No. 17-531

IN THE

Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF IN OPPOSITION FOR INTERVENORS FOR RESPONDENT TEAMSTERS LOCAL NUMBERS 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839 AND 962

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QUESTION PRESENTED

Should the Supreme Court accept review of a unanimous Court of Appeals decision that upheld a unanimous NLRB decision that was rational, consistent with the National Labor Relations Act, and based on substantial evidence?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Oak Harbor Freight Lines, Inc. The Respondent is the National Labor Relations Board. Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 ("Teamsters" or "Union") are Intervenors for Respondent (as they were in the proceeding before the United States Court of Appeals for the District of Columbia Circuit).

Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 are all employee organizations under 29 USC § 1002(4) and therefore there are no corporate parents and no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF THE CASE

Despite claims by Oak Harbor, the remaining portions of this case, for which Oak Harbor is seeking review, are not novel and do not merit further review. This case merely upholds longstanding NLRB precedent related to collective bargaining and waiver—which both the NLRB and D.C. Circuit Court of Appeals properly followed. In addition, as described in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364 (1998):

> Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42, 96 L. Ed. 2d 22, 107 S.Ct. 2225 (1987), and if the Board's 'explication is not inadequate, irrational or arbitrary,' *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 10 L. Ed. 2d 308, 83 S. Ct. 1139 (1963).

Moreover, the Courts must defer to the NLRB's conclusions if they are supported by substantial evidence. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). With such a strong deferral requirement, in addition to the facts, this case is simply not appropriate for Supreme Court review.

Most of the arguments that Oak Harbor raises in its Petition for Certiorari were already rejected by the NLRB (in a three-to-zero decision, 361 NLRB No. 82 (2014)[1] and

1. Which incorporated by reference NLRB Decision 358 NLRB No. 41 (May 16, 2012) .

the Court of Appeals (in another three-to-zero decision). The arguments were once again rejected by the Court of Appeals when it denied Oak Harbor's request for an *en banc* hearing, and its request for stay of mandate (pending filing of petition for writ of certiorari).

And yes, as Oak Harbor claims, healthcare is important. But that is why employers—such as Oak Harbor—must follow longstanding NLRB precedent and not take away healthcare from employees without first bargaining to impasse—which is exactly what Oak Harbor did to violate the Act in this case.

The basic case law about bargaining and waiver that the Court of Appeals relied upon is decades old. *E.g.*, *NLRB v. Katz*, 369 U.S. 736 (1962); *Metro Edison Co. v. NLRB*, 460 U.S. 693 (1983). And Oak Harbor completely misframes the issue by trying to claim it only had two choices[2]: (1) employees go without healthcare coverage, or (2) Oak Harbor had to unilaterally implement a Company healthcare plan before the parties reached impasse. But these are not the only two choices. The other choice that Oak Harbor had—the legal and proper choice—was to maintain the status quo and apply the Oregon Warehouse Trust (OWT) healthcare plan to the proper Oregon employees and continue to contribute to the OWT; and not unilaterally implement the Company medical plan for all employees; and continue to bargain. Therefore, the cases Oak Harbor cites to support its economic exigency arguments are not analogous to this case, which is why the Supreme Court should not review it. There is not a split in the Circuits or conflict with the Supreme Court that would affect this case.

2. Related to employees covered by the OWT.

In fact, if Oak Harbor would have followed the law, maintained the status quo, and continued to abide by the OWT—which longstanding federal precedent requires—there would be no Unfair Labor Practice (ULP). Consequently, there is nothing legally unique or special here.

In the end, Oak Harbor tries to create issues for the Supreme Court to review by misframing the issue and misleading the Court. This is unfortunate.

Nonetheless, the Court of Appeals properly followed NLRB precedent and upheld the NLRB, which it must do unless the NLRB decision was irrational, inconsistent with the National Labor Relations Act (NLRA), or not based on substantial evidence. *See Allentown Mack*, 522 U.S. at 364; *Fall River Dyeing*, 482 U.S. at 42; *Universal Camera Corp.*, 340 U.S. 474.

A. Procedural History

A trial was held before an administrative law judge of the NLRB in July of 2010 after the Union filed unfair labor practice charges related to Oak Harbor's unilateral cessation of contributions to the Trust Funds and implementation of its Company healthcare plan (as well as other ULPs). The ALJ issued his decision on January 5, 2011, to which the parties filed exceptions and cross-exceptions with the NLRB.

On May 16, 2012, the NLRB issued its decision for this case, 358 NLRB No. 41 (2012), which ultimately ended up in proceedings before the Court of Appeals for the District of Columbia in 2014. But in 2014 the Supreme Court

issued *NLRB v. Noel Canning*, 134 S.Ct. 2550 on June 26. At the time of Decision 358 NLRB No. 41 in 2012, the National Labor Relations Board had two persons whose appointments had been constitutionally challenged. *Noel Canning* held that the challenged appointments were not valid.

Therefore, on August 1, 2014, before ruling on the merits of the case, the Court of Appeals for the District of Columbia vacated and remanded NLRB Decision 358 NLRB No. 41 (2012) to the NLRB for further proceedings. The NLRB then issued Decision 361 NLRB No. 82 on October 31, 2014, which incorporated by reference the earlier Decision 358 NLRB No. 41 (2012). All the parties appealed the NLRB decision and the same case eventually returned to the Court of Appeals for the District of Columbia again.

The Court of Appeals issued its decision on the merits of this case on May 2, 2017. Then the Court of Appeals denied Oak Harbor's request for an *en banc* hearing on July 7, 2017. Finally, the Court of Appeals denied Oak Harbor's request for stay of mandate pending filing of petition for writ of certiorari on August 10, 2017. The petition for a writ of certiorari was filed on October 4, 2017, and placed on the docket on October 10, 2017.

B. Background Facts

1. The Collective Bargaining Agreement, the Trust Funds, and the Subscription Agreements

Oak Harbor and the Union were last party to a collective bargaining agreement in effect from November 1, 2004 through October 31, 2007.[3]

The CBA requires Oak Harbor to contribute to four Teamsters Taft-Hartley benefits Trusts: the Western Conference of Teamsters Pension Trust (WCTPT), Washington Teamsters Welfare Trust (WTWT), Retirees Welfare Trust (RWT), and the Oregon Welfare Trust (OWT).[4]

In order to comply with the CBA and make contributions to three of the trusts, the WCTPT, WTWT, and the RWT require Oak Harbor and the Union to sign a number of forms provided by the Trusts, called "Employer/Union Certifications" (EU) by the WCTPT (pension) and "Subscription Agreements" (SA) by the WTWT (current employee medical) and the RWT (retiree medical).

The OWT, which is the main trust at issue for the petition for this writ of certiorari, provides medical, dental and vision benefits, together with retiree medical

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3. Absent contrary indication in the text, the term "Teamsters" or "Union" subsumes all of the local unions listed on the title page of the collective bargaining agreement.

4. A "Taft-Hartley" trust is governed by a board consisting of equal numbers of employer and union trustees. It is not a trust fund run solely by a labor union.

benefits. Notably, the parties did not sign—nor does the OWT require—an SA or an EU.

Generally, the EUs and the SAs contain language that requires a written labor agreement to be in effect that calls for contributions, and the labor agreement must conform to the Trustees' policies governing the acceptance of those contributions. The EUs and the SAs also prohibit discrimination among members of the bargaining unit with respect to the payment of contributions, and provide for continued contributions after expiration of the underlying collective bargaining agreement, subject to a five-day notice of cancellation.

For nearly a year following contract expiration on October 31, 2007, Oak Harbor continued to forward, and the benefits trusts continued to accept, the contributions required under the expired CBA.

2. The Union Goes on Strike and Oak Harbor Unilaterally Ceases Making Contributions To All Trust Funds

On September 22, 2008, the Union commenced a strike at all of the Oak Harbor terminals covered by the '04-'07 collective bargaining agreement.

The next day, Oak Harbor's lead negotiator, John Payne, notified all of the Teamsters locals of Oak Harbor's intent to cancel its obligation to contribute to the WTWT, WCTPT, and the OWT. On September 26, 2008, Payne similarly notified all of the Union leaders of the Company's intent to cancel contributions to the RWT.

Payne also informed all the Trusts that Oak Harbor wished to continue to make contributions on behalf of "crossover" employees, whom Payne defined as those who "did not join the strike, but chose instead, to cross the picket line and continue working . . . ." However, Payne told the trusts that Oak Harbor did not intend to make contributions on behalf of new-hire "strike replacements." Payne also asked each Trust whether it would continue to accept contributions for crossovers, but not strike replacements. Payne made the inquiry because he knew that the Teamsters Trusts routinely required contributions on behalf of everyone doing bargaining unit work, and that discriminating between crossover employees and strike replacement employees would violate Trust rules. *See,* JA 0487, lines 18-24; JA 0488, lines 21-24.

3. The OWT Responds Differently than the Other Trusts to Oak Harbor's Unilateral Cessation of Making Trust Fund Contributions, Because It Has No Subscription Agreement

Each of the Trusts sent responsive letters informing Payne that the Trust would not accept contributions as proposed in Payne's letters. The letters from the WCTPT, the WTWT and the RWT made reference to the absence of an EU or SA as a basis for declining to accept Payne's proposed contributions. The letter from the OWT, however, stated that it would not accept contributions for crossover employees.

Therefore, the OWT knew exactly what it was doing—refusing contributions for only part of the unit—which it had to do under trust policy.

4. The Parties Agree on Proposal for Crossovers, But Not For Returning Strikers

The Teamsters agreed to escrow WCTPT and RWT contributions for crossover employees during the strike. However, it is likewise undisputed that, as the ALJ found (and affirmed by NLRB), Hobart's agreement related only to crossover employees during the strike and that there was no agreement of any kind with respect to terms and conditions of employment for employees who returned to work after the strike ended. *See Oak Harbor Freight Lines, Inc. and Teamsters Locals 81, et. al,* 361 NLRB No. 82 (2014); incorporated by reference, 358 NLRB No. 41 (2012). Hobart was the lead negotiator for the Union.

Payne ultimately conceded as much on cross examination:

> Q. And, in fact, when you went to the October 9th meeting when you sought agreement from Mr. Hobart with respect to, well, what do we do, what do we do with crossovers, you were actually referring to this October 3rd letter, correct?
>
> A. That's correct.
>
> Q. And you got agreement on this October 3rd letter?
>
> A. That's correct.
>
> Q. And that agreement was only with respect to crossover employees?
>
> A. That's correct.

Q. It had nothing to do with returning strikers?

A. That's correct.

See, JA 0455, line 22 to JA 0456, line 8.

5. The Union Ends the Strike and Oak Harbor Unilaterally Changes Benefits, Relying upon an Admitted "Misstatement" by Payne

On February 12, 2009, Hobart sent an unconditional offer to return to work to Payne on behalf of all of the signatory Unions.

On February 17, 2009, the parties met to discuss details surrounding the return to work. Toward the end of the meeting, Payne gave Hobart a letter. In the letter Payne never claimed that the Union had waived bargaining in the EUs and SAs or that the Company was entitled to act unilaterally. To the contrary, Payne acknowledged a continuing status quo obligation and contended that the only reason the Company could not maintain it was the trusts' unwillingness to accept contributions. JA 0947-0948. He then justified placing returning strikers under a Company medical plan and stripping them of their pension and retiree medical benefits on the basis of an alleged agreement with the Union.

Hobart reacted with surprise and anger, telling Payne that "[he didn't] agree with this" and it was "totally unacceptable." *See,* JA 0391, lines 15-17 (Payne: Hobart said he was in "complete disagreement"); JA 0206, line 18 to JA 0207, line 2 (Hobart: "I was very much in disagreement and anger and didn't believe that that was status quo").

6. Despite Claims by Oak Harbor, It is Undisputed that the Parties Had No Agreement on Benefits for Returning Strikers

In dramatic testimony, Payne conceded on redirect examination that his second letter dated February 17, 2009, is a "misstatement." JA 0535, lines 10-15. In particular, Payne ultimately conceded that the Union never agreed to any changes to the contractually-required benefits for "returning strikers," as the letter wrongly claims. *See,* JA 0534, lines 14-22. Payne stated:

> I used returning strikers over and over in this memo and it was a misstatement when I said what I said about early October '08. In that discussion with Al Hobart and I and Buck was there and Hicks, that that was crossovers.

See, JA 0535, lines 11-15.

In the ensuing months, Payne reiterated his misstatement over and over, including in declarations under penalty of perjury submitted to Region 19 and position statements. *See,* JA 0546, line 7 to JA 0547, line 8; JA 0540, line 20 to JA 0542, line 7; JA 0543, lines 4-25.

7. The Union Made Clear to Oak Harbor that they Had To Apply the Status Quo to Returning Striking Employees

On February 18, 2009, Hobart sent Payne a letter stating the Union's position and proposing a mechanism for resuming participation in all of the benefits Trusts. Hobart informed Payne that it was the Union's position that federal law required that the strikers be returned to work "without the Company making any unilateral changes in

the established terms and conditions of employment as reflected in the parties' expired bargaining agreement." Hobart also proposed, on the basis of attached e-mails from the administrative offices for the trusts, that the parties execute an "interim agreement" and EUs and SAs sufficient to resume participation in the trusts. JA 1124-1128.

On February 25, 2009, Hobart sent Payne a letter noting that strikers had begun to return to work and that the Company refusing to maintain the benefits as reflected in the contract was unlawful. On that same day, Payne sent Hobart a letter claiming that the Union's request that the Company sign an "Interim Agreement" to recommence participation in the Trusts constituted the placing of conditions on the Union's offer to return to work. Payne also told Hobart that the Company would unilaterally apply the terms of Payne's February 17 letter to the returning strikers regarding pension, health and welfare, and retirees health and welfare.

In a letter dated February 26, 2009, Hobart rejected Payne's claim that the Union was placing conditions on its offer to return to work, but renewed the Union's unconditional offer to return to clear up any confusion or misunderstanding.

8. Despite the Parties Not Being at Impasse, Oak Harbor Unilaterally Implemented the Company Medical Plan

Ignoring the Union's objections, the Company unilaterally implemented the provisions of Payne's letter as soon as the strikers returned to work on February 26, 2009. Significantly, Payne did not argue that the unilateral implementation was justified by an impasse, contending

instead that the Union had impermissibly placed conditions on its offer to return to work.

And in other voluminous correspondence between Oak Harbor and the Union during and after the strike, Oak Harbor likewise never claimed that the parties were at impasse, in whole or in part. Hobart testified, without rebuttal, that the Company never declared an impasse, either before or after the strike. *See,* JA 0215, lines 18-22. After some initial evasion, Payne ultimately admitted that the Company never used the words "impasse" or "unilateral" and that he never told Hobart that he believed the Company was privileged to act unilaterally. *See*, JA 0484, line 1 to JA 0485, line 8.

Despite ongoing discussions about whether the Employer was going to argue impasse, Oak Harbor didn't reveal until almost the end of the NLRB hearing that it had a right to argue impasse. Thereafter, the ALJ rejected Payne's claim that an impasse defense was subsumed within affirmative defenses 8 and/or 9 of Oak Harbor's Answer and denied Payne's eleventh-hour motion to amend the Company's Answer. *See,* JA 0626, line 7 to JA 0627, line 10.[5]

Nonetheless, all the evidence indicates that the parties were ***not*** at good faith impasse (on a single issue or overall).[6]

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5. The ALJ correctly concluded that an impasse affirmative defense was not subsumed within Affirmative Defenses 8 and 9 of Oak Harbor's Fourth Amended Answer. *See,* JA 0806-0816. Neither of the affirmative defenses alleges impasse, nor do they even hint at Oak Harbor's Selective Impasse Argument.

6. Without waiving the Union's argument that Oak Harbor's impasse arguments should not even be considered.

9. Coverage by OWT Was the Status Quo

The status quo for Oregon employees in the bargaining unit was to be covered by the OWT for medical, and Oak Harbor to make contributions on behalf of everyone in the bargaining unit (who was eligible for the OWT). Oak Harbor unilaterally changed the status quo by refusing to pay contributions to the OWT, and only offering to pay for crossovers—only part of the bargaining unit. The Trust could not, of course, accept contributions for only part of the unit. In the end, Oak Harbor wrongfully tried to create a new status quo ***after*** it made its unlawful unilateral changes.

Notably, the OWT does not issue a subscription agreement, nor does it require that unions or participating employers sign one. This is undisputed. As a consequence, the language in the EUs and SAs that formed the basis of the NLRB's waiver finding for the WCTPT, the WTWT, and the RWT does not exist with the OWT. Therefore, the Union never waived bargaining and Oak Harbor was required to continue contributing to the OWT on behalf of members of Oregon locals when the strike ended in February, 2009.

Consequently, in its petition, Oak Harbor misrepresents the OWT's requirements by wrongfully lumping it together with the other trusts (WTWT, RWT, and WCTPT).

So any claim by Oak Harbor that the OWT refused contributions for the entire bargaining unit is incorrect.[7]

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7. And after the strike Oak Harbor has never offered to make contributions for the entire bargaining unit. The Teamsters placed Oak Harbor on notice that it was violating the Act when it filed a ULP after Oak Harbor stopped contributing to the OWT.

The WTWT, RWT, and WCTPT may have also refused contributions, but that was for lack of an SA, which Oak Harbor cancelled.

REASONS FOR DENYING THE WRIT

I. OAK HARBOR'S CERTIORARI PETITION DOES NOT PRESENT SUBSTANTIAL QUESTIONS FOR SUPREME COURT REVIEW

A. Oak Harbor Does Not Raise any Novel Legal Questions Related to Its Unilateral Implementation of Its Company Health Care Plan

To begin with, the Court of Appeals decision was proper because it reached solid conclusions that were rational, consistent with the NLRA, and based on substantial evidence (as was the NLRB decision in this case). *See Allentown Mack*, 522 U.S. at 364; *Fall River Dyeing*, 482 U.S. at 42; *Universal Camera Corp.*, 340 U.S. 474. Therefore, this case is not a proper vehicle for review.

Oak Harbor argues that it was entitled to separately implement its benefits changes and eliminations because it was faced with exigent circumstances in February, 2009. But it wasn't.

The NLRB and the Court of Appeals followed longstanding NLRB precedent related to exigent circumstances. For example, the rules governing implementing particular terms separate from the overall contract are summarized in *Vincent Industrial Plastics Inc.*, 328 NLRB 300 (1999). There, the Board explained that when the parties are in negotiations for a CBA "an

employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an *overall* impasse has been reached on bargaining for the agreement as a whole." *Id.,* at 300 *citing Bottom Line Enterprises,* 302 NLRB 373, 374 (1991)(emphasis added). And there is no dispute that the parties were not at impasse.

There are only "two limited exceptions" to this general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." *Vincent Industrial Plastics, supra,* at 300 *quoting Bottom Line, supra,* at 374. Economic exigencies sufficient to trigger the exception must be "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Vincent Industrial, supra,* at 300 *quoting RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), *quoting Hankins Lumber Company*, 316 NLRB 837, 838 (1995), *quoting Angelica Healthcare Services,* 284 NLRB 844, 852-853 (1987). Proving an entitlement to the economic exigency exception requires that the employer meet a "heavy burden." *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995). In particular, the employer has the burden of proving:

> . . . that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency ***was caused by external events, was beyond the employer's control, or was not reasonably foreseeable***.

Vincent Industrial, supra, at 301 *quoting RBE Electronics,* 320 NLRB at 82 (emphasis added).

But Oak Harbor cannot carry the "heavy burden" of establishing that the allegedly exigent circumstances in February, 2009 were "caused by external events, [were] beyond the employer's control, or [were] not reasonably foreseeable." Especially with the OWT, which did not require ***any*** additional documents or actions for Oak Harbor to start making contributions again.

In fact, Oak Harbor could easily have recommenced the status quo at any time it wanted. For the OWT, all Oak Harbor needed to do was to start making contributions again on behalf of the entire bargaining unit. JA 0344, lines 3-15; JA 0346, lines 4-13; JA 0353, lines 12-25.

Indeed, Oak Harbor's John Payne, who is their lead spokesperson and attorney, ultimately admitted that it was his client's obduracy that prevented a return to the pre-strike status quo, not any position taken by the Trusts. *See*, JA 0530, lines 15-20. This demonstrates that the circumstances were not "caused by external events, …beyond the employer's control;" they were a convenient excuse for Oak Harbor to evade its legal obligations.

Under Oak Harbor's arguments, employers could always create economic exigencies by simply refusing to apply the status quo current healthcare plan for its employees, and then argue that they must unilaterally implement a different Company plan, otherwise its employees won't have healthcare coverage. This is, of course, absurd. And not the standard in any court.

In the end, Oak Harbor only had to follow the law and maintain the status quo: Which entailed contributing to the OWT and covering the appropriate employees with the

OWT and not implementing its Company medical plan for all employees. The parties were not at overall impasse or even at impasse on healthcare. So Oak Harbor could not implement under any standard in any court or jurisdiction. And the Union never refused to bargain—it was only insisting on keeping the status quo. By not applying the OWT to the appropriate employees and unilaterally implementing its Company medical plan, Oak Harbor was forcing the Union to bargain to return to the status quo—which is unlawful.

Moreover, the Court of Appeals did not create new law when it ruled, it just found that the cases that Oak Harbor relied on to support its arguments were not analogous or applicable to the facts of this case. Consequently, Oak Harbor cannot meet its burden to establish an economic exigency under any recognized standard, jurisdiction, or court. And even assuming there is a split in the circuits, based on the facts of this case Oak Harbor cannot establish extenuating circumstances or a compelling business justification to justify violating the Act.

Notably, Oak Harbor lost its argument at the Court of Appeals on economic exigency because the facts didn't support it—it didn't meet its burden of proof. It fails to meet the burden of proof under any standard. The Court of Appeals correctly deferred to the NLRB. *See Allentown Mack*, 522 U.S. at 364; *Fall River Dyeing*, 482 U.S. at 42; *Universal Camera Corp.*, 340 U.S. 474. Therefore, this case is certainly not appropriate for Supreme Court review.

B. The Court of Appeals Properly Rejected Oak Harbor's Equitable Estoppel Argument

1. The Teamsters Never Waived Their Right to Bargain about Contributions to the OWT

Oak Harbor mischaracterizes the Court's decision related to its equitable estoppel arguments. To begin with, as discussed in greater detail below, the Union did not act as if the Oregon Trust was subject to a Subscription Agreement. In addition, the Court relied on several different factors and reasons to deny Oak Harbor's equitable estoppel arguments—relying on sound NLRB principles and arguments.

Again, there is nothing new or novel in the Court's decision related to its denial of Oak Harbor's equitable estoppel arguments. The Court did not just rely on the fact that "Oak Harbor had not presented 'affirmative evidence that the Union had informed Oak Harbor that the subscription agreement existed'" as stated by Oak Harbor, to deny its equitable estoppel arguments. The Court followed proper precedent related to Oak Harbor's equitable estoppel arguments.

More specifically, Oak Harbor is overstating what the Court of Appeals held. The Court of Appeals is not requiring that there be affirmative conduct to establish an equitable estoppel defense. The Court of Appeals was merely distinguishing *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005) (and other cases) from the current case (which was cited by Oak Harbor). The *Manitowoc* case had affirmative conduct and the present case does not. The NLRB and the Court of Appeals simply stated

that the facts in the present case don't match the facts of *Manitowoc*, so *Manitowoc* doesn't apply.

Therefore, the Court of Appeals didn't apply the wrong argument or reveal a split in the circuits. It was merely responding to the arguments and cases that Oak Harbor used to support its equitable estoppel argument. The Court of Appeals found that the facts of the present case are different than the facts of *Manitowoc*—or the other cases that Oak Harbor cited to support its estoppel arguments. That is, the Court of Appeals simply rejected Oak Harbor's arguments on a factual or burden of proof basis where Oak Harbor argued the facts of the current case are similar to *Manitowoc* (or to the other cases it cited).

Notably, there were several reasons to deny Oak Harbor's equitable estoppel arguments. To begin with, the OWT does not issue a subscription agreement, nor does it require that unions or participating employers sign one. This is undisputed. Therefore, the Union never waived bargaining and Oak Harbor was required to continue contributing to the OWT on behalf of members of Oregon locals when the strike ended in February, 2009. It is Oak Harbor's burden to establish waiver—but it can't in this case. And it can't in this case because not only does Oak Harbor have to produce a subscription agreement—which it can't—it needs to produce a subscription agreement with waiver/cancellation language—which it also can't.

Put another way, Oak Harbor cannot properly establish waiver only by showing that there was a subscription agreement—it must also show the subscription agreement had a waiver. And there is no evidence that anyone from Northwest or the OWT told Oak Harbor that the subscription agreement had waiver language. In fact, the

OWT could not even confirm that there *was* a subscription agreement, let alone waiver. This lack of confirmation and lack of actual agreement put Oak Harbor on proper notice that it could not establish that the Union waived bargaining.

And even John Payne admitted to Region 19 of the NLRB that, "[i]f no such Subscription Agreement exists, then [his] notice to cancel was legally void." JA 0637 (April 29, 2009 letter to Region 19). The Court should reject any attempt by Oak Harbor to repudiate this representation.

2. OWT Never Refused Contributions for the Entire Unit

Unlike the other trusts, it is undisputed that the OWT does not require an SA and has never refused contributions for the entire bargaining unit (before or after the strike). Yes, the OWT refused contributions for crossovers, but that was based on trust rules of selectivity and the requirement that the OWT cannot accept contributions for only part of the bargaining unit—as Oak Harbor was proposing with only contributing for crossovers. *See*, JA 0976, JA 0347, lines 10-24.[8]

So any claim by Oak Harbor that it was confused by the OWT refusing contributions for the entire bargaining unit is invalid. In fact, Trust Administrator Mark Coles gave undisputed testimony that the OWT would have

8. In a letter to John Payne related to crossovers, Mr. Buckley, the attorney for the OWT, even asked "What basis is there, if any, for the employer making contributions on some employees and not on others?" JA 1156.

continued to accept contributions even after receiving Payne's cancellation letter (JA 0964) because OWT did not have a subscription agreement providing for cancellation. *See,* JA 0346, lines 4-13.[9] Thus, Oak Harbor's claim that Coles did not get permission to collect Oak Harbor's contributions until one week before trial is incorrect. The OWT place no new conditions on Oak Harbor to continue making contributions. JA 1124-1127.

Consequently, it was not reasonable for Oak Harbor to rely on the OWT's refusal to accept contributions only for crossovers[10] as an indication that there was an SA.[11] In fact, Oak Harbor should have known there was no SA because the OWT responded differently than the other trusts to Oak Harbor's proposal related to contributions only for crossovers.

While the letters from the WCTPT, the WTWT and the RWT made reference to the absence of an EU or SA as a basis for declining to accept Payne's proposed contributions, **the letter from the OWT made no such reference in its refusal**, saying only that the Trust "will

9. Coles did confirm that the OWT would accept retroactive contributions from Oak Harbor if ordered by the ALJ. *See,* JA 0351. However, this basis for accepting contributions came after, and was supplemental to, Coles's earlier testimony that the OWT could have continued to accept contributions even after Payne's cancellation letter. *See*, JA 0346, lines 4-13, JA 0964.

10. And there could be no crossovers after the strike ended—only employees.

11. Which is why *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104 (D.C. Circ. 1988) and related cases are distinguishable and not helpful to Oak Harbor.

not accept employer contributions for those employees that you describe as 'crossovers' . . . ." *See,* JA 0974. The request was denied because the OWT could not accept contributions for only part of the bargaining unit as proposed by Payne—not because there was no SA. *See,* JA 0347, lines 10-24; JA 0974.

Moreover, the OWT never said there was definitely an SA. In fact, if there was an SA or EU, Oak Harbor would have known since it would have been required to sign it (as it did for the WTWT (JA 0949); RWT (JA 0951); and WCTPT (JA 0955). Notably, NWA gave a qualified answer when asked about an SA for the OWT. Pet. App. 154(a)-156(a), 213(a)-216(a), 258(a)-259(a). Oak Harbor was never able to produce one—because there isn't one. Therefore, Oak Harbor should have known it did not have an SA for the OWT, or gotten firm confirmation (which it didn't).

In addition, Oak Harbor had no records of an SA for the OWT despite having similar records for other Trusts. JA 454-455, 588-589. This should have put Oak Harbor on notice that it was likely that there was no subscription agreement.

Therefore, Oak Harbor should have double-checked on the existence of an SA before unilaterally ceasing to make payments into the OWT—especially since Oak Harbor has the burden to establish the existence of an SA with waiver language. Oak Harbor, however, was put on proper notice that there was no subscription agreement.

The Union was not part of the discussions when Oak Harbor was asking NWA about an SA—those discussions only involved Oak Harbor and NWA. Oak Harbor cannot blame the Union for what happened in those discussions—

or for Oak Harbor's failure to follow up and confirm the existence of an SA for the OWT. Therefore, Oak Harbor violated the Act when it unilaterally stopped making contributions to the OWT and changed coverage for all its employees to its Company medical plan.

Consequently, Oak Harbor didn't establish the necessary elements to prove equitable estoppel under ***any*** standard in any court or jurisdiction—even assuming there is a split. The Court didn't apply a heightened, different, or incorrect standard for evaluating Oak Harbor's equitable estoppel claim. The Court of Appeals correctly deferred to the NLRB. *See Allentown Mack*, 522 U.S. at 364; *Fall River Dyeing*, 482 U.S. at 42; *Universal Camera Corp.*, 340 U.S. 474. Therefore, this case is certainly not appropriate for Supreme Court review.

B. There Was No Agreement to Place Returning Strikers Under the Company Medical Plan

Despite claims by Oak Harbor, it's undisputed that the parties never agreed to place returning strikers under the Company medical plan. When the strikers returned to work, Oak Harbor unilaterally placed them under the Company medical plan, which forced the Union to file an unfair labor practice charge. That is, Oak Harbor did not return to the status quo for the returning striking employees covered by the OWT, and by then applying the Company medical plan to all employees, which is why the Union filed the ULP.

In fact, Oak Harbor has already openly admitted that there was no agreement on healthcare coverage for returning strikers. Payne conceded this on cross examination. *See,* JA 0455, line 22 to JA 0456, line 8.

Moreover, Payne also conceded on redirect examination that his second letter dated February 17, 2009, where he stated that there was an agreement on placing returning strikers under a Company medical plan and stripping them of the pension and retiree medical benefits, was a "misstatement." JA 0535, lines 10-15. In particular, Payne ultimately conceded that the Union never agreed to any changes to the contractually-required benefits for "returning strikers," as the letter wrongly claims. *See,* JA 0534, lines 14-22, 535, lines 11-15.

Unfortunately, Payne reiterated his misstatement over and over. *See*, JA 0546, line 7 to JA 0547, line 8. And Oak Harbor is using this statement to claim the parties had an agreement on benefits for returning strikers—they didn't.

Once again, Oak Harbor is putting forth this fiction that Oak Harbor and the Union agreed on placing returning strikers under the Company medical plan. But as already described in great detail above, the parties had no agreement to place the returning strikers under the Company medical plan and/or to cut their benefits in any manner. JA0423-0424, 1180-1182. The Union was clear on this—and so was Oak Harbor.

Oak Harbor simply unilaterally cut benefits for returning strikers and then forced the Union to bargain back to status quo. This was the basis for the Union filing the unfair labor practice charges, which both the NLRB and the Court of Appeals found to be valid.

Because there was no meeting of the minds, the NLRB properly ruled there was no agreement. Consequently, there is no reason for Supreme Court review.

CONCLUSION

In sum, Oak Harbor's Petition for Writ of Certiorari should be denied because the remaining portions of this case do not raise any novel issues, and the Court of Appeals decision does not conflict with the Supreme Court or any other Court of Appeals. Moreover, the Court of Appeals decision was proper because it reached solid conclusions that were rational, consistent with the NLRA, and based on substantial evidence (as did the NLRB decision in this case).

Dated this 11th day of December, 2017.

Respectfully Submitted,

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