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**Longmont United Hospital and National Nurses Organizing Committee/National Nurses United (NNOC/NUU).** Case 27–CA–296153

February 26, 2026

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PROUTY, MURPHY, AND MAYER

On September 30, 2022, the National Labor Relations Board issued a Decision and Order in this case finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to recognize and bargain with National Nurses Organizing Committee/National Nurses United (the Union) and ordering the Respondent to bargain with the Union on request.<sup>1</sup> We also severed and retained the issue of whether the Board should grant the General Counsel’s request for the Board to overrule *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), and adopt a remedy that would require employers to compensate employees “for the lost opportunity to engage in collective bargaining at the time and in the manner contemplated by the Act” in test-of-certification cases.<sup>2</sup> After further consideration, the Board declines to depart from its longstanding remedial practice where an employer has defended its refusal to bargain on grounds that it is challenging the union’s certification.

<sup>1</sup> *Longmont United Hospital*, 371 NLRB No. 162 (2022), enf’d. 70 F.4th 573 (D.C. Cir. 2023).

<sup>2</sup> This is the only issue remaining for Board disposition in this case. Accordingly, we need not address the merits of other remedies that our dissenting colleague advocates. Moreover, we note that the Board considered, and rejected, “the additional remedies sought by the General Counsel in her Motion for Summary Judgment.” *Id.*, slip op. at 2 fn. 5. Those “additional remedies” included “imposing a bargaining schedule” and “requiring Respondent to hold a meeting or meetings during work-time at which the remedial notice is read aloud to employees.” GC Motion for Summary Judgment at 10.

<sup>3</sup> Congress made a “deliberate choice” to exclude Board-issued certifications from direct judicial review. *American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940). But Congress specified in Sec. 9(d) of the Act that a court of appeals *does* have jurisdiction to review the Board’s representation case decision when an order of the Board in an unfair labor practice case is “based in whole or in part upon facts certified” by the Board in a representation case. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964) (recognizing that Sec. “9(d) of the Act makes full provision for judicial review of the underlying certification order”); see also *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995) (holding that an employer waived its right to challenge the validity of the certification when it recognized the union and entered into negotiations with it (citing cases)). As such, a certification-testing refusal to bargain is materially different from cases in which an employer makes unilateral changes to terms and conditions of employment during the period that objections to an election are pending but before a final determination has

The only way that an employer can obtain judicial review of a Board certification is by refusing to bargain. This is because the courts do not have jurisdiction to directly review a certification and because an employer waives its right to challenge a union’s certification in court if it recognizes and bargains with the union.<sup>3</sup> Requiring a certification-testing employer to pay compensatory damages for refusing to bargain in order to challenge a Board-issued certification would “present a realistic threat of interference” with this “regulatory scheme.”<sup>4</sup> It would also impermissibly burden the exercise of the right to seek judicial review.<sup>5</sup> And “any attempt by a court,” or by the Board, “at preventing an appeal is unwarranted and cannot be tolerated.”<sup>6</sup>

Moreover, Section 8(d) of the Act makes clear that the Board does not have the authority to compel the parties to reach any agreement.<sup>7</sup> As the Board explained in *Ex-Cell-O Corp.*, it follows that the Board does not have the power to achieve the same result indirectly, by ordering an employer to pay damages in lieu of reaching an agreement. 185 NLRB at 110. Any such remedy would also be wholly speculative, insofar as it would require the Board to determine what the parties would have agreed to if they had bargained immediately after the Board issued the certification. *Id.*

The proposed remedy would also undermine the parties’ bargaining once the certification is enforced, by forcing the parties to litigate, in a Board compliance hearing, the size of the increases that the employer supposedly would

been made. See *Mike O’Connor Chevrolet*, 209 NLRB 701, 703 (1974) (holding that an employer acts at its peril if it implements unilateral changes while it is challenging a union’s certification), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). A certification-testing employer must refuse to bargain in order to obtain judicial review, but there is no requirement that it make unilateral changes to obtain judicial review or for any other reason.

<sup>4</sup> *In re Sewell*, 690 F.2d 403, 409 (4th Cir. 1982) (internal quotation omitted).

<sup>5</sup> *Id.* at 407 (recognizing that “[a] threat of liability for taking the steps necessary for appellate consideration of Board orders inevitably will deter petitions for review.”). It is also important to note that not all refusals to bargain pending review are, in fact, unlawful. When an employer refuses to bargain in order to obtain judicial review to challenge a union’s certification, and a reviewing court agrees with the employer’s challenge, the court is in effect finding that the employer *never had a duty to bargain with the wrongfully certified union* in the first place. Accordingly, the liability threat being proposed could well have the effect of pressuring employers into bargaining with unions that do not, in fact, represent the majority of employees in an appropriate unit.

<sup>6</sup> *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974), cert. denied 419 U.S. 1070 (1974); see also *Lindsey v. Normet*, 405 U.S. 56, 77–79 (1972) (holding statute conditioning appeal on posting of double bond unconstitutional under Fourteenth Amendment’s Equal Protection Clause).

<sup>7</sup> *H.K. Porter v. NLRB*, 397 U.S. 99, 103–104 (1970).

have granted in the past *at the same time* that they are bargaining over the size of the wage increases the employer will grant in the future as part of first contract negotiations. Employers would undoubtedly offer less in bargaining, and unions would undoubtedly demand more, both with an eye to how any agreement would affect the size of a monetary award.<sup>8</sup> Meanwhile, the parties' respective litigation positions would also be influenced by how they would affect the contract negotiations. It is hard to imagine a better recipe for hindering, rather than encouraging, the parties reaching a agreement through collective bargaining.

In sum, we reach the same conclusion based on the same factors that the Board majority relied on in *Ex-Cell-O Corp.* 56 years ago. As the Board there specifically stated, even while acknowledging the inadequacy of extant remedies to provide complete relief for Section 8(a)(5) violations, "we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board." 185 NLRB at 110. For all of the foregoing reasons, we respectfully decline the former General Counsel's request to overrule *Ex-Cell-O Corp.*

Dated, Washington, D.C. February 26, 2026

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James R. Murphy, Member

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Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting.

It is my belief that *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), was wrongly decided and has been the law for far

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<sup>8</sup> *Tiidee Products, Inc.*, 194 NLRB 1234, 1235 (1972), enfd. 502 F.2d 349 (D.C. Cir. 1974) (recognizing that the remedy would deter employers from agreeing to wage increases in bargaining conducted after a bargaining order is enforced "for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain"), cert. denied 421 U.S. 991 (1975). In addition, the award alleged by the region would also very likely serve as a floor for what the union would accept in bargaining. After all, a union could never explain to the unit employees why it had accepted less.

<sup>1</sup> These "technical" 8(a)(5) violations stem from Congress choosing not to provide for direct judicial review of representation certifications. *American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940). Congress did so because it was mindful of the long delays that would plague enforcement of a union's certification if employers could apply to the Federal appellate courts for review of orders for elections. *Id.* at 410 & fn. 2. Yet the negative repercussions of long delays to the collective-bargaining process remain just as relevant with the system we have today

too long. That decision unnecessarily restricts the Board's remedial authority in cases where an employer unlawfully refuses to bargain to "test" a union's certification. As the *Ex-Cell-O Corp.* majority and dissent alike acknowledged, a refusal to bargain demonstrably harms the certified union's and the unit employees' collective-bargaining rights under the Act in a manner that *Ex-Cell-O Corp.*'s limited remedies do not redress. I would therefore take this occasion to overrule *Ex-Cell-O Corp.* Going forward, I would impose on employers that unlawfully delay bargaining by "testing certification" a set of remedies already imposed in other refusal-to-bargain cases under Board law and, in addition, I would permit the General Counsel to prove that affected employees suffered remediable economic harm that resulted from the employer's unlawful refusal to bargain.

I start from the bedrock principle that an employer commits an unfair labor practice under Section 8(a)(5) of the Act when it refuses to bargain with a union certified by the Board as the collective-bargaining representative of a unit of its employees. While such refusals to bargain are sometimes colloquially referred to as "technical" 8(a)(5) violations, required in order for the employer to "test certification," there is nothing technical about the harm that results from such an unlawful refusal to bargain in defiance of its bargaining obligation under the Act.<sup>1</sup> Indeed, nothing in the Board's current remedial scheme adequately redresses the damage done to a certified union and the employees it represents by the often lengthy delay to the collective-bargaining process caused by the employer's refusal to bargain and the Board's concomitant necessity under the Act to petition a Federal circuit court of appeals to enforce the Board's order.<sup>2</sup>

In the face of this delay, *Ex-Cell-O Corp.* categorically forecloses the possibility of fashioning make-whole relief to remedy the harms caused by employers' refusal to bargain in test-of-certification cases. This categorical denial

that fails to remedy the harms to employees and unions from violations of the statutory duty to bargain suffered while an employer seeks in direct review of the certification.

<sup>2</sup> Here, National Nurses Organizing Committee/National Nurses United (the Union) ultimately prevailed in a mail-ballot election that ended on July 7, 2021. On April 5, 2022, after the Board denied the Respondent's request for review of the Regional Director's decisions on challenged ballots and objections, the Regional Director issued a Certification of Representative based on a second revised Tally of Ballots. On May 2, 2022, the Union requested that the Respondent bargain with it. Nonetheless, it was not until June 13, 2023—almost 2 years after the representation election and more than a year after the Union requested bargaining following its certification—that the District of Columbia Circuit denied the Respondent's petition for review and granted the Board's cross-application for enforcement of the Board Order requiring the Respondent to bargain with the Union. The delay to bargaining in this case is by no means the exception.

of appropriate relief is inconsistent with Section 10(c) of the Act, which both authorizes and requires the Board to remedy these harms. It is past time for the Board to modify its remedial approach in these cases. An employer should know that, upon enforcement of the Board's order by a circuit court, it will have to fully remedy the harms caused by its extended unlawful refusal to bargain, not just take the same action (recognition and bargaining) that it should have initially taken upon the union's certification and demand for bargaining.

I propose that, where an employer has defended its unlawful refusal to bargain on grounds that it is challenging the union's certification, the Board should supplement the inadequate and insufficient remedies provided for under *Ex-Cell-O Corp.*—ordering the employer to recognize and bargain with the union and post a remedial notice—with several additional remedies which will come closer to making the affected parties whole for their losses. These remedies would restore the status quo ante as nearly as possible and place the parties in the position they would have occupied had the employer not unlawfully refused to bargain. The delay that follows from such a refusal, and from the lengthy legal proceedings that result, has a reasonable tendency to erode the union's support among employees and thus diminish its bargaining power while also chilling employees, perhaps irreparably, in their exercise of their rights under the Act.

The first group of remedies I would impose include non-monetary remedies designed to protect employees' ability to exercise their rights under the Act, including the right to be effectively represented by their chosen union in collective bargaining with their employer despite the delay in bargaining. Specifically, I would require the employer to provide the union with access to employer bulletin boards, reasonable access to the employer's facility to meet with employees at the facility on nonworking time and in non-working areas, and ongoing employee contact information. To rebuild its standing with employees after the refusal to bargain has prevented the union from carrying out its representative functions, the union must be able to meet and communicate with employees, which is most effectively accomplished in the workplace. In ordering the

employer to bargain, I would require the offending employer, which has already demonstrated to employees a willingness to flout its bargaining obligation, to adhere to a bargaining schedule and to submit regular progress reports on the status of the negotiations. Additionally, I would require the employer to post both a traditional Board notice and an Explanation of Rights document for an extended period of 1 year, to mail the notice and Explanation of Rights to current and former employees, and to call a meeting where the employer's agent or a Board agent will read the notice and Explanation of Rights to employees. This remedy will help ensure that unit employees know that the employer's refusal to bargain was unlawful and that the employer has now accepted its bargaining obligation.

In the second group of remedies, I would order the employer to make the union whole for any reasonable monetary expenditures above what it otherwise would have spent to maintain its relationship with employees in the bargaining unit. The employer's refusal to bargain by testing certification, and the extended delay to bargaining during the period of litigation, may force the union to expend funds and other resources to rebuild its relationship with unit employees who, during the journey from certification to a court-enforced bargaining order, would reasonably view their certified bargaining representative as ineffective and inconsequential.

In addition to these established make-whole remedies already applied by the Board in other contexts, I would further modify our standard remedy in these refusal-to-bargain cases in which the employer tests a union's certification. In agreement with the dissenting opinion in *Ex-Cell-O Corp.*, I would find that the delay resulting from a test of certification may, in some cases, put employees in a worse economic position than they would have occupied but for the employer's unfair labor practice in refusing to bargain.<sup>3</sup> Accordingly, in all test-of-certification cases, the Board should expressly order the employer to compensate affected employees for any other provable, reasonably quantifiable economic harm resulting from the unlawful refusal to bargain.<sup>4</sup> The General Counsel would have to present evidence in compliance demonstrating the

<sup>3</sup> See *Ex-Cell-O Corp.*, 185 NLRB at 112 (Members McCulloch & Brown, dissenting in part) ("Deprivation of an employee's statutory rights is often accompanied by serious financial injury to [them]. Where this is so, an order which only guarantees the exercise of [their] rights in the future often falls far short of expunging the effects of the unlawful conduct involved. Therefore, one of the Board's most effective and well-established affirmative remedies for unlawful conduct is an order to make employees financially whole for losses resulting from violations of the Act.").

<sup>4</sup> This would not "present a realistic threat of interference" with the current "regulatory scheme" to challenge a union's certification.

Compare *In re Sewell*, 690 F.2d 403, 409 (4th Cir. 1982) (finding Federal preemption of union's State law tortious interference with contract claim seeking punitive and compensatory damages for employer's refusal to bargain). Instead, it would promote the representation election process under Sec. 9. Employers would be encouraged to respect the Board's representation certifications unless they had a valid basis for seeking judicial review. As the law is currently enforced, employers have no reason not to delay bargaining and seek judicial review of every union certification, regardless of whether there is a legitimate basis to question the certification. Although it is impossible to know the effect that make-whole relief would have on bargaining, once it finally commences, the

reasonably approximate measure of the harm due to the employer's unfair labor practice—i.e., the harm must be attributable to the delay caused by the refusal to bargain.<sup>5</sup> The employer, in turn, would have the opportunity to present evidence challenging the amount of money claimed or argue that the harm would have occurred regardless of the unfair labor practice.<sup>6</sup> If proven by the General Counsel, the remedial period would run from the employer's initial refusal to bargain and continue until the date when the parties begin bargaining in good faith.<sup>7</sup> I believe that standardizing this remedy in all test-of-certification cases

existing alternative has been to allow the employer to freely stymie for months, and often years, the employees' representation wishes and weaken the union's bargaining position as employees see the union as a futile representative incapable of bringing the employer to the bargaining table. "In fashioning remedies the Board must bear in mind that the remedy should 'be adapted to the situation that calls for redress,' with a view toward 'restoring the situation as nearly as possible, to that which would have obtained but for [the unfair labor practice].'" *Royal Plating & Polishing Co.*, 148 NLRB 545, 548–549 (1964) (quoting *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938), and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)) (alteration in original). The remedies I propose would help restore the union's lost bargaining power and help ensure that bargaining pursuant to the prospective bargaining order is fruitful. See, e.g., *Royal Plating & Polishing Co.*, 160 NLRB 990, 997 (1966) ("If the [u]nion must bargain devoid of all economic strength, we would perpetuate the situation created by" the employer's unlawful conduct "which prevented the [u]nion from meaningful bargaining.").

<sup>5</sup> *Ex-Cell-O Corp.*, 185 NLRB at 118 (Members McCulloch & Brown, dissenting in part) ("The burden of proof would be upon the General Counsel at the compliance stage to translate that legal injury into terms of measurable financial loss, if any, which the employees might reasonably be found to have suffered as a consequence of that injury . . . . [T]he General Counsel or Charging Party [has to show] by acceptable and demonstrable means that the employees could have reasonably expected to gain a certain amount of compensation by bargaining . . . ."). For example, "if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining. The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry. Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics, [or] other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity." *Id.* at 118–119. In addition, in attempting to restore the unit employees to the economic position they would have otherwise been in, the Board should approximate the likely wages and/or benefits employees would have received if the employer had not unlawfully delayed bargaining. For example, if an employer has a historical wage and/or benefit pattern or practice, or grants a wage and/or benefit increase to nonunit employees consistent with (or correlated to) increases that would have also been granted to unit employees, the employer should be required to make that wage and/or benefit adjustment for unit employees during the period when it unlawfully refused to bargain. These are amounts that a union would have reasonably been able to secure for unit employees in collective bargaining that it was unable to because of the lost opportunity to bargain. Requiring such a showing to be supported by evidence demonstrating the reasonably approximate measure of the harm ensures

is necessary to encourage timely collective bargaining with employees' freely chosen bargaining representative and to satisfy the Board's Congressional mandate set forth in Section 10(c) of the Act to "take such affirmative action . . . as will effectuate the policies of [the Act]" when issuing orders to address unfair labor practices.<sup>8</sup>

To be sure, the Board cannot prevent an employer from "testing certification" in order to seek court review of a union certification it believes to be wrongly decided under the Act. And, of course, an employer that is successful in such a challenge will be found not to have violated the Act

that any resulting remedy would be rooted in what employees and the union actually suffered. See *Ex-Cell-O Corp.*, 185 NLRB at 117 (Members McCulloch & Brown, dissenting in part) ("The amount to be awarded would be only that which would reasonably reflect and be measured by the loss caused by the unlawful denial of the opportunity for collective bargaining.").

<sup>6</sup> See, e.g., *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) ("Once the General Counsel has established the gross amount . . . due the [employees] in question, 'the burden is upon the employer to establish facts which would negat[e] the existence of liability to a given employee or which would mitigate that liability.'") (quoting *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963)).

<sup>7</sup> *Ex-Cell-O Corp.*, 185 NLRB at 116 (Members McCulloch & Brown, dissenting in part) ("The compensatory period would normally run from the date of the employer's unlawful refusal to bargain until it commences to negotiate in good faith, or upon the failure of the [u]nion to commence negotiations . . . ."). Importantly, a make-whole remedy for the employer's failure to bargain would not specify new or continuing terms of employment or prohibit changes in existing terms and conditions, which would be left to the outcome of bargaining. *Id.* at 116 & fn. 55 (Members McCulloch & Brown, dissenting in part). The make-whole remedy would simply restore the status quo ante and thereby ensure that the process of good-faith bargaining pursuant to a prospective remedial bargaining order will be effective. This distinguishes the remedy involved in this case from the one rejected by the Supreme Court in *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), in which the Board ordered an employer to adopt a specific contract clause. See *NLRB v. Tiidee Products, Inc.*, 426 F.2d 1243, 1253 (D.C. Cir. 1970) ("We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of the our remand first, to consideration of past damages, notto compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act."), cert. denied 421 U.S. 991 (1975).

<sup>8</sup> 29 U.S.C. § 160(c). See also, e.g., *King Soopers, Inc.*, 364 NLRB 1153, 1155 (2016) (changing the Board's standard make-whole remedy was necessary to "satisfy the Board's statutory obligation to provide meaningful, make-whole relief for losses incurred . . . as a result of a respondent's unlawful conduct"), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). As the Supreme Court has recognized, the harm to the prospective long-term collective-bargaining relationship between an employer and a union stemming from an unremedied refusal to bargain can be significant. *International Assn. of Machinists, Tool & Tie Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 82 (1940) ("It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining.").

and will not be required to adopt the remedies that I have articulated herein.<sup>9</sup> But I believe that, consistent with the Act, the Board's remedial scheme must be strengthened to make it clear to employers contemplating such a challenge that they do so at their peril, and that the costs imposed on employees and unions by an employer's unsuccessful challenge will have to be equitably redressed. An employer that unlawfully refuses to bargain in conscious defiance of its bargaining obligation should be required to make the affected parties fully whole for the harms suffered. A certified union and the unit employees it

represents should not—and under the Act need not—bear the costs of the employer's refusal to bargain in violation of the Act.

Dated, Washington, D.C. February 26, 2026

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David M. Prouty,

Member

NATIONAL LABOR RELATIONS BOARD

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<sup>9</sup> Precisely for this reason, an employer with legitimate challenges to a union's certification would not be dissuaded—and certainly would not be prevented—from pursuing its claim in court. An employer would be free to proceed at its own risk, and if it prevails, its refusal to bargain will be lawful with no legal consequences. This would be no different than other instances where an employer can act at its peril, such as an employer engaging in unilateral actions without bargaining during the period that objections to an election are pending but before a final

determination has been made. See *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Furthermore, while the Board does not want to burden the right of any party to file reasonable applications for judicial review, the collective-bargaining process is in no way furthered by having a process that promotes frivolous requests for judicial review leading to lengthy delays before bargaining even commences. That is where we currently find ourselves.