

No. 08-4045

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOCAL 65-B, GRAPHIC COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

QUEBECOR WORLD MT. MORRIS II, LLC

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL APPENDIX FOR
THE NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REVIEW OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

The jurisdictional statement of Local 65-B, Graphic Communications
Conference of the International Brotherhood of Teamsters (“the Union”), is not

complete and correct. This case is before the Court on the Union’s petition for review of portions of a Decision and Order of the Board that issued on September 8, 2008, and is reported at 353 NLRB No. 1. (SA 1-12.)¹ In its Decision and Order, the Board dismissed unfair labor practice complaint allegations that the Company unlawfully implemented a “Performance Improvement Plan” (“PIP”) process as part of its disciplinary system, and demoted employee Robert Gigous pursuant to a PIP. (SA 1-4.) The Union’s petition challenges those dismissals.²

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction over

¹ “SA” refers to the short appendix filed by the Union, which includes the Board’s Decision and Order and certain transcript pages. “BSA” refers to the supplemental appendix filed by the Board. “GCX” and “CEX” refer to exhibits introduced by the Board’s General Counsel and the Company, respectively, at the hearing before the administrative law judge. “Tr” refers to the transcript of the hearing below. References preceding a semicolon are to the Board’s findings; those following refer to the supporting evidence.

² In its Decision and Order, the Board also found that the Company unlawfully failed to provide the Union with relevant information relating to the Union’s grievance over the PIP process, and entered appropriate remedial relief for that violation. (SA 1, 3-4.) The Board has not filed an application for enforcement of its Decision and Order with the Court, because the Board’s Subregional Office has administratively advised it that the Company intends to comply with the Decision and Order.

this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b))³, and Illinois was the location of the alleged unfair labor practices. The Union filed its petition for review on November 26, 2008. The petition was timely filed, as the Act places no time limitations on such filings. On December 10, 2008, the Court granted the motion of Quebecor World Mt. Morris II, LLC ("the Company") to intervene on the side of the Board.

STATEMENT OF THE ISSUE

The overarching issue is whether the Board properly dismissed the portion of the complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a PIP process and demoting employee Robert Gigous pursuant to a PIP. The subsidiary issue is whether substantial

³ In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, __F.3d__, 2009 WL 638248 (1st Cir. Mar. 13, 2009).

The issue has been briefed before this Court in *New Process Steel v. NLRB* (7th Cir. Nos. 08-3517, 08-3518, 08-3709 and 08-3859), which is scheduled for oral argument on April 10, 2009.

evidence supports the Board's finding that the parties orally agreed to extend their expiring contract in its entirety, and thus, the contract's management-rights provision privileged the Company's actions.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint against the Company alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing a PIP process as part of its disciplinary system, demoting employee Robert Gigous pursuant to a PIP, and refusing to provide the Union with relevant information relating to a grievance filed by the Union over the PIP procedure.

Following a hearing, an administrative law judge issued a decision finding merit to all of the complaint allegations. With respect to the allegations that the Company unlawfully implemented a PIP process and demoted Gigous pursuant to a PIP, the judge rejected the Company's contention that implementation of the PIP process was permitted under the management-rights provision in the parties' contract. (SA 2.) The judge concluded that, because there was no written or formal extension of the contract, it ceased to govern the parties' relationship as of its expiration, and for that reason, the management-rights provision, which did not survive the contract's expiration, could not privilege

the Company's post-expiration conduct. (SA 2.) The judge did not analyze the question of whether undisputed testimony demonstrated that the parties had orally agreed to extend their expiring contract. (SA 2.)

The Company filed exceptions to the judge's decision; the Union and the General Counsel each filed limited cross-exceptions. On review, the Board affirmed the judge's finding that the Company had unlawfully refused to provide the Union with requested information. However, the Board reversed the judge's finding that the Company violated Section 8(a)(5) and (1) by unilaterally implementing the PIP process as part of its disciplinary system, and demoting Gigous pursuant to a PIP. The Board rejected the judge's view that continued operation of the management-rights provision required a "formal" i.e., written" extension of the contract. (SA 2.) The Board found that the evidence established that the Union and the Company had orally agreed to extend their contract, without qualification, and that under the management-rights provision in that contract, the Union had waived its right to bargain over the implementation and application of the PIP. (SA 1-4.) No party filed a motion for reconsideration of the Board's decision.

As noted above, the Union challenges the Board's decision to dismiss the complaint allegations that the Company unlawfully implemented the PIP

process and demoted Gigous pursuant to a PIP, claiming that the parties did not agree to extend the contract.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations; the Union Represents the Company's Finishing Department Employees for Purposes of Collective Bargaining

The Company, which operates a facility in Mt. Morris, Illinois, is engaged in the commercial printing business. (SA 1, 5; SA 14, BSA 8-9, 24.) It prints mail-order catalogs, magazines, and newspaper supplements. (SA 1, 5; BSA 9, 24.) The Company employs approximately 650 individuals in various departments. (SA 5; BSA 35.)

Approximately 250 of those employees work in the finishing department, where they bind the printed materials and prepare them for distribution. (SA 1-2, 5; BSA 9-10, 25, 28, 36.) The Union has represented a unit of finishing department employees for purposes of collective bargaining since 1918. (SA 1, 5; BSA 10, 28.) During the course of their long bargaining relationship, the Company and the Union have been party to a series of collective-bargaining agreements. (GCX 1(g)-(i).)

B. The Union and the Company Orally Agree to Extend Their Expiring Contract in Its Entirety; the Contract Includes a Management-Rights Provision

The most recent written collective-bargaining agreement (“the contract”) between the Company and the Union was set to expire on March 31, 2006. (SA 1; BSA 54.) The contract contained a management-rights provision. (SA 2-3; BSA 18-20, 43.) That provision granted the Company the exclusive right to, among other things, demote, suspend, or discipline employees, and to establish and apply reasonable standards of performance and rules of conduct. (SA 3; BSA 20-21, 43.) The Company had previously demoted two unit employees for disciplinary reasons. (SA 3 & n.14; Tr 162.)

On March 30, the Company and the Union began negotiating for a new contract. (SA 1, Tr 56, 98.) At a bargaining session occurring that day—or the next day—the Company’s chief negotiators and the Union’s chief negotiators orally agreed, without qualification, to extend the contract while they continued their negotiations for a new one. (SA 1; SA 15, 18-19, BSA 19, 21-22, 31-32, 38.) The Company’s chief negotiator asked if the Union “was going to sign a written extension . . . because [he said] that it was [the Company’s] ‘intention to work under our current agreement.’” (SA 1 & n.6; SA 19). The Union’s chief negotiator responded that, although he did not see “the need for a written extension[,] . . . it was [the Union’s] intention, too, to just work under the

current agreement.” (SA 1 & n.6; SA 19.) The Company’s chief negotiator then stated that he “was okay with that,” and the matter was closed. (SA 1 & n.6; SA 19.) The parties viewed the management-rights provision as being extended. (SA 1-2; SA 19, BSA 19, 20-21, 30-32, 38.)

**C. In September 2007, Employee Robert Gigous
Receives a PIP; the Company Subsequently
Demotes Him Pursuant to the PIP**

Employee Robert Gigous has worked in the finishing department for several years. (SA 5; Tr 57.) Over the years, he has received several corrective action notices addressing deficiencies in his work performance. (SA 5; CEX 4.) On September 7, 2006, the Company gave Gigous his annual performance review, along with a PIP. (SA 1-2, 5; Tr 25, 27, 58-59, GCX 2.) The Company had a disciplinary system in place—which included the use of corrective action notices—but Gigous was the first unit employee to receive a PIP. (SA 1-2, 5; Tr 24, 61, 118, 125, 150, BSA 14-15.)

The PIP called for close evaluation of Gigous’s performance over 90 work shifts. (SA 1-2, 5; BSA 12.) At the end of that period, absent improvement in his performance, Gigous would be subject to further discipline, including demotion. The Company demoted Gigous in February 2007 because his performance had not improved as required under the PIP. (SA 1-2, 8; BSA 13, 15-18.) The Company did not bargain with the Union over its

implementation of the PIP or the demotion of Gigous. (SA 3; Tr 61.)

Union Vice President/Steward Daniel Strohecker learned that Gigous had been given a PIP. (SA 6; Tr 72.) Soon thereafter, Strohecker filed a grievance with the Company regarding the implementation of the PIP. He subsequently requested information from the Company about the PIP process and Gigous's disciplinary history. (SA 6; Tr 28, 68, 75, 84, 152, GCX 10, BSA 13.) The Company maintained that the Union had not presented the grievance through the appropriate channels. The Company failed to provide the Union with the requested information. (SA 1, 7-8, 10; Tr 78-80, 83, 92.)

II. THE BOARD'S DECISION AND ORDER

In his decision, the administrative law judge found merit to all of the complaint allegations. (SA 4-12.) As noted above, with respect to the allegations that the Company unlawfully implemented a PIP process and demoted Gigous pursuant to a PIP, the judge rejected the Company's contention that implementation of the PIP process was permitted under the management-rights provision in the parties' contract. (SA 2, 8.) The judge concluded that, because there was no written or formal extension of the contract, it ceased to govern the parties' relationship as of its expiration, and for that reason, the management-rights provision, which did not survive the contract's expiration, could not privilege the Company's post-expiration unilateral action. (SA 2, 8.)

The judge did not analyze the question of whether undisputed testimony established that the parties had orally agreed to extend their expiring contract. (SA 2, 8.)

The Board (Chairman Schaumber and Member Liebman) reversed the judge, in part, and found that the Company did not violate the Act by unilaterally implementing the PIP process as part of its disciplinary system, and demoting Robert Gigous pursuant to a PIP. (SA 1-4.) In reversing the judge, the Board found that the judge's view—that continued operation of the management-rights provision required a written extension of the contract—was erroneous. The Board found that the undisputed evidence established that the Union and the Company had orally agreed to extend their contract, without any qualification. The Board further found, in light of the oral agreement, that the contract's management-rights provision remained in effect, and the Company was privileged to implement the PIP process. Having found that the implementation of the PIP process was not unlawful, the Board accordingly dismissed the allegation that Gigous was demoted pursuant to an unlawfully-implemented PIP. (SA 1-3.) As noted above, the Union's challenge to these dismissals is the only issue before the Court.

SUMMARY OF ARGUMENT

The Board properly dismissed the complaint allegation that the Company violated the Act by implementing a PIP process as part of its disciplinary system, and demoting employee Robert Gigous pursuant to a PIP. Substantial evidence supports the Board's finding that the Union and the Company orally agreed to extend their expiring contract—which included a management-rights provision—without qualification. The management-rights provision, in turn, remained in effect, and privileged the Company's implementation and application of the PIP.

On review, the Union concedes that, if the parties orally extended their contract, then the management-rights provision remained in effect. The Union also does not challenge the Board's finding that the management-rights provision privileged the Company's unilateral actions.

The Union's sole challenge is to the Board's finding that the parties orally agreed to extend their contract. The Union's fact-based challenge to this finding is untimely, however, and the Court is jurisdictionally barred from considering it. In any event, the claim is without merit. The Board's analysis of unchallenged testimony is entirely reasonable.

There is also no merit to the Union's contention that the Board's finding that the parties orally extended their contract is inconsistent with certain Board

cases and federal district court cases. The Court is jurisdictionally barred from entertaining this argument too. In any event, contrary to the Union’s contention, these cases in no way establish a rigid dichotomy between an agreement to extend a contract (which, the Union concedes, would privilege the Company’s actions), and an agreement to work under the terms of an expired contract (which, the Union asserts, would not result in survival of the management-rights provision). The alleged dichotomy is a false one—and an irrelevant one, in any case, because the parties agreed to extend their contract. Further, the cases cited by the Union are readily distinguishable from the present case. In sum, the Union has provided no basis for disturbing the Board’s finding.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE PARTIES ORALLY AGREED TO EXTEND THEIR EXPIRING CONTRACT, INCLUDING A MANAGEMENT-RIGHTS PROVISION, WHICH PRIVILEGED THE COMPANY’S UNILATERAL ACTION

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”⁴ Section 8(d) of the Act defines

⁴ An employer’s failure to meet its Section 8(a)(5) collective-bargaining obligations constitutes a derivative violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to

collective bargaining as “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.”

An employer is normally prohibited from making a material change relating to mandatory terms and conditions of employment without first affording its employees’ collective-bargaining representative an opportunity to bargain over the change. *See, e.g., Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

However, a contractual provision, such as a management-rights provision, may privilege an employer’s unilateral action. *See, e.g., Provena St. Joseph Medical Center*, 350 NLRB 808 (2007)(applying Board’s longstanding “clear and unmistakable” waiver analysis to find that, under a contract’s management-rights provision, the union waived its right to bargain over a new disciplinary policy); *but see Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992)(rejecting the Board’s “clear and unmistakable” waiver standard, as applied to a management-rights provision, as excessively stringent, and approving, instead, an analysis of management-rights provisions that utilizes “the usual principles of contract interpretation”).

interfere with, restrain, or coerce employees in the exercise of the[ir] statutory rights.” *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1984).

Provisions such as management-rights clauses, no-strike clauses, union-security clauses, and arbitration clauses will not routinely survive the expiration of a contract, absent some evidence of the parties' contrary intention. *See, e.g., Long Island Head Start Child Development Center*, 345 NLRB 973, 973 (2005), *enforcement denied on other grounds*, 460 F.3d 254 (2d Cir. 2006); SA 2.

However, parties may extend their expiring contract (*see, e.g., Certified Corp. v. Hawaii Teamsters & Allied Worker, Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979)), including a management-rights provision. *See University of Pittsburgh Medical Center*, 325 NLRB 443, 443 n.2 (interpreting *Lustrelon, Inc.*, 289 NLRB 378 (1998)).

This Court reviews Board decisions deferentially. *See, e.g., Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370-71 (7th Cir. 2001); *Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993). The Board's findings of fact are "conclusive" if they are supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). *Accord Jet Star, Inc. v. NLRB*, 209 F.3d 671, 675 (7th Cir. 2000). That standard is met if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). *Accord Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 829 (7th Cir. 2005). On

review, a court may not displace the Board's choice between fairly conflicting views of the evidence, even if the court justifiably would have made a different choice had the matter been before it de novo. *Universal Camera Corp.*, 340 U.S. at 474, 477, 488. *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314 (7th Cir. 1991). Moreover, a Board determination that the General Counsel has failed to prove a violation of the Act "must be upheld unless the determination has no rational basis in the record." *Kankakee-Iroquois County Employers' Assn. v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987)(citations and internal quotations omitted). *Accord American Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004).

It is settled that the Board "has the primary responsibility for developing and applying national labor policy." *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union v. NLRB*, 544 F.3d 841, 858 (7th Cir. 2008). As this Court has emphasized, the Board's "legal conclusions should be accepted . . . unless they are irrational or inconsistent with the Act." *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1027 (7th Cir. 1990).

As we now show, the Board properly dismissed the allegations that the Company violated Section 8(a)(5) and (1) by unilaterally implementing a PIP process and demoting employee Gigous pursuant to a PIP.

B. The Union's Challenge to the Board's Finding that the Parties Orally Agreed to Extend Their Expiring Contract in Its Entirety is Jurisdictionally Barred; In Any Event, the Challenge is Without Merit

The Union concedes that, if the Board properly found that the parties orally agreed to extend their expiring contract, then the contract's management-rights provision "would continue in effect precisely as [it] had during the term of the contract." (Br 11) In addition, the Union does not challenge the Board's finding that the language of the management-rights provision privileged the Company's unilateral implementation of the PIP. In short, if the Court agrees with the Board's finding that the parties orally agreed to extend their contract, then the Board's findings that the management-rights provision remained in effect pursuant to that agreement and privileged the Company's conduct are entitled to summary affirmance. By not briefing these issues, the Union has waived its right to raise them before the Court. *See, e.g., Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 667 (7th Cir. 1988); *Justak Brothers & Co. v. NLRB*, 664 F.2d 1074, 1076 (7th Cir. 1981); *see also* FRAP 28(a)(9)(A)(failure to raise argument in opening brief results in waiver).

To begin, as the Board explained (SA 1), and the Union does not dispute, it is settled that a collective-bargaining agreement does not have to be in writing to be enforceable (*Merk v. Jewel Food Stores*, 945 F.2d 889, 895 (7th Cir. 1991)), and an expiring written collective-bargaining agreement may be orally

extended. *See, e.g., Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979). Whether parties have reached a contractual agreement is a factual question for the Board to determine. *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 829 (7th Cir. 1988). Indeed, it is settled that the Board's finding that parties reached a contractual agreement will be upheld if it is supported by substantial evidence. *Capitol Husting Co., Inc. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982). As this Court has recognized, in resolving a question of whether parties have reached a contractual agreement, "[a]ll that is required [in the federal labor law context] is conduct manifesting an intention to be bound by the terms of an agreement." *Capitol Husting Co., Inc. v. NLRB*, 671 F.2d at 243. *Accord NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976).

The Union's sole challenge is to the Board's finding that the parties orally agreed to extend their contract. In support of its challenge, the Union claims that the Board erred as a factual matter in finding that the parties orally agreed to extend their expiring contract. (Br 15-19.) However, the Union failed to raise this argument before the Board, and the Court is therefore jurisdictionally barred from considering it on review. In any event, the claim is without merit.

Before this Court, the Union asserts (Br 15-19), for the first time, that the Board, in finding that the parties orally extended their expiring contract,

“misstated” the administrative law judge’s findings, and improperly rejected without explanation the judge’s alleged credibility-based finding that there was no contract extension. Judicial consideration of the Union’s claims is precluded by Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides, in relevant part, that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent extraordinary circumstances not present here. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). In short, as described below, even though the Union had the opportunity to raise its misgivings before the Board, it failed to do so.

The Union asserts (Br 15, 18-19)—for the first time—that the judge made a credibility-based finding that the parties had not entered into an oral agreement to extend their contract, and that the Board misstated the judge’s finding. To the extent the Union asserts this as a reason for overturning the Board’s decision, the Union should have brought this claim to the Board’s attention, instead of raising it as a novel matter in its brief to the Court. In its decision, the Board explicitly observed that the judge, in rejecting the Company’s defense that implementation of the PIP process was permitted under the management-rights provision in the parties’ contract, concluded that the contract ceased to govern the parties’ relationship as of expiration “because there was no ‘formal,’ i.e., written, extension of the agreement.” (SA 2).

The judge’s finding that the parties had not entered into a “formal” written extension of their expiring contract was his sole basis for concluding that the contract had not been extended. (SA 2, 8.) The judge referred to a portion of the relevant undisputed testimony, but failed to analyze the testimony to determine whether the parties had entered into an *oral agreement* to extend their expiring contract. The Board rejected the judge’s analytical framework, namely, his focus on the absence of a *written* extension. Conducting its own review of the uncontroverted testimony, the Board found that the parties had orally agreed to extend their expiring contract. (SA 1-2 & n.6.)

Yet, even in the face of the Board’s highlighting the fundamental flaw in the judge’s analysis, and then analyzing the unchallenged testimony, the Union chose not to file a motion for reconsideration of the Board’s Decision and Order. Had the Union filed a motion for reconsideration, it could have brought its concerns about the Board’s interpretation of the judge’s analysis—and the Board’s own analysis of the testimony—to the Board’s attention.⁵ *See* NLRB

⁵ The Union seeks to downplay the Board’s rejection of the judge’s analytical framework—that is, his finding that the management-rights provision expired because there was no formal extension of the contract—by referring to the matter as a “red herring.” (Br 18.) However, by acknowledging that the parties had not raised that issue, and that the Board “recast” (Br 18) the question as a matter of written versus oral extensions, the Union is simply highlighting the fact that, in such circumstances, it should have raised its concerns to the Board in a motion for reconsideration.

Rules and Regulations, 29 C.F.R. § 102.48(d)(1)-(2)(motions for reconsideration, which may assert, among other things, that the Board made factual errors, “shall be filed within 28 days . . . after service of the Board’s decision and order”). However, it failed to do so. Accordingly, under settled principles, this Court lacks jurisdiction to consider the Union’s arguments that the Board misstated the judge’s finding and misanalyzed the unchallenged testimony.

In short, as here, “courts should not topple over administrative decisions unless the administrative agency not only has erred, but has erred against objections made at the time appropriate under its practice.” *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). Simply put, “[t]o hold otherwise would be to set the Board up for one ambush after another.” *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996); *see also United Food and Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007).

In any event, the parties’ collective-bargaining relationship spans some 90 years, and they have worked under a series of collective-bargaining agreements. (SA 1-2; GCX 1(g) & (i).) On or around the day on which their most recent contract was set to expire, the parties decided, during a bargaining session, to avoid the undesirable situation of operating in a contractual vacuum while they

negotiated over a successor contract. Uncontroverted evidence established that, during that bargaining session, the Company's chief negotiator "asked if [the Union] [was] going to sign a written extension . . . because" it was the Company's "intention to work under our current agreement." (SA 1 & n.6; SA 19). The Union's chief negotiator responded that, although he did not see "the need for a *written* extension[,] . . . it was [the Union's] intention, too, to just work under the current agreement." (SA 1 & n.6; SA 19.) (emphasis added.) The Company's chief negotiator then stated that he "was okay with that," and the matter was closed. (SA 1 & n.6; SA 19.)

The Board reasonably interpreted this exchange between the parties' chief negotiators as a manifestation of their mutual intent to extend their expiring contract, without qualification, while they negotiated over a successor contract. (SA 1-2.) Viewed in context, the exchange was unquestionably about the parties undertaking the *affirmative act* of extending their contract. Thus, the Company's chief negotiator initiated the exchange by asking if the Union was going to sign an extension, because it was the Company's intention to work under the current agreement. As phrased by the Company's chief negotiator, the term "extension" was intertwined with "working under the current agreement." (SA 1 & n.6; SA 19.) This was clear to the Union's chief negotiator. Thus, although the Union's chief negotiator responded that he did not see the need to

sign a *written* extension, he otherwise accepted the company negotiator's offer. (SA 1 & n.6; SA 19.)

In short, the word “extension” framed the discussion between the negotiators—the only difference between the parties was whether the extension would be in writing or not. As the Board observed (SA 2-3), the oral agreement to extend the contract did not contain any qualifications. That is, there were no limitations on which provisions would remain operative. (SA 2-3; SA 19.) Indeed, the Union does not argue that the agreement was qualified in any respect.

In this context, it is hardly surprising that the parties saw fit to dispense with unnecessary formalities— such as devoting time and resources to writing out an extension agreement—and chose, instead, to enter into an equally binding, but more efficient, oral agreement to accomplish the same objective. At bottom, the Act is designed to foster harmonious bargaining relationships between employers and unions, and the parties' oral agreement was consistent with that goal. *See* Section 1 of the Act (29 U.S.C. § 151.)

Further, there is no doubt that, as the Board explained (SA 1), the parties “understood that they were operating under the terms of the expired contract, as extended.” This is confirmed by the testimony of the witnesses—the Company's long-serving human resources manager, Ron Slade, and the Union's

long-serving vice president and steward, Daniel Strohecker. (BSA 19, 21-22, 31-32, 38) Moreover, both Slade and Strohecker went so far as to specifically confirm in their undisputed testimony that the management-rights provision in the expiring contract remained in effect as a result of the parties' oral agreement to extend the contract. (BSA 19, 31-32.) It was thus appropriate for the Board to hold the parties—who may be viewed as sophisticated collective-bargaining negotiators, after all (*see Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992))—to their oral agreement.

Finally, in determining that the parties had reached an oral agreement to extend their contract, including the management-rights provision, the Board reasonably drew guidance from analogous cases—none of which the Union challenges—involving the effect of an oral extension on other similar contractual provisions. As the Board explained (SA 2), in *Granite Construction Company*, 330 NLRB 205, 207-08 (1999), it found that the parties orally agreed to extend their expiring contract when the union's negotiator nodded affirmatively in response to the company negotiator's question as to whether the union would agree to keep the contract in place during negotiations for a new contract; based on this agreement, the contract's no-strike clause, which would normally have expired when the contract expired, remained operative. Similarly, in *Kroger Co.*, 177 NLRB 769, 776 (1969), *enforced sub nom.*,

Silbaugh v. NLRB, 429 F.2d 761 (D.C. Cir. 1970), the Board found that striking employees were lawfully discharged where a no-strike provision remained in effect after the parties orally agreed to extend their expiring contract. In a comparable case involving an agreement between the successor union and the employer to continue to abide by the terms of a predecessor union's contract, the Board approved a finding that a management-rights provision in the extended contract privileged an employer's unilateral action. *See University of Pittsburgh Medical Center*, 325 NLRB 443, 443 n.2 (1998)(interpreting *Lustrelon, Inc.*, 289 NLRB 378 (1988)).

In sum, if the Court were inclined to reach the issue, substantial evidence supports the Board's finding that the parties orally agreed to extend their contract without qualification, and therefore the management-rights provision remained in effect and privileged the Company's implementation and application of the PIP.⁶

In any event, although not properly before the Court, the Union's challenges to the Board's finding that the parties orally agreed to extend their contract are unsupported by the record. At bottom, the Union seeks to place a

⁶ Although the Union contends, at the very end of its brief (Br 24-25), that the Board's "[d]ecision" is inconsistent with a "clear and unmistakable" waiver analysis, it does not challenge the Board's finding that, "on the face of the management-rights clause, the Union clearly and unmistakably waived its right to bargain over implementation of the PIP procedure." (SA 3.)

revisionist gloss on the Board's reasonable interpretation of the testimony establishing that the parties' chief negotiators orally agreed to extend the expiring contract. First, the Union's claim that the judge made a credibility-based finding is simply wrong: the judge made no such finding. Rather, the judge found that "because there was no 'formal,' i.e., written, extension of the agreement," the management-rights provision did not survive expiration of the parties' contract. (SA 2.) As the Board explained, the judge mistakenly focused exclusively on whether there had been a written extension, without addressing whether there had been an oral agreement. The Union, in raising this argument, fails to acknowledge the judge's error.

In no sense did the judge's analysis hinge on a credibility-based determination that weighed competing witnesses' testimony, demeanor, or the like. Accordingly, the Board in no way overturned a credibility finding.⁷ The Board did nothing more than apply its own analysis to *undisputed* testimony—

⁷ The Union's citation (Br 18-19) of cases involving deference to an administrative law judge's credibility findings is thus irrelevant. In any event, the Union overstates the holdings of those cases. *See, e.g., Chicago Tribune Co. v. NLRB*, 874 F.2d 933, 934-35 (7th Cir. 1992). Further, in raising its challenge, the Union overlooks the fact that it has been settled for over half a century that the Board has the ultimate power and responsibility of determining the facts as revealed by the preponderance of the evidence after conducting a *de novo* review of the record. *See Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), *enforced* 188 F.2d 362 (3d Cir. 1951). As the Board found, the record contained uncontroverted evidence that the parties orally extended their contract without qualification.

including testimony that was referred to by the judge—and the Union has offered no reason for unsettling the Board’s interpretation of that testimony as an oral agreement between the parties to extend their expiring contract. (SA 2, 5, 8.)

The Union’s further attacks on the Board’s finding that the parties’ orally agreed to extend their expiring contract are also unavailing. Thus, the Union challenges (Br 16) the Board’s finding that it was “undisputed” that at all relevant times, the parties understood that they were operating under the terms of the expired contract, as extended. The Union’s challenge is unpersuasive, because it flies in the face of uncontroverted testimony—testimony that the Union tellingly ignores. The Union’s own official, Vice President Strohecker, confirmed the parties’ understanding. (BSA 31-32.) Strohecker also testified that the management-rights provision remained in effect. (BSA 31-32.) His testimony was corroborated by company official Ron Slade. (BSA 146.) Notably, Strohecker and Slade corresponded with one another over Strohecker’s grievance about the implementation of the PIP process, so their understanding of the parties’ contractual relationship is important. (BSA 29.) The Union has provided no basis for unsettling this undisputed testimony.⁸

⁸ The Union’s reliance (Br 15-17) on statements by trial counsel for the General Counsel in response to questions from the judge is irrelevant. The relevant inquiry is whether the witnesses’ testimony supports the Board’s finding. In any

**C. The Union's Attempt to Have this Court Analyze
Readily Distinguishable Cases Is Jurisdictionally Barred;
In Any Event, the Challenge Is Without Merit**

The Union also attempts to unsettle the Board's finding that the parties orally agreed to extend their contract by arguing (Br 19) that the Board's finding "is . . . contrary to its . . . prior holdings in other cases involving similar facts." According to the Union, these cases establish a rigid dichotomy between an agreement to extend a contract and an agreement to work under the terms of an expired contract. The Union concedes that the first sort of agreement would enable a management-rights provision to survive. The Union essentially asserts, however, that the latter type of agreement could never be evidence of such an intention between parties. The dichotomy proffered by the Union is a false one. The Union's selective citation of a handful of cases reveals nothing more than the unremarkable fact that cases in this area are fact-intensive and record-intensive. In short, there is no technical language that parties must use to evidence their intentions.

At the outset, the Court is jurisdictionally barred under Section 10(e) of the Act from entertaining this argument, because it is nothing more than an outgrowth of its similarly-barred attack on the Board's finding that the parties

event, the Union ignores that on another occasion, trial counsel for the General Counsel agreed with the judge that there was an oral extension. (BSA 6-7.)

orally agreed to extend their contract. *See* discussion at pp. 17-20.

In any event, the cases cited by the Union are readily distinguishable from the instant case, and do nothing to advance its position that the words exchanged between the parties' chief negotiators did not amount to an oral agreement to extend the contract.

Thus, in *S&W Motor Lines, Inc.*, 236 NLRB 938 (1978), *enforced in part*, 621 F.2d 598 (4th Cir. 1980), which the Union discusses at length (Br 19-20), the administrative law judge concluded that the parties had not reached a "meeting of the minds" as to a contract extension. The judge's core finding in that case—which, unlike the present case, hinged on conflicting testimony — was that the *only* "clear understanding" between the parties was reflected in full in a written document they executed during negotiations for a new contract. However, that document dealt with the retroactivity of certain benefits, and it said nothing about extending the parties' expired contract. *Id.* at 946, 949. In contrast, here it is uncontested that the parties discussed an extension of the contract and mutually agreed "to work under the current agreement." (SA 1 & n.6.)

Likewise, in *Cardinal Operating Company*, 246 NLRB 279 (1979), on which the Union also relies (Br 20-21, 24), the administrative law judge found that the parties had not agreed to extend their contract. Unlike the parties in the

instant case, the parties in *Cardinal Operating Company* made one-sided statements about their respective *opinions* as to whether the contract remained in effect, and the judge essentially concluded there was no meeting of the minds. *Id.* at 286-87. Further, unlike the parties in the instant case, who mutually agreed to work under the current agreement, the parties in *Cardinal Operating Company* had no such agreement.

The Union's citation to inapposite federal cases involving lawsuits to compel the arbitration of grievances does nothing to advance its cause. As a baseline matter, these contract cases involve litigation under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185), not the Act.⁹ More importantly, they provide no grounds for disturbing the Board's finding that the parties entered into an oral agreement to extend their contract in its entirety. Thus, in *General Warehousemen Local No. 636 v. J.C. Penney Co.*, 484 F.Supp. 130 (W.D. Pa 1980), the judge found there was not a bilateral agreement between the parties to extend their contract. The employer did nothing more than articulate that the terms and conditions of the old contract would continue.

⁹ Section 301(a) of the Labor Management Relations Act states, among other things, that “[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States” In short, Section 301(a) is a separate mechanism “enacted to give the federal courts power to enforce collective bargaining agreements in suits by and against labor organizations.” *The Developing Labor Law* 1298 (Patrick Hardin and John E. Higgins, Jr. eds. 4th Ed.).

Id. at 133-34. In the present case, the Company went well beyond that—its chief negotiator explicitly mentioned a written contract extension in the context of continuing to work under the expiring agreement. The Union saw no need for the extension to be in writing, but otherwise agreed with the Company’s proposal. This agreement was an affirmative action that simply cannot be characterized as a robotic recitation of “legal obligations” under the Act, as the Union would seem to have it. (Br 23.)

For similar reasons, the Union’s reliance on *Graphic Comm. Union, Local 2 v. Chicago Tribune Co.*, 613 F.Supp. 873 (N.D. Ill. 1985), *rev’d* 794 F.2d 1222 (7th Cir. 1986), is unpersuasive. In that case, the plaintiff argued that the employer’s practice of maintaining existing conditions during contract renewal negotiations constituted a promise to extend the contract. *Id.* at 876 n.2.

This is a far cry from what occurred in the present case.¹⁰ In sum, the Union's reliance on these cases does nothing to advance its argument that the Board's finding should be overturned.

In conclusion, the Board reasonably found that the parties orally agreed to extend their expiring contract, and that the Company's actions were privileged by the management-rights provision of the contract, as extended.

¹⁰ The Union ignores the fact that the Board, in its decision (SA 2), cited two cases in which parties had agreed to extend their expiring contracts. The Union does not even attempt to distinguish the cases discussed above at pp. 23-24. Moreover, the orbit of federal district court caselaw is far more diverse than the Union would seem to have it. For instance, in *Newspaper Guild of Greater Philadelphia Local 10 v. Central States Publishing Co.*, 451 F.Supp. 1112 (E.D. Pa. 1978), the court found that an arbitration clause in an expiring contract remained operative as a result of the parties' agreement to "abide by the terms of the old agreement" *Id.* at 1115. By virtue of this bilateral understanding, the court explained, the terms in the old agreement became "extended" terms. *Id.*

CONCLUSION

For the foregoing reasons, the Court should enter a judgment denying the Union's petition for review.

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March 2009

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of settled principles of law to straightforward facts. The Board therefore does not believe that oral argument would materially assist the Court. However, if the Court desires oral argument, the Board believes that 10 minutes per side would be sufficient for the parties to present their respective positions.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOCAL 65-B, GRAPHIC COMMUNICATIONS	*
CONFERENCE OF THE INTERNATIONAL	*
BROTHERHOOD OF TEAMSTERS	*
	*
Petitioner	* No. 08-4045
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 33-CA-15319
	*
Respondent	*
	*
and	*
	*
QUEBECOR WORLD MT. MORRIS II, LLC	*
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,153 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003. The Board further certifies, pursuant to Circuit Rule 31(e), that the PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (3/16/2009 rev. 2), and found free of viruses

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Dated at Washington, DC
this 18th day of March 2009

