UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
ARRMAZ PRODUCTS,	)	
	)	
and	)	Case No. 12-CA-294086
	)	
INTERNATIONAL CHEMICAL WORKERS UNION OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	

AMICUS BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, IN OPPOSITION TO THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT SEEKING EXTRAORDINARY REMEDIES IN VIOLATION OF THE BOARD'S LONGSTANDING _EX-CELL-O_ DOCTRINE

The Coalition for a Democratic Workplace ("CDW"), together with its undersigned member associations Associated Builders and Contractors ("ABC"), The Chamber of Commerce of the United States of America ("the Chamber"), the National Association of Manufacturers ("NAM"), and the National Association of Wholesaler-Distributors ("NAW") (collectively the "CDW _Amici_"), hereby file this _amicus_ brief in response to the General Counsel's motion for summary judgment and the Board's notice to show cause why the motion should not be granted. More specifically, this brief opposes the General Counsel's proposed remedy, which asks the Board to "make the bargaining unit employees whole for the lost opportunity to engage in collective bargaining" during the period when the Employer refuses to bargain in order to test the union's certification in the courts. (GC Mot. at 1-2). This radical proposal would require the Board to overturn one of its most longstanding and established precedents, _Ex-Cell-O Corp._, 185 NLRB

107 (1970). If adopted, the General Counsel's proposed remedy would chill the rights of every employer seeking to petition the courts to review the Board's certification of a union as the exclusive representative of the employer's employees. Overruling *Ex-Cell-O Corp*. would violate the Act, the Constitution, and numerous Supreme Court holdings, and would severely undermine the integrity of the Board on which the regulated community relies to preserve labor relations stability. The General Counsel's proposed new remedy should be rejected in this case and in any other case where the General Counsel has filed the same or similar motion.

INTERESTS OF THE *AMICI*

CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country. CDW and its members are joined by their mutual concern over regulatory overreach by the General Counsel and the Board, threatening the rights of employees and employers protected by the Act, and jeopardizing economic growth. Employers and employees alike rely on the Board to maintain labor relations stability. Such reliance interests are severely undermined, and the integrity of the Board itself is jeopardized, when longstanding and established precedents are overturned without adequate justification, as is threatened in this case.

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 68 chapters represent all specialties within the U.S. construction industry, comprised primarily of firms that perform work in the industrial and commercial sectors. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and fair and open competition.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and

professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million men and women, contributes $2.77 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NAW is an employer and a non-profit trade association that represents the wholesale distribution industry - the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation.

ARGUMENT

1. *Ex-Cell-O* Protects Fundamental Rights of Employers and Was Correctly Decided.

In *Ex-Cell-O*, the Board held it was not empowered by the Act to award prospective compensatory make-whole relief for the period when an employer refuses to bargain while testing the union's certification in court. Specifically, the Board rejected the relief of awarding raises to employees as if they would have been entitled to such increases in collective bargaining which did

not actually occur. 185 NLRB at 108–09. The Board correctly concluded that compelling employers "to accede to terms never mutually established by the parties" would violate the plain language of Section 8(d) of the Act, as applied by the Supreme Court in *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970) (holding that Section 8(d) "does not compel either party to agree to a proposal or require the making of a concession" and limiting the Board's powers to include such a remedy for refusals to bargain.). *See* 185 NLRB at 110. The *Ex-Cell-O* Board therefore properly concluded that imposing a wage increase as a compensatory remedy would constitute a punitive measure against employers exercising their statutory rights to seek judicial review of Board orders, which was (and remains) beyond the Board's statutory authority. *Id.*

Though mentioned only in a footnote in the General Counsel's motion (GC Mot. at 16, n.28), the Board's decision in *Ex-Cell-O* was *enforced* by the D.C. Circuit. *See Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971) (relying in part on the rule that "denial of affirmative relief is appropriate where there is a debatable question," citing *United Steelworkers v. NLRB (Quality Rubber Mfg. Co.]*, 430 F.2d 519, 521-22 (1970)). Since that time, no court has remanded a Board order in a test of certification case for failure to impose the sort of punitive remedy now being advocated by the General Counsel.[1]

The *Ex-Cell-O* decision is further supported by Section 10(f) of the Act, which entitles "any person aggrieved by a final order of the Board" to "obtain a review of such order in any United States court of appeals…." 29 U.S.C. 160(f). It is well established under the Supreme Court's holding in *Boire v. Greyhound Corp*., 376 U.S. 473, 477-78 (1964), that certification

[1] *See, e.g., Retail Clerks Union, Local 1401 v. NLRB (Zinke's Foods),* 463 F.2d 316, 325 (D.C. Cir. 1972) (upholding Board's decision not to award make-whole relief); *Int'l Union of Elec., Radio & Mach. Workers v. NLRB (Tiidee Products II),* 502 F.2d 349 (D.C. Cir. 1974) (*en banc*) (same).

proceedings "are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit." *See also Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139 (1971). Nothing in this or any other Supreme Court decision, or in the legislative history of the Act's review provisions, gives support to the idea that Congress intended the Board to be able to penalize employers for exercising their right to petition for judicial review in the only manner allowed to them – by refusing to bargain with an improperly certified union.

To similar effect is *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), which overturned the Board's attempt to penalize an employer's unsuccessful court filing on constitutional grounds. As the Court held: "The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." *Id*. at 524-25. The *BE&K* Court further recognized the right to petition the courts as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Id.*, quoting *United Mine Workers* v. *Illinois Bar Ass'n,* 389 U.S. 217, 222 (1967). And the Court explained that the right is implied by "the very idea of a government, republican in form," *Id.*, quoting *United States* v. *Cruikshank,* 92 U.S. 542, 552, 23 L. Ed. 588 (1876). The First Amendment right of employers to petition the courts would have little meaning if such petitions resulted in the draconian penalties now being advocated by the General Counsel.

The business community represented by the CDW *amici* has long relied on the foregoing settled principles to seek appropriate review of Board certification decisions. The Board is required by the Administrative Procedure Act to take such reliance interests into account before reversing a longstanding policy. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016)

(failure to acknowledge significant reliance interests resulting in reversal of agency's overruling of its previous position). As further set forth below, the General Counsel's motion gives no attention to the reliance interests and protected rights of employers and otherwise fails to justify overruling *Ex-Cell-O*.

2. The General Counsel's Arguments for Overruling *Ex-Cell-O* Are Wrong.

The General Counsel's motion makes three primary arguments for overruling *Ex-Cell-O*: (i) that the Board should not treat employers testing certification as a "lesser breed of 'wrongdoers'" such that requiring them to pay compensation might be deemed punitive; (ii) that the Board should ignore the Supreme Court's holding in *H.K. Porter* and the plain language of Section 8(d) of the Act; and (iii) that the Board should not treat the proposed remedy as "unduly speculative." None of the General Counsel's arguments have merit for the reasons below.[2]

(i) The General Counsel misstates the unique context of test-of-certification cases.

The General Counsel's motion improperly claims that a make-whole remedy is "particularly appropriate in the context of an Employer's unlawful refusal to bargain with a newly certified union." (GC Mot. at 20-22). The General Counsel reaches this conclusion only by cherry picking legislative and judicial efforts to restrict *direct* judicial review of the certification process. The General Counsel virtually ignores the longstanding precedent (*Boire*, et al) establishing the

[2] As a preliminary argument, the General Counsel asserts without citing any current legal authority that *Ex-Cell-O* is "ripe for reconsideration." (GC Mot. at 17-19). It is telling, however, that the General Counsel primarily relies for this argument on a California agricultural bargaining law whose drafters were required to *modify the NLRA's text* in order to empower the Agricultural Labor Relations Board to "mak[e] employees whole … for the loss of pay resulting from [an] employer's refusal to bargain." Cal. Lab. Code 1160.3. Likewise irrelevant is the experience and different statutory scheme of the Ontario Labour Relations Board cited in the General Counsel's motion. (GC Mot. at 20).

right of employers to obtain judicial review of the Board's certification after the Board makes an unfair labor practice finding. As stated in *Boire*, 376 U.S. at 478-79:

> [Certification] decisions, … are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, Section 9(d) of the Act makes full provision for judicial review of the underlying certification order….* * * That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays. * * *
>
> Both the House and the Senate Reports spelled out the thesis, repeated on the floor, that the purpose of Section 9(d) was to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election." [citing 79 Cong. Rec. 7658].

Contrary to the General Counsel's motion, because employers are compelled to refuse to bargain as the only means by which they can test union certifications in the courts, the *Ex-Cell-O* Board was entirely correct in holding that technical unfair labor practices committed by such employers are a "lesser form of wrongdoing." 185 NLRB at 110. The General Counsel's claim that a punitive make-whole remedy is appropriate in such circumstances runs contrary to the congressional scheme and Supreme Court authority.

In truth, the General Counsel's proposed remedy should not be characterized as a "make-whole" remedy at all. The General Counsel's proposed remedy is nothing less than an impermissible demand for *consequential* damages. Consequential damages are those damages "that do not flow directly and immediately from an injurious act, but that result *indirectly* from that act." *Black's Law Dictionary*, 54 (7th ed. 1999) (emphasis added). The Board is not authorized to award consequential damages under Section 10(c) of the Act. "Congress did not establish a

general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Int'l Union, United Auto Workers v. Russell*, 356 U.S. 634 (1958).

The General Counsel's analogies to civil actions outside the NLRA and to remedies for unilateral changes while certification challenges are pending are likewise inapposite. (GC Mot. at 25-29). The test-of-certification process is unique to the Act. And there is no claim here that the employer has made unilateral changes while the test of certification is pending. *Compare Mike O'Connor Chevrolet-Buick-GMS Co*., 209 NLRB 701, 703 (1974).

(ii) The Board remains bound by the Supreme Court's holding in H.K. Porter and the plain language of Section 8(d) of the Act.

The General Counsel's motion expends considerable space arguing that its proposed make-whole remedy does not violate Section 8(d) or the Supreme Court's decision in *H.K. Porter*. (GC Mot. at 31-40). The General Counsel's arguments are unavailing and cannot override the plain language of the Act and the Supreme Court's holding.

Section 8(d) flatly states that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Yet the General Counsel's motion seeks to impose a remedy that is exactly such a concession and presumes the likelihood of an agreement between the parties on a wage increase that could not be lawfully compelled by the Board. The Supreme Court in *H.K. Porter* expressly barred the Board from imposing a remedy that presumes to compel agreement between the parties where they have not in fact agreed:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8 (d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental

> policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 107-08. This holding refutes the General Counsel's claimed distinction between imposing a contract term and imposing a wage increase based on a presumed (but fictional) agreement between the parties as a "remedial" measure. Just as the Board held in *Ex-Cell-O,* "the distinction is more illusory than real." 185 NLRB at 110. As the Board further held: "Despite the admonition of the Supreme Court that Section 8(d) was intended to mean what it says, *i.e*., that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession,' one of the parties under this remedy is forced by the Government to submit to the other side's demands." *Id*.

Contrary to the General Counsel's motion, the foregoing holding of the Supreme Court and the Board remain as valid and controlling today as they have always been, and there is no basis for the Board to depart from these long-established principles now, in the absence of legislation which Congress has chosen not to pass.

iii. The General Counsel's proposed remedy is entirely speculative and arbitrary.

As was well articulated by the Board in *Ex-Cell-O*,185 NLRB at 110, and contrary to the General Counsel's claims, the proposed remedy described in the motion is inherently speculative and arbitrary. Unlike the remedies in other contexts on which the General Counsel relies, here the proposed make-whole remedy cannot be calculated without presuming an agreement that the Board is not entitled to presume – or to compel.

The General Counsel's motion ignores the fact that a substantial percentage of unions and employers are unable to agree on a wage increase at all in "first contract" negotiations. Recent reporting indicates the mean number of days it takes newly unionized employers and their employees to reach agreement, if at all, is 465 days.[3] Based upon such statistics, the only reasonable conclusion is that the likelihood of achieving a wage increase through the supposedly lost opportunity to bargain is extremely low, at least while the test of certification is pending in the a court of appeals. By granting a remedy which presumes an agreement between the parties and/or an agreement within any arbitrarily designated time period, the General Counsel is asking the Board to engage in an exercise that is not only speculative but is virtually guaranteed to reach an arbitrary and punitive outcome.

The General Counsel's proposed solution of identifying and utilizing "comparator" contracts to calculate lost wages, in reality would compound the problem by comparing employers who cannot be compelled to reach agreements with employers who have voluntarily chosen to do so. And of course in many instances, sufficiently comparable contracts do not even exist.

The General Counsel cannot propose that the Board overturn long-settled law, and then leave it up to the compliance process to address the inevitable (unanswerable) questions that will result. In considering whether to overrule *Ex-Cell-O*, the Board is required to address the full implications of such an action. *Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (failure to deal with important aspects of a problem addressed by a decision being overturned constitutes arbitrary and capricious agency action).

[3] https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-now-it-takes-465-days-to-sign-a-unions-first-contract.

CONCLUSION

For the reasons set forth above and in the Respondent Employer's opposition, the General Counsel's motion asking the Board to overrule its holding in *Ex-Cell-O* should be denied.

Respectfully submitted,

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August 26, 2022