

No. 24-1003

Consolidated with Case Nos. 24-1014, 24-1016, 24-1021, 24-1022

United States Court of Appeals
for the District of Columbia Circuit

ALPHABET WORKERS UNION-COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 9009,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

-and-

COGNIZANT TECHNOLOGY SOLUTIONS
U.S. CORP., and GOOGLE, LLC,

Intervenors.

PETITION FOR REVIEW
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE NO. 16-CA-326027

PETITIONER'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioner states as follows:

Parties:

The parties before the Court are:

1. Petitioner Alphabet Workers Union-Communications Workers of America, Local 9009 (“AWU” or “Union”)
2. Respondent National Labor Relations Board (“NLRB” or the “Board”)
3. Intervenor Cognizant Technology Solutions U.S. Corp. (“Cognizant”)
4. Intervenor Google, LLC (“Google”)

Ruling Under Review:

The ruling under review is the Decision and Order of the NLRB entered on January 3, 2024, and published at 373 N.L.R.B. No. 9, slip op. (NLRB Case No. 16-CA-326027). This ruling held that Cognizant and Google, by refusing to recognize and bargain with AWU, engaged in unfair labor practices under Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5). A true and correct copy of the Decision and Order was attached to AWU’s Petition for Review, filed on January 5, 2024.

Related Cases:

AWU is unaware of any related cases currently pending between the parties involving the same or similar issues. The petitions have been consolidated.

STATEMENT REGARDING JOINT APPENDIX

Pursuant to Federal Rule of Appellate Procedure 30(c) and Circuit Rule 30(c), counsel for the parties have conferred and agreed to use a deferred joint appendix.

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GLOSSARY OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Definition</u>
Act	National Labor Relations Act, 29 U.S.C. §§ 151 <i>et seq.</i>
AWU	Alphabet Workers Union-Communications Workers of America, Local 9009
AWU MSJ	Alphabet Workers Union’s Motion for Summary Judgment
Board	National Labor Relations Board
Cognizant	Cognizant Technology Solutions U.S. Corp.
Employers	Cognizant and Google, collectively
Generalist	Music Generalist, worker on the Music Content Operation
SPE	Senior Process Executive-Data/Music Generalist, worker on the Music Content Operation
SME	Subject Matter Expert, worker on the Music Content Operation
Google	Google, LLC
Google FTE	Google Full-Time Employee
G.C. MSJ	NLRB General Counsel’s Motion for Summary Judgment
MCO	YouTube Music Content Operation
NLRB	National Labor Relations Board
Union	Alphabet Workers Union-Communications Workers of America, Local 9009

INTRODUCTION

On October 21, 2022, the Alphabet Workers Union-Communications Workers of America, Local 9009 (“AWU” or “Union”) filed its petition before the National Labor Relations Board (“NLRB” or “Board”) to represent the YouTube Music Content Operation workers, jointly employed by Cognizant Technology Solutions U.S. Corp. (“Cognizant”) and Google, LLC (“Google”) (collectively “Employers”). The workers voted unanimously to be represented by AWU in an NLRB-directed election on April 26, 2023. Nevertheless, Cognizant and Google have refused to recognize AWU despite their statutory obligation to bargain in good faith under the National Labor Relations Act (“Act”). During the intervening two years since the workers sought to unionize, Google and Cognizant have subjected bargaining unit members – their own employees – to a series of unfair labor practices that have tangibly harmed the workers in the absence of bargaining.

To remedy this wrong, AWU filed an unfair labor practice charge against Cognizant and Google with the NLRB and asked for remedies to put these workers in the same position they would have been in but for the Employers’ unlawful refusal to bargain. After all, the Board, for its part, has a statutory mandate to “take such affirmative actions” as will make workers whole for workplace labor violations. 29 U.S.C. § 160(c). However, the decision the Board ultimately issued falls far short of this charge. It found the Employers violated the Act by refusing to bargain, but

simply ordered the Employers to do what they were already required to do, bargain. The Board failed to consider meaningfully the Union's request for other remedies.

More than a procedural error, the Board's refusal to address concrete harms caused by the Employers' labor violations frustrates the remedial purpose of the Act. Congress empowered the Board "to create 'a restoration of the situation, as nearly as possible, to that which would have obtained' but for the unfair labor practices." *N.L.R.B. v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) (quoting *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941)). The Board ignored its statutory mandate in this case. The Union's petition should be granted.

JURISDICTIONAL STATEMENT

The Court has jurisdiction to review the NLRB's final order in this matter, 373 N.L.R.B. No. 9, slip op. (Jan. 3, 2024), pursuant to 29 U.S.C. § 160(f), which permits "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to obtain review "in the United States Court of Appeals for the District of Columbia."

STATEMENT OF THE ISSUES

1. Whether the Board abused its discretion in denying the requested non-monetary remedies without explanation or analysis.
2. Whether the Board erred by severing the question of monetary remedies for future consideration.

STATUTORY AND REGULATORY PROVISIONS

Pursuant to Circuit Rule 28(a)(5), applicable statutes to this petition for review are as follows:

29 U.S.C. § 160(c).

“ . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act”

29 U.S.C. § 160(f).

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

29 U.S.C. § 158.

“(a) Unfair labor practices by employer — It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; 29 U.S.C. § 160(f)...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.”

5 U.S.C. § 706.

“To the extent necessary to decision and when presented, the reviewing court shall decide all questions of relevant law, interpret constitutional and statutory provisions, and the meaning of applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

STATEMENT OF THE CASE

I. BACKGROUND

Google is a multi-trillion-dollar technology company providing an array of internet-based services and products. This case involves Google’s online video sharing platform, YouTube. Cognizant is a Fortune 200 company that provides labor and related services to its clients particularly in the technology sector.

Starting in 2019, Google contracted with Cognizant to provide labor for its “Music Content Operations – Music Content Research” project (the “MCO”). Google refers to Cognizant as a “supplier[] of Google’s extended workforce.” *See*

Cognizant Technology Solutions U.S. Corp. and Google LLC, 372 N.L.R.B. No. 108, slip op. at 3 (July 19, 2023) (hereinafter, “Election Order”).¹

The MCO maintains Google’s YouTube Music platform. The MCO consists of approximately 60 rank-and-file workers, all of whom fall into two job categories: Music Generalists and Subject Matter Experts (“SMEs”).² These employees ensure that approved music content is available on the site and correct any glitches. As such, these workers manage virtually all aspects of Google’s YouTube Music platform on an ongoing basis. *Id.*

II. THE DECISION AND DIRECTION OF ELECTION

AWU filed a petition with the Board to be recognized as the exclusive representative of a unit of all Music Generalists and Subject Matter Experts on the MCO, jointly employed by Cognizant and Google, pursuant to 29 C.F.R. § 102.66, on October 21, 2022. In response to the petition, Google contested that it was a joint employer of the bargaining unit employees.

¹ Pages 1-2 of the Election Order constitute the Board’s order denying Google and Cognizant’s request for review of the Regional Director’s Decision and Direction of Election. Pages 2 through 8 are the Board’s reproduction of the Regional Director’s Decision and Direction of Election, which was under the Board’s review.

² In the record, Music Generalists are sometimes referred to as Senior Process Executives-Data, or SPEs. Generalist and SPE refer to the same job classification for which Google and Cognizant have different nomenclature.

Region 16 of the Board conducted a hearing day-to-day from November 29, 2022, through December 5, 2022, in which Google, Cognizant, and AWU presented evidence for the record. Specifically, the parties put on 8 witnesses and introduced thousands of pages of exhibits, primarily related to the joint employer issue. For its part, the Union put on 10 hours of testimony from 4 bargaining unit employees who testified about their own personal experiences working jointly for Google and Cognizant. The Union supported that testimony with hundreds of pages of emails and other communications, workplace policies, training materials, images of work tools, and audio recordings. In other words, the evidentiary record related to the joint employer issue is detailed and well-developed.

On March 3, 2023, the Regional Director issued a Decision and Direction of Election (“DDE”), finding Google and Cognizant acted as joint employers under the Act. The Regional Director’s decision focused on four aspects of the evidentiary record that showed Google exerted “direct and immediate control over benefits, hours of work, supervision, and direction of work. [And] [t]o a lesser extent, Google also exercises control over unit employees’ wages by setting minimum standards.” Election Order, at p. 7.

Following the Regional Director’s decision, the NLRB conducted an election by mail-in ballot on April 26, 2023. The Union won the election unanimously by a count of 41 to zero. The Regional Director certified AWU as the exclusive

representative of the bargaining unit, jointly employed by Google and Cognizant, on May 4, 2023. The Employers' duty to bargain with AWU commenced upon certification. *See AFL-CIO v. N.L.R.B.*, 57 F.4th 1023, 1039 (D.C. Cir. 2023).

Subsequently, Google and Cognizant both sought review of the Regional Director's DDE, contesting the joint employer decision. On July 19, 2023, the Board denied the request for review, agreeing with the Regional Director that Google exercised substantial direct and immediate control over supervision, hours of work, and benefits so as to create a joint employer relationship. Election Order, at p. 1.

The Board agreed with the Regional Director that Google exerts substantial control over supervision by instructing employees on how to do their job. *Id.* at 1. Cognizant hires the MCO workers, utilizing job descriptions and requirements set by Google, *id.* at 4, who are then supervised and controlled almost completely by Google in their day-to-day work. Google manages and meticulously scrutinizes every aspect of work performed by MCO employees, and Google and Cognizant constantly collaborate on many critical aspects of the MCO employees' terms and conditions of employment – a hallmark of joint employment.

Once hired, MCO employees are subject to both Cognizant and Google workplace policies. *Id.* at 4. They start with one week of Cognizant training in which MCO employees are introduced to their Cognizant e-mail, the timekeeping tool, and information concerning Cognizant-specific policies and benefits. *Id.* at 4. Next, the

new hires must complete a longer Google training, which includes “an overview of Google and YouTube Music,” instruction on how to use Google spreadsheets and other Google tools used to complete their work, and Google business etiquette. *Id.* Google exclusively creates, edits, and maintains the training materials, without input from Cognizant, which provide specific instruction to MCO employees on how to complete daily work tasks. *Id.* at 4–5. Critically, “Google drafted and maintains ownership of these training documents Cognizant may not make changes to those documents” *Id.*

The main job of a Generalist is to fix problems that arise on the YouTube Music platform. To facilitate their work, Google has created “workflows” or processes for each type of problem a Generalist may encounter. *Id.* at 1, 3. For example, one workflow is to fix bugs³ in the YouTube Music platform that are reported by external YouTube users. Tasks for each workflow are compiled either in a Google spreadsheet or the appropriate Google developed and maintained software tool for that workflow.⁴ *Id.* at 5–6. The Generalist is then expected to process the task in accordance with Google’s instruction. *Id.*

³ A “bug” is a Google term for an error or glitch within the YouTube Music platform. For example, if Beyonce’s picture is incorrect on her profile or a song title is incorrect, it is reported as a bug in the workflow to be addressed by a MCO employee. Election Order, at p. 6.

⁴ For example, “Buganizer” is the name of the proprietary Google software tool that MCO employees use to process bugs.

SMEs are, in essence, senior Generalists; they utilize their knowledge acquired over time to assist Generalists in their tasks. *Id.* at 3. SMEs also evaluate the quality of the Generalists' work by using Google-created tools to capture a sample of the Generalists' work, following a rubric with criteria set by Google, and providing a grade for the work which is automatically calculated by the Google tool. *Id.* at 5. As such, Google "actually issue[s] weekly employee performance appraisals . . . through [Google's] exclusive control of the detailed quality 'rubrics.'" *Id.* at 2.

Further, Google direct-hire employees (referred to in the record as Google full-time employees or "FTEs") and MCO employees enjoy a collaborative working dynamic. For example, Google FTEs are always available to help troubleshoot problems that arise in the regular course of the MCO work and give instructions to bargaining unit employees on an as-needed basis. Generalists and SMEs interface directly with Google FTEs in this manner. *Id.* at 6 ("They attend weekly video meetings . . . , chat online daily, and may reach out to Google employees for help with any bugs they are unable to fix."). Google can pull MCO employees off their regular daily work and reassign them to special, "ad hoc" projects. *Id.* FTEs and MCO employees often collaborate on these ad hoc projects, with FTEs providing detailed instruction, guidance and supervision. *Id.* Google FTEs further check the work of both SMEs and Generalists by sampling their work and performing independent quality assessments. *Id.* at 5.

Finally, Google and Cognizant evaluate MCO employees across several metrics largely set by Google and laid out the Employers' contract, including attendance, productivity (including the "rate per hour" at which the work was completed for each workflow), the overall quality assessment score of the work, and compliance with various processes such as timely submission of timesheets, corrections, and an end-of-day form. *Id.* at 5–6. Google may alter these expectations and add or remove standards or service levels in its discretion. An MCO employee's failure to meet these Google standards could result in discipline, including removal from the project. *Id.* at 5.

The Board also agreed with the Regional Director's finding of control over wages and benefits. *Id.* at 2. While Cognizant gives the employees their paychecks, Google exercises significant control over MCO workers' wages and benefits. Google selects benefits for workers by requiring suppliers of its extended workforce, like Cognizant, to provide a minimum level of benefits. *Id.* at 4. This resulted in Cognizant providing additional benefits to MCO employees as compared to other Cognizant employees, such as paid time off, tuition reimbursement, and employee assistance sessions. *Id.* Similarly, Google sets a minimum wage per hour that is to be paid to MCO employees and negotiates the actual hourly pay rate with Cognizant in their contract. *Id.* at 7.

Lastly, the Board agreed with the Regional Director's conclusion that Google and Cognizant co-determine the employees' holiday schedule and overtime hours. *Id.* at 2. The record demonstrates that Google sets the MCO hours of operation and, therefore, these workers' workday. *Id.* at 7. Google may ask employees to work outside their normal work hours and must approve overtime requests. *Id.* Likewise, "Google sets the holiday schedule such that if Cognizant recognizes a holiday that Google does not, unit employees must work." *Id.* Google dictates the employees' work location, including whether they can work remotely. *Id.* at 3.

On this robust record, the Board held, "it is clear that Petitioner has established that Google possesses and exercises such substantial and direct immediate control over one or more essential terms or conditions of the petitioned-for employees' employment as to warrant a finding that Google 'meaningfully affects' matters related to their employment relationship and is therefore their joint-employer under Section 103.40(a)." *Id.* at 2. The Board agreed with the Regional Director's DDE and denied review. *Id.* at 1 ("[T]he Petitioner has established that Google is a joint employer of the petitioned-for employees because it 'share[s] or codetermine[s] the employees' essential terms and conditions of employment' with Cognizant.") (citation omitted).

III. PROCEEDINGS TO ENFORCE BARGAINING

Despite the Board's Election Order, Google and Cognizant refused to recognize AWU and refused to bargain with their employees' chosen representative. They have refused to bargain, in plain violation of the law, for more than a year, and to date they remain stalwart in their defiance of the law.

In response, the Union filed an unfair labor practice charge, 16-CA-326027, alleging that the Employers' refusal to bargain violated Section 8(a)(5) of the Act. On September 25, 2023, the Regional Director issued and served a Complaint, which the Employers answered on October 10, admitting the material facts in the Complaint, namely the Union's certification, its multiple requests to bargain, and the Employers' failure to meaningfully respond. *See Cognizant Technology Solutions U.S. Corp. and Google LLC*, 373 N.L.R.B. No. 9, slip op. (Jan. 3, 2024) (hereinafter "Bargaining Order").

The General Counsel, in response, filed a motion for summary judgment with the Board, pointing out that neither Google nor Cognizant raise any newly-discovered, previously-unavailable evidence or special circumstances warranting re-litigation of those issues. G.C.'s Mem. ISO Mtn. for Summ. J. ("G.C. MSJ"), at pp. 15–18. The General Counsel requested that the Board require the Employers to bargain in good faith, extend the certification year pursuant to *Mar-Jac Poultry Co.*,

136 N.L.R.B. 785 (1962), and that the Board adopt a compensatory, make-whole remedy. G.C. MSJ at pp. 19–20.

In the Union’s view, these requests were insufficient to make the Union whole. Indeed, they failed to recognize the deleterious nature of the Employers’ bald refusal to bargain with their employees. AWU filed its own motion for summary judgment, joining the General Counsel in her requests for relief, but also requesting additional relief, including the imposition of a bargaining schedule, a notice reading, a posting of an Employee Rights poster, mandatory training, and compensatory relief. AWU Mtn. for Summ. J. (“AWU MSJ”), at pp. 8–13.

On January 3, 2024, the Board granted the motions for summary judgment as to the failure and refusal to bargain. The Board concluded that Google and Cognizant’s “conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.” Bargaining Order, at p. 2. Thus, the Board found the Employers had committed an unfair labor practice by not bargaining with the Union in violation of the Act. *Id.*

To remedy these undisputed violations, however, the Board granted limited relief. Specifically, the Board ordered Google and Cognizant to “[c]ease and desist from . . . refusing to recognize and bargain with” AWU; to “bargain with the Union” upon request; and to post a notice of the Board’s order at the Employers’ Austin location. *Id.* at 3. The Board declined to grant the compensatory relief requested by

the General Counsel and the Union and also declined to grant the additional remedies, such as training and a bargaining schedule, requested by the Union. Instead, the Board “decided to sever” the issue of compensatory damages and “retain it for further consideration” at a future time. *Id.* at 3. As to the additional remedies requested by AWU, the Board simply stated, “we decline to order, in this case, the additional remedies sought by the Union in its Motion for Summary Judgment.” *Id.* at 3, n. 6.

The Union timely filed this petition for review on January 5, 2024. In the instant petition, AWU’s challenge is limited to the Board’s denial of the additional remedies requested in its motion for summary judgment.

Google and Cognizant filed petitions for review in the Fifth Circuit Court of Appeals, prompting the Board to submit the petitions for review to the United States Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112(a)(3), for consolidation. The Panel designated this Court as the appropriate venue, where the petitions for review are now consolidated. The Board then filed cross-petitions for enforcement of its order. Cognizant and Google subsequently moved to transfer the consolidated case to the Fifth Circuit, which this Court denied on April 30, 2024.

SUMMARY OF THE ARGUMENT

The Union requested the Board award specific remedies that fall into three general categories. First, the Union requested a bargaining order. Second, the Union requested prospective, non-monetary relief to ensure the Employers' good faith compliance with the bargaining order. Third, and finally, the Union requested compensatory, or monetary, remedies to make the employees whole for their economic losses caused by the Employers' refusal to bargain. AWU MSJ, at pp. 8–9. The General Counsel also sought a bargaining order and compensatory damages. *Id.* (“The Union joins the General Counsel’s request for these requested remedies”); Bargaining Order, at p. 2. Ultimately, the Board granted only the first form of relief sought, ordering the Employers to recognize the Union and bargain with it.

The Board’s decision is flawed in two respects. As to the non-monetary relief, the Board refused to consider AWU’s requests and denied them without explanation. As such, the Board failed to engage in reasoned decision making in violation of its statutory mandate and fundamental administrative law principles. Nonetheless, Board precedent and the record here merit imposition of these remedies.

Further, as to the monetary relief, the Board severed the question and reserved its resolution for an indefinite later date. However, the Act requires the Board to “take such affirmative action” as will remedy the Employers’ unfair labor practices

in each case before it. 29 U.S.C. § 160(c). By declining to reach the question of compensatory damages, the Board ignored its statutory mandate.

STANDING

Pursuant to Circuit Rules 28(a)(7) and 28.1(b), Petitioner sets forth the basis for its standing. Only an “aggrieved” party has standing to bring a petition under 29 U.S.C. § 160(f). A party is treated as aggrieved under Section 10(f) any time the party is “not granted the relief requested” by the Board. *See Oil, Chemical & Atomic Workers Local Union No. 6-418 v. N.L.R.B.*, 694 F.2d 1289, 1294–96 (D.C. Cir. 1982).

AWU requested certain remedies in addition to the Board’s bare bargaining order, remedies which would compensate the Union and the bargaining unit employees for the harms suffered as a result of the Employers’ intentional violation of the law. The Board declined to grant those affirmative remedies. Bargaining Order, at p. 3, n.6. Because AWU did not prevail in whole by the Board’s refusal to grant all the relief it requested, it was aggrieved and may seek review of the Board’s Order. *Oil, Chemical & Atomic Workers Local Union*, 694 F.2d at 1294–96.

ARGUMENT

I. STANDARD OF REVIEW

This Court cannot uphold a decision of the Board that “relied upon findings that are not supported by substantial evidence, failed to apply the proper legal

standard, or departed from its precedent without a reasoned justification for doing so.” *Int’l Longshore & Warehouse Union v. N.L.R.B.*, 890 F.3d 1100, 1107 (D.C. Cir. 2018). “The Board’s findings of fact are ‘conclusive’ if supported by substantial evidence.” *Id.* (quoting 29 U.S.C. § 160(e)). “That said, while [the Court’s] review is deferential, [the Court] will not rubber stamp Board decisions, and [the Court] will remand where a Board order reflects a lack of reasoned decisionmaking.” *Tramont Mfg., LLC v. N.L.R.B.*, 890 F.3d 1114, 1119 (D.C. Cir. 2018).

AWU’s petition for review challenges the Board’s decision as to remedies. Congress has granted the Board broad discretion to “fashion[] remedies to undo the effects of violations of the Act.” *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953) (citing 29 U.S.C. § 160(c)). The Board’s choice of remedy is reviewed for an abuse of discretion. *United Steelworkers of Am. v. N.L.R.B.*, 376 F.2d 770, 773 (D.C. Cir. 1967). However, the agency’s action may be upheld only “on the basis articulated by the agency itself.” *Motor Vehicles Mfrs. Ass’n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983).

II. THE BOARD ERRED BY FAILING TO TAKE AFFIRMATIVE ACTION TO REMEDY THE EMPLOYERS’ UNFAIR LABOR PRACTICES.

“We start with the broad *command* of § 10(c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. § 160(c), that upon finding that an unfair labor practice has been committed, the Board *shall* order the violator ‘to take such

affirmative action . . . as will effectuate the policies’ of the Act.” *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969) (emphasis added). The relevant text is the foundation of AWU’s assignment of error:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and ***shall*** issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, ***and to take such affirmative action*** including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter[.]

29 U.S.C. § 160(c) (emphasis added).

Thus, Section 10(c)’s “broad command” is twofold. Upon a finding the employer has committed an unfair labor practice, the Board must order the employer to cease its violative practices and must also order affirmative relief as will effectuate the policies of the Act. Section 10(c) “extend[s] not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act[.]” *Nat’l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 364 (1940). In other words, Congress has mandated the Board provide both prospective and retrospective relief to employees harmed by an employer’s labor violations.

In this case, the Board issued only an order requiring the Employers to cease and desist from their ongoing unfair labor practices. To be precise, the Board

ordered Google and Cognizant to “[c]ease and desist from . . . refusing to recognize and bargain with” AWU, to “bargain with the Union” upon request, and to post a notice of the Board’s order at the Employers’ Austin, Texas location. *Id.* at 3. Taken together, this type of prospective relief constitutes a traditional bargaining order granted by the Board in refusal-to-bargain cases. However, as to the Union’s request for additional relief, the Board “severed” the question of monetary relief “for future consideration” and, without explanation, simply “declined to order, in this case, the additional [non-monetary] remedies sought by the Union in its Motion for Summary Judgment.” *Id.* at 3, n. 6.

While Section 10 provides the Board broad discretion in fashioning remedies that “will effectuate the policies” of the Act, *see, e.g., Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964), that discretion does not permit the Board to simply ignore a congressional mandate. The Supreme Court has repeatedly admonished that Section 10(c)’s “affirmative action” provision is a “public right and [a] duty” of the Board. *Nat’l Licorice Co.*, 309 U.S. at 364; *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 262 (referring to the “broad command of § 10(c) of the National Labor Relations Act”). The plain language of the statute requires the Board to consider and take affirmative action to remedy fully the employers’ unfair labor practices; it does not permit the Board to refuse to consider the matter in a particular case. This Court has long agreed. “The ‘affirmative action’ clause of § 10(c) is not

a mere charter of authority that the Board has the option to exercise or ignore. It is, as the Court has recently stated, a ‘broad command.’” *Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. N.L.R.B.*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) (citing *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 262).

A. The Board Abused Its Discretion by Declining to Award Certain Non-Monetary Remedies Requested Without Explanation

Against this statutory backdrop, the Board cannot decline to take action without reasoned explanation. Agency discretion, no matter how broad, is not “unbounded.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962). Agency action cannot be “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). “This legal requirement helps assure agency decision making based upon more than the personal preferences of decision makers.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 548 (2009).

The NLRB, like all federal agencies, must follow a “logical and rational” decision making “process.” *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998). “[T]he Board behave[s] in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking.” *Fred Meyer Stores, Inc. v. N.L.R.B.*, 865 F.3d 630, 638 (D.C. Cir. 2017); *Int’l Union of Op. Eng’rs v. N.L.R.B.*, 294 F.3d 186, 188 (D.C. Cir. 2002) (“The Board has an obligation to engage in reasoned decision making.”). Reasoned decision making requires the Board to provide at least some explanation as to its disposition. *See Fred Meyer Stores, Inc.*,

865 F.3d at 638 (stating the Board must “examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and the choice made”) (citing *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Of particular significance in this case, “the agency must do more than simply ignore [an] argument.” *LeMoyne-Owen College v. N.L.R.B.*, 357 F.3d 55, 61 (D.C. Cir. 2004) (citing *Speedrack Prods Group Ltd. v. N.L.R.B.*, 114 F.3d 1276, 1279 (D.C. Cir. 1997)).

“[W]here the Board fails to adequately explain its reasoning,” as it did here, the Court “cannot be deferential.” *Point Park Univ. v. N.L.R.B.*, 457 F.3d 42, 49 (D.C. Cir. 2006). The requirement for the Board to explain its reasoning is no mere *pro forma* exercise. “Without a clear presentation of the Board’s reasoning, it is not possible for [the Court] to perform [its] assigned reviewing function and to discern the path taken by the Board in reaching its decision.” *Id.* at 50.

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. N.L.R.B.* (“*UAW*”), this Court faced a similar petition for review, addressing concerns that the NLRB failed to adequately explain why it denied the remedies requested by the union. 455 F.2d at 1369. There, “the NLRB . . . rejected the Union's requests without stating any findings or conclusions except for [one] sentence in a footnote.” *Id.* This Court found such scant reasoning problematic: “[t]o permit the NLRB to announce its decisions without

setting forth the justifications in the findings and conclusions would be tantamount to vesting in it absolute discretion by removing from the courts the only tools they possess which enable them to exercise their limited function of review.” *Id.* at 1369–70. *UAW*, like this case, dealt with novel remedies. *Id.* (“Although the requested relief is unusual, that alone does not excuse the failure to justify its denial.”).

The Board’s similar denial of the AWU’s requested remedies, also contained to a single “sentence in a footnote,” raises the same deficiencies as those in *UAW*, 455 F.2d at 1369–70. In moving for summary judgment, the Union requested, and the parties briefed, a series of prospective, non-monetary remedies that the Union requested to remedy fully Google and Cognizant’s recalcitrance towards the bargaining process. AWU MSJ, at pp. 9–12 (seeking notice reading, a bargaining schedule, and mandatory training). The Board’s order ignored these arguments, denying the request without explanation, and thus failed “to engage in reasoned decision making” regarding AWU’s request for remedies. *Int’l Union of Op. Eng’rs*, 294 F.3d at 188. By failing to do so, the Board abused its discretion.

The Board’s decision making, or lack thereof, violates fundamental tenets of administrative law. *See* 5 U.S.C. § 557. When the Board determined that the requested prospective remedies were inappropriate, it should have explained why it reached that conclusion. Even more egregiously, perhaps, the Board’s order violates the legislative mandate pursuant to which it exercises its authority. Section 10(c)

does not require the Board to order the all the remedies sought by the employees or their bargaining representative. AWU recognizes that the Board's authority to fashion appropriate remedies – both traditional and novel – is broad and discretionary. *See Int'l Union of Elec., Radio & Mach. Workers*, 426 F.2d at 1250 (“There is a presumption that favors the Board, with its expertise, in its selection of remedies.”) (citation omitted). However, the Board must engage in reasoned analysis when fashioning appropriate relief in each case before it. By failing to do so in this case, the Board abused its discretion.

The Board's failure also upsets the careful balance struck by Congress between the executive and judicial branches. The Administrative Procedures Act, 5 U.S.C. § 706, sets out the standard of judicial review that allows agencies to make policy subject to constitutional checks and balances. “The court fulfills [its] role by recognizing constitutional delegations . . . and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.” *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247 (2024) (internal citations omitted). Here, the Union does not challenge the result of the Board's decision making, but that it engaged in no decision making at all.

This Court has repeatedly granted a union's petition for review when the Board has similarly failed to engage in reasoned analysis of remedies. *See, e.g., UAW*, 455 F.2d at 1369–70 (granting union's petition for review); *N.L.R.B. v.*

Brown, 380 U.S. 278, 291–92 (1965) (“[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.” (citation omitted)). “Although the courts will not lightly interfere with Board orders, the Board is under a complementary obligation to set forth in rational fashion the relationship between the case and the remedy it orders.” *Textile Workers Union of Am., AFL-CIO v. N.L.R.B.*, 475 F.2d 973, 976 (D.C. Cir. 1973) (granting union’s petition for review). Because the Board’s lack of reasoning here is tantamount to the abandonment of that statutory obligation, the Court should grant the petition.

B. The Board’s Decision to Sever the Question of Compensatory Relief is Contrary to the Act

AWU argues that the Board also abused its discretion in severing the question of compensatory, or monetary, remedies for future resolution. The Board did provide a rationale for declining to award monetary relief, namely that “[t]o do [otherwise] would require overruling *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), and outlining a methodological framework for calculating such a remedy.” Bargaining Order, at p. 3. However, this reasoning confuses the Board’s policymaking and adjudicative roles and violates the mandates of Section 10(c) of

the Act.⁵ The Board cannot abdicate its obligation to provide relief by postponing it indefinitely.

Bargaining is the touchstone of the National Labor Relations Act. “The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace.” *Int’l Union of Elec., Radio & Mach. Workers*, 426 F.2d at 1249. “Enforcement of the obligation to bargain collectively is crucial to the statutory scheme.” *Id.* (quoting *N.L.R.B. v. American Natl. Ins. Co.*, 343 U.S. 395, 402 (1952)). In *Ex-Cell-O*, the Board majority acknowledged that “current remedies of the Board are designed to cure violations of Section 8(a)(5),” 185 N.L.R.B. at 108, but declined to order compensatory or monetary damages. The *Ex-Cell-O* decision, in essence, standardized the Board’s abandonment of its statutory mandate of promoting collective bargaining by refusing to entertain, as a threshold matter, additional remedies in refusal-to-bargain cases.

In addition to being contrary to the Act, the Board’s decision in *Ex-Cell-O* creates a process that is ripe for abuse. The test-of-certification process, under

⁵ This Court recently grappled with the Board’s severing the issue of compensatory damages. *Longmont United Hosp. v. N.L.R.B.*, 70 F.4th 573 (D.C. Cir. 2023). In *Longmont*, however, the union did not challenge the Board’s decision to sever, as AWU challenges here. Instead, the employer argued that the decision to sever deprived this Court of jurisdiction to review the matter and that the request for compensatory damages creates a dispute of fact defeating summary judgment. The Court rejected that argument. *Id.* at 582 (finding the Board “severed that issue for later consideration, as it has done in other cases raising the same issue”).

current Board law, allows employers to delay recognition of their employees' union for years on end. This type of delay "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 704 (1944). It frustrates the legislative purpose of collective bargaining – peaceful labor relations. 29 U.S.C. § 151.

The Board's abandonment of its statutory mandate creates a zero-sum game in the workplace during this test-of-certification period, where employers gain at the expense of their own employees. This case is no different. Google and Cognizant are, as a result, able to "reap a second benefit from [the] original refusal to comply with the law: [they] may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." *Int'l Union of Elec. Radio & Mach. Workers*, 426 F.2d at 1249. The employers' scofflaw position deprives employees of the economic benefit of bargaining for improved wages and other terms and conditions of employment. Of course, it is not just the employees who suffer economic harm during this period of delay. The Union, as an entity, must also expend considerable resources, over an extended period of time, to continue to represent its members in an effort to secure a first contract for them. In sum, the "prospective-only doctrine" adopted by the Board in *Ex-Cell-O* "means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit." *Id.*

This case is exemplary of the deleterious consequences to industrial peace of the Board's abandonment of the congressional framework of the Act. Since May 4, 2023, when the Regional Director certified the election and the Employers' bargaining obligation commenced, the Union has filed 9 unfair labor practice charges. In other words, in the last 14 months, the MCO employees have suffered repeated workplace abuses that should have been resolved in bargaining. Labor relations at the MCO have spiraled into such an abysmal state that it has received local media attention. The Employers' recalcitrance is certainly to blame, although their dilatory actions have been facilitated by the Board's bald abandonment of its obligations contained in Section 10(c) of the Act.

Against this backdrop, the "traditional remedy" offered by the Board in test-of-certification proceedings is plainly incongruent with its statutory role. Section 10(c) of the Act provides that "the Board shall state its findings of fact and shall issue" its order based on those facts and with notice to the employer. Here, the Board eschewed this congressional mandate, making no findings of fact and choosing instead to "sever this issue and retain it for further consideration" at an undisclosed time. Bargaining Order, at p. 3. The purpose of the Act, and the goal of the Board's exercise of its remedial authority, is "to create 'a restoration of the situation, as nearly as possible, to that which would have obtained' but for the unfair labor practices." *Keystone Steel & Wire*, 653 F.2d at 307 (7th Cir. 1981) (quoting *Phelps*

Dodge Corp., 313 U.S. at 194). However, the *Ex-Cell-O* “traditional” remedy – the only remedy ordered by the Board here – overlooks the myriad harms suffered by the workers, falling short of the “affirmative actions” the Board is required to take.

Individually, the MCO employees have lost the improved wages, benefits and working conditions they would have negotiated in collective bargaining. They have, moreover, suffered unilateral changes by Google and Cognizant that have worsened their working conditions within the MCO. In the aggregate, they have also lost the resources they pool together in the form of dues payments and the ability to use those resources for their mutual aid. The Union, after all, is simply the representative body of the bargaining unit. The MCO workers *are* the Union. They pool their economic resources for the benefit of the group. Unlike Google – a multi-trillion-dollar company – the Union’s resources are very limited, meaning the Employers’ unlawful acts cause the Union to have to devote its limited economic resources to legal compliance rather than mutual aid. In other words, by their dilatory actions, Google and Cognizant have stolen money from their own employees in the form of both wages/benefits and dues.

This case demands a more robust remedy to make up for the lost opportunity to engage in collective bargaining. Google challenges its status as an employer of the bargaining unit, despite a mountain of evidence to the contrary. Cognizant has simply profited from its counterpart’s conduct with no good-faith basis for doing so.

While the Employers are entitled to challenge the Board's joint employer decision before this Court, they are not entitled to profit at the expense of their own employees while seeking judicial review. The plain language of Section 10(c) makes that clear. The Board's disregard for that language "is not sanctified" by couching its inaction as a "traditional" remedy. See *Int'l Union of Elec., Radio & Mach. Workers*, 426 F.2d at 1250.

III. THE COURT SHOULD ORDER THE REMEDIES REQUESTED BY THE UNION.

In light of the Board's errors, AWU requests that the Court grant the petition for review and also order the additional remedies requested by the Union. Remand to the Board would only be necessary to award compensatory relief, as the Board failed to develop a factual record related to the employees' monetary losses. AWU requests the Court order *immediate* enforcement of the bargaining order, and remand to the Board only on the question of compensatory, or monetary, remedies. *Int'l Union of Elec., Radio & Mach. Workers*, 426 F.2d at 1253 (remanding order "to the Board for further consideration of the make-whole claim (while the remainder of the Board's order is enforced)").

The Court is, nevertheless, in a position to order the prospective, non-monetary remedies requested by the Union without remand, as the evidentiary record supports those remedies without further factfinding. See *Red Oaks Nursing Home, Inc. v. N.L.R.B.*, 633 F.2d 503, 509 (7th Cir. 1980) (declining to remand and instead

“reach[ing] the merits of the propriety of the order, in part to avoid further compromise of employee rights inherent in the delay of remand”); *cf. Commc’ns Workers v. N.L.R.B.*, 362 U.S. 479, 480 (1960) (per curiam) (modifying NLRB remedial order where “we find neither justification nor necessity” for the scope of that order). This is true because these prospective remedies are inextricably linked with the detailed factfinding of the Board’s joint employer ruling.

For example, AWU requested an order that both “Employers’ supervisors and managers, particularly those involved in bargaining-related communications, [] attend mandatory training sessions about employee rights under the Act.” AWU MSJ, at p. 12. The Board has already found that MCO employees “regularly interact with Google employees.” Election Order, at p. 6 (detailing types of interaction). It follows that both Employers’ personnel should be trained on their employees’ basic labor rights. Because Google has some involvement in employee discipline and discharge, *id.* at 5, it follows that they should be trained on just cause termination standards, the contractual grievance process, and the like. The same is true for MCO employees’ schedules, work hours, holidays, and overtime pay, all of which Google and Cognizant co-determine and Google can change. *Id.* at 7.

Similarly, the Union requested the Board “require Cognizant and Google CEOs, Ravi Kumar and Sundar Pichai, respectively, to read the notice” of rights and to also mail to and post for their employees, company-wide, an employee rights

poster. AWU MSJ, at p. 10. These communications by Google and its CEO, in particular, will offset the chilling effect of the Employers' multiyear refusal to bargain, and, critically, will demonstrate to Cognizant recruiters and management that its customer, Google, is committed to protecting its employees' labor rights. In other words, this notice reading communicates to everyone involved that Google cannot use suppliers like Cognizant as agents for union busting.

Finally, the Union requested the Board "order that the Employers commence bargaining with the Union within 15 days and set a schedule for bargaining." AWU MSJ, at pp. 11–12. Cognizant obviously believes it cannot bargain without Google's participation – it has refused to bargain for that reason for the last year. Such a remedial order would ensure that both Employers will participate in bargaining without further delay, even if bargaining representatives for the parties are all in different cities or states.

In addition to being supported by the record, each of these remedies is plainly supported by Board precedent. *First*, the Board regularly orders mandatory training for supervisors and managers to "take[] into account the role supervisors have in an employer's compliance with the Act." *HTH Corp.*, 361 N.L.R.B. 709, 716 (2014). Again, the Board should have ordered this remedy here, where the Employers have essentially written off their bargaining obligations with the Union.

Second, the Board has ordered a notice reading remedy when, like here, an employer's unlawful conduct has been "serious and widespread" in order to ensure "the content of the notice is disseminated to all employees." *Homer D. Bronson Co.*, 349 N.L.R.B. 512, 515 (2007). "Reading the notice (and any explanation of rights) aloud disseminates that information through the work force in a clear and effective way." *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 N.L.R.B. No. 80, slip op. at 6 (Apr. 20, 2023). Where there is a "serious" unfair labor practice, the Board may order that a senior official, such as the CEO, read aloud the notice. *Id.* at 10; *Salem Hospital Corp.*, 363 N.L.R.B. 515, 515 n.3 (2015).

It bears repeating that Google and Cognizant's unfair labor practice – a bald refusal to recognize the Union – is so egregious, and has persisted unremedied for so long, that it necessarily undermines employees' confidence in their statutory rights and the Board's ability to enforce those rights. In other words, the Employers' actions undermine the rule of law. If employees elect to be represented by a union, but are prevented from being represented, then the statutory purpose of promoting collective bargaining is frustrated. 29 U.S.C. § 151(1). Although the Board failed to grapple with how to remedy these harms, these principles provide a legal basis for ordering these remedies on this factual record.

Third, the Board may order the parties to submit to a bargaining schedule and has done so when, as here, a party refuses to bargain in good faith for a prolonged

period of time. In *Serenthos Care Center LLC d/b/a St. Christopher Convalescent Hosp.*, 371 N.L.R.B. No. 54, slip op. (Jan. 14, 2022), for example, the Board ordered a bargaining schedule where the employer “unlawfully failed and refused to bargain for a successor collective bargaining agreement despite the Union’s repeated requests to bargain over many months.” *Id.* at 2; *see also Crushin’ It*, 372 N.L.R.B. No. 100, slip op. at pp. 8–9 (June 29, 2023); *Amerigal Constr. Co.*, 372 N.L.R.B. No. 103, slip op. at p. 4 (July 7, 2023). Here, as in *Serenthos*, many months have passed by, and Google and Cognizant have refused to honor the Union’s requests for information or sit down for even a single bargaining session. 371 N.L.R.B. at 2.

In sum, these additional remedies would make a meaningful difference to the Union and the MCO employees. They would help ensure the Employers do not persist in the dereliction of their bargaining obligations. The Board abused its discretion in failing to consider these remedies. Nevertheless, Board precedent and the evidentiary record here support an award of these remedies by this Court.

CONCLUSION

For the reasons set forth herein, the Court should grant the Union’s petition for review, order the prospective remedies requested by the Union, and remand the question of compensatory damages to the Board to decide in the first instance.

Dated: July 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Office 365 with 14-point Times New Roman. The brief contains a total of 8,026 words, as calculated by my word processing software, excluding the statements and other materials specified in Federal Rule of Appellate Procedure 32(f), in compliance with this Court's order, dated May 31, 2024, limiting the word count to 10,000.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 15, 25(d) and 25(c) and Circuit Rule 25(d), I hereby certify that on this 15th day of July 2024, a true and correct copy of the foregoing was served on all other parties through this Court's CM/ECF system, all of whom are registered CM/ECF users.

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