

NO ORAL ARGUMENT REQUESTED

Nos. 07-9519 and 07-9525

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEISER CONSTRUCTION, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

IRON WORKERS LOCAL UNION NO. 10, AFFILIATED WITH
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL,
ORNAMENTAL & REINFORCING IRON WORKERS, AFL-CIO

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

SURREPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

The National Labor Relations Board's ("the Board's") principal brief detailed the substantial evidence that supports the Board's finding that the Company, Leiser Construction, LLC, violated the National Labor Relations Act (29 U.S.C. §§ 151 et seq.) ("the Act") by discharging employee David Coleman, threatening and suspending employee Travis Williams, and refusing to hire applicants Richard Christopherson and Michael Bright because of their union membership and their protected union activities. Additionally, the Company committed several other violations, including threats and interrogations concerning union membership, which the Company did not contest in its opening brief. In response, the Company's reply brief reiterates arguments raised in its opening brief without directly responding to the Board's brief, and boldly misrepresents or ignores the record evidence. In addition, the reply brief raises new arguments to challenge the Board's findings and its remedy. Under well-established principles, the Company is precluded from raising new arguments for the first time in its reply brief.

ARGUMENT

1. The Company asserts (Rep. Br 6)¹ that “[t]he evidence adduced at the hearing does not support any conclusion that [the Company’s] actions were due to unlawful purposes,” and repeatedly accuses the Board (Rep. Br 1, 3, 5-8) of drawing incredible inferences in finding that the Company acted unlawfully. Those claims simply ignore the unlawful statements and actions of company owners Lloyd and Sandra Leiser that were uncontested in the Company’s principal brief and that provided ample basis for the Board’s findings of unlawful motivation.

As set forth in the Board’s principal brief, these uncontested violations include Lloyd Leiser telling Coleman that he would not have hired Coleman if he had known of Coleman’s union background (Bd. Br 9, 19, 26; GCX 12 p.19), and coercively interrogating then-applicant Williams about his union activity (Bd. Br. 12, 20; GCX 17 p.3), as well as Sandra Leiser telling applicant Christopherson that the Company would not hire applicants who are affiliated with the Union² or who

¹ “Bd. Br” refers to the Board’s principal brief, “Co. Br” refers to the Company’s principal brief, and “Rep. Br” refers to the Company’s reply brief.

² The Union is the Iron Workers Local Union No. 10, affiliated with International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO.

engage in union activity (Br 9-10, 19-20; GCX 4 p.2). Those, as well as other uncontested violations, and the suspicious timing of the Company's adverse actions—immediately after learning of their union activity—provided ample basis for the Board's finding that the Board's General Counsel met his initial burden of showing that the Company unlawfully discharged Coleman and suspended Williams. *See* Bd. Br 25-27, 31-34.

Nor, as the Company continues to suggest (Rep. Br 3, 4, Co. Br 19, 21), was the Board legally compelled to simply accept at face value the Company's asserted reasons for Coleman's discharge and Williams' suspension. *See* Bd. Br 29.

Rather, as fully set out in the Board's principal brief (Bd. Br 27-30), the Board reasonably rejected Leiser's claim that he fired Coleman for lying on his job application. The Board found, based on Leiser's instantaneous discharge of Coleman upon learning of Coleman's status as a union organizer, as well as his statement shortly after discharging Coleman that he would not have hired him had he known of Coleman's union status, that Leiser's reliance on Coleman's application was simply untrue. The Board's finding does not, as the Company suggests (Rep. Br 4), exempt Coleman from compliance with the Company's

hiring standards. Instead, the Board found that Leiser falsely relied on Coleman's application as a pretext for discriminating against Coleman.³

Likewise, the Board reasonably rejected the Company's explanation that Williams' removal from the worksite was necessary to promote safety and protect Williams. The record is devoid of any evidence that Leiser ever expressed such a concern to Williams at the time of his suspension. To the contrary, the evidence shows that Leiser's order to Williams to leave the worksite immediately upon learning of Williams' union activity was accompanied by an unlawful threat, a threat that constituted an independent violation of the Act. *See* Bd. Br 31-33.⁴

The Company repeatedly misstates the record evidence in asserting that it did not unlawfully refuse to hire Christopherson and Bright. Thus, the Company states (Rep. Br 16) that it did not hire Christopherson and Bright because their "applications merely indicate that [they] are full time organizers." Under "Skills and Qualifications," however, both Christopherson's and Bright's applications

³ Indeed, the Board (D&O 2 n.5) reasonably declined to address whether Coleman's discharge would have been lawful had the falsified job application been the real reason for his discharge.

⁴ Although the Company (Rep. Br 13) rekindles the assertion (Co. Br 8) that Williams was initially ordered off a job site because of an offensive hard hat and t-shirt, the Company does not dispute (Bd. Br 12-14, 33) that this assertion intertwines two distinctly different events that occurred on two different days.

listed an iron worker apprenticeship, over 20 years of iron work experience, and various certifications. (Bd. Br pp. 10-11, 37-38, 40-41; GCX 7.) For example, Christopherson’s application states: “certified welder, . . . ironworker apprenticeship, 24 years experience structural steel and pre-cast.” (GCX 7.) Similarly, Bright’s states: “certified welder, connector, rigger, foreman, precast erector, sheeter, . . . 28 years experience in ironwork.” (GCX 7.) Accordingly, the Board did not, as the Company asserts (Rep. Br. 16), force it to merely “assume” that they had years of experience.

Likewise, the Company’s claims—that it is “undisputed” (Rep. Br 16-17) that the Company had already filled the positions when Christopherson and Bright applied and that S. Leiser lawfully declined to consider their applications—flies in the face of the record evidence. The evidence demonstrates that hiring was not complete when Christopherson and Bright applied on February 24, 2005. Rather, between February 27 and December 21, 2005, the Company hired 13 employees, with approximately 9 hired between June and December. (D&O 5-6 and n.25; GCX 30.) The Board discredited (D&O 15) S. Leiser’s claim that applications were valid only for a limited time (and, again, the Company did not challenge this finding in its principal brief). Accordingly, the Company had no basis for failing to consider Christopherson and Bright for openings that arose after they applied.

Similarly, the Company's claim (Rep. Br 16-17), that five other union members were offered jobs before the Company knew that an unfair labor practice charge had been filed, is directly contrary to the Company's past admissions before the Board as well as this Court. In its brief in support of exceptions to the Board, the Company acknowledged that the apparent offer to the five union members came only after it had received at least one unfair labor practice charge, filed by the Union, alleging that the Company had unlawfully refused to hire the five union members as well as Christopherson and Bright. See Bd. Br 39. In its principal brief (Co. Br 25-26 n.10), the Company noted that its offer of employment to union members had come after it had received at least one unfair labor practice charge.

In its reply brief (Rep. Br 1, 7, 8, 10, 11, 12-13) the Company raises an inflammatory new argument—namely, that the Union's sole purpose in having its members seek employment with the Company was to “sabotage” it and put it “out of business.” That argument is not properly before this Court because it was never presented to the Board, as required by Section 10(e) of the Act (29 U.S.C. §

160(e)).⁵ Section 10(e) is “[a] limitation which Congress has placed upon the power of courts to review orders of the Labor Board” *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (“Court of Appeals lacks jurisdiction to review objections that were not urged before the Board”). In addition, under settled principles, the Company has waived that issue by failing to raise it in the Company’s opening brief. *See Silvertown Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 783-84 (10th Cir. 2006) (consistent with the principle that failure to raise an issue in an opening brief waives that issue, appellate courts will not entertain an issue raised for the first time in a reply brief); *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n.3 (10th Cir. 2003) (employer’s challenge to findings for the first time in reply brief is insufficient; because employer failed to challenge findings in opening brief, issue is waived); *New York Rehabilitation Care Management v. NLRB*, ___ F.3d ___ (D.C. Cir. 2007), 2007 WL 3145494 *4 (2007) (failure to address issue in its opening brief forfeits right to

⁵ That section provides, in relevant part, that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e).

challenge the Board's finding); *Bd. of Regents of the Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) ("To prevent this sort of sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived.").

In any event, not only has the Company offered no evidence to support its inflammatory claim, but also it (Rep. Br 10, 13) grossly distorts the record by citing to the administrative law judge's decision (ALJD 2, D&O 11) in support of its assertion. The referenced discussion simply describes the fact that Coleman sought employment with the Company. Apparently, under the Company's flawed logic, the mere act of a union member in applying for employment with the Company constitutes sabotage. Although L. Leiser characterized the protected

union activity by Coleman as “treason” (GCX 12 p.18), the Act protects legitimate organizing activity.⁶

3. In its reply brief, the Company claims for the first time (Rep. Br 4) that it did not commit numerous previously uncontested violations of the Act. As discussed above, where a party fails to contest the Board’s finding in its opening brief, it is waived and deemed admitted. Contrary to the Company’s claims (Rep. Br 4), the fact that the Board filed a cross-application for enforcement of its Order

⁶ In a case which issued 7 months after the instant case, *Toering Electric Company*, 351 NLRB No. 18, 2007 WL 2899733 (2007), involving an extensive salting campaign targeting nonunion employers, the Board held that an applicant who is entitled to statutory protection as an employee within the meaning of the Act (29 U.S.C. § 152(3)) is one “genuinely interested in seeking to establish an employment relationship with the employer.” 2007 WL 2899733 *5. The Board further held that the employer must put at issue the genuineness of the applicant’s interest through evidence that creates a reasonable question as to the applicant’s actual interest in going to work for the employer. If the employer puts forward such evidence, then the Board’s General Counsel must rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer. *Id.* As noted above, the Company has never claimed that the discriminatees were not seeking a genuine employment relationship with it.

does not afford the Company an additional opportunity to raise new challenges to the Order in its reply brief.

4. Finally, although the Company (Rep. Br 1-2, 17) continues to attack the Board's make whole remedy on the grounds that it constitutes a windfall, it fails to address the Board's argument (Bd. Br at 44-45) that the claim is not properly before this Court because it was never presented to the Board, as required by Section 10(e) of the Act (29 U.S.C. § 160(e)). See above pp. 7-8. Because this argument was never presented to the Board, the Company is in no position to rely on *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, 2007 WL 1610437 (2007), a case that issued before the Company filed its opening brief, to bolster this argument.

In any event, *Oil Capitol* is not relevant to this proceeding. In *Oil Capitol*, the Board held that it would place the burden on the Board's General Counsel, rather than the employer, to establish in the compliance proceeding the period of time a union organizer-discriminatee would have worked for the employer. The question presented in the instant case is whether substantial evidence supports the Board's finding that the Company is liable for committing a host of unfair labor practices. The instant case does not address the amount of backpay due the discriminatees and/or whether, in the circumstances, the discriminatees are entitled

to reinstatement/reinstatement, issues the Board, with court approval, has for decades left to be resolved in a compliance proceeding. *See Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (“recogniz[ing] the Board’s normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge”). Thus, to the extent the Company seeks to rely on the shifting burdens established by the Board in *Oil Capitol*, to limit its remedial obligations on the ground the discriminatees would not have continued to work for the Company beyond a date certain, it can raise those arguments in a compliance proceeding.

CONCLUSION

For the foregoing reasons, as well as those set out in the Board's principal brief, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

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and	*
	*
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ASSOCIATION OF BRIDGE, STRUCTURAL,	*
ORNAMENTAL & REINFORCING IRON	*
WORKERS, AFL-CIO	*
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 2,522 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
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	*
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ASSOCIATION OF BRIDGE, STRUCTURAL,	*
ORNAMENTAL & REINFORCING IRON	*
WORKERS, AFL-CIO	*
	*
Intervenor	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's brief in the above-captioned case have this day been served by first-class mail upon counsel at the addresses listed below:

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