two courses, but the Union did not pursue the matter. The administrative law judge found that the Union waived its right to bargain over these two courses. (A. 23, 26.)

In December 2011, after learning about the credit hour reductions from members, the Union requested bargaining over the effects of the reductions as well as a list of affected courses. (A. 24; SA 15, 197.) Two months later, the College responded to the Union's bargaining request. First, the College provided a list of affected courses. (A. 25; SA 198.) Next, the College stated that while it believed it had no obligation to bargain over effects, it would nevertheless bargain if the Union first provided a proposal regarding the effects and a list of unit members affected by the changes. (A. 5, 25; SA 199.) Over the next couple of months, the Union continued to request bargaining, and the College continued to refuse, asserting that it had no obligation to bargain over effects and that in its view, it could not "fulfill any bargaining obligation unless and until the Union responds to Columbia's information request by specifying what it wants to bargain and who it believes was affected." (A. 25; SA 193-94.)

On May 4, 2012, the College notified the Union that it was willing to bargain over effects notwithstanding its continued belief it had no duty to bargain. (A. 25; SA 221.) The parties subsequently met twice to bargain about the effects of the reduction in course credit hours (among other issues, including the successor agreement) in June and July 2012. (A. 25; SA 222-27, 230-37.)

D. The College Investigates Vallera for Misconduct, Informs Her of Forthcoming Discipline, and Refuses to Provide Information about the Misconduct Complaint

In January 2012, while the Union demanded effects bargaining as a result of the credit hours reduction and sought to continue in-person bargaining over the successor agreement, Vallera received a telephone call from her nanny, who was concerned about an unknown man taking photographs of Vallera's home. Vallera returned home and called the police. (A. 45.) When Vallera's nanny described the man to the responding officer, Vallera thought the description matched someone employed by the College's general counsel's office. The police officer asked Vallera for a photograph to show the nanny. Vallera obtained a photograph, and the nanny identified the man in the photograph as the person she had seen outside Vallera's house. (A. 45.)

Vallera subsequently spoke about the surveillance of her home at a national education conference and at a Union membership meeting. (A. 46.) On April 19, General Counsel Kelly filed an internal complaint against Vallera and asked that Vallera be investigated "for making false, damaging statements about me/my office by alleging that we are involved in criminal activity." (A. 46.) During the resulting investigation, Vallera and her union representative requested information about the complaint against her. The College provided a paraphrased summary of the

complaint but did not provide any of the other information Vallera requested. (A. 50.)

On August 13, Louise Love notified Vallera that the investigation was complete and that Love wanted to schedule a meeting to inform Vallera of the contemplated disciplinary action against her. Love postponed, and then later cancelled, the meeting, which was never held. (A. 49.)

E. The College Maintained an Overbroad Network and Computer Use Policy

The College maintains a network and computer use policy, which, among other things, states that users "may not use information technology in ways that interfere with or demean others . . . ." (A. 29; SA 201.)

F. The College Failed to Respond to the Union's Information Request Regarding Its Newly Implemented Early Feedback System

In the fall of 2011, the College implemented a pilot "Instructor Early Feedback System" to monitor the performance of instructors in its first year seminar classes. (A. 32.) The early feedback system included student surveys, classroom visits, mentoring of instructors needing additional guidance, and an evaluation of instructors subject to mentoring. (A. 32-33.) The Union requested the names of part-time faculty members notified of dissatisfaction with their performance and any actions taken regarding those faculty. (A. 1, 34.)

G. The College Discriminated Against Vallera in Assigning Courses for the Fall 2012 Semester and Failed to Provide Information about Class Assignments to Part-time Faculty in the Photography Department for Fall 2012

Vallera, a part-time faculty member since 2005, generally taught two courses in the fall and spring semesters. (A. 17, 35.) She received outstanding evaluations from her students, was nominated at least twice for the College's excellence in teaching award, and was qualified to teach several classes the College offered. (A. 35, 40.) In 2009, after Vallera taught an Advanced Lighting course for the first time, the academic manager of the photography department asked Vallera to send her the goals and objectives Vallera developed for the course so that they could be shared with others in the department. (A. 37 n.45.)

In March 2011, Elizabeth Ernst, the coordinator of the studio program within the photography department, emailed the department chair about whether Vallera should be assigned a second course for the fall semester. (A. 37; SA 205.) In her email, Ernst stated that Vallera was not qualified to teach Advanced Lighting and instead recommended a relatively new instructor to teach a studio course because she "is a problem solver and not a problem maker." (A. 37; SA 205.)

On April 23, 2012, the College notified Vallera that she had been assigned to teach only one course in the fall 2012 semester. (A. 38.) On May 13, 2012, Vallera requested information regarding faculty assignments in the photography department.

The College failed to respond until September 28. (A. 41.) The Board found that the College violated the Act by failing to assign Vallera to more than one class and by refusing to provide the requested information about course assignments in the photography department. (A. 1.)

II. The Board's Conclusions and Order

On March 24, 2016, the Board (Members Hirozawa and McFerran; Member Miscimarra, dissenting) found, in agreement with the administrative law judge, that the College violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to bargain with the Union from February to May 2012 about the effects of its decision to reduce the number of credit hours awarded for certain courses and setting unlawful preconditions to bargaining. (A. 1.)

The College failed to file exceptions to the administrative law judge's findings, which the Board adopted, that it further violated Section 8(a)(5) and (1) by:

- engaging in overall bad-faith bargaining;[5]
- failing to meet and bargain with the Union for a successor agreement from February to June 2012;
- failing and refusing to provide the Union with requested information regarding the College's Early Feedback System, class assignments to part-time

[5] In accordance with Section 102.46(b)(2) of the Board's Rules and Regulations, 29 C.F.R. §102.46(b)(2), the Board disregarded the College's exception to the bad-faith bargaining finding because that exception did not "state the grounds on which the judge's conclusion should be overturned." The College does not challenge the Board's decision to disregard its bare exception before the Court.

faculty in the photography department, and the investigation of Union President Vallera;

violated Section 8(a)(3) and (1) by:

- notifying Vallera that disciplinary action was forthcoming because of her protected statements about alleged surveillance at her home;
- failing to assign Vallera more than one class section for the Fall 2012 semester; and

and violated Section 8(a)(1) by:

- maintaining an overbroad work rule regarding network and computer use.

(A. 1.)

The Board's Order requires the College 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. Affirmatively, the Order directs the College to take the following actions: to bargain, on request, with the Union regarding the effects of the College's decision to reduce the number of credit hours awarded for 10 courses; make any unit members who taught the 10 courses whole for any loss of earnings and other benefits suffered as a result of the College's failure to engage in effects bargaining; make Vallera whole for any loss of earnings and other benefits as a result of the College's discrimination against her; remove any reference from its files of the notification to Vallera that the College was considering disciplining her for engaging in protected activity; furnish the Union the information it requested on

the Early Feedback System, the fall 2012 class assignments, and the investigation of Vallera for misconduct; rescind the overbroad portion of the College's network and computer use policy, and notify employees that the rule has been rescinded or furnish employees with a revised policy; and post a remedial notice. In addition, the Board ordered the College to reimburse the Union for the bargaining expenses it incurred from March 31, 2012 to June 13, 2012, in connection with bargaining a successor contract, and from February 21, 2012 to May 4, 2012, in connection with bargaining the effects of the College's reduction in credit hours in 10 courses. (A. 6-7.)

SUMMARY OF THE ARGUMENT

Before the Court, the College fails to challenge the Board's findings that it unlawfully engaged in overall bad-faith bargaining; failed to meet and bargain for a successor agreement between February and June 2012; set unlawful preconditions to bargaining; failed and refused to provide the Union with requested information on three separate occasions; notified Union President Vallera that disciplinary action was forthcoming because of her protected statements about alleged surveillance at her home by the College; discriminated against Vallera by failing to assign her more than one class section for the fall 2012 semester; and maintained an overly broad network and computer use policy. The Board is therefore entitled to summary enforcement of the portions of its Order remedying those violations.

The Board has long interpreted Section 8(a)(5) of the Act to require that employers bargain with their employees' bargaining representative over the effects of decisions concerning terms and conditions of employment. The distinction between bargaining over a decision and its effects has been recognized by the Supreme Court. Even where the parties' collective-bargaining agreement gives the employer the right to make a certain decision, the employer may still be required to bargain over the effects of that decision. Applying its longstanding clear and unmistakable waiver doctrine, the Board determined that although the collective-bargaining agreement gave the College the authority to reduce course credit hours, the Union did not waive its right to bargain over the effects of that decision.

Finally, the Board acted well within its broad remedial discretion and exercised its particular labor expertise when it determined that the College's bad-faith bargaining and conduct away from the bargaining table warranted a remedy directing it to reimburse the Union's negotiating expenses. The Board's remedial order is fully consistent with its precedent and amply supported by the factual findings underpinning the College's statutory violations. The Board concluded that the College's conduct deprived the Union of meaningful bargaining and needlessly expended the Union's resources and economic strength. Under these circumstances, the Board reasonably exercised its remedial discretion in ordering

the College to reimburse the Union's negotiating expenses to return the parties to the status quo at the bargaining table.

STANDARD OF REVIEW

The Court's review of Board orders is "sharply limited." *Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993). The Court will "uphold the Board's determination if its factual findings are supported by substantial evidence in the record as a whole and its legal conclusions have a reasonable basis in the law." *Id.* Under that standard, the Court will not "dabble in fact-finding" or "displace reasonable determinations simply because [the Court] would have come to a different conclusion if [it] reviewed the case de novo." *Id.* Where, as here, the Board disagrees with the administrative law judge on the legal inferences drawn from facts, rather than on the facts themselves, the Court does not employ a heightened standard of review but instead "is limited to determining whether substantial evidence supports the Board's conclusion." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1475-76 (7th Cir. 1992). *See also Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 935 (7th Cir. 1992).

While the Board has the authority to interpret collective-bargaining agreements in order to resolve unfair labor practice cases, *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-30 (1967), this Court "appl[ies] a de novo standard of review when interpreting the contract itself." *Chicago Tribune*, 974 F.2d at 938. But

the Board's factual findings on matters bearing on the intent of the parties to the contract are entitled to the same deference as any other factual findings. *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986).

The Board's remedial order is "subject only to limited judicial review," and the Court "shall not interfere with the Board's choice of remedies absent abuse of discretion." *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 437 (7th Cir. 1993). This deferential standard flows from the recognition that "[i]n fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). As such, a reviewing court must enforce the Board's choice of remedy unless a challenging party can show "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of the Portions of Its Order Regarding Its Uncontested Findings

In its opening brief to the Court, the College failed to challenge the Board's findings that it violated the Act by:

- Engaging in overall bad-faith bargaining;
- Failing to meet and bargain for a successor agreement between February and June 2012;
- Failing and refusing to provide the Union with requested information regarding the College's Early Feedback System, class assignments to part-time faculty in the photography department, and the investigation of Union President Vallera;
- Notifying Vallera that disciplinary action was forthcoming because of her protected statements about alleged surveillance at her home;
- Discriminating against Vallera by failing to assign her more than one class section for the fall 2012 semester;
- Maintaining an overly broad network and computer use policy; and
- Setting an unlawful precondition to bargaining by demanding that the Union respond to its December 30, 2011 proposal before it would resume face-to-face negotiations.

In addition to not challenging them in its opening brief, the College failed to challenge all but the unlawful precondition finding before the Board (A. 1 & n.4). The Court has no jurisdiction to hear any challenge to findings not excepted to before the Board. *See* 29 U.S.C. § 160(e) ("[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to

urge such objection shall be excused because of extraordinary circumstances"). *See also NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1162 (7th Cir. 1996). In addition, the by failing to contest these issues in its opening brief, the College has abandoned these arguments, and the Board is entitled to summary enforcement. *See id.* Accordingly, the Court should grant summary enforcement of the uncontested portions of the Board's Order.

II. Substantial Evidence Supports the Board's Finding that the College Unlawfully Failed to Engage in Effects Bargaining

Under Board and court law, even where an employer has no obligation to bargain about a decision, it may nonetheless violate Section 8(a)(5) and (1) of the Act by failing to bargain with its employees' bargaining representative about that decision's effects on employees' terms and conditions of employment. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981); *NLRB v. Ensing's Supermarket, Inc.*, 872 F.2d 1279, 1286–87 (7th Cir. 1989). As shown below, substantial evidence supports the Board's finding that the College violated the Act by failing to bargain over the effects of its reduction in course credit hours and by setting unlawful preconditions for effects bargaining.[6]

[6] Assuming the Court agrees with the Board that the College unlawfully failed to engage in effects bargaining, the College's preconditions for bargaining—that the Union first provide a list of affected faculty and an effects bargaining proposal—were also unlawful. *See Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 960-61 (6th Cir. 2006) (employer violated Act by preconditioning bargaining on union's providing a detailed proposal and agenda). The College makes no specific argument

A. The Board Reasonably Interprets the Act To Require an Employer To Bargain over the Effects of a Decision Affecting Wages, Hours, or Terms and Conditions of Employment

Section 7 of the Act, 29 U.S.C. § 157, gives employees the right to choose a collective-bargaining representative and to have that representative bargain with the employer on their behalf. Employers have the corresponding duty to bargain with their employees' chosen representative, and a refusal to bargain violates this duty under Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1).[7] In turn, Section 8(d) of the Act, 29 U.S.C. § 158(d), defines the "duty to bargain collectively" as "the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

The Board and courts have also long interpreted the Act's obligation to engage in collective bargaining as encompassing an obligation to engage in both "decisional bargaining" about an employer's underlying decision and "effects bargaining" about the effects that an employer's decision will have on the terms and conditions of employment. *See, e.g., Holiday Inn of Benton*, 237 NLRB 1042,

---

that its preconditions to effects bargaining were lawful. Instead, the College contends only that because it had no obligation to bargain over effects, it did not violate the Act by setting preconditions. (Br. 27 n.7.)

[7] A violation of Section 8(a)(5) of the Act produces a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

1042-43 (1978), *enforced in relevant part sub nom. Davis v. NLRB*, 617 F.2d 1264, 1267-70 (7th Cir. 1980); *NLRB v. Challenge-Cook Bros.*, 843 F.2d 230, 232-33 (6th Cir. 1988); *Int'l Ladies' Garment Workers Union, AFL-CIO v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972); *Brown-McLaren Mfg. Co.*, 34 NLRB 984, 1015 (1941). As this Court has noted, "the difference between 'decision' bargaining and 'effects' bargaining is well recognized." *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am.* ("*National Lock*"), 802 F.2d 969, 972 (7th Cir. 1986).

In *First National Maintenance*, the Supreme Court ratified that decisional-bargaining and effects-bargaining distinction by holding that an employer's decision to terminate part of its business was a core entrepreneurial decision falling outside the scope of Section 8(d)'s mandatory bargaining subjects, even though the employer retained the distinct "duty to bargain about the results or effects of its decision." 452 U.S. at 676-77 & n.15, 686. The Court explained that the responsibility to bargain over effects is a statutory one, "mandated by § 8(a)(5)." *Id.* at 681. *Accord NLRB v. Challenge-Cook Bros.*, 843 F.2d at 233 (duty to bargain over effects "is a statutory duty that derives from §8(a)(5)").

Even in cases where the parties have a collective-bargaining agreement, the statutory responsibility to bargain over effects remains. *See, e.g.*, *Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 706 F.3d 73, 83-84 (2d Cir. 2013); *Challenge-Cook Bros.*, 843 F.2d at 233. *Accord Natomi Hosps. of California, Inc.*

("*Good Samaritan Hosp.*"), 335 NLRB 901, 902 (2001). Moreover, contractual language waiving a union's right to bargain over a specific decision "does not constitute a waiver of the right to bargain over that decision's effects." *Good Samaritan Hosp.*, 335 NLRB at 903. *Accord Local Union 36*, 706 F.3d at 86; *Challenge-Cook Bros.*, 843 F.2d at 233. An employer's failure to give a union the opportunity to bargain about the effects of a decision affecting employees' working conditions effectively "denigrate[s] the Union and the viability of the process of collective bargaining itself, in the eyes of unit employees." *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 208 (D.C. Cir. 2003).

B. The Board's "Clear and Unmistakable Waiver" Standard Is a Reasonable Construction of the Act and Has Been Approved by the Supreme Court and Courts of Appeals, including the Seventh Circuit

For more than 60 years, the Board has consistently adhered to the position that contractual waivers of statutory bargaining rights must be clear and unmistakable. *See Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098 (1949) (rejecting contention that contractual "management functions" clause privileged employer's unilateral changes in pension plan); *Provena Hosps.*, 350 NLRB 808, 812 & n.19 (2007) (citing cases). Because no language in the Act specifically addresses the subject of waiver of bargaining rights, a reasonable statutory construction by the Board on this subject is entitled to deference under *Chevron,*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Under the Board's clear and unmistakable waiver analysis, a finding of waiver "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term . . . ." *Provena*, 350 NLRB at 811. An employer asserting that a union has waived its bargaining rights has the burden of proving a clear and unmistakable waiver. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) (citations omitted), *enforced sub nom. Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001).

The Supreme Court approved the clear and unmistakable waiver standard in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12, 709 (1983), a case involving discrimination under Section 8(a)(3) and (1) of the Act. Since then, while the D.C. Circuit applies a "contract coverage" standard, *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005),[8] the Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits have approved the Board's use of the clear and unmistakable waiver standard. *See Local Union 36, Int'l Bhd. of Elec. Workers,*

[8] *See also Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (adopting the D.C. Circuit's contract coverage standard but also requiring a "sound arguable basis" for the Board's contract interpretation).

AFL-CIO v. NLRB, 706 F.3d 73, 81-82 (2d Cir. 2013)[9]; *Engelhard Corp. v. NLRB*, 437 F.3d 374, 378 (3d Cir. 2006); *Universal Sec. Instruments v. NLRB*, 649 F.2d 247, 256-57 (4th Cir. 1981); *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 233 (6th Cir. 1988); *United Bhd. of Carpenters & Joiners of Am., Local 2848 v. NLRB*, 891 F.2d 1160, 1164 (5th Cir. 1990); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (8th Cir. 1979); *Am. Distrib. Co. v. NLRB,* 715 F.2d 446, 450 (9th Cir. 1983).

Since at least 1958, this Court has also applied the Board's clear and unmistakable waiver standard. *See J.I. Case Co. v. NLRB*, 253 F.2d 149, 154 (7th Cir. 1958) (finding "no language in the contracts . . . which, under the circumstances, could be considered a waiver of the Union's right to receive the requested information" and noting the requirement that a union's waiver of a statutory right must be "clear and unmistakable"). In the intervening decades since the *J.I. Case* decision, the Court has reiterated its view that the Board's clear and unmistakable

[9] The Second Circuit in *Local Union 36* set out a two-step analysis to determine whether a union has waived its employees' statutory right to bargain. First, the court looks to the text of the collective-bargaining agreement to determine *de novo* whether the contract "clearly and unmistakably" resolves the disputed issue. *Local Union 36*, 706 F.3d at 83-84. Next, if the contract does not directly resolve the issue, the court determines whether the union has otherwise "clearly and unmistakably *waived* [the] right" to bargain over the issue in the agreement's provisions or by its past conduct, "including [its] past practices and bargaining history." *Id.* at 84.

standard is appropriate.[10] *See Local 65-B, Graphic Commc'ns Conference of the Int'l Bhd. of Teamsters v. NLRB*, 572 F.3d 342, 351 (7th Cir. 2009) (citing *Metropolitan Edison's* clear and unmistakable waiver finding with approval and finding that management-rights clause was a valid waiver of union's statutory rights); *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 838 (7th Cir. 2000) (finding that contract language was not a clear and unmistakable waiver of union's right to bargain); *National Lock*, 802 F.2d at 973 (rebuking the Board for failing to apply clear and unmistakable standard in interpreting contract language and noting that "[t]he courts and the Board have held over and over again that evidence that the parties intended to waive a statutory right must, to be credited, be clear and unmistakable"); *NLRB v. Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399 (7th Cir. 1971) (noting that "to effectuate the relinquishment of a collective bargaining right under the provisions of a collective bargaining agreement, we think that the preferable rule requires that waiver be in 'clear and unmistakable language'").

[10] As the Board acknowledged (A. 3), the Court endorsed the D.C. Circuit's contract coverage standard in *Chicago Tribune* (discussed below, pp. 38-39). But the great weight of the Court's authority indicates that its waiver standard is consistent with that of the Board. *See Provena*, 350 NLRB at 812-13 & nn.21, 24 (noting earlier decisions of the Court, never reversed, which followed the clear and unmistakable waiver standard).

C. The Union Did Not Clearly and Unmistakably Waive Its Right To Bargain over the Effects of the College's Reduction in Course Credit Hours

1. The Board and courts look to the language of the collective-bargaining agreement and bargaining history to determine waiver

The College admittedly failed to bargain between February and May 2012 over the effects of its reduction in course credit hours. Under Board and court law, such a failure to bargain over effects violates the Act unless the Union clearly and unmistakably waived its right to bargain. *See Local Union 36*, 706 F.3d at 86; *Challenge-Cook Bros.*, 843 F.2d at 233; *Good Samaritan Hosp.*, 335 NLRB at 903. As shown below, substantial evidence supports the Board's finding that the Union did not clearly and unmistakably waive its right to bargain over the effects of the College's decision to change course credit hours. (A. 2-3, 25-26.)

The Board may find waiver "in an express provision in the parties' collective bargaining agreement, or [in] the conduct of the parties, including their past practices and bargaining history, or by a combination of the two." *NLRB v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989). In order for contractual language to waive the statutory right to bargain, "the language must be *clear and unmistakable.* Silence . . . does not meet this test." *Challenge-Cook Bros.*, 843 F.2d at 233 (emphasis in original) (internal quotation omitted). *Accord Local Union 36*, 706 F.3d at 86. If the contract is silent, the Board will not find a waiver unless it appears "from an evaluation of the negotiations that the particular matter in issue was fully

discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter." *Angelus Block Co., Inc.*, 250 NLRB 868, 877 (1980). *See e.g., Provena*, 350 NLRB at 822; *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989); *Press Co.*, 121 NLRB 976, 978 (1958).

As shown below, neither the language of the collective-bargaining agreement nor the parties' bargaining history shows that the Union clearly and unmistakably waived its right to bargain over the effects of the College's decision to reduce course credit hours. Therefore, the Board's finding that the College violated the Act by failing to engage in effects bargaining should be upheld.

2. The language of the parties' collective-bargaining agreement did not waive the Union's right to effects bargaining

While it is undisputed that the management-rights clause gave the College the right to reduce course credit hours, neither that clause—nor anything else in the agreement—relieved the College of its obligation to bargain over effects. (A. 2 n.8, 3; A. 225-47.)[11] Nothing in the management rights clause refers to effects bargaining and, as explained above, silence in a collective-bargaining agreement cannot

[11] The management-rights clause gave the College the right to, among other things: "plan, establish, terminate, modify, and implement all aspects of educational policies and practices, including curricula; admission and graduation requirements and standards; scheduling; academic calendar; student discipline; and the establishment expansion subcontracting, reduction, modification, alteration combination, or transfer of any job, department, program, course, institute, or other academic or non-academic activity and the staffing of the activity, except as may be modified by this Agreement." (A. 229.)

"effectuate the relinquishment of a collective bargaining right." *Challenge-Cook Bros.*, 843 F.2d at 233. *Accord Local Union 36*, 706 F.3d at 86 (language of the collective-bargaining agreement was "not specific enough" to show that the union "clearly and unmistakably waived its right to bargain over the *effects* of a change under those clauses") (emphasis in original).

The Board (A. 2-3) appropriately rejected the College's argument that the language of the management-rights clause and other contract provisions compelled any resulting effects of its reduction in course credit hours. First, as the Board pointed out (A. 2), the College did not even make this argument to the Board. Instead, dissenting Board Member Miscimarra raised the issue, which the College has repeated, much of it verbatim, in its brief. Under Section 10(e) of the Act, "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The College "may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the § 10(e) bar; the Act requires the party to raise its challenges itself." *Enter. Leasing Co. of Florida v. NLRB*, __ F.3d __, 2016 WL 4150930, at *11 (D.C. Cir. Aug. 5, 2016) (quotation omitted).

In any event, substantial evidence supports the Board's finding that the contract "did not inevitably dictate the effects of the [College's] decision." (A. 3.)

The agreement established only minimum employee benefits and did not prohibit other arrangements between the parties to compensate employees for the credit reductions. For example, while article XI of the contract established wage rates, those rates were only "minimum compensation." (A. 3; A. 240.) Nothing in the collective-bargaining agreement prevented the College from paying a premium to faculty whose courses were affected by the credit hours reduction, "grandfathering" in faculty for one semester after the changes and paying them for the unreduced credit hours, or compensating faculty who taught reduced-credit classes where contact hours with students did not also decrease. (SA 222-27.) Thus, the parties could have bargained over effects "without calling into question the [College's] underlying decision." *Bridon Cordage*, 329 NLRB 258, 259 (1999).

Accordingly, the College failed to meet its burden of showing that all of the effects of its decision to reduce course credit hours derived directly from that decision, or that "there was no possibility of alternative changes in terms of employment that would have warranted bargaining." (A. 3.) *See Fresno Bee*, 339 NLRB 1214, 1215 (2003) (rejecting employer's claim that it did not have to bargain over the effects of its decision to implement a new printing system because the effects were the "inevitable consequences" of the decision itself).

Nor does the language of the zipper clause in the parties' collective-bargaining agreement demonstrate that the Union waived its right to bargain over effects, as the

College argues (Br. 24-25).[12] Rather, that clause fails to mention effects bargaining at all, as the Board and courts require to establish waiver in a zipper clause, and clearly contemplates that the parties may bargain over "significant issue[s]" not discussed during the negotiations. (A. 242.) *See Challenge-Cook Bros.*, 843 F.2d at 233; *Allison Corp.*, 330 NLRB 1363, 1366 (2000) (noting that the "Board looks to the precise wording of the relevant contractual provisions" to determine whether a union waived its right to bargain and finding that the zipper clause "does not address the effects of any subcontracting"); *Johnson-Bateman*, 295 NLRB at 184 (noting that the Board "has repeatedly held that generally worded management-rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights").

The College's assertion (Br. 25) that the Board allows parties to use a zipper clause as a "shield" to block demands for bargaining fails to consider that the Board

---

[12] The "entire agreement," or zipper, clause in the parties' contract (A. 242) states:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the right and opportunity to make demands and proposals on any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this, the sole Agreement between the parties regarding wages, hours, and other terms and conditions of employment. Except where the parties agree in writing that a significant issue was not discussed during the negotiations and agree in writing to negotiate only the stated issue, the Agreement cannot be modified during its term. If the parties cannot agree that the issue is significant and/or was overlooked, the matter may be taken to arbitration by either party according to the provisions outlined in Step 3 of Article IX.

found that the contract did not contain a waiver of the Union's right to bargain over effects. A zipper clause, by itself, "does not mean that a union has clearly and unmistakably relinquished its right to bargain over all mandatory subjects of bargaining." *Success Village Apartments, Inc.*, 348 NLRB 579, 629 (2006). Rather, a zipper clause "which does no more than indicate that the parties have embodied their full bargaining agreement in the written contract, affords no basis for an inference that the agreement contains an implied understanding over and beyond those actually written into the contract." *Consol. Equities Realty #3, LLC*, 351 NLRB 1079, 1084 (2007) (quotation omitted). Neither the Board nor the courts have interpreted a broad zipper clause as a "relinquishment of the right to bargain over the effects of the unilateral acts of the employer." *Challenge-Cook Bros.*, 843 F.2d at 234.

3. The College's own actions and the parties' bargaining history show that the Union did not waive its right to effects bargaining

Substantial evidence also supports the Board's finding that College's own actions and the parties' bargaining history show no waiver. First, the Board found that the College's "own actions demonstrate that the existing collective-bargaining agreement does not contain a clear and unmistakable waiver of [the Union's] right to engage in effects bargaining." (A. 26 n.24.) Specifically, the undisputed facts show that the College agreed to bargain with the Union over the effects of its unilateral decisions and electronically notified all faculty that it would do so when the parties

settled another unfair-labor-practice case against the College. (A. 26 n.24; SA 19-20, 51-57, 240-41.)

Next, the parties' bargaining history shows, contrary to the College's claims (Br. 20-21), that the Union did not agree to waive effects bargaining. Indeed, the Union requested effects bargaining in the past, going so far as to file unfair-labor-practice charges over the College's unwillingness to engage in effects bargaining. As the Board explained, while the Union did not consistently request bargaining when the College unilaterally changed the curriculum, "the record [was] clear that when it came to course credit hour reductions (as here), [the Union] expected and demanded effects bargaining." (A. 26 n.24.) *See NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513, 518 (7th Cir. 1998) (finding that the union's "failure to demand bargaining in the past, without more, does not waive that bargaining right forever").[13]

In the College's view (Br. 22), the parties' bargaining history shows that the parties fully discussed effects bargaining, and the College's demands that the Union

[13] The College's hyperbolic claim that bargaining over the effects of all curriculum changes would be a "logistical nightmare" (Br. 23) fails to consider that effects bargaining is required only over decisions that affect employees' terms and conditions of employment. *See, e.g., Good Samaritan Hosp.*, 335 NLRB at 903 (disagreeing with administrative law judge and finding that decision did affect employees' terms and conditions of employment and that effects bargaining was required). *See also Beverly California Corp.*, 227 F.3d at 838 (employer's right to schedule employees did not waive union's right to bargain over employees' hours and wages).

agree to waive effects bargaining were merely an attempt "to memorialize its understanding of the meaning of the existing management-rights clause." But the Board explicitly found that the College's effects-bargaining proposals were not a memorialization but rather were in retaliation for the Union's protected activity. (A. 53 & n.69, 54 & n.71.) Moreover, any such understanding was only on the part of the College, not a view shared by the Union to demonstrate waiver; the Union consistently resisted the addition of such language.

Specifically, the Board found that in 2010, the College demanded for the first time that the Union waive its right to effects bargaining in retaliation for the Union's protected activity (filing an unfair-labor-practice charge and obtaining a settlement regarding the College's failure to bargain the effects of credit hour changes in the photography department). (A. 54 n.71.) In October and December 2011, the College demanded an even more explicit effects-bargaining waiver, again in retaliation for the Union's protected activity. (A. 53.) The College does not claim that these facts are unsupported in the record; the Court will not, therefore, "substitute [its] own inference for that of the Board." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1473 (7th Cir. 1992).

4. The Board's decision is in accord with this Court's precedent

While citing the Court's decision in *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992), to claim that the Board's clear-and-unmistakable waiver standard clashes with the views of this Court (Br. 16-17), the College fails to even mention the Court's decisions in *Local 65-B*, and *Beverly California Corp.*, which issued after *Chicago Tribune*.[14] *See Local 65-B, Graphic Commc'ns Conference of the Int'l Bhd. of Teamsters v. NLRB*, 572 F.3d 342 (7th Cir. 2009); *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000). In those cases, the Court reaffirmed its view that the Board's clear and unmistakable waiver standard is appropriate. What sets this case—and *Local 65-B* and *Beverly California Corp.*—apart from *Chicago Tribune* is the lack of specificity in the contractual language. In *Chicago Tribune*, the Court found that the management-rights clause in the parties' collective-bargaining agreement "gives management carte blanche to impose rules relating to employee conduct, provided only that they are reasonable rules." 974 F.2d at 936. The Court, finding itself faced with "a simple question of interpretation," disagreed with the Board's view of the collective-bargaining

[14] The College also cites (Br. 17) *Local 15, Int'l Bhd. of Elec. Workers v. Exelon*, 495 F.3d 779, 783 (7th Cir. 2007), a case interpreting an arbitrator's award. But *Exelon* does not mention either the clear-and-unmistakable or contract-coverage standard. Nor does it address the issue of effects bargaining. There, the Court found that the Union failed to show that the arbitrator "evidenced manifest disregard for the law" in interpreting the management-rights clause of the contract to give the company "an express management right to promulgate workplace rules." *Id.* at 783.

agreement. The Court found that the Board incorrectly "dr[e]w the line between on-the-job and off-the-job conduct" where the contract gave the employer "the exclusive right to establish reasonable regulations relating to employee conduct" with "no limitation to conduct on the job." *Id.* at 937. As a result of its disagreement with the Board over the contract's interpretation, the Court found that the union expressly gave up its right to bargain over off-the-job conduct rules by agreeing to the management-rights clause. *Id.*

In contrast, in *Beverly California Corp.*, the Court found that a management-rights clause giving the company the right to "direct, control, and schedule its operations work force" was not a clear waiver of the union's right to bargain over the reduction in wages that resulted from the company's implementation of a new schedule. 227 F.3d at 837-38. And in *Local 65-B*, the Court upheld the Board's decision that the parties orally extended the management-rights clause, which "no one dispute[d] . . . was a valid waiver of the union's statutory rights" under *Metropolitan Edison*. 572 F.3d at 351.

The College's repeated citations to the D.C. Circuit's decisions in *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), and *Heartland Plymouth Court MI, LLC v. NLRB*, __F.App'x__, 2016 WL 3040451 (D.C. Cir. May 3, 2016) (per curiam) (unpublished) do not require a different result here. As discussed above, the D.C. Circuit does not apply the Board's clear and unmistakable

waiver standard, but instead applies a "contract coverage" or "covered by" standard. *Enloe*, 433 F.3d at 838. The contract-coverage standard explicitly presupposes that the parties have exercised, rather than waived, their statutory right to bargain via their contract. Under that doctrine, "[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement, with respect to a matter covered by the contract." *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836, 838 (D.C. Cir. 1993). Moreover in *Enloe*, the D.C. Circuit stated that "[i[t would be rather unusual . . . to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision." *Id.* at 839. But *Enloe* does not explain how a waiver of decisional bargaining can automatically waive effects bargaining where they are separate rights. In addition, *Enloe* is in direct conflict with the views of the Second and Sixth Circuits, which hold that the duty to bargain over effects is a distinct duty under Section 8(a)(5). *See Local Union 36*, 706 F.3d at 87; *Challenge-Cook Bros.*, 843 F.2d at 233. Because the duty to bargain over effects is a separate right from decisional bargaining, it must be clearly and unmistakably waived. *Local Union 36*, 706 F.3d at 86; *Challenge-Cook Bros.*, 843 F.2d at 233. Under the view of the Second and Sixth Circuits, where a contract gives an employer the right to make business decisions but is "completely silent with respect to the duty to bargain over the *effects* of these decisions," that silence "does not constitute a waiver." *Challenge-*

Cook Bros., 843 F.2d at 233 (emphasis in original). *Accord Local Union 36*, 706 F.3d at 87.

Furthermore, even under the D.C. Circuit's contract coverage approach as explained in *Enloe*, the parties' bargaining history shows that the Union did not intend to waive its right to effects bargaining. In *Enloe*, the court noted that "language or bargaining history" could "support the proposition that the parties intended to treat [decisional and effects bargaining] separately." 433 F.3d at 839. Here, the parties' bargaining history (see pp. 35-37 above) clearly shows that they intended to treat decisional and effects bargaining separately. Further, the general language of the management-rights clause gave the College the right to change course credit hours but was silent with regard to curriculum changes affecting employee hours and wages. *See Beverly Cal. Corp.* 227 F.3d at 838 ("[e]ven though this contract says that the company may 'schedule its operations,' it does not say anything about schedule changes that affect hours and wages"). Because the effects of the change in credit hours are not matters that were covered by the parties' agreement, the contract coverage doctrine does not require a different result.

III. The Board Properly Exercised Its Broad Remedial Discretion in Ordering the College to Reimburse the Union for Its Negotiating Expenses Where the College's Violations During Contract Negotiations Needlessly Expended the Union's Time and Resources

A. Applicable Principles Regarding the Board's Remedial Authority

The College challenges the Board's remedial order directing it to pay the Union's negotiating expenses incurred from March 31, 2011 to June 13, 2012 (in connection with bargaining a successor agreement) and from February 21, 2012 to May 4, 2012 (in connection with bargaining over the effects of the credit hours changes). It faces a high hurdle in doing so. The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 216 (1964) (Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review"); *accord Am.'s Best Quality Coatings Corp. v. NLRB*, 44 F.3d 516, 520 (7th Cir. 1995). Under Section 10(c) of the Act, 29 U.S.C. § 160(c), the Board is directed to order remedies for unfair labor practices. The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

Section 10(c) of the Act expressly authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also "to take such affirmative action . . . as will effectuate the policies of th[e] Act." The Board's

task in applying Section 10(c) is to restore the status quo ante—in other words, "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1975). Moreover, in devising an appropriate remedy, the Board attempts to "both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation.'" *Mead Corp. v. NLRB*, 697 F.2d 1013, 1023 (11th Cir. 1983) (citation omitted); *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996).

The Board's statutory authority to fashion appropriate remedies includes the discretion to order special remedies when necessary "to dissipate fully the coercive effects of the unfair labor practices." *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 473 (1995) (citing cases), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996). The Board has determined that a special remedy is warranted when an employer engages in unusually aggravated misconduct that is "calculated to thwart the entire collective-bargaining process and forestall the possibility of . . . ever reaching agreement with the chosen representative of its employees." *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), *enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). Under such circumstances of egregious misconduct, the appropriate remedy—both to restore the status quo ante and to dissipate fully the effect of the violations—is reimbursement of the union's negotiating expenses.

Frontier, 318 NLRB at 859. The Board reasons, with court approval, that where an employer willfully defies its statutory obligation, the union has wasted its resources in a futile exercise. *Id.; see also Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1093 (D.C. Cir. 2016) ("An award of bargaining expenses remedies an unfair labor practice by ensuring that, upon resolution of the unfair labor practice charge, the injured party can return to negotiations on the same footing it occupied before the violation of the Act occurred."); *NLRB v. HTH Corp.*, 693 F.3d 1051, 1061 (9th Cir. 2012) (upholding several special remedies, including negotiating expenses, where "[u]nion wasted resources over a period of years during which [employer] had no intention of reaching an agreement").

A Board order directing reimbursement for negotiating expenses effectuates the policies of the Act by "allowing the harmed party to be returned to its financial position *ex ante*." *Camelot*, 824 F.3d at 1093. It also creates an incentive for the parties to bargain in good faith and prevents advantages gained by a party's unlawful conduct. *See Virginia Elec.*, 319 U.S. at 541 (a Board remedy "is a permissible method of effectuating the statutory policy" where it "places the burden upon the [employer] whose unfair labor practices brought about the situation" and it "deprives [the] employer of advantages accruing from a particular method of subverting the Act"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (Board acts appropriately where it takes action to "give effect to the declared public policy of the

Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining").

B. The College's Egregious Misconduct Fully Warrants Reimbursement of Bargaining Expenses

The Board did not abuse its discretion in determining that traditional remedies fail to eliminate the effects of the College's substantial unfair-labor practices. Relying on *Frontier*, the Board based its award of negotiating expenses on the College's egregious conduct: regressive bargaining, unlawful preconditions to bargaining, insistence on an effects-bargaining waiver, and misconduct away from the bargaining table, including retaliation against the Union. As shown below, these uncontested facts demonstrate that the Board's bargaining expenses remedy was fully warranted.

First, in October 2011, the day after learning that the Union had filed another unfair-labor-practice charge against it, the College informed the Union that it was resubmitting its March 30 contract proposal and disregarding all not-in-dispute (NID) items that had been reached in the meantime. (A. 4.) The Board found that the College "simply submitted regressive bargaining proposals in direct retaliation for the Union engaging in protected activity." (A. 4.) The College submitted a new proposal on December 19, which, again, was virtually the same as the March 30 proposal. As the Board noted, this proposal included the College's decision to eliminate the requirement that disciplinary action be based on just cause. (A. 4-5.)

The Board found that the College, by reopening not-in-dispute issues without justification, "forced the Union to expend resources bargaining anew on those items—resources that could have been devoted to addressing open items." (A. 5.)

Next, the College refused to meet with the Union to bargain over the successor contract and over the effects of its decision to reduce course credit hours. Rather than meet, the College imposed unlawful preconditions to bargaining, which "forced the Union to expend time and energy just getting the [College] to the table." (A. 5.) Between February and June 2012, the College refused to meet with the Union face-to-face to discuss the successor contract and demanded that the Union first provide written comments on the College's December 19 proposal or make a counter-proposal. (A. 5.) Between February and May 2012, the College also refused to meet with the Union to bargain over the effects of the course credit hours changes and instead demanded that the Union first provide a proposal regarding effects and a list of union members affected by the changes. (A. 5.) The College continued to make these demands for several months before finally agreeing to meet with the Union and bargain over the effects of the credit hour changes. (A. 5.) The College's unlawful delays "inevitably diminished the Union's bargaining strength with respect to both issues." (A. 5.)

Further, the College insisted throughout negotiations on a waiver of the Union's right to bargain over the effects of the College's decisions, a waiver the

Union continually opposed. The existing contract already gave the College broad rights to make decisions regarding the terms and conditions of employment. Without a contract, the Union would have the right under the Act to bargain over the effects of any changes the College made to unit employees' terms and conditions of employment. The effects bargaining waiver sought by the College would "have granted it unfettered control and left bargaining-unit employees with fewer rights and less protection than they would have under the Act without a contract." (A. 5.) The Board found that this conduct, in the context of the parties' negotiations, was an attempt "to frustrate the collective-bargaining process and undermine the Union's representative role as envisioned by the statute." (A. 5 & n.20.) Contrary to the College's claim (Br. 29), the fact that its effects bargaining waiver was not unlawful by itself, which the Board acknowledged (A. 5 n.20), is of no moment. As the Tenth Circuit has explained, even where the proposals themselves are not unlawful, "rigid adherence throughout negotiations to a battery of contract proposals undermining the Union's ability to function as the employees' bargaining representative demonstrated it could not seriously have expected meaningful collective bargaining." *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003) (internal quotations omitted).

Finally, the College's conduct away from the bargaining table further demonstrates that an award of reimbursement is warranted. Specifically, the College

unlawfully retaliated against union president Vallera for her aggressive advocacy by notifying her that discipline would be forthcoming because of her protected statements and by refusing to assign her more than one class in the fall 2012 semester. The College also refused to provide the Union with necessary, relevant information on three occasions. (A. 5.) The Board found that "[t]hese unfair labor practices tainted the parties' relationship and predictably undermined both the Union's leverage in bargaining and its support among the employees." (A. 5.) *See Pub. Serv. Co. of Oklahoma*, 318 F.3d at 1177 n.3 (upholding the Board's finding that the employer engaged in bad-faith bargaining, based in part on the employer's conduct away from the bargaining table).

Under these circumstances, the College wasted the Union's time and resources in a "futile pursuit of a collective-bargaining agreement." *Harowe Servo Controls, Inc.*, 250 NLRB 958, 965 (1980); *see also O'Neill, Ltd.,* 288 NLRB 1354, 1356-57, 1387 (1988) (ordering employer to reimburse union for resources that it wasted in useless bargaining), *enforced*, 965 F.2d 1522 (9th Cir. 1992). The Union fruitlessly expended time and financial resources associated with arranging dates to be available for bargaining, developing and drafting proposals and counterproposals, consulting with the mediator, and keeping union members apprised of bargaining efforts. (SA 102-37, 155-56, 176-82, 185-87, 191-92.) Accordingly, the Board properly directed the College to bear the costs of its violations. *See, e.g., NLRB v.*

Rutter-Rex Mfg. Co., 396 U.S. 258, 264-65 (1969) (wrongdoing employer must bear the costs stemming from its violations); *Camelot*, 824 F.3d at 1093 ("award of bargaining expenses remedies an unfair labor practice by ensuring that, upon resolution of the unfair labor practice charge, the injured party can return to negotiations on the same footing it occupied before the violation of the Act occurred"); *HTH*, 693 F.3d at 1061 ("[employer] is not entitled to benefit financially from the consequences of the delay created by its unlawful bargaining tactics").

C. The Court Should Reject the College's Attempts To Recast the Facts in an Effort To Establish Less Egregious Conduct

The College's waiver of all but the effects bargaining-related violations—and therefore the underlying facts supporting them—renders the College's conduct precisely as the Board found it and in the manner the Board characterized it. Before this Court, the College seeks to avoid reimbursement by recasting the uncontested facts and parsing specific conduct in isolation to support its baseless assertion (Br. 29-30) that it did not engage in "unusually aggravated misconduct." In doing so, the College ignores the Board's finding that it discarded six months of productive bargaining and "simply submitted regressive bargaining proposals in direct retaliation for the Union engaging in protected activity." (A. 4.) The Court cannot reexamine the facts that formed the basis for the Board's finding that the College violated the Act; the Company did not challenge them before the Board or in its opening brief. *See NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1162 (7th Cir.

1996) (issues not raised in opening brief are waived). It is far too late for the College to push a more benign narrative to evade responsibility for its actions.

Instead of disputing that it engaged in most of the conduct the Board relied upon, the College makes a myriad of unsupported arguments to justify its claims that bargaining expenses are unwarranted. First, the College claims (Br. 27)—without citation to authority—that it cannot be liable for bargaining expenses because the Board based its remedy on the effects bargaining violation for which the College had a "good faith legal defense." That violation is no less unlawful because the College claims its defense was in good faith. The College's "good faith belief that [it] is acting lawfully is not a defense to an unfair labor practice charge." *See NLRB v. E-Sys., Inc.*, 642 F.2d 118, 121 (5th Cir. 1981).

Nor is there any basis to the College's suggestion (Br. 29) that because the NIDS were "not meant to rise to the level of tentative agreements," the College did not engage in egregious conduct by disregarding them. The Board found that "the parties engaged in productive bargaining sessions, exchanging proposals and nearly reaching agreement on numerous issues," which they termed NID, meaning "that the language was not in dispute, but that further bargaining might occur." (A. 4 & n.16.) According to the College's lead negotiator, the College preferred NIDS to tentative agreements because it wanted the ability to "horse trade" once agreement on the entire contract was reached. (SA 42.) But the College did not offer to horse

trade any NIDS when it rejected them out-of-hand. Indeed, it offered "no explanation" for disregarding the NIDS wholesale and "simply submitted regressive bargaining proposals in direct retaliation for the Union engaging in protected activity." (A. 4.) Accordingly, the Board was fully justified in relying on the College's retaliatory, regressive bargaining to find that a negotiation expenses remedy was warranted.

The College further asserts (Br. 28, 31) that the Board relied on only three actions (preconditions to bargaining, reopening NID issues, and proposing an effects bargaining waiver) and that "the only result" of the College's misconduct was the failure of the parties to engage in face-to-face bargaining for four months (Br. 31-32). These assertions understate the Board's findings, which, as detailed above, included the College's numerous violations of the Act by: reopening NIDs, setting unlawful preconditions to bargaining, proposing an effects bargaining waiver that would leave employees with fewer rights and protections, repeatedly refusing to provide information to the Union, and discriminating against union president Vallera.

Again, the College does not dispute that all of this conduct violated the Act. Instead, it attempts (Br. 31) to change the standard by which the Board assessed that conduct, asserting that in this case, the administrative law judge "made no findings that [the College's] conduct was deliberately calculated to preclude negotiations or reduce them to a sham." As the Board explained in its decision, it has not

established a particular category of egregious conduct (such as sham bargaining) to warrant reimbursement of negotiation expenses. (A. 4 n.14.)

Nor, as the Board explained (A. 4 n.14), is it required by *Frontier* to find that an employer's conduct is *as* egregious as, or identical to, that of the employer in *Frontier*. The absence of identical facts is immaterial. On the facts of this case, the Board did not abuse its discretion by rejecting the College's contention that its conduct is not sufficiently egregious to warrant imposition of a reimbursement remedy (Br. 29-30). The critical Board finding is that the College "discarded over 6 months of productive bargaining" and "directly caused the Union to waste its resources in futile bargaining." (A. 6 n.21, internal quotation omitted.)

In any event, the College's conduct is very similar to that involved in other cases in which the Board ordered bargaining expenses. For example, in *Whitesell Corp.*, which the College concedes presents "conduct very similar to that at issue here" (Br. 31), the Board ordered the reimbursement of bargaining expenses because the employer: made regressive bargaining proposals, insisted on proposals that "would have left the employees significantly worse off than they were without a contract," delayed providing information to the union, refused to meet with the union unless it provided proof it intended to come to agreement, and insisted on bargaining only through "comprehensive" proposals. 357 NLRB 1119, 1120-21 (2011). *See also Fallbrook Hosp. Corp.*, 360 NLRB No. 73, 2014 WL 1458265, at

*2-3, *enforced*, 785 F.3d 729 (D.C. Cir. 2015) (ordering employer to reimburse bargaining expenses where employer failed to provide proposals or counterproposals during the first eight bargaining sessions, left one session abruptly and without explanation, left another three minutes after arriving, threatened to discontinue bargaining, falsely claimed impasse, and refused to bargain).

Finally, the College's numbers defense (Br. 27)—that the "two-member Board majority" made findings that were "completely incongruous with the ALJ's findings and the dissenting member's opinion"—must fail. As this Court has explained, the fact that the Board reversed the administrative law judge two to one does not make the score two to two: "[t]he rule of one person, one vote does not apply to officers at different levels of a judicial or administrative hierarchy." *Chicago Tribune*, 974 F.2d at 934.

D. The Court Lacks Jurisdiction To Hear the College's Challenge to the Timeframe for the Reimbursement

The College argues (Br. 32-33) that the Board erred by awarding bargaining expenses from March 31, 2011, to June 13, 2012, instead of a shorter period beginning on February 16, 2012. Because this claim was never presented to the Board, the Court lacks jurisdiction to hear it.

As described above (p. 32), under Section 10(e) of the Act, arguments not raised before the Board cannot be considered by the Court. 29 U.S.C. § 160(e). Because the Board itself determined the timeframe for the award of bargaining

expenses, the College needed to file a motion for reconsideration of the Board's order to claim that the period was too long. 29 C.F.R. § 102.48(d)(1), (2) (moving party has 28 days after the Board issues its decision to request reconsideration). To excuse its failure to challenge the timeframe, the College wrongly attempts to pass off its general objection to a bargaining-expenses remedy, as one raising this specific claim—that the remedy should begin on February 16, 2012 rather than March 31, 2011 (Br. 32-33). Because the College failed to request reconsideration or to suggest any extraordinary circumstances that might excuse its failure, the Court lacks jurisdiction to hear the College's claim. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012).

In any event, as discussed above, the Board fully explained the College's egregious conduct, and the import of March 2011 is clear. On March 31, 2011, the College submitted a written bargaining proposal, which "served as the basis of further bargaining in sessions held over the next 6 months." (A. 4.) But afterwards, the College derailed negotiations with regressive bargaining and stonewalling until it finally agreed to bargain over effects (May 2012) and the successor contract (June 2012). (A. 6 n.21.) By focusing on February 16, 2012 (when it first refused to meet to bargain the successor contract), the College (Br. 32) effectively ignores the entire course of conduct on which the Board's finding is based. Specifically, the College

refused to bargain, placed unlawful preconditions on bargaining, and "repeatedly reopen[ed] 'not in dispute' issues without any justification," which "forced the Union to expend resources bargaining anew on those items—resources that could have been devoted to addressing open items." (A. 5.) Considering that course of conduct, the Board did not abuse its discretion by ordering the College to reimburse the Union for its bargaining expenses.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny the College's cross-petition for review.

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Kellie Isbell
KELLIE ISBELL
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-2482

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

September 2016

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner/Cross-Respondent	)	
v.	)	Nos. 16-2026, 16-2080
COLUMBIA COLLEGE CHICAGO Respondent/Cross-Petitioner	)	Board Nos. 13-CA-073486 et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,222 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of September, 2016

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner/Cross-Respondent	)	
v.	)	Nos. 16-2026, 16-2080
COLUMBIA COLLEGE CHICAGO Respondent/Cross-Petitioner	)	Board Nos. 13-CA-073486 et al.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that the 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:

Alex V. Barbour, Attorney
Jenny R. Goltz, Attorney
Joseph E. Tilson, Attorney
Cozen O'Connor
123 N. Wacker Drive, Suite 1800
Chicago, IL 60606-0000

Patricia T. Bergeson, Attorney
Melissa L. Carter
Columbia College Chicago
600 S. Michigan Ave, Room 810
Chicago, IL 60605

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 27th day of September, 2016

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

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

The Board's Rules and Regulations

1. NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

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

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

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section 8(d) of the Act (29 U.S.C. § 158(d)) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering

employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

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

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

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

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.
(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

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

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

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

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a

labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

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

its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

2. THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.46(b):

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions

document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50–page limit as for briefs set forth in § 102.46(j).

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

29 C.F.R. § 102.48(d):

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

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

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