Nos. 11-1342 & 11-1402

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAYCON PRODUCTS COMPANY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

DRIVERS CHAUFFEURS & HELPERS LOCAL 639

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-35687
	)	
and	)	
	)	
DRIVERS CHAUFFEURS & HELPERS LOCAL 639	)	
	)	
	)	
Intervenor	)	

THE BOARD'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Daycon Products Company, Inc., was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Drivers, Chauffeurs & Helpers Local Union 639 was the Charging Party before the Board.

B. Rulings under Review

Daycon is seeking review of a Decision and Order issued by the Board in case number 5-CA-35687 on September 21, 2011 and reported at 357 NLRB No. 92.

C. Related Cases

The Board is currently seeking enforcement in the Fourth Circuit of a different Decision and Order (reported at 357 NLRB No. 52), issued by the Board in case number 5-CA-35043 on August 12, 2011, that also involves unlawful conduct by Daycon. While it involves the same parties, that case does not involve similar or related issues.

s/Linda Dreeben (by MF)
Linda Dreeben
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Dated at Washington, DC
this 3rd day of April 2012

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Statutes: **Page(s)**

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

[*] Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

The Act = **The National Labor Relations Act (29 U.S.C. §§ 151 *et seq*.)**

The Board = **The National Labor Relations Board**

Br. = **Daycon Products Co., Inc.'s Opening Brief**

Daycon = **Daycon Products Company, Inc.**

The Union = **Drivers, Chauffeurs & Helpers Local Union 639**

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Intervenor for Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Daycon Products Company, Inc. to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued on September 21, 2011 and reported at 357 NLRB

No. 92. (A. 65-78.)[1] The Board found that Daycon unlawfully implemented its last offer without reaching a good-faith impasse in bargaining with Drivers, Chauffeurs & Helpers Local 639; refused to rehire unfair-labor-practice strikers who had unconditionally offered to return to work; and unilaterally subcontracted repair work normally done by unit employees, without bargaining with the Union. The Board's Order is final with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.[2]

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. Daycon's petition, filed on September 23, 2011, and the Board's cross-application, filed on October 19, 2011, were timely; the Act places no time limitations on such filings. This Court has jurisdiction over both the petition for review and the cross-application for enforcement pursuant to Section 10(e) and (f),[4] which provides that petitions for review of Board orders may be filed in this Court and that the Board may cross-apply for enforcement of its order.

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[1] Record references in this final brief are to the Joint Appendix ("A.") filed by Daycon. References before a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Daycon's opening brief.

[2] 29 U.S.C. § 160(e) & (f).

[3] *Id.* § 160(a).

[4] *Id.* § 160(e) & (f).

STATEMENT OF THE ISSUES

1. **Impasse and Unilateral Implementation of Contract**. The party asserting impasse must prove that, at the time it acted, there was no realistic prospect that continuation of discussion would be fruitful. Here, the parties raised new and significant ideas during their last meetings and the Union was prepared to make additional concessions when Daycon suddenly quit negotiating and declared impasse. Does substantial evidence support the Board's finding that Daycon failed to prove the parties were at impasse when it walked out of negotiations and unilaterally implemented its bargaining proposals?

2. **Reinstatement of Strikers.** It is well-settled that, where an employer's unfair labor practice contributes to causing a strike, the strikers are entitled to immediate reinstatement on their unconditional offer to return to work. Here, union leadership testified that they called the strike because Daycon unlawfully implemented its contract proposals and that they discussed that decision with employees before the strike. The strike began immediately after the unlawful implementation, and employees carried signs protesting Daycon's unfair labor practice. Does substantial evidence support the Board's finding that the strike was caused at least in part by Daycon's unfair labor practice and that Daycon therefore violated the Act by refusing to immediately reinstate all strikers when they unconditionally offered to return?

3. **Procedural Motions.** A party challenging the Board's denial of evidentiary and procedural motions must show abuse of discretion and prejudice. Did the Board abuse its discretion in denying Daycon's motions to reopen the record and explain a press release?

4. **Unilateral Subcontracting**. The allocation of work to a bargaining unit is a term and condition of employment over which an employer must bargain. Here, Daycon subcontracted the unit's snow thrower repair work without notifying or bargaining with the Union. Does substantial evidence support the Board's finding that Daycon violated the Act by doing so?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are included in the addendum.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that Daycon violated Sections 8(a)(5) and (1) of the Act by implementing its last contract offer without reaching impasse with the Union and by subcontracting repair work without bargaining with the Union. The complaint also claimed that Daycon violated Section 8(a)(3) and (1) by refusing to rehire unfair-labor-practice strikers who had unconditionally offered to return to work. (A. 173-78.) Following a hearing, an administrative law judge found merit

to the Acting General Counsel's allegations and issued a decision and recommended order. (A. 67-78.)

Daycon filed exceptions. On September 21, 2011, the Board issued a decision finding that Daycon violated the Act as alleged in the complaint. (A. 65.) Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

I. The Board's Findings of Fact

A. Background: Collective-Bargaining Relationship Since 1973

Daycon manufactures and distributes janitorial, maintenance, and hardware supplies. (A. 67; 761.) It also repairs floor cleaning equipment, snow throwers, and other industrial equipment. (A. 67; 648.) Its headquarters are located in Upper Marlboro, Maryland. (A. 67; 654.)

The Union has represented Daycon's drivers, warehouse employees, chemical compounders, utility employees, and repairmen since about 1973. (A. 67; 453.) The most recent collective-bargaining agreement was effective from March 3, 2007 through January 31, 2010. (A. 67; 181, 452.) That agreement set forth minimum wage rates and annual increases for all employees. (A. 193, 215.) It also required, as had other contracts before it, greater wage increases for less-senior employees, which the parties referred to as "catch-up" raises. (A. 195, 468-69.) According to the Union, the idea behind "catch-up" raises is that an employee

with three years of experience is just as valuable as an employee with ten years of experience. (A. 496.)

B. Negotiations For a Successor Agreement

The parties held one informal and nine formal bargaining sessions over five months from November 4, 2009 to April 22, 2010, after which Daycon unilaterally declared impasse. Daycon's chief negotiator was Attorney Jay Krupin, who was assisted by Attorney Paul Rosenberg. (A. 68; 454.) Doug Webber, the Union's business agent, was the chief negotiator for the Union. In addition, Daycon President John Poole and Union President Tommy Ratliff attended several sessions. (A. 68; 451, 453.) The most contentious subjects were wage increases for employees at the top rate and the amount of time it would take newer employees to "catch up" to the top rate.

1. November 4: the parties began negotiating a successor agreement, and the Union presented its noneconomic proposals

On November 4, 2009, the parties began negotiating a successor collective-bargaining agreement. (A. 68; 454, 457.) Prior to negotiations, Daycon President Poole surveyed the market and Daycon's finances. He targeted between three and four percent as an appropriate wage increase. (A. 70-71; 794.)

Poole began the session by talking about the 36-year bargaining history between Daycon and the Union. He proposed trying something different for the

new contract: a performance-based economic package where wage increases are tied to productivity. (A. 68; 458, 784.) Union Business Agent Webber responded that Daycon had always had an hourly wage, and he was unsure about any change to a performance-based system. (A. 68; 425, 458, 783-84.) Webber was especially concerned about how a performance-based pay plan could work for delivery drivers, whose performance is largely determined by the terrible traffic in the D.C. area. (A. 461.)

Webber then distributed the Union's noneconomic proposals, addressing subjects such as seniority, the work week, vacations, temporary employees, and contract duration of three years. (A. 68; 220, 459, 462.) The parties discussed the proposals and agreed on several issues, including changes to the seniority and the effective date provisions of the previous contract. (A. 69; 221-22, 463.) Daycon presented no specific proposals at this meeting. (A. 460.)

2. December 9: the Union presented its economic proposals

The next negotiating session took place on December 9. (A. 69; 224, 464.) Although the parties had not yet reached agreement on all noneconomic topics, the Union distributed its proposals on economic subjects such as holidays, wages, personal days, vacations, health and welfare, and retirement. (A. 69; 225-29, 466-68.) Webber reminded Daycon's negotiators that the unresolved noneconomic issues were still open. (A. 69; 465.)

Union proposals eight and nine addressed wages. Proposal nine included an increase of 75¢ an hour for each job classification over the maximum amount earned under the prior agreement. (A. 69; 471-72.) It also included a "catch-up" provision by which new employees not already at the top rate would steadily progress toward the maximum wage rate. (A. 69; 227, 466-68.) During their first year of employment, these employees would earn 85 percent of the top rate; during their second year, they would earn 90 percent; during their third year, 95 percent. After three years, these employees would earn the top wage rate. (A. 69; 227, 470-71.) Proposal eight provided that all employees hired before February 18, 2008 would earn the top wage rate for their job.

After receiving the Union's proposal, Daycon's negotiators caucused. When they returned, Daycon Attorney Krupin said that he would have to "cost it out," or determine how much the Union's proposal would cost Daycon, and the meeting ended. (A. 69; 473.) Daycon made no proposals at this meeting. (A. 473.)

3. December 15: Daycon rejected the Union's wage proposal but made no wage counter-offer; Daycon proposed an economic distress clause it never expected to use

The parties next met on December 15. (A. 69; 230, 474.) Daycon Attorney Rosenberg opened the meeting by announcing that the Union's proposal would cost $3 million. (A. 69; 475-76, 785.) Daycon again raised productivity-based wage increases with no specifics. (A. 69; 475-76.)

Rosenberg then submitted a proposal to the Union. (A. 69; 234-72, 671.) It was a copy of the prior collective bargaining agreement, with certain deletions and additions. (A. 69; 234-72, 478-79.) Among other things, this proposal eliminated double pay for Sundays, eliminated the floating holiday, reduced the uniform allowance, and eliminated union dues check-off. (A. 245-46, 254-55, 257.) The proposal also eliminated the minimum wage scale but failed to specify any replacement terms on wages or increases. (A. 246-47.) Daycon had determined that was not "prudent" to provide a counter-offer on wages at that time. (A. 69; 476.)

Just like the Union, Daycon proposed a three-year contract. (A. 270.) Daycon also proposed an "Economic Distress" provision: "[i]f average revenue over the last 12 month rolling period, decreases by 5% or more th[e]n the economic increases that shall be effective during the life of this Agreement will be postponed until revenue reverts to pre-distress levels." (A. 69; 247, 478-79.) Daycon had no reason to believe this economic distress clause would ever be used; it had never experienced such revenue decreases. (A. 788.)

The Union negotiators caucused to discuss Daycon's proposal. They rejected a number of the proposals, but tentative agreement was reached on changes to the holiday, floating holiday, sick leave, and management rights provisions. (A. 244-46, 267, 477.)

4. January 5: the Union rejected the economic distress clause; the parties discussed other issues

The next meeting occurred on January 5, 2010. The Union refused the proposed economic distress clause. (A. 69; 273, 480, 483.) Daycon Attorney Krupin distributed an "Agenda," which listed eight subjects to discuss but included no proposals. (A. 69; 481-83.) The parties generally discussed the subjects on the Agenda, which included discipline, wages, and scheduling. (A. 69; 276-77, 481.) At the end, Daycon Attorney Krupin suggested narrowing the scope of future negotiations to four to six issues, including wages. (A. 69; 484.) Union Business Agent Webber was non-committal. (*Id.*)

5. January 19: Daycon made its first proposal on wages, but the bonus concept remained vague

The parties next met on January 19, and Daycon gave its wage proposals to the Union. (A. 69; 278-83, 485-86.) Daycon proposed a wage increase of one percent on the date the parties ratified the contract, with one percent increases each year afterwards over the three-year contract. (A. 69; 281.) In addition, employees could receive "an annualized bonus payment of up to 3% of their base hourly earnings" if they met certain productivity criteria. (*Id.*) However, the bonus concept was still in its "early stages," and Krupin told Webber that "they hadn't flushed out" the productivity "metrics." (A. 69; 841-43.)

After the Union caucused, Webber said the Union preferred a "cents on the dollar" pay increase rather than a percentage increase. (A. 69; 487.) A percentage increase would exacerbate the wage disparity between newer employees and long-term employees while the Union's catch-up proposal would reduce it as quickly as possible. (A. 488.)

Webber also said the Union was not interested in productivity-based compensation. Daycon's bonus proposal referred repeatedly to, but did not define, "accepted area standards" as the requirement for the bonus. (A. 69; 842-43.) The Union was unsure whether Daycon could effectively measure productivity. (A. 842.)

Krupin responded that Daycon was not interested in cents on the dollar pay increases without the performance requirements. (A. 69; 488.) He again raised the economic distress clause, but the Union rejected it. (A. 69; 489.)

6. January 29: Daycon withdrew its bonus proposal and proposed its own catch-up provision, but the parties continued to disagree on the time frame and amount

On January 29, Daycon presented a new wage proposal. (A. 69; 284-86, 290-91, 490.) Employees at the top wage rate would receive a two percent wage increase on ratification, and one percent increases yearly over the course of the three-year contract. (A. 69; 290.) The Union again objected to percentage increases instead of cents on the dollar increases. (A. 70; 494.) Daycon translated

the percentages into cents on the dollar (one percent equals 17¢, two percent equals 34¢). (A. 70; 290, 789.) The Union continued to press for 75¢ increases to the top wage rate, and Daycon again requested an economic distress clause. (A. 69-70; 290, 295, 497-98.)

Daycon also proposed a catch-up provision, whereby employees not at the top wage rate would receive larger pay increases of three percent (or 50¢) on ratification and 1.5 percent (or 25¢) increases yearly after that. (A. 69; 290, 491.) The Union made clear that the catch-up provision was one of its primary objectives in the negotiations. (A. 70; 790.) Discussion on wages continued, and the parties agreed on health and welfare issues. (A. 70; 492-93, 787.) Daycon withdrew its productivity-based incentive proposal. (A. 69-70; 290-91, 497-98.)

7. February 18: both parties modified their proposals, and Daycon presented its "best offer"; the Union subsequently updated members on negotiations

The parties next met on February 18. (A. 70; 301, 499.) Prior to the meeting, Daycon prepared a list of the agreements reached. (A. 70; 306-08, 500-02.)

Daycon presented a new proposal on wages and catch-up increases. (A. 70; 309, 503-04.) Employees at the top rate would receive a 40¢ raise on ratification, and annual 20¢ raises during the three-year contract. (*Id.*) Employees not at the top rate would receive a 60¢ raise on ratification with annual 30¢ raises. (*Id.*)

Daycon also amended its economic distress proposal to postpone pay increases if revenue decreased by six percent or more over a year, rather than five percent. (*Id.*)

In response, the Union moved on many points. It withdrew several proposals, including funeral leave, an increase in premium pay for night shift work, and guaranteed hours for weekend work. (A. 70; 313-17, 505-07.) The Union also cut its proposed increase to the top rate from 75¢ to 65¢. (A. 70; 508.) The Union rejected the economic distress provision, and Daycon rejected proposals made previously by the Union related to holidays and the work week. (A. 70; 309, 314, 504-05.)

At about 4:45 p.m., Daycon presented what Attorney Krupin referred to as its "best offer." (A. 70; 311, 508, 793.) Under this proposal, employees at the top rate would receive a 40¢ raise on ratification, and annual 40¢ raises during the three-year contract. (A. 70; 311.) Employees not at the top rate would receive a 60¢ raise on ratification, and yearly 60¢ raises. (*Id.*) The wage increases included in this "best offer" were very close to Daycon President Poole's pre-bargaining targets. (A. 71; 794.)

Business Agent Webber asked Krupin what he meant by "best offer," and Krupin responded that any agreement reached "ha[d] to be something very close to this." (A. 71; 795.) Webber asked Krupin if the proposal was Daycon's "last,

best, and final offer," or just its "best offer." (A. 71; 510.) Krupin answered, "What difference does it make?" (*Id.*)

Webber scheduled a meeting with the Union's membership for February 27. (A. 71; 318, 449.) Approximately 30 employees attended, and Webber informed them that Daycon had just presented its "best offer." (A. 71; 512.) He described the four main unresolved issues (pension, wages, catch-up wages, and the economic distress provision), and announced his intention to ask a federal mediator to get involved in the negotiations. (A. 71; 512-13.)

Webber added that sometimes a strike vote works as a tool to get a company to bargain more seriously. (*Id.*) He told the members, "It's a first step preparation. We don't want to strike … if we don't have to. We [are] using it as a tool to continue bargaining." (*Id.*) The members voted to authorize a strike. (A. 71; 663, 763.)

8. March 17: the parties met with a federal mediator

Daycon and the Union next met on March 17, with a federal mediator in attendance. (A. 71; 319, 515, 517.) The Union rejected the wage proposal and economic distress provision in Daycon's "best offer" and again proposed a 65¢ increase to the top wage rates. (A. 71; 322, 517-18.) Union Business Agent Webber gave Daycon's negotiators lists of open economic and noneconomic subjects and said he hoped they would respond. (A. 71; 321, 323-26, 519-21.)

The parties then discussed the duration of the contract. Daycon proposed that the contract become effective on ratification, while the Union wanted it to be retroactive to February 1, 2010, when the prior contract expired. (A. 71; 312, 325.) Both parties proposed three-year contracts. (*Id.*)

The parties each caucused with the mediator, who suggested they address one issue at a time. (A. 71; 798-99.) Daycon wanted to discuss wages first, but the parties ultimately determined nothing could be resolved that day. (A. 71; 524-25, 691.) Webber's notes for this meeting state, "Very far apart." (A. 71; 319.)

9. April 1: the parties had an "off-the-record" meeting at which both made new and different proposals

On March 26, Daycon Attorney Krupin called Union President Ratliff – who was not the Union's chief negotiator and had not even attended all the bargaining sessions – and asked to have an off-the-record meeting. (A. 71; 534, 692.) Krupin said he believed the parties could reach agreement. (A. 71; 692.) The Union

believed the request "was a good sign." (A. 71; 526, 740.) The parties met at a restaurant on April 1. (A. 71; 527-29, 694.) Ratliff began by asking what Daycon had to offer. (A. 72; 695.) Krupin responded that the Union's wage proposals were "too rich" for Daycon, but made no specific counter-proposal. (A. 72; 530, 695.)

The Union negotiators caucused and decided to offer something different to move the negotiations forward. Although the Union dislikes long-term contracts, it suggested a four-year contract to spread the catch-up pay increases over a longer period. The Union hoped this would be more acceptable to Daycon. (A. 71; 530-31, 696.)

Daycon's negotiators caucused and similarly devised a new approach: an "artificial top rate" to which all employees would progress during the term of the contract. (*Id.*) For example, if the top wage rate for a particular job was $20, an artificial top rate of $18 would be established; all employees with that job would reach $18 by the end of the three-year contract. (A. 71; 532, 696.) Daycon did not explicitly reject the Union's four-year contract proposal. (A. 531.)

The Union negotiators caucused and were "pretty optimistic." (A. 71; 532, 697.) They raised the idea of a five-year contract, which they considered "a major concession," during which all employees would progress to the top rate. (A. 72; 533, 538, 612-13, 697, 742, 765, 813.) Since Daycon's primary problem seemed

to be the idea of all employees reaching the top rate over three years, the Union believed the five-year proposal would spread out the costs and alleviate Daycon's concerns. (A. 71; 533, 697.)

Daycon responded that it needed to "crunch the numbers." (A. 533, 697, 742.) Krupin said he would respond to the Union's proposal by April 6, 2010, and the meeting ended. (A. 71; 533, 697, 742.) The Union left this meeting feeling optimistic about the negotiations. (A. 72; 698.)

10. April 22: Daycon abandoned negotiations without notifying the Union or the mediator and declared impasse

The parties next met, again with the mediator, on April 22. (A. 72; 349, 537, 647, 764.) Union President Ratliff opened the meeting by saying that he felt optimistic at the last meeting, but he was disappointed that Daycon had not responded to the Union's five-year contract proposal as Krupin had said it would. (A. 72-73; 538, 698, 700, 816.) The parties discussed the duration of the contract (three, four, or five years), how quickly employees would progress to the top rate during the term of the contract, and the artificial top rate idea that Daycon had proposed on April 1. (A. 72-73; 538, 612-13, 700, 816-17, 856.) The Union said it was "wedded" to progression to the top wage rate during the term of the contract but flexible on contract duration. (A. 72; 538.)

Daycon's negotiators asked to caucus. (A. 72-73; 539, 701-02, 765.) As the union negotiators waited, they spoke with the mediator about "where [they] were

prepared to move next off [their] proposal" and "some of the items that [they] were willing to let go." (A. 72-73; 701.) After a while, the mediator suggested the Union go to lunch because Daycon's caucus might take some time. (A. 72-73; 539, 701, 766.) When the Union negotiators reached the parking lot, they realized that Daycon President Poole's Corvette was gone. (A. 72-73; 540, 701, 767.) Ratliff and the mediator went to the room where they had thought Daycon was caucusing. It was empty. (A. 72-73; 540, 702, 818, 845.)

A few hours later, Krupin sent a letter to the Union. He claimed the parties were at impasse, and that Daycon would "proceed accordingly." (A. 72; 333, 541, 543.)

C. On April 23, Daycon Implemented Its Contract Proposal; on April 26, the Union Went on Strike, and Daycon Hired Replacement Workers

On April 23, Daycon President Poole met with employees and announced that Daycon was implementing its contract proposal, including a 40¢ raise for employees at the top rate and a 60¢ raise for other employees. (A. 73; 768-70.) An employee who attended the meeting contacted Union Business Agent Webber and reported these events. (A. 73; 544, 770.)

Webber immediately met with Union President Ratliff and Union Secretary John Gibson. They discussed filing unfair-labor-practice charges. (A. 744.) Then they decided to call a strike. Union Business Agent Webber testified that they

called the strike "[b]ecause we thought that [Daycon] had violated the law, that they declared impasse improperly." (A. 545.) Union President Ratliff testified that "since the Company already declared impasse and made them unilateral changes, that we ha[d] no other choice but to take a job action against the Company." (A. 704.)

Webber and Ratliff met with employees before the strike started. Webber explained that the strike was necessary due to Daycon's illegal implementation of its bargaining proposals. (A. 549, 665, 772.) Ratliff further told employees, "we believe Daycon violated Federal labor law" by declaring impasse. (A. 549.)

The strike began on April 26. (A. 73; 548, 715, 771.) Workers carried signs reading,

ON STRIKE
DAYCON
UNFAIR -VIOLATES
FEDERAL LABOR LAWS
TEAMSTERS
UNION
LOCAL 639.

(A. 73; 329-32, 547.) The Union filed unfair-labor-practice charges the day after the strike started. (A. 3.)

Daycon began hiring replacement employees at the hourly rates set out in the expired collective-bargaining agreement. (A. 74; 858-59.) All replaced

employees received a letter notifying them that they had been replaced. (A. 74; 351, 666-67.)

D. On July 2, the Employees Unconditionally Offered To Return to Work, But Daycon Refused To Reinstate All Workers

On July 2, Union Business Agent Webber sent an email to Daycon Attorney Krupin, making an "unconditional offer" for employees to return to work on July 6. The Union also requested a meeting to continue bargaining for a new agreement. (A. 73; 340, 551.)

The next day, Krupin responded that he "looked forward" to discussing the issues raised by the Union, "including your unconditional offer and continued negotiations." He offered to meet on July 7. (A. 74; 341-42.) The parties exchanged further emails in which they disagreed about whether the strike was an unfair-labor-practice strike or an economic strike. (A. 74; 343-44, 554-55.)

Daycon began recalling all employees who had not been replaced. (A. 74; 343-44.) When additional jobs opened up, Daycon offered them to replaced employees, referencing the Union's "unconditional offer … to return to work." (A. 74; 352, 669.)

E. July 13: The Parties Met For the Last Time With a Mediator, But Reached No Agreement

The parties next met, with a mediator, on July 13 at the office of the Federal Mediation and Conciliation Service. (A. 74; 345, 555.) They discussed whether the strike was an unfair-labor-practice strike or an economic strike, and Attorney Krupin stated he was "happy" to litigate that issue "for years." (A. 74; 557, 822.) The Union relaxed many of its requests. (A. 74; 557, 746.) It proposed a five-year contract with full catch up, it asked that the top wage rate be increased by 55¢ rather than 65¢, and it asked that Daycon join the Teamster pension plan in the fourth year of the contract rather than immediately. (A. 74; 557-58, 711, 746.)

Daycon's negotiators caucused for about five minutes and then rejected the Union's proposals. Krupin responded that Daycon's "last offer is still on the table." (A. 74; 558, 712, 746, 825.) The Union did not agree, and the meeting ended. There were no further meetings. (A. 74; 747, 824-25.)

F. While Negotiations Were Ongoing, Daycon Subcontracted Unit Work Without Notifying or Bargaining With the Union

Daycon's repair shop was busy in early 2010. Heavy snow in the area created more repair work than usual on snow throwers. Daycon's repairmen worked full time during this period and worked mandatory overtime on a few weekends. (A. 68; 649, 657.)

In March 2010, while negotiations for a successor contract were continuing, Daycon subcontracted the repair of 12 snow throwers to Marlboro Mowers. Normally, bargaining-unit repairmen would do this work. Employees and the Union were unaware of similar instances of subcontracting for at least the past 12 years. (A. 67, 75; 451, 514, 576, 648, 653.) Daycon did not notify the Union or bargain before subcontracting the work. (A. 67; 514-15, 578, 645-46.)

The expired contract permitted Daycon to subcontract work if "all regular full time employees are working" and "in accordance with [Daycon's] past practice," but not "as a subterfuge to violate the other provisions" of the contract. (A. 67; 184.) The expired contract also required mandatory overtime any time more than 75 pieces of equipment needed repair until the backlog went below 75 or as necessary. (A. 68; 190.)

Daycon President Poole testified that Daycon prefers to do repairs in-house but subcontracted the work on this occasion because it could not obtain the necessary parts to do the repairs in-house: "Marlboro Mower had carburetors for our machines, but they wouldn't sell them to us at this point because they were limited. They wanted the work." (A. 68; 831.) However, the parts manager for Marlboro Mower denied this. (A. 68; 865.) In fact, Marlboro Mower would have preferred to simply sell the parts to Daycon because the snow throwers take up a lot of space, and Marlboro Mowers gets paid faster for selling parts than for

repairs. (A. 68; 865.) The judge credited the Marlboro Mower parts manager, who "clearly had no reason to lie." (A. 75.)

II. The Board's Conclusions And Order

On September 21, 2011, based on the above facts, the Board (Chairman Pearce and Members Becker and Hayes) issued a Decision and Order. The Board agreed with the administrative law judge that Daycon violated the Act as alleged. The Board found that Daycon violated Section 8(a)(5) and (1) of the Act[5] by unilaterally implementing its last offer based on a premature declaration of impasse. The Board further found that Daycon violated Section 8(a)(3) and (1) of the Act[6] by refusing to reinstate the unfair-labor-practice strikers who unconditionally offered to return to work. Finally, the Board found that Daycon unlawfully subcontracted snow thrower repair work without notifying or bargaining with the Union, in violation of Section 8(a)(5) and (1) of the Act.[7] (A. 65, 77.)

The Board's Order requires Daycon to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by

[5] 29 U.S.C. § 158(a)(5) & (1).

[6] *Id.* § 158(a)(3) & (1).

[7] *Id.* § 158(a)(5) & (1).

Section 7 of the Act.[8] Affirmatively, the Order requires Daycon to offer full reinstatement to all strikers not already re-hired; to make all striking employees whole for any loss of earnings or benefits caused by Daycon's refusal to reinstate them on July 6, 2010; notify and bargain with the Union before making any changes to wages, hours, or other terms and conditions of employment; on request by the Union, rescind any or all changes to terms and conditions that were unilaterally implemented in Daycon's last offer; and post a notice. (A. 65-66.)

SUMMARY OF ARGUMENT

The primary issue in this case is whether the parties were impasse when Daycon implemented its bargaining proposals on April 23. Substantial evidence supports the Board's determination that Daycon – which bore the burden of proof – failed to prove impasse. At the last two meetings, both parties raised new and significant ideas in an attempt to reach agreement, and the Union clearly stated that it believed an agreement could be reached. Around the same time, Daycon Attorney Krupin also expressed his belief that the parties could reach agreement. Yet Daycon's negotiators abruptly left the last meeting without informing the Union or the mediator, declared impasse via email, and implemented its proposals the following day.

[8] *Id.* § 157.

The Union was upset about Daycon's unlawful implementation, and it decided to strike. Substantial evidence supports the Board's finding that Daycon's unfair labor practice was a cause of the strike. Employers must immediately reinstate unfair-labor-practice strikers who unconditionally offer to return. After two months, the employees offered to unconditionally return to work, but Daycon refused to reinstate them immediately.

Daycon also contends that the Board wrongly denied its motion to reopen the record and its motion "for explanation," which questioned the Board's impartiality in this case. But the Board did not abuse its discretion in denying these motions, nor has Daycon demonstrated the requisite prejudice to have the Board's rulings reversed.

Finally, while the parties were negotiating a new contract, Daycon subcontracted snow thrower repair work without notifying or bargaining with the Union. It is well settled that the allocation of work to a bargaining unit is a term and condition of employment over which an employer must bargain, and substantial evidence supports the Board's finding that Daycon violated the Act by failing to do so.

STANDARD OF REVIEW

This Court gives great deference to the Board's factual findings.[9] The determination of whether an impasse exists is a question of fact, and "because of the subjectivity involved in deciding when an impasse has occurred, its existence is an inquiry 'particularly amenable to the experience of the Board as a fact-finder.'"[10] The Board's finding as to impasse may not be disturbed unless it is irrational or unsupported by substantial evidence.[11] Indeed, as this Court has recognized, "'in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems.'"[12] This is because, as the Supreme Court has acknowledged, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."[13]

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[9] *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008).

[10] *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (quoting *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 293 (7th Cir. 1987)).

[11] *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986).

[12] *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (attribution omitted).

[13] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

The "Board's findings regarding the causes of a strike are [also] factual."[14] Accordingly, this Court "must uphold them if they are supported by substantial evidence in the record as a whole."[15]

Further, the credibility determinations of an administrative law judge, when adopted by the Board, "'may not be overturned [by the reviewing court] absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.'"[16]

ARGUMENT

I. Substantial Evidence Supports the Board's Finding That Daycon Violated Section 8(a)(5) and (1) of the Act By Unilaterally Implementing Its Bargaining Proposal In the Absence of Impasse

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees."[17] Section 8(d) of the Act requires employers to bargain collectively before changing "wages, hours, and other terms and conditions of employment."[18] Accordingly, an

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[14] *General Indus. Employees Local 42 v. NLRB*, 951 F.2d 1308, 1312 (D.C. Cir. 1991) (citations omitted).

[15] *Id.* (citations omitted).

[16] *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996)).

[17] 29 U.S.C. § 158(a)(5).

[18] *Id.* § 158(d).

employer violates Section 8(a)(5) by making any changes to mandatory bargaining subjects covered by Section 8(d) without first bargaining to impasse or agreement.[19] A violation of Section 8(a)(5) derivatively violates Section 8(a)(1), which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their statutory right to bargain collectively.[20]

The primary issue on appeal is Daycon's April 2010 decision to unilaterally foist new wages and conditions of employment on its union-represented employees. An employer cannot take such action unless it can prove that it reached a bargaining impasse.[21] Ample evidence supports the Board's findings that Daycon failed to do so and that its unilateral implementation was unlawful.

A. Impasse Exists Only Where Both Parties In Good Faith Believe They Are At the End of Their Bargaining Rope

A stalemate in negotiations constitutes a good-faith impasse only when "there [is] no realistic prospect that continuation of discussion at that time would [be] fruitful."[22] It is defined as the deadlock reached by bargaining parties "after

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[19] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[20] 29 U.S.C. § 158(a)(1); *see also Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

[21] *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

[22] *Am. Fed. of Television and Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

good-faith negotiations have exhausted the prospects of concluding an agreement."[23]

The burden of proving impasse rests with the party asserting it.[24] The Board looks at the totality of the circumstances in determining whether impasse exists.[25] In doing so, it considers the "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations."[26]

The Board does not require that all the factors militate in favor of a finding of impasse. This Court observed that "[o]f central importance" is "the parties' perception regarding the progress of the negotiations."[27] Accordingly, there can be no impasse unless "[b]oth parties in good faith believe that they are at the end of

[23] *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986) (citations omitted).

[24] *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

[25] *Grinnell Fire Protection Sys., Co.*, 328 NLRB 585, 586 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000).

[26] *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622, 628 (D.C. Cir. 1968).

[27] *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

their [bargaining] rope."[28] Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole.[29]

B. Daycon Failed To Prove that the Parties Were at Impasse When It Implemented Its Proposal

The most important factors in this case are the parties' bargaining history and the contemporaneous understanding of the parties. The issue of catch-up raises was an admittedly important one. But throughout the negotiations and particularly in April, Daycon and the Union continued to narrow the issues at the bargaining table. Ample evidence supports the Board's finding that there was still room to negotiate and that the parties were expecting further negotiations when Daycon walked out on negotiations on April 22 without telling the Union or the mediator. (A. 76.)

1. Bargaining History: there was no impasse because the parties had made movement and could have continued when Daycon quit negotiating and implemented its proposals

While the parties had come to agreement on a number of noneconomic items early in negotiations, real discussion on wages did not begin until the parties' fifth meeting, on January 19, when Daycon finally presented a concrete wage proposal.

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[28] *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987).

[29] *Wayneview*, 664 F.3d at 349-50.

(A. 69; 284-86, 290-91.) At this meeting, both parties had catch-up proposals on the table; the sticking point was the amount and whether newer employees would reach the top rate during the term of the contract. (*Id*.) At this point, both parties wanted a three-year contract. Over the next couple of meetings, Daycon increased its wage proposals and the Union decreased its wage demands and withdrew other requests. (*Id.*)

During the last two meetings, both parties raised significant new ideas they had not discussed previously.[30] (A. 76; 530-31, 696.) Daycon proposed an artificial top wage rate, and the Union suggested for the first time a contract of four or five years to spread out the catch-up wage increases, thereby reducing the cost to Daycon. (*Id.*) While Daycon claims in its brief (Br. 40) that the Union never proposed a five-year contract, Daycon President Poole testified otherwise: "The Union came back with a five year proposal" at the April 1 meeting. (A. 813, *see also* A. 533, 538, 612-13, 697, 742, 765.) Because the April 1 meeting was supposed to be "off the record," the Union "officially" proposed a five-year contract at the April 22 meeting. (A. 538.) This new proposal demonstrates "a willingness to compromise further,"[31] yet the final two meetings together lasted

[30] *Wayneview*, 664 F.3d at 348 (no impasse where parties made changes to proposals at last session).

[31] *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001) (finding impasse, in part due to union's failure to make new proposals at last meeting); *Chicago*

less than two hours (A. 526, 537). This brief amount of time makes it unlikely that the parties could have "thoroughly explored" these newly-raised ideas.[32]

In addition, the new proposal for a five-year contract was an attempt to address the problem Daycon had with the Union's catch-up proposal.[33] Daycon would not agree to full progression to the top rate over the course of three years, but its artificial top rate proposal demonstrated that Daycon did not oppose wages reaching within $2 of the top rate within three years. (A. 71; 532, 696.) The five-year contract proposal took off on this idea. (A. 71; 533, 697.) Employees would come close to, but not reach, the top rate during the first three years, as suggested by Daycon, but the extension of the contract to five years meant that employees would ultimately reach the top rate by the end of the contract. Although not

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Local No. 458-3M, Graphic Communications Int'l Union v. NLRB, 206 F.3d 22, 34 (D.C. Cir. 2000) (impasse existed where at parties' "last meeting," "the union failed to offer any new proposal").

[32] *See Storer Comm'ns*, 294 NLRB 1056, 1088 (1989) (impasse cannot exist "until [the parties] fully and thoroughly explore all matters at issue between them, and neither party is in a position to make a judgment about impasse until they have at least turned over, examined, and explained every card on the table"); *see also Tom Ryan Distrib., Inc*, 314 NLRB 600, 605 (1994) (no impasse where parties met eight times, but only spent two meetings discussing the important issue that supposedly caused the employer to declare impasse); *Betlem Serv. Corp*., 268 NLRB 354, 354 (1983) ("Generally, the Board will not find that an impasse has occurred unless the negotiations between the parties have been *exhaustive*.") (emphasis added).

[33] *Wayneview*, 664 F.3d at 348 (no impasse where, at last meeting, union made effort to address goals expressed by employer).

satisfactory to Daycon, the Union's new proposal was designed to make "significant progress towards the goal desired by" Daycon.[34]

Given that the parties continued to raise new ideas at their last two meetings, which lasted less than two hours, the Board reasonably concluded (A. 76) that negotiations had not come to the requisite standstill to qualify as impasse.[35] Unlike *United States Sugar*, cited by Daycon (Br. 35), where "[e]ach party had explained its own position and had explored the opposing view,"[36] the parties did not have the opportunity to bargain exhaustively about the newly-raised ideas or devise other compromises due to Daycon's decision to abandon negotiations. Under the circumstances, Daycon was not "warranted in assuming that further bargaining would be futile."[37]

2. When Daycon quit negotiating and implemented its proposals, there was no "contemporaneous understanding" that talks were at impasse

As Daycon recognizes (Br. 33), the contemporaneous understanding of the parties "is perhaps the most important" factor in determining whether impasse exists. "Each party must independently, and in good faith, believe that it is 'at the

[34] *See Grinnell Fire Protection Sys. v. NLRB*, 236 F.3d 187, 200 (4th Cir. 2000) (no impasse in such circumstances).

[35] *See Wayneview*, 664 F.3d at 348-49.

[36] 169 NLRB 11, 19 (1968).

[37] *Powell Electrical Mfg.*, 287 NLRB 969, 973 (1987).

end of [its] rope.'"[38] The evidence overwhelmingly shows that both parties had not reached this conclusion.

The creative ideas raised during the last two meetings gave hope to the Union that an agreement could be reached, and the Union clearly conveyed its optimism to Daycon. At the April 22 meeting, Union President Ratliff told the Daycon negotiators and the mediator that he was optimistic about the status of negotiations, and that the prior meeting had been "positive" and "encouraging." (A. 76; 700, 816.)

At trial, Daycon President Poole disagreed with the Union's sunny outlook: "I'm thinking on the flip side … I didn't know what was so positive about it." (A. 73; 816.) But Poole never expressed this thought to the Union, nor did any of the Daycon negotiators suggest that they believed impasse was near.[39] In fact, when scheduling the April 1 meeting, Daycon Attorney Krupin told Union President Ratliff that he believed the parties could reach agreement. (A. 71; 692.)

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[38] *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001) (quoting *PRC Recording Co.*, 280 NLRB 615, 635 (1986)).

[39] *See Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 12 (1st Cir. 2001) (no impasse where employer "never told the Union that failure to agree on its proposal would result in deadlock"). *Compare TruServ*, 254 F.3d at 1117 (impasse where employer had "clearly announced that its position [was] final"); *Chicago Local No. 458-3M, Graphic Comm'ns Intern. Union v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (impasse where employer's attorney "stated that he believed the parties were at an impasse" and the union "did not disagree").

Daycon had, on February 18, given the Union what it termed its "best offer." (A. 71; 510.) Krupin said that the final agreement had to be "very close" to that offer, which indicates there was some room for movement. In addition, Poole testified that the "best offer" was close – not identical – to the three percent increase he had targeted, again recognizing that there was room for additional compromise. (A. 71; 795.) And when Webber specifically asked Krupin whether that proposal was Daycon's "last offer," Krupin refused to clarify, saying, "What difference does it make?" (A. 71; 510.) But the Board has recognized that it makes a big difference. A finding of impasse is less likely where a party has not "explain[ed] that a failure to achieve concessions would result in a bargaining deadlock."[40]

Unlike *TruServ Corp. v. NLRB*,[41] cited by Daycon (Br. 36-37), and *Laurel Bay Health & Rehab. Ctr. v. NLRB*,[42] where the employers unambiguously identified their last, best, and final offers, here Daycon refused to respond to the Union's request for clarification. And given that, even after this "last offer," Krupin indicated he believed the parties could reach agreement and the parties actually raised new ideas in later sessions, Daycon never gave the Union a reason

[40] *Hotel Roanoke*, 293 NLRB 182, 185 (1989).

[41] 254 F.3d 1105, 1112 (D.C. Cir. 2001).

[42] No. 10-1340, 2012 WL 164051, at *4 (D.C. Cir. Jan. 20, 2012).

to believe that impasse was near. Under the circumstances, both parties' expressed confidence that agreement could be reached is understandable.

Despite Ratliff's announcement about his optimism for negotiations, Daycon contends (Br. 24-25, 33-34) that the Union believed negotiations were at a stalemate. But much of what it points to occurred months before its declaration of impasse and implementation, and the issue "is whether the parties had bargained to an impasse at the time the [employer] acted."[43] Even if the parties had been near impasse in February and March, the new ideas explored in April prompting the Union's renewed hope changed the bargaining atmosphere.[44] Nothing Daycon points to suggests that the Union was at the end of its rope on April 22, when Daycon dashed those hopes by abandoning negotiations after less than an hour, or on April 23, when Daycon implemented its contract proposals.

The most compelling proof that both parties were not at the end of their bargaining rope on April 22 is the Union's willingness to make further concessions. (A. 76.) Webber testified that the Union "w[as] going to make

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[43] *E.I. DuPont & Co.*, 268 NLRB 1075, 1075 (1984).

[44] *Union Terminal Warehouse*, 286 NLRB 851, 858 (1987) (even if parties had been at impasse in August, "subsequent events ended any impasse that may have existed on that date," preventing unilateral implementation in October); *see also Beverly Farm Found., Inc*., 323 NLRB 787, 793 (1997) ("An impasse is easily overcome by any number of changed circumstances."), *enforced*, 144 F.3d 1048 (7th Cir. 1998).

movement on some other items" when Daycon returned from its caucus (A. 538), and that it was "prepared to bargain all day" (A. 572). And Ratliff testified that – at the same time Daycon was walking out on negotiations – the Union's team was talking to the mediator about "where we were prepared to move next off our proposal" and "some of the items that we were willing to let go." (A. 701.)[45] The Board's findings here are based on this clear testimony, not "rank speculation," as Daycon suggests (Br. 39).

Webber further asserted that the proposals the Union made when bargaining resumed on July 13 "probably could have [been made] on April 22nd." (A. 557.) Daycon strangely claims (Br. 26) that this testimony supports a finding of impasse. But the Union's plan to make additional proposals—when Daycon abandoned negotiations—proves that there was no impasse.[46] And while Daycon further argues (Br. 27-28) that its declaration of impasse did not prevent the Union from making additional proposals, Daycon misses the point. The Union's ability to

[45] *Compare with Laurel Bay*, 2012 WL 164051, at *1-2 (impasse where union said certain proposals "would not be negotiable" and union "would not even hear any discussions about" them; where union said it was "going to get" certain proposals, "could not 'deviate' from or 'make any changes' to" others, and that one proposal in particular was "'set in stone'").

[46] *Compare TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117-18 (D.C. Cir. 2001) (finding impasse in part due to union's failure to make new proposals at last meeting).

make additional proposals does not justify Daycon's earlier declaration of impasse when the "Union remained open and willing to negotiate."[47]

Nor is there any merit to the argument (Br. 26-29) that the Union was obligated to offer new proposals – by letter – in the few hours after Daycon declared impasse but before it implemented its proposals the next morning. In the case Daycon cites (Br. 28), *Sutter West Bay Hospitals*, the Board found that impasse existed where the union demonstrated inflexibility at several in-person meetings during the *three months* between the declaration of impasse and the employer's implementation of its last offer.[48]

Here, nothing that took place between the declaration of impasse and implementation supports a finding of good-faith impasse. Given that Daycon had walked out of negotiations, the Union was understandably upset that the parties' negotiations had been unnecessarily cut off before Daycon had even responded to the Union's latest proposal, as it had promised. (A. 334.) There is no requirement that in the face of Daycon's (premature) declaration of impasse, the Union must scramble to advance a new proposal – even the one planned by the Union – to stave off the unilateral implementation of Daycon's last proposal and induce it to

[47] *See Grinnell Fire Protection Systems Co. v. NLRB*, 236 F.3d 187, 199 (4th Cir. 2000).

[48] 356 NLRB No. 159, 2011 WL 2059840, at *1 n.1 (2011).

come back to negotiations.[49] Nor does Daycon's declaration of impasse and unilateral implementation shift the burden to the Union to affirmatively demonstrate that further bargaining would quickly yield agreement.

Daycon claims (Br. 29) that "impasse is the 'speak now or forever hold your peace' moment." But by failing to say that it thought impasse was near, by slinking out without telling the Union or allowing it to make its contemplated proposals, and by declaring impasse only hours later and implementing the very next morning, Daycon deprived the Union of any real opportunity to "speak" before implementation. Daycon may have been frustrated with the pace of negotiations, but "futility, rather than mere frustration, discouragement, or apparent gamesmanship, is necessary to reach impasse."[50] Given the compelling evidence that the parties had recently made movement and expressed optimism and that the Union planned additional concessions, the Board reasonably concluded that no contemporaneous understanding existed, further negotiations were not futile, and the parties therefore were not at impasse.[51]

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[49] *See Storer Communications*, 294 NLRB 1056, 1089 (1989) (stating "the [u]nion was not required to capitulate before it could negotiate").

[50] *Grinnell*, 236 F.3d at 199.

[51] *Teamsters Local 639*, 924 F.2d at 1084 (stating "an impasse cannot exist" if either party "remains willing to move further toward an agreement").

3. When Daycon quit negotiating and implemented its proposals, there was no impasse on the agreement as a whole

Finally, Daycon focuses exclusively on wage progression or catch-up and ignores other issues, many of which were still open for discussion and some of which had been resolved. Even if the parties were stuck on the catch-up wage rate, a number of other subjects had barely been discussed. At the March 17 meeting, the Union gave Daycon a list of open subjects, including seniority, weekend overtime work, holiday pay, retirement, and supervisors performing bargaining-unit work. (A. 71; 321, 323-25, 519-20.) The parties had not exhausted discussion on any of these subjects when Daycon refused to continue bargaining and declared impasse.[52] Indeed, as Daycon admits (Br. 21 n.15), the parties had not discussed pensions for three months, and Daycon's own witness testified that those discussions had been only "brief[]." (A. 823.)

The Union's use of the word "logjam" to refer to discussion over wages in its April 22 letter does not prove impasse. (Br. 25.) Impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole.[53]

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[52] *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 349-50 (D.C. Cir. 2011) (no impasse where employer failed to show "that the asserted deadlock over health insurance inhibited progress on any other aspect of the negotiations").

[53] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *NLRB v. Whitesell Corp.*, 638 F.3d 883, 891 (8th Cir. 2011) (no overall impasse because

Turning to other subjects may very well have given the parties momentum to tackle the admittedly difficult subject of wages.[54] But instead of discussing the other open subjects, Daycon abandoned negotiations, declared impasse, and implemented its proposals.

Citing *CalMat Co.*,[55] Daycon claims (Br. 30) that the supposed deadlock on wages created impasse on all issues. However, as the Board noted in that case, "'an impasse on a single issue … would not ordinarily suspend the duty to bargain on other issues.'"[56] Such an extraordinary event occurs only where "'impasse on a single critical issue creates a complete breakdown in the entire negotiations.'"[57] A party urging such a finding must prove three things:

> first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall

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Union did not believe parties were at impasse over retirement plan, even though parties were "clearly deadlocked" over discipline policy and overtime).

[54] *See Garden Ridge Mgmt., Inc*., 347 NLRB 131, 154 (2006) ("By reaching agreement on the less contentious provisions first, they hope to build up 'momentum' – a habit of finding common ground which can carry them through the more difficult conflicts on monetary terms.").

[55] 331 NLRB 1084 (2000).

[56] *Id*. at 1098 (quoting *Sacramento Union*, 291 NLRB 552, 554 (1988)); *see also Wayneview*, 664 F.3d at 349-50.

[57] *CalMat*, 331 NLRB at 1098 (quoting *Sacramento Union*, 291 NLRB at 554).

> negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.[58]

Assuming that wages were a "critical issue," Daycon failed to prove the two other elements necessary to demonstrate "a complete breakdown in the entire negotiations." As shown above, the parties were not at good-faith impasse – even on wages – because the Union believed agreement could be reached and was prepared to make additional concessions. Nor has Daycon presented any evidence or even argument in its opening brief as to why the parties' disagreement on wages prevented them from discussing the many other open subjects including those not related to wages, such as seniority and supervisors performing bargaining-unit work.[59]

While Daycon contends (Br. 42) that impossible-to-bridge ideological differences existed, the facts reveal that the dispute was essentially about money. The parties may have started out far apart – with Daycon proposing a productivity-based payscale and the Union proposing full catch-up in three years – but they subsequently moved much closer. In the end, both parties agreed to the idea of catch-up raises. The Union proposed catch-up raises spread out over a five-year contract; Daycon offered catch-up raises to its so-called "contract rate" over a

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[58] *Id.*

[59] *See Wayneview*, 664 F.3d at 349-50.

three-year period. In essence, the parties only differed in degrees. Where several subjects are on the table and the parties have a dispute about money, there is room for compromise.[60]

Essentially, Daycon was frustrated with the slow movement on wages and pulled the plug on the whole process. It has not come close to showing overall impasse. Accordingly, the Board properly found that Daycon violated the Act by implementing its bargaining proposals.

[60] *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000).

II. Substantial Evidence Supports the Board's Finding That the Strike Was an Unfair-Labor-Practice Strike and That Daycon Violated Section 8(a)(3) and (1) of the Act By Failing To Reinstate Former Strikers On Their Unconditional Offer To Return To Work

A. An Employer Violates the Act By Failing To Immediately Reinstate Unfair-Labor-Practice Strikers Who Unconditionally Offer To Return to Work

It is well-settled that unfair-labor-practice strikers, unlike economic strikers, are entitled to immediate reinstatement on their unconditional offer to return to work, even if the employer has permanently replaced them.[61] An employer therefore violates Section 8(a)(3) and (1) of the Act[62] by failing to immediately and fully reinstate former unfair-labor-practice strikers once they have made an unconditional offer to return to work.[63]

B. Employees Struck To Protest Daycon's Unfair Labor Practices

Daycon does not dispute that "if the employers' violations of the labor laws are a 'contributing cause' of the strike," then it is an unfair-labor-practice strike.[64] Under this well-established standard, the strike is an unfair-labor-practice strike if

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[61] *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50-51 (1972); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1363 n.26 (D.C. Cir. 1983).

[62] 29 U.S.C. § 158(a)(3) & (1).

[63] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 141 (D.C. Cir. 1999).

[64] *General Indus. Employees' Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991).

Daycon's unlawful acts "had anything to do with causing the strike."[65] The determination of a "causal connection" between the unfair labor practices and the decision to strike focuses on the employees' subjective motivations.[66]

Here, the Board's finding (A. 76) that Daycon's unfair labor practices caused the strike is based on the timing of the strike, the clear, consistent, and undisputed testimony of employees and union leaders about their reasons for striking, as well as the language on strike signs. On April 23, 2010, immediately after learning that Daycon had implemented its last offer, an employee alerted the Union's leaders, who met to discuss that unlawful action and decided to call a strike. Union Business Agent Webber testified that they called the strike "[b]ecause we thought that [Daycon] had violated the law, that they declared impasse improperly." (A. 545.) Union President Ratliff testified that "since the Company already declared impasse and made them unilateral changes, that we ha[d] no other choice but to take a job action against the Company." (A. 704.)

Contrary to Daycon's claim (Br. 51), employees were not "simply told they were on strike, handed a sign and sent to picket," which is why this case is nothing

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[65] *General Drivers & Helpers Union, Local 662*, 302 F.2d 908, 911 (D.C. Cir. 1962).

[66] *Golden Stevedoring Co., Inc.*, 335 NLRB 410, 411 (2001); *C-Line Express*, 292 NLRB 638, 639 (1989).

like *Pirelli Cable Corp. v. NLRB*.[67] There, the Fourth Circuit found the Board's evidence of strike motivation unreliable because it was based solely on the testimony of union leadership.[68] Here, in contrast, the Board relied on the testimony of both employees and Union officials, plus the timing of the strike and the striking workers' picket signs complaining about Daycon's unfair labor practice. Two employees testified that, prior to the strike, Webber explained to employees that Daycon implemented its bargaining proposals prematurely and in violation of federal labor law. (A. 549, 665, 772.) Ratliff further told a group of 30 employees that "Daycon violated Federal labor law" by declaring impasse. (A. 549.) One of these employees testified that he responded, "I'm with you guys," and Webber gave him a picket sign. (A. 665.) The sign read, "DAYCON UNFAIR – VIOLATES FEDERAL LABOR LAWS." (A. 329-32, 547.) The credited evidence contradicts Daycon's position (Br. 44) that its unilateral implementation of its proposal had nothing to do with the strike and that the employees carrying these signs struck for a reason other than Daycon's unfair labor practices.

To impeach the undisputed testimony of employees and Union leaders about the reasons for the strike, Daycon points (Br. 46, 48-49) to articles published by a

[67] 141 F.3d 503 (4th Cir. 1998).

[68] *Id.* at 518.

separate labor organization, the Metropolitan Washington Council, AFL-CIO. (A. 407, 412, 623, 625, 627.) The author selected certain quotes and shaped the articles, but does not work for Daycon or the Union, which had no control over the article's content. (A. 609, 611, 623-25.) The judge ruled that the full testimony about the decision to strike from the people involved, subject to cross-examination, provided better evidence of the cause of the strike than a few articles not written or released by the Union. (A. 627-29.)

In any event, nothing in the articles or the other documents Daycon points to (Br. 47-49, A. 412-14) supports Daycon's claim that that the strike was motivated by economic concerns. Each document reveals that the Union consistently complained about Daycon's illegal declaration of impasse and implementation of its bargaining proposals. For example, in one letter to Daycon's customers (Br. 49 n.33), the Union wrote that Daycon "improperly implement[ed] its demands without further bargaining with its workers, [which] forced the company's workforce out on an unfair labor practice strike." (A. 414.) In a letter to all Teamsters members, the Union noted that employees were "entering their seventh week on strike for various unfair labor practice infractions and bad faith bargaining by" Daycon. (A. 413.) And the April 27 article by the Metropolitan Washington Council notes that the Union was on strike, that Daycon "implemented [its] last offer," and that the Union had "filed unfair labor practice charges against Daycon."

(A. 412.) Yet Daycon incorrectly states (Br. 48) that this last article "made no reference to any alleged unfair labor practice."

Daycon makes much (Br. 47, 49, A. 412) of the fact that, in addition to complaining about the illegal *implementation* of its bargaining proposal, the Union's leadership also criticized the *content* of that proposal. The Union's voicing concerns about the economic welfare of its members during this difficult period hardly disproves the Union's and employees' outrage over Daycon's unlawful implementation of its bargaining proposals or that Daycon's unilateral action was a cause of the strike.[69]

Finally, Daycon incorrectly asserts (Br. 44-45) that the Union's vote in February to strike if necessary shows that the April strike was based on economic issues, rather than concern that the rights of employees under the Act were being violated. As Daycon notes (Br. 45-46), when the Union took the strike vote it did not believe negotiations were going well. Even then, however, the Union took the vote only as a bargaining tactic and was not contemplating an actual strike at that time. (A. 513, 720.) Rather, Union President Ratliff testified that he decided to call a strike only when Daycon committed an unfair labor practice. (A. 715-16.) And while Daycon complains (Br. 48) that the Union did not take another strike

[69] *Gen. Drivers & Helpers Union, Local 662*, 302 F.2d at 911 (strike is unfair-labor-practice strike if employer's unlawful acts "had anything to do with causing the strike").

vote, the Union's internal rules on strikes are irrelevant to the Board's determination that employees struck at least in part due to Daycon's unfair labor practice.[70]

Furthermore, circumstances had changed significantly over the two months after the strike vote. On April 1 and April 22, the last two meetings before the strike, the Union negotiators felt "optimistic," "very positive," and "encourage[ed]" about the possibility of coming to agreement. (A. 700, 740, 816.) And on March 26, Daycon Attorney Krupin had similarly said that he believed the parties could reach agreement. (A. 692.) Given this improvement in the bargaining atmosphere, the motive for the February strike vote is irrelevant. There is simply no evidence that the employees would have struck on April 26 but for Daycon's unlawful implementation of its bargaining proposals, and the Board's finding of an unfair-labor-practice strike is well-supported.[71]

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[70] *Allied Mech. Servs., Inc.*, 332 NLRB 1600, 1608 (2001) (any "union procedural strike authorization requirement[] … is an internal union matter and is not pertinent" to findings under the Act).

[71] *General Indus. Employees*, 951 F.2d at 1312 ("Board's findings regarding the causes of a strike are factual," and this Court "must uphold them if they are supported by substantial evidence in the record as a whole") (internal citations omitted).

C. Daycon Violated the Act By Refusing To Rehire All Employees On the Union's Unconditional Offer To Return to Work

It is undisputed that Daycon failed to rehire all of the strikers. Daycon suggests (Br. 60-61), without support, that the strikers' offer to return to work was not unconditional, which would justify its refusal to rehire them. On July 2, 2010, Union Business Agent Webber emailed Daycon Attorney Krupin:

> On behalf of all the Daycon employees on strike, we hereby make an unconditional offer to return to work immediately. The employees will return for work on Tuesday, July 6, 2010. In addition, Local 639 requests that we continue negotiations for a new Collective Bargaining Agreement immediately.

(A. 73; 340, 551.)

Daycon's correspondence at the time demonstrates its view that the offer was unconditional. (A. 350, 352 ("In light of your union's unconditional offer on your behalf to return to work …").) Daycon's attorney similarly recognized the unconditional offer in a letter to the Union: "Upon receipt of your unconditional offer to return to work, [Daycon] made known to employees who have not been replaced that they remain welcome to return to work as well." (A. 343.) Yet, Daycon refused to immediately reinstate all strikers. (A. 76; 651-56.) Accordingly, by not reinstating the unfair-labor-practice strikers upon their unconditional offer to return to work, Daycon violated the Act.

D. The Judge Did Not Abuse His Discretion By Excluding Articles Daycon Sought to Introduce for Impeachment Purposes

Daycon incorrectly argues (Br. 51-52) that the judge should have admitted into evidence three news articles to show an economic cause of the strike. (A, 417-18, 422.) All three report on the strike and purportedly quote union leaders.

Although Board hearings should, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts,"[72] the Board has considerable discretion on evidentiary rulings.[73] Such rulings are reviewed for abuse of discretion,[74] and the party challenging the ruling must prove prejudice.[75] Daycon has failed to meet those standards.

Daycon expressly sought to admit these and other news articles to impeach the testimony of union witnesses about the reason for the strike. (A. 628.) However, the witnesses had no knowledge of the information contained in these

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[72] 29 U.S.C. § 160(b).

[73] *Artra Group, Inc. v. NLRB*, 730 F.2d 586, 591 (10th Cir. 1984) (the "decision not to consider evidence is within the discretion of the ALJ").

[74] *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same).

[75] *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from ALJ's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer "failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing").

articles. For example, Rejected Exhibit 1 is an article by Lindsey Robbins that quotes Union Business Agent Webber. Webber did not recall even speaking to Ms. Robbins. (A. 633-34.) Similar testimony was presented about Rejected Exhibits 2 and 3. (A. 637-38, 736-37.)[76] Given Daycon's failure to demonstrate that the statements reported in the articles were actually made, the probative value of the articles for impeachment purposes was limited or nonexistent, and the judge did not abuse his discretion by excluding them. (A. 628-31.)[77] Furthermore, even relevant evidence may be excluded if its probative value is outweighed "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[78] Here, the judge reasonably believed that the articles were

[76] Webber testified that he was "really unfamiliar" with Rejected Exhibit 2 and did not remember making the statements attributed; Ratliff similarly could not recall making the statements attributed to him in Rejected Exhibit 3, and testified, "I can't help what they put in these papers."

[77] "JUDGE BIBLOWITZ: … how are you going to establish that he said it? Why – isn't it possible that the article quotes him and he didn't say it? … how are you going to prove otherwise? … Counsel for General Counsel and counsel for the Union may very well stipulate to the authenticity of the articles, but that doesn't mean that Mr. Webber – that doesn't establish that Mr. Webber said it." (A. 628-31.)

[78] Fed. R. Evid. 403; *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1268 (11th Cir. 1999) (judge "has broad discretion to exclude evidence in order to prevent needless introduction of cumulative evidence").

of limited value given the voluminous direct testimony about why employees went on strike. (A. 628-29.)[79]

Finally, even if these articles should have been admitted, Daycon has not explained how it was prejudiced by the judge's decision to exclude them. The judge admitted similar articles about the strike where nobody objected (A. 412, 625) or where the witness admitted to making the statements described in the article (A. 407, 563). Because Daycon has failed to demonstrate prejudice, its argument that these exhibits were improperly excluded should be rejected.

III. The Board Did Not Abuse Its Discretion or Prejudice Daycon By Denying Certain Motions

Daycon claims (Br. 59-61) that the Board wrongfully denied its motion to reopen the record to admit testimony given at a district court proceeding in which the General Counsel sought a temporary injunction under Section 10(j) of the Act.[80] The Board's refusal to reopen the record is reviewed for abuse of discretion[81] and will not be reversed unless a party can show clear prejudice.[82]

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[79] "JUDGE BIBLOWITZ: … Don't we have more direct testimony rather than newspaper articles or promotional articles …. What's the relevance of all this rather than going through witnesses' testimony, direct testimony?" (A. 628-29.)

[80] 29 U.S.C. § 160(j).

[81] *See May Dep't Stores Co. v. NLRB*, 897 F.2d 221, 230 (7th Cir. 1990)(Board's ruling on motion to reopen record "will only be disturbed by [the Court] if the [moving party] establishes an abuse of discretion"); *accord Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 14 (D.C. Cir. 1986).

Daycon suggests (Br. 60) that impasse existed in April 2010 because, in February 2011, the Union expressed an unwillingness to agree to the terms Daycon implemented almost a year earlier. But Daycon cannot meet its burden of proving impasse with such anachronistic testimony, so the Board reasonably denied the motion. (A. 65 n.1.) As shown above, Daycon failed to prove that, in April 2010, "there was no realistic prospect that continuation of discussion at that time would have been fruitful."[83] Nothing about "[t]he Union's viewpoint … on February 11, 2011" (Br. 60) is relevant to that determination.

Nor does Webber's February 2011 testimony that the employees offered to return after the General Counsel decided to issue the unfair-labor-practice complaint show, as Daycon claims (Br. 60-61), that the Union's offer to return to work in July 2010 was conditional. As shown above, the Union unambiguously stated that employees would return to work on July 6. Regardless of whether the timing of that offer was affected by the Board's issuing complaint, the offer was clear, and nothing elicited at the 10(j) proceeding suggests that employees did not,

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[82] *L&M Radiator, Inc. v. NLRB*, 696 F.2d 76, 78 (8th Cir. 1982); *P.S.C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386 n.5 (1st Cir. 1978).

[83] *Am. Fed. of Television and Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

in fact, plan to return to work. Accordingly, the Board properly exercised its discretion in denying Daycon's motion.[84]

Finally, Daycon claims (Br. 61-62) that the Board wrongly denied its Motion for Explanation and denied it due process and a fair hearing when a press release summarizing the judge's decision in this case appeared on the Board's website.[85] To prevail on such a claim, Daycon must show a high probability of actual bias,[86] as well as prejudice.[87] Daycon failed to meet this burden. The article merely recapped the judge's decision for the public and revealed no new information that would affect the Board's review of the decision. The Board's order denying the motion stated that no Board members played any part in authoring or approving the press release.[88] (A. 64.) And given how many news articles Daycon sought to

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[84] *See May Dep't Stores*, 897 F.2d at 230.

[85] *NLRB Judge finds Daycon Products violated labor laws; must reinstate workers and resume bargaining with union* (Feb. 16, 2011), available at https://www.nlrb.gov/news/nlrb-judge-finds-daycon-products-violated-labor-laws-must-reinstate-workers-and-resume-bargaini

[86] *UFCW Local 400 v. NLRB*, 694 F.2d 276, 279 (D.C. Cir. 1982).

[87] *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996).

[88] *See Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (presumption of regularity "can be overcome, and further explication can be required of the decisionmaker, only upon a strong showing of bad faith or improper behavior"); *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 462 (D.C. Cir. 1967) (presumption of regularity applies to administrative agencies' decisions and cannot "be overcome by speculative allegations")..

introduce into evidence, it is incongruous to chastise the Board for its posting of this article in a case that apparently had already become newsworthy. Daycon falls far short of the "clear and convincing showing" that the Board had an "unalterably closed mind on matters critical to the disposition of the proceeding," which is necessary to show bias.[89] It has also identified no prejudice from the article to prove its vague due process claim (Br. 62).

IV. Substantial Evidence Supports the Board's Finding That Daycon Violated 8(a)(5) and (1) of the Act by Subcontracting Bargaining-Unit Work

A. Well-Settled Precedent Requires an Employer To Bargain Over the Allocation of Bargaining-Unit Work

As shown above (p. 27), an employer violates Section 8(a)(5) of the Act by refusing to bargain over wages, hours, and other terms and conditions of employment. There can be no doubt that "the allocation of work to a bargaining unit is a 'term and condition of employment'" and therefore a mandatory subject of bargaining.[90] Accordingly, "an employer may not unilaterally attempt to divert

[89] *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991).

[90] *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 307 (D.C. Cir. 2003); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982); *see also Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 209, 215 (1964) (decision to subcontract bargaining-unit work is mandatory subject of bargaining).

work away from a bargaining unit without fulfilling his statutory duty to bargain."[91]

Specifically, the Supreme Court in *Fibreboard Paper Products v. NLRB* held that an employer was required to bargain over its decision to substitute an independent contractor's employees for its own.[92] Following *Fibreboard*, the Board held that an employer's decision to substitute or replace employees with a subcontractor requires bargaining with the union: "there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is."[93] Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by subcontracting unit work without bargaining with the union.[94]

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[91] *Road Sprinkler Fitters*, 676 F.2d at 831.

[92] 379 U.S. at 209; *see also Mine Wrkrs. District 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989) ("It is agreed that subcontracting of bargaining unit work is a mandatory subject of bargaining.").

[93] *Torrington Indus.*, 307 NLRB 809, 810 (1992); *accord Regal Cinemas*, 317 F.3d at 307.

[94] *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 882-83 (7th Cir. 2011) (unlawful subcontracting of unit work due to large project necessitating additional personnel); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) ("[A]n employer who violates section 8(a)(5) also, derivatively, violates section 8(a)(1).").

B. Substantial Evidence Supports the Board's Finding that Daycon Subcontracted Work Without Notifying or Bargaining With the Union

The record shows that Daycon violated the Act by transferring or subcontracting work usually done by its bargaining-unit employees to Marlboro Mowers without bargaining with the Union. While it was negotiating for a successor contract, Daycon sent 12 snow throwers to be repaired by Marlboro Mowers, work that is typically performed by Daycon's own repair workers. (A. 75; 650-53.) It is undisputed that Daycon never bargained with – or even notified – the Union before doing so. (A. 75; 515.)

Daycon first claims (Br. 53) that the subcontracting was justified by a "past practice," to which the Union had consented "for the past 21 years." This is an affirmative defense on which an employer has the burden of proof.[95] The Board reasonably ruled (A. 65 n.1, 75) that Daycon failed to meet its burden. As Daycon notes (Br. 56-57), there was some testimony that Daycon had previously subcontracted repair work. But the evidence is undisputed that the Union was unaware of these instances, and therefore could not have consented to any past practice. Union Business Agent Webber testified that Daycon had never notified him or bargained over subcontracting repair work during the 6 years he represented

[95] *Beverly Health & Rehab. Servs.*, 335 NLRB 635, 636 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

Daycon's workers. (A. 68; 451 514, 576.) And an employee who had worked in the repair shop for 12 years was similarly unaware of any instance of repair work like this being subcontracted. (A. 648, 653.) Daycon failed to present a single piece of evidence showing it had ever notified the Union that it subcontracted work normally done by its repairmen. Because the Union cannot have consented to a past practice that it was unaware of – based on "peak demand" or otherwise – Daycon failed to prove that its subcontracting was justified by a "past practice."[96]

Daycon also claims (Br. 53) that it was entitled to act unilaterally because it was "up to [its] ears in snow blowers." But as the Board found (A. 65 n.1), this claim of urgency is undermined by the fact that the snow throwers sat in the repair shop for at least two months before going to Marlboro Mowers. (A. 428, 829.) Daycon had ample time to bargain with the Union before subcontracting.

Nor does the contract language Daycon points to (Br. 56, A. 183) justify its unilateral actions. As the Board (A. 65 n.1) and Daycon note (Br. 57-58), the contract stated that subcontracting was not to be used "as subterfuge to violate" other parts of the contract. Another provision required Daycon to "assign overtime as necessary" if there were more than 75 pieces of equipment in need of repair

[96] *Vico Prods. Co., Inc. v. NLRB.*, 333 F.3d 198, 208 (D.C. Cir. 2003) ("The fatal defect in [employer's] waiver argument is that the Union was unaware of the past practice."); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1146 (D.C. Cir. 1988) (no violation where union was "far from being unaware" of employer's "past practice of transferring unit work").

until the backlog fell below 75. (A. 190.) Here, as Daycon admits (Br. 53), there were more than 75 pieces of equipment in need of repair; yet – despite Daycon's claim to the contrary (Br. 57) – employees were not working overtime every weekend. (A. 657.) There is no evidence that Daycon had reached a limit on overtime or that it considered, or discussed with the Union, additional overtime in lieu of subcontracting. That Daycon did not violate the Act even further by subcontracting more than 12 machines (Br. 57-58) does not justify its failure to bargain over the subcontracting it did do. The Board reasonably determined that the subcontracting violated the "no subterfuge" provision because it circumvented the mandatory overtime provision. (A. 65 n.1.) Indeed, Daycon's witness was discredited about the circumstances of subcontracting the work to Marlboro Mowers. (A. 75; 865.)

Finally, this Court is without jurisdiction to consider Daycon's claim (Br. 58) that the collective-bargaining agreement provided a "sound arguable basis" for its unilateral actions because Daycon never raised that argument to the Board. (A. 100-70.) Section 10(e) of the Act[97] provides that "no objection that has not been urged before the Board … shall be considered by the Court," absent

[97] 29 U.S.C. § 160(e).

extraordinary circumstances. Accordingly, the Court lacks jurisdiction to consider this untimely challenge, articulated for the first time in Daycon's appellate brief.[98]

In any event, the "sound arguable basis" test applies only where a collective-bargaining agreement is in effect and the General Counsel has alleged that an employer modified a term of employment contained in that agreement.[99] Here, no contract was in effect when Daycon subcontracted the snow thrower work and there was no allegation of a mid-term modification, making Daycon's sound arguable basis argument irrelevant.

Daycon was not precluded from subcontracting the snow thrower repairs, but it had to talk to the Union first. Perhaps employees would have wanted to work additional overtime; if not, the Union may not have had reason to oppose the subcontracting. But Daycon has provided no persuasive justification for its failure to negotiate with the Union before acting.

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[98] *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (party's failure to present issue to Board "prevents consideration of the question by the courts"); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) ("[T]he critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection."); *Harvard Indus. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990).

[99] *See Bath Iron Works Corp.*, 345 NLRB 499, 501-03 (2005), *review denied sub nom.*, *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying Daycon's petition for review.

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April 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAYCON PRODUCTS COMPANY, INC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1342, 11-1402
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-35687
	)	
and	)	
	)	
DRIVERS CHAUFFEURS & HELPERS LOCAL 639	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,803 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/ Linda Dreeben (by MF)
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Dated at Washington, DC
this 3rd day of April 2012

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

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

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.....
>
> * * *
>
> (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].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

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

Sec. 10(b). [Sec. 160(b)] [Complaint and notice of hearing; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . 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. . . .

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 10(j). [Sec. 160(j)] [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of

any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAYCON PRODUCTS COMPANY, INC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1342, 11-1402
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	5-CA-35687
	)	
and	)	
	)	
DRIVERS CHAUFFEURS & HELPERS LOCAL 639	)	
	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I certify that, on April 3, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All parties' counsel are registered users and will receive service through the CM/ECF system.

/s/Linda Dreeben (by MF)
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Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3rd day of April, 2012