Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphic Communications Conference/International Brotherhood of Teamsters. Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028738, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124

May 31, 2013

ORDER DENYING MOTION FOR RECONSIDERATION AND MODIFYING REMEDY

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On September 27, 2012, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding adopting the judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) in multiple respects.[1] Among the 8(a)(5) violations affirmed by the Board was that the Respondent engaged in bad-faith bargaining by adhering to an overly broad management-rights proposal while simultaneously committing numerous unfair labor practices away from the bargaining table. To remedy the bad-faith bargaining violation, the Board ordered, among other remedies, that the Respondent reimburse the Union for its negotiation expenses.[2]

1. On October 25, 2012, the Respondent filed a Motion for Reconsideration. On November 8, 2012, the Acting General Counsel filed an opposition.

Under Section 102.48(d)(1) of the Board's Rules and Regulations, a motion for reconsideration must be justified by "extraordinary circumstances." We find that none of the arguments the Respondent raises in its motion satisfy this requirement.[3]

The Respondent argues that the Board improperly "deviated from precedent" by ordering it to reimburse the Union for its bargaining expenses. The Respondent asserts that "[i]n each case involving the extraordinary remedy of reimbursed bargaining expenses, the extraordinary remedy has been specifically sought in a complaint or . . . through a motion." In the Respondent's view, the Board erred in ordering this remedy here because the remedy was waived as neither the Acting General Counsel nor the Union requested this remedy from the judge at the hearing, the judge did not provide for the remedy, and the Union's exception to the judge's failure to provide it does not qualify as a motion.

We find no merit in these arguments. Our authority to order the reimbursement of the Union's bargaining expenses in the absence of such a request to the judge is well supported by precedent.[4] In *Regency Service Carts*, 345 NLRB 671 (2005), cited in fn. 8 of our decision, neither the General Counsel nor the Union requested a bargaining expense remedy from the judge. Id. at 676. Rather, like the Union here, they requested this remedy in cross-exceptions to the Board. The Board granted the request, relying on its "broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct." Id. at 677 (quoting *Teamsters Local 112*, 334 NLRB 1190, 1195 (2001), and *WestPac Electric*, 321 NLRB 1322, 1322 (1996)). Indeed, even in the absence of exceptions to a judge's failure to award the reimbursement of bargaining expenses, the Board may grant this remedy sua sponte. *Teamsters Local 112*, 334 NLRB at 1195.

In addition, the Respondent argues that its bargaining conduct was not sufficiently egregious to warrant the Board's order to reimburse the Union for its bargaining expenses. This argument does not merit reconsideration, as it fails to raise any issue not previously considered by the Board.

2. On December 18, 2012, while the Respondent's motion was pending before us, the United States Court of Appeals for the District of Columbia Circuit granted the Respondent's petition for review in a related case, *Santa Barbara News-Press*, 357 NLRB No. 51 (2011) (*Santa Barbara I*), vacated that Decision and Order and denied the Board's cross-application for enforcement. *Santa Barbara News-Press v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012).[5] The events in *Santa Barbara I* involved an orga-

[1] 358 NLRB No. 141 (*Santa Barbara II*).

[2] 358 NLRB No. 141, slip op. at 3–4.

[3] The Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

[4] It is worth noting that in Board proceedings, remedies are not usually pleaded. See NLRB Casehandling Manual, Part One, Sec. 10380.

[5] As discussed below, the court's decision raises issues with respect to our finding that the Respondent bargained in bad faith in violation of

nizing campaign by the newsroom employees that commenced shortly after the Respondent's owner, Wendy McCaw, implemented several new publishing guidelines to eliminate what she perceived was bias in the employees' reporting. The employees, however, perceived McCaw's guidelines as an attack on their journalistic integrity and submitted a written demand that the Respondent "[r]estore journalism ethics" to the newspaper, recognize the Union, and negotiate a collective-bargaining agreement with the newsroom employees. 357 NLRB No. 51, slip op. at 2. The Board found that during the course of the dispute, which included union requests that readers cancel their subscriptions if employees' demands were not met, the Respondent committed numerous 8(a)(1) and (3) violations, including the discharges of two employees for alleged biased reporting and of six others who protested the initial two terminations. The Board rejected the Respondent's arguments that the employees' demands for journalistic integrity, which it claimed was the principal objective of their organizing and protest activities, was unprotected and that any violations found by the Board would constitute impermissible interference with its First Amendment right to control the content of its newspaper.

When the Respondent reasserted these arguments on appeal, the court agreed and vacated the Board's Decision and Order. The court observed that the "First Amendment affords a *publisher*—not a reporter—absolute authority to shape a newspaper's content," and that "a publisher's editorial policies do not constitute a 'term and condition' of employment" under Section 7. 702 F.3d at 56, 57. Determining, contrary to the Board, that the newsroom employees' actions were primarily directed against the paper's new editorial guidelines, the court found the conduct unprotected. Id. at 57. The court further rejected the Board's argument that its decision was enforceable even if the employees pursued an unprotected goal of gaining editorial control, because they also engaged in protected conduct that sought the Respondent's negotiation of a contract governing wages and working conditions. Id. at 58.

Here, the Respondent insists that the Union's bargaining proposals and the 8(a)(5) allegations continued the employees' unprotected quest for editorial control of the newspaper. The record evidence, however, simply does not bear out the Respondent's assertions.

In support of its position, the Respondent asserts that the Union rejected section 2(a) of the Respondent's management rights proposal, which sought "sole and exclusive rights . . . to determine the content" of its newspaper. 358 NLRB No. 141, slip op. at 78. In fact, the Union did not reject the proposal. The Respondent's own bargaining notes state that the "Union does not disagree that Management has a right to determine the content of the paper." Nor did the Union withdraw this concession by subsequently proposing that the Respondent's right to control the content of its newspaper "does not extend to the use of the employee's byline." The Board has long held that byline protection clauses are mandatory subjects of bargaining, rather than an impingement on a newspaper publisher's right to control the content of its product. *Westinghouse Broadcasting*, 285 NLRB 205, 215 (1987).[6]

We similarly reject the Respondent's contention that the Union sought content control of the newspaper by opposing the Respondent's right to discipline or discharge an employee for "biased reporting." 358 NLRB No. 141, slip op. at 79. The Union in fact *agreed* that biased reporting constituted just cause for discipline and proposed only that the Respondent provide some definitional guidelines so that employees would understand how this disciplinary rule would be applied. The events of *Santa Barbara I*, in which two employees were discharged for biased reporting, notwithstanding that their articles had been approved for publication by management officials who "initially saw no bias," illustrate the reasonableness of the Union's request. *Santa Barbara I*, supra, 357 NLRB No. 51, slip op. at 26, 33, 35–36, 42.

Finally, whatever doubts the Respondent may have had about the Union's intentions regarding content control should have been dispelled by the Union's "Employee Integrity" proposal, which reiterated the byline protection language and made clear that:

> [n]othing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, con-

Sec. 8(a)(5) and (1), and with the special remedies that we ordered for this and the other violations committed by the Respondent. Before discussing these issues, however, we note that the Respondent did not seek to amend its motion to argue that the court's decision warrants reconsideration of any violation found or remedy ordered in our decision. See, e.g., *Ideal Market*, 211 NLRB 344 (1974). By failing to do so, under Sec. 10(e) of the Act, 29 U.S.C. § 160(e), the Respondent has waived reliance on the court's decision as support for any argument that it may ultimately make on appeal with respect to issues reviewable by an appellate court. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1254–1255 (D.C. Cir. 2012); *W & M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1345–1346 (D.C. Cir. 2008).

[6] See also *Capital Times Co.*, 223 NLRB 651, 682 fn. 81 (1976), overruled on other grounds, *Peerless Publications Inc.*, 283 NLRB 334 (1987) (an "employee's professional reputation is among the interests protected by restrictions on management's use of a reporter's byline, which restrictions are included in the instant bargaining agreement and have been held mandatory subjects of collective bargaining").

> sistent with applicable law and with the employee's right to withhold his/her byline as described above.

Santa Barbara II, supra, 358 NLRB No. 141, slip op. at 82. Rather than embrace this offer for what it plainly was—complete acceptance of the Respondent's authority to determine the content of its newspaper—the Respondent rejected the proposal, asserting that it involved a permissive subject of bargaining and would "hamper[] the bargaining process and stifle[] progress towards an overall agreement." Simply put, the Respondent refused to take "yes" for an answer on a matter it asserts was of vital concern to it throughout negotiations.[7]

Whatever may have motivated the Union's organizing efforts, at the bargaining table—as the record demonstrates—the Union was willing to concede the Respondent's right to editorial control. Therefore, we reject the Respondent's content control defense to the 8(a)(5) bargaining violations found by the judge.

3. To the extent that we relied on them in our initial decision, we no longer rely on the violations found by the Board in *Santa Barbara I* as support for the remedies ordered in this case. Nevertheless, having carefully considered the issue, we find that these remedies remain appropriate.

With respect to the broad cease-and-desist order that we provided under *Hickmott Foods*, 242 NLRB 1357 (1979), we adhere to our previous finding that the Respondent's violations in this case alone are sufficient to justify a broad order under the "egregious and widespread misconduct" standard of *Hickmott* without reliance on the alternative standard of proclivity to violate the Act. See 358 NLRB No. 141, slip op. at 3. In assessing the appropriateness of a broad order under either aspect of *Hickmott*:

> the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights.

Five Star Mfg., 348 NLRB 1301, 1302 (2006) (internal quotation and citation omitted). The Respondent's conduct here shows an unmistakable campaign to undermine the Section 7 rights of unit employees. Despite the employees' election of a bargaining representative, the Respondent sought to maintain unilateral control of their terms and conditions of employment. In a pattern of unlawful conduct, it disregarded the fundamental rights of its employees by, among other violations: (1) transferring unit work to nonunit freelance reporters; (2) prohibiting employees from discussing matters involving their terms and conditions of employment outside its employee meeting; (3) bargaining in egregiously bad faith by insisting on proposals that the employees' status remained at-will employment and that granted the Respondent virtually unlimited control over their working conditions; (4) dealing directly with unit employees with regard to their terms and conditions of employment; and (5) implementing unilateral changes concerning mandatory subjects of bargaining. These violations, as well as the other unlawful conduct found in this proceeding, directly affected the entire bargaining unit and sent a clear message that the employees' decision to be represented by the Union would only be to their detriment.

In view of its broad scope and severity, the Respondent's misconduct here alone provides more than a sufficient "objective basis for enjoining a reasonably anticipated future threat to [employees'] Section 7 rights" in accordance with *Five Star Mfg.*, supra. We note that such an expectation is supported by the Respondent's further unlawful conduct following the events involved here. In *Santa Barbara News-Press*, 358 NLRB No. 155 (2012) (*Santa Barbara III*), issuing the same day as the decision in this proceeding, the Board found that the Respondent's service of subpoenas on employees prior to the hearing in the instant case, demanding copies of their confidential affidavits to the Board during the investigation of this case, "had a chilling effect on the employees' rights to participate in Board investigations and coerced the employees in violation of Section 8(a)(1)." Id. slip op. at 2. The Board there found that the Respondent was well aware that it was not entitled to such affidavits before the employees testified at the hearing, having been so informed by the judge in *Santa Barbara I* in a ruling undisturbed by the court's decision in that case. Id., slip op. at 3. Therefore, without relying on the vacated *Santa Barbara I* violations or on the "proclivity" aspect of the *Hickmott* standard, we reaffirm our determination that a broad cease-and-desist order is warranted in this proceeding.

We also find that the notice-reading remedy remains appropriate based on the serious and unit-wide impact of the violations here, all of which were committed by high-

[7] Later in negotiations, the Union resubmitted a revised Employee Integrity proposal that contained stronger language in favor of the Respondent's content control right, but the Respondent again rejected it. The revised proposal read:

> Nothing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, or interfere with the employer's entrepreneurial control of its operations, consistent with applicable law and with the employee's right to withhold his/her byline as described above.

ranking officials of the Respondent. See *OS Transport LLC*, 358 NLRB No. 117, slip op. at 2 (2012); *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46, slip op. at 1–2 (2012). The violations found in *Santa Barbara III* render this remedy all the more warranted.

The 12-month extension of the Union's certification year ordered by the Board is the traditional remedy for the kind of bad-faith bargaining in which the Respondent engaged in this case.[8] The court's decision concerning the violations found by the Board in *Santa Barbara I* does not affect the continued appropriateness of this remedy.

With respect to our order that the Respondent reimburse the Union for its negotiation expenses, we noted in our decision, among other things, that the Respondent's proposal concerning discipline and discharge stated that the relationship with employees under the contract would remain at-will employment and provided a grievance procedure that would end in an unreviewable decision by the copublishers, who committed most of the violations found by the Board in *Santa Barbara I.* Our discussion relied on the Respondent's bad-faith bargaining conduct in adhering to these proposals and not on the violations found in the vacated decision. Therefore, this remedy also remains appropriate.[9]

Accordingly, having duly considered the matter, we find that the Respondent has not raised any extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(d),(1) of the Board's Rules and Regulations.

IT IS ORDERED, therefore, that the Respondent's motion for reconsideration is denied.

IT IS FURTHER ORDERED that the Order and notice be modified to include the following provision regarding the tax and social security reporting remedies:

1. Insert the following as paragraph 2(h) and reletter the subsequent paragraphs.

"(h) Compensate Dennis Moran, Richard Mineards, and unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."

Dated, Washington, D.C. May 31, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue letters or other communications to you from the owner and copublisher offering to provide our attorney to represent you if you are contacted by Board agents investigating unfair labor practice allegations.

WE WILL NOT instruct you that anything said at an employee meeting concerning employees' terms and condi-

[8] See 358 NLRB No. 141, slip op. at 3, and the cases cited therein.

[9] In *Latino Express*, 359 NLRB No. 44 (2012), which issued after the decision in this case, the Board modified its backpay remedy by adding two new requirements: the reimbursement to employees of any additional income taxes they owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year; and the submission of appropriate documentation to the Social Security Administration (SSA) ––allocating backpay, when it is paid, to the appropriate calendar quarters. The Board decided to apply both remedial policies retroactively to all pending cases in whatever stage. Id., slip op. at 1. In accordance with *Latino Express*, we order the Respondent to reimburse Dennis Moran, Richard Mineards, and unit employees adversely affected by the Respondent's unilateral changes an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no unlawful action taken against them. Further, we order the Respondent to submit the appropriate documentation to the SSA so that when backpay is paid to Moran, Mineards, and unit employees adversely affected by the unilateral changes, it will be allocated to the appropriate periods. We shall modify the Order and include a new notice to conform with these revisions.

tions of employment is confidential and proprietary and cannot be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to nonunit employees of contract agencies because you form, join, or assist Graphic Communications Conference, International Brotherhood of Teamsters (the Union), or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT transfer unit work to freelance nonemployees because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT suspend or otherwise discriminate against you because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT discharge you because you form, join, or assist the Union, or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT unreasonably delay in furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as your collective-bargaining representative.

WE WILL NOT transfer unit work from unit employees to nonunit employees of contract agencies and fail and refuse to provide the Union with notice and an opportunity to bargain concerning the decision to utilize the nonunit employees and the effects of the decision on unit employees.

WE WILL NOT fail to grant you merit increases for the period December 2006 through January 2009 without providing the Union notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT unilaterally change the timing of employee meetings with their supervisors as part of the performance evaluation system without providing the Union notice and an opportunity to bargain about the change and its effects.

WE WILL NOT lay off, suspend, or discharge you without providing the Union notice and an opportunity to bargain about these decisions and their effects.

WE WILL NOT assign bargaining unit work to nonunit freelance employees without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

WE WILL NOT unilaterally announce a requirement that you produce at least one story per day without providing the Union notice and an opportunity to bargain about the proposed new policy.

WE WILL NOT bypass the Union and deal directly with you by offering you nonunit terms and conditions of employment for unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that we retain unilateral control over many terms and conditions of employment, thereby leaving you and the Union with substantially fewer rights and protections than you would have without any contract.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed by us at our Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year will extend 1 year from the date that good-faith bargaining begins.

WE WILL reimburse the Union for its costs and expenses incurred in collective-bargaining negotiations from November 13, 2007, until the date on which the last negotiation session occurred.

WE WILL make our unit employees whole for any loss of earnings and other benefits resulting from our discontinuation of our program of merit pay raises for performance years 2006–2008 or our change in the timing of employee meetings with their supervisors regarding their 2008 performance evaluations, plus interest.

WE WILL make unit employees whole for any loss of earnings or other benefits resulting from our wrongful unilateral use of nonunit employees to do unit work, plus interest.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment that we unlawfully made and restore the status quo ante.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no

longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits resulting from our unlawful employment actions against them, less any net interim earnings, plus interest.

WE WILL compensate Dennis Moran, Richard Mineards, and unit employees adversely affected by our unilateral changes for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and WE WILL, within 3 days thereafter, notify each of them that this has been done and that those wrongful actions will not be used against them in any way.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS