No. 98-561

In the Supreme Court of the United States

OCTOBER TERM, 1998

EXXEL/ATMOS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the employer violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by failing to comply with a court-enforced order of the National Labor Relations Board directing the employer to cease and desist from refusing to bargain collectively with its employees' union.

2. Whether the employer waived its right to object in the court of appeals to the National Labor Relations Board's issuance of an affirmative bargaining order, by failing to contest the propriety of the order before the Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals in this case (*Exxel II*) (Pet. App. 1a-17a) is reported at 147 F.3d 972. The decision and order of the National Labor Relations Board (Board) in *Exxel II* (Pet. App. 39-50a) is reported at 323 N.L.R.B. No. 158 (June 5, 1997).

The opinion of the court of appeals in a prior, related case (*Exxel I*) (Pet. App. 25a-38a) is reported at 28 F.3d 1243. The Board's decisions and orders in *Exxel I* (Pet. App. 59a-98a, 53a-58a) are reported at 309 N.L.R.B. 1024 (1992) and 323 N.L.R.B. No. 159 (June 5, 1997).

JURISDICTION

The decision of the court of appeals was entered on June 26, 1998. Pet. App. 1a. A petition for rehearing was denied on August 26, 1998. Pet. App. 101a-102a. The petition for a writ of certiorari was filed on October 1, 1998.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the summer of 1990, the United Steelworkers of America (Union) began an organizing campaign at the plant of Exxel/Atmos, Inc. (Company or Exxel) and subsequently obtained authorization cards from a majority of the Company's 19 production and maintenance employees. Pet. App. 66a. On September 7, 1990, based on this showing of majority support, the Company recognized the Union as the bargaining representative of its production and maintenance employees. *Ibid.* On that same day, however, the Company laid off five bargaining-unit employees, including several of the Union's leading supporters. *Ibid.* The Union responded by canceling a contract-negotiation meeting that had been scheduled for September 12, and by filing charges with the Board alleging that the layoffs were motivated by anti-union animus. *Id.* at 67a-69a. While the unfair-labor-practice charges were under investigation by the Board, neither party attempted to contact the other regarding negotiations. *Id.* at 68a-70a.

On May 7, 1991, Union representative Daniel Applegate, upon learning that the Board's General Counsel planned to dismiss the unfair-labor-practice charges,

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[1] The judgment proposed by the Board was entered by the court of appeals on October 2, 1998. Pet. App. 107a-111a.

requested a meeting to negotiate a contract. Pet. App. 70a. The Company's new president, Bob Shiels, refused to engage in formal negotiations unless the employees voted for the Union in a Board-conducted election. *Ibid.* Applegate responded that an election was not necessary since the Company had already recognized the Union, and he demanded that formal negotiations begin at once. *Ibid.* When Shiels refused this demand, the Union filed a charge with the Board, alleging that the Company had unlawfully refused to bargain. *Id.* at 71a, 77a.

The Board, adopting the findings of its administrative law judge (ALJ), concluded that the Company withdrew recognition from the Union on May 7, 1991, without having a reasonable basis for doubting the Union's majority status, and thereby violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5).[2] Pet. App. 60a n.1, 82a-83a (*Exxel I*). The Board ordered the Company to cease and desist from its unlawful refusal to bargain, and to bargain, upon request, with the Union. *Id.* at 96a-97a.

b. On July 15, 1994, the court of appeals upheld the Board's determination that the Company had unlawfully withdrawn recognition from the Union. Pet. App. 25a-38a (*Exxel I*). The court explained that "[i]f the employer chooses voluntarily to recognize the union * * * the union enjoys a presumption of continuing

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[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) proscribes employer interference with, restraint of, or coercion of employees in the exercise of their statutory rights, which include the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

majority support," which is "irrebuttable" for "a reasonable time after voluntary recognition, usually one year." *Id.* at 30a-31a. The court accepted the ALJ's finding that "a reasonable time for bargaining had not elapsed between Exxel's voluntary recognition of the Union in September, 1990 and the May 7 Shiels/Applegate conversation," in which the Company withdrew recognition from the Union, "because that eight-month period falls well within the one-year window within which a voluntarily recognized union enjoys a conclusive presumption of continuing majority support." *Id.* at 32a.

The court enforced the Board's cease-and-desist order, but it remanded for further explanation of the need for an affirmative bargaining order. The court noted that, while "[c]ease and desist orders * * * require only that the employer conform his conduct to the norms set forth in the Act," bargaining orders, "under longstanding Board practice[,] * * * are accompanied by a decertification bar that prevents employees from challenging the union's majority status for a reasonable period of time." Pet. App. 34a-35a (internal quotation marks omitted). Therefore, the court noted, the Board is required to "explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." *Id.* at 35a. The court added that:

> A strong argument can be made that the Board's decision to impose a bargaining order was justified because Exxel's refusal to bargain occurred during the first year of voluntary recognition. Unlike cases in which an unfair practice occurs after the first year, imposing merely a cease and desist order in first year refusal cases does not return the parties

> to status quo. * * * The cease and desist order requires the offending company to bargain, but it does so in a context outside the protective range of the one-year conclusive presumption. In such a setting, but not in the first year, the company (or its anti-union employees) would be entitled to question the union's majority status * * *. As such, the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union the same protection it rightfully enjoyed during its first year.

Id. at 35a-36a. The court concluded, however, that "it is not for us to apply those rationales to a particular case—at least not in the first instance," for it "is up to the Board, not the courts, to make labor policy." *Id.* at 36a-37a.

c. On remand, the Board again concluded that an affirmative bargaining order was an appropriate remedy for the Company's unlawful withdrawal of recognition and refusal to bargain. Pet. App. 53a-57a. The Board based this conclusion on its holding in *Caterair International*, 322 N.L.R.B. 64, 65 (1996), that an affirmative bargaining order is a standard and "routinely appropriate" remedy for an unlawful refusal to bargain. Pet. App. 54a-56a. The Board also relied on its holding in *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175, 177-178 (1996), remanded on other grounds, 117 F.3d 1454 (D.C. Cir. 1997), that the continuing detrimental effect of an unlawful refusal to bargain on employees' free choice can be cured only by resumption of bargaining for a reasonable time. Pet. App. 56a-57a & n.8. Accordingly, the Board required the Company,

upon the Union's request, "to bargain with it for a 'reasonable period.'" *Id.* at 57a.

2. a. On the same date that it issued its decision on remand in *Exxel I*, the Board issued another decision and order finding the Company guilty of additional unfair labor practices. Pet. App. 39a-52a (*Exxel II*). The Board found that on December 7, 1994, after the remand in *Exxel I*, Ronald Lemke, Exxel's president, gave a speech to the production and maintenance employees in which he explained the procedure for decertifying the Union and informed the employees that the Company was obligated to bargain with the Union unless it was decertified. The Company also gave each of its employees a cash Christmas bonus of $100 during the week of December 23, 1994. *Id.* at 42a-44a.

In early January 1995, one of the company's employees gave the Company form letters in which approximately 13 employees indicated to the Board that they no longer wished to be represented by the Union. Pet. App. 42a-44a. On January 10, 1995, the Company canceled all bargaining sessions with the Union, then scheduled for early 1995. *Id.* at 4a, 43a. On January 26, one of the company's employees filed a formal decertification petition with the Board. *Ibid.* The Company thereafter asserted that it was under no obligation to bargain until a decertification election was held. *Ibid.* By letters dated January 10 and 30, 1995, company counsel asked the Board's Regional Office whether a decertification petition had been signed by a majority of the Company's bargaining-unit employees. *Id.* at 118a-119a, 125a, 128a. The Regional Office declined to provide this information on the ground that Board policy prohibited its disclosure. *Id.* at 130a-131a.

The Board noted that, in its decision on remand in *Exxel I*, it reaffirmed its original finding that the proper remedy for the Company's earlier refusal to bargain with the Union was an affirmative bargaining order requiring the Company, upon request, "to bargain with the Union for a 'reasonable period of time.'" Pet. App. 44a. Finding that the Company "has never acceded to any union demands for bargaining since its August 1991 unlawful withdrawal of recognition," the Board concluded that "it is clear that a reasonable time for bargaining has not elapsed and that the [Company's] refusal to bargain violated Section 8(a)(5) and (1) of the Act." *Id.* at 45a. The Board further concluded that the Company "unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act," and that, because the $100 Christmas bonus constituted wages, the Company's unilateral action in granting the bonus violated Section 8(a)(1) and (5) of the Act. *Id.* at 45a-46a. As a remedy, the Board again ordered Exxel to cease and desist from refusing to bargain, and affirmatively to bargain with the Union upon request. *Id.* at 48a-49a.

b. The Company sought judicial review of the Board's decision on remand in *Exxel I* and its decision in *Exxel II*. As to the Board's decision in *Exxel II*, the court of appeals held that (1) the Company president's speech about the procedures for decertifying the Union did not amount to an unfair labor practice, since it was not coercive and did not promise any benefit; and (2) there was no duty to bargain about the Christmas bonus, since it was a seasonal gift and not a part of the Company's wage structure. Pet. App. 5a-11a.

The court further held, however, that the Company's refusal to bargain with the Union in early 1995 was a "direct violation" of the court's order in *Exxel I* that

the Company "[c]ease and desist from * * * [w]ithdrawing recognition from and refusing to meet and bargain collectively with" the union. Pet. App. 12a, 13a. In addition, the court held, neither the decertification petition, nor the Board's refusal to reveal how many employees supported it, excused the Company's failure to comply with the court of appeals' order in *Exxel I*. *Id.* at 13a. Finally, the court held that Section 10(e) of the Act, 29 U.S.C. 160(e), precluded the Company from challenging the affirmative bargaining order in *Exxel II*, because the Company had not contested the propriety of that order before the Board. *Id.* at 13a-14a.[3]

ARGUMENT

1. The question whether petitioner was justified in continuing its refusal to bargain with the Union turns on whether petitioner failed to comply with the court's decree in *Exxel I*, enforcing a Board order requiring petitioner to cease and desist from refusing to bargain with the Union. That narrow, fact-based issue does not warrant review by this Court. See *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) ("the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes") (internal quotation marks omitted). In any event, the court of appeals correctly concluded that

[3] The court dismissed the Company's petition for review and the Board's cross-application for enforcement of the Board's supplemental decision and order in *Exxel I*. It found it unnecessary to rule on the propriety of the affirmative bargaining order issued in that case, since that order was "effectively identical" to the order in *Exxel II*. Pet. App. 14a & n.5.

petitioner had not complied with the court's prior decree.

The court acknowledged that under some circumstances an employer may suspend bargaining if it can show either that the union has lost majority support or that the employer has a reasonable, good faith doubt of continuing majority support. Pet. App. 12a. The court also recognized that Exxel twice requested by letter that the Board inform it whether a majority of Exxel's employees had petitioned for decertification, but the Board refused the request. *Id.* at 13a. The court held, however, that neither circumstance excused the Company from complying with the order entered in *Exxel I*. "It was 'utterly clear,'" the court stated, that "our order put Exxel under an affirmative obligation to bargain with the union as of November 30, 1994, the date our mandate issued." *Id.* at 12a. Instead, Exxel "held no bargaining sessions with the union in the weeks leading up to January 10. And when on that date Exxel learned of an impending decertification effort on the part of some of its employees," it "promptly canceled all planned bargaining sessions with the union, including one scheduled for the next day," even though "no decertification petition had been filed at that time." *Ibid.* The court concluded that "Exxel should have bargained with the union as soon as was practically possible following the issuance of our mandate. At the very least, it should have gone ahead with the scheduled bargaining sessions until January 26, when a formal decertification petition was filed." *Id.* at 13a.

The court of appeals reasonably interpreted its decree in *Exxel I* to require petitioner to bargain with the Union as of November 30, 1994, when the mandate issued. Pet. App. 12a-13a. The court also reasonably concluded that petitioner's failure to comply with that

obligation precluded petitioner from relying on the decertification petition that was subsequently filed on January 26, 1995. *Id.* at 13a.

Contrary to petitioner's contention (Pet. 11), the decision of the court of appeals in this case is not in "direct conflict" with that of the Third Circuit in *NLRB* v. *New Associates*, 35 F.3d 828 (1994). In *New Associates*, the employer was not under a court order to bargain, and the union was entitled only to a rebuttable presumption of continued majority status, at the time of the filing of the decertification petition. The employer was thus privileged, under the Board's decision in *Dresser Industries, Inc.*, 264 N.L.R.B. 1088, 1089 n.7 (1982), to withdraw from further bargaining with the union if presented with a valid decertification petition supported by a majority of the unit employees. Moreover, there was no assertion in *New Associates* that "the employer's unfair labor practices ha[d] caused the decertification petition to be filed in the first place." 35 F.3d at 835. It was in this context that the Third Circuit held that the Board could not withhold information as to the percentage of employees supporting the decertification petition,[4] which would allow the employer to make an "informed decision" on whether the union had, in fact, lost majority support. *Id.* at 834.

In this case, petitioner, unlike the employer in *New Associates*, refused to bargain and again withdrew recognition before the filing of a decertification petition, and therefore cannot rely on that petition to support a claim that it had a reasonable doubt of the Union's majority status when it withdrew recognition. More-

[4] A petition for decertification will be investigated and processed by the Board if supported by at least thirty percent of the bargaining-unit employees. 29 C.F.R. 101.18(a).

over, petitioner, unlike the employer in *New Associates*, was under a court order to bargain. As the court of appeals correctly observed (Pet. App. 13a), neither the filing of a decertification petition nor the Board's refusal to reveal how many employees signed the petition excused petitioner from complying with that order.

2. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, on a petition for review or application for enforcement of a Board order, "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure * * * to urge such objection shall be excused because of extraordinary circumstances." Petitioner does not challenge the finding of the court of appeals (Pet. App. 13a) that petitioner did not argue before the Board that an affirmative bargaining order was not an appropriate remedy in *Exxel II*. Rather, petitioner argues (Pet. 17-20) that it was not required to present this contention to the Board. That contention raises no issue warranting further review by this Court.

a. There is no merit to petitioner's suggestion (Pet. 18) that the relevant provision of Section 10(e) applies only to objections to substantive findings of unfair labor practices and not to objections to the Board's remedial order. The plain language of the statute makes no such distinction; it says that *no* objection not raised before the Board may be considered by a reviewing court. Section 10(e) merely codifies the longstanding doctrine of exhaustion of administrative remedies, as articulated in *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952): "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection

made at the time appropriate under its practice." This Court and the courts of appeals have consistently applied this doctrine to bar untimely objections to Board remedial orders. See, *e.g.*, *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943); *Southern Moldings, Inc.* v. *NLRB*, 728 F.2d 805, 806-807 (6th Cir. 1984) (en banc).

b. The cases relied on by petitioner (Pet. 19) are clearly distinguishable. In *Oil, Chemical & Atomic Workers* v. *NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988), the court held that a union was not barred from challenging the retroactive application of a Board decision establishing a new rule of law. The court reasoned that the issue had necessarily been presented to the Board, because "[r]etroactivity is necessarily an issue any time a new rule of law is formulated." *Ibid.* Whatever the merits of that reasoning, it has no application in this case, where the Board announced no new rule of law, but simply followed its longstanding policy of issuing an affirmative bargaining order to remedy an unlawful refusal to bargain. See *Caterair Int'l*, 322 N.L.R.B. 64, 64, 68 (1996).[5] It was incumbent on petitioner to urge a departure from that policy.

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[5] Although the Board did not directly cite *Caterair* in *Exxel II*, it relied on, and thus incorporated by reference, its reasoning in *Exxel I*. Pet. App. 44a. In *Exxel I*, the Board expressly relied on *Caterair* as a basis for reaffirming its bargaining order. Pet. App. 54a-55a. Contrary to petitioner's contention (Pet. 17-18), the Board's findings of other unfair labor practices, which the court of appeals reversed (see p. 7, *supra*), were not the "essential roots" of the bargaining order in *Exxel II*. The Board merely treated those findings as an alternative ground for rejecting petitioner's reliance on the decertification petition. Pet. App. 46a. Its primary ground for issuing a bargaining order was the reasoning in *Exxel I* (Pet.

Similarly, in *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 970-972 & n.1 (10th Cir. 1990), the court held that it could consider a due-process issue, even though the issue had never been presented to the Board, because the Board, *sua sponte*, had expressly decided it. In those circumstances, the court held, "the policies underlying [Section] 10(e), *i.e.*, notice, efficiency and providing the Board with the first opportunity to consider a claim," were satisfied. *Id.* at 971.

In the present case, the court refused to consider the contention that "the Board failed to justify the bargaining order" (Pet. App. 13a). Nothing in the Board's decision addresses that specific contention. As has been noted, the Board's view is that it need not engage in a case-by-case factual analysis before issuing an affirmative bargaining order in a withdrawal-of-recognition case. *Caterair*, 322 N.L.R.B. at 64. If petitioner wished to argue in the court of appeals that such an analysis was necessary, it was obligated to give the Board the first opportunity to address the argument by specifically raising it before the Board. It concededly did not do so in *Exxel II*.

c. Contrary to petitioner's contention (Pet. 17-18 & n.6, 19-20 & n.7), the fact that the propriety of a bargaining order was before the Board on remand in *Exxel I* did not excuse petitioner's failure to challenge

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App. 56a-57a & n.8), which relied on *Caterair* as well as *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175, 177-178 (1996) (adopting presumption that any decertification petition filed while employer is unlawfully refusing to bargain, or has failed to bargain for reasonable time following unlawful withdrawal of recognition, results from, and is therefore tainted by, that unlawful conduct). Cf. *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 117 F.3d 1454, 1459-1460 (D.C. Cir. 1997) (approving presumption as rational and consistent with Act).

the need for such an order in *Exxel II*. Although the bargaining orders issued by the Board in the two cases were essentially the same, the underlying issues were different. In *Exxel I*, the issue was whether an affirmative bargaining order was an appropriate remedy for a single unlawful refusal to bargain. In *Exxel II*, the issue was whether the same remedy was appropriate where petitioner had twice unlawfully refused to bargain, the second time in "direct violation" (Pet. App. 13a) of a court order. A negative answer to the former question would not necessarily imply a negative answer to the latter, for "if the employer's violation is deliberate and egregious enough, the interest in deterrence of future violations may override the employees' wishes, especially if it is likely that the workers' rejection of the Union flows from the Company's violations." *Peoples Gas System* v. *NLRB*, 629 F.2d 35, 47 (D.C. Cir. 1980). It was therefore incumbent on petitioner specifically to argue to the Board in *Exxel II* that the added factors of recidivism and disregard of a court order did not make the second withdrawal of recognition "deliberate and egregious enough" to warrant issuance of an affirmative bargaining order without the detailed analysis required by the remand in *Exxel I*.[6]

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[6] Nor is petitioner aided by the fact that the Board did not rely on Section 10(e) in its brief to the court of appeals. This Court held in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982), that a reviewing court "lacks *jurisdiction* to review objections that were not urged before the Board" (emphasis added). Accordingly, the court of appeals properly held (Pet. App. 14a) that the Board's failure to brief the jurisdictional issue did not waive the issue. See *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (provision of Civil Service Reform Act "virtually identical" to Section 10(e) "speaks to courts, not parties" and is therefore "not 'waived' simply because the FLRA fails to invoke it" in court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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