

**Nos. 08-1148 & 08-1170**

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**UNITED STATES COURT of APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SFO GOOD-NITE INN, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

SFO GOOD-NITE INN, LLC, )  
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 Petitioner/Cross-Respondent )  
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 v. ) Nos. 08-1148 & 08-1170  
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 NATIONAL LABOR RELATIONS BOARD )  
 )  
 Respondent/Cross-Petitioner )  
 \_\_\_\_\_ )

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

SFO Good-Nite Inn, LLC was the respondent before the National Labor Relations Board, and is the petitioner/cross-respondent herein. The Board is the respondent/cross-petitioner herein; its General Counsel was a party before the Board.

**B. Rulings Under Review**

The ruling of the Board under review is *SFO Good-Nite Inn, LLC*, 352 NLRB No. 42, 2008 WL 773411 (Mar. 20, 2008).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel are not aware of any related case.

s/Linda Dreeben  
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Dated at Washington, DC  
this 26th day of February 2009

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## **GLOSSARY**

1. “the Board” National Labor Relations Board
2. “the Company” SFO Good-Nite Inn, LLC
3. “the Act” National Labor Relations Act  
(29 U.S.C. §§ 151, et seq.)
4. “the Union” Unite Here! Local 2
5. “A.” The parties’ Joint Appendix
6. “Br.” Opening brief filed by the Company
7. “OLC” The United States Department of Justice’s  
Office of Legal Counsel

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**JURISDICTIONAL STATEMENT**

These consolidated cases are before the Court on the petition of SFO Good-Nite Inn, LLC (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order in *SFO Good-Nite Inn, LLC*, 352 NLRB No. 42, 2008 WL 773411 (Mar. 20, 2008).

(A. 348-60.)<sup>1</sup> The Company filed its petition to review on April 4, 2008 and the Board filed its cross-application for enforcement on April 30, 2008. Those filings were timely because the Act imposes no time limits on proceedings to enforce or review Board orders.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board submits that the Court has jurisdiction over these consolidated cases pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).<sup>2</sup> (A. 348 n.3.)

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<sup>1</sup> Record citations are to the Joint Appendix, and are abbreviated as set forth in the Glossary. When a citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

<sup>2</sup> In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The issue was argued before this Court on December 4, 2008, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214.

## **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company committed numerous unfair labor practices in violation of Section 8(a)(1) of the Act, as well as its findings that the Company violated Section 8(a)(3) of the Act, which the Company only summarily challenges.
2. Whether substantial evidence supports the Board's finding that the Company unlawfully withdrew recognition of the Union in violation of Section 8(a)(5) of the Act.
3. Whether the Company's challenge to the Board's Order is jurisdictionally barred from review under Section 10(e) of the Act.

## **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are contained in the attached addendum.

## **STATEMENT OF THE CASE**

The Board found (A. 348-51) that the Company committed numerous unfair labor practices against its employees in an effort to unseat their certified bargaining representative, Unite Here! Local 2 ("the Union"). The Company does not contest the majority of those findings, which include the Company's multiple and repeated unlawful solicitations of employees to sign petitions to decertify the Union. Also uncontested are the Company's unlawful acts threatening employees with

discharge or loss of benefits, and promising them benefits, in order to coerce them into signing the petitions. As the Board found, all of those acts violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

Further, of the Company's remaining arguments, two are not properly before the Court. First, the Company has waived its summarily-raised contention challenging the Board's findings (A. 349-50) that it discriminatorily selected two employees for discharge because they refused the Company's repeated solicitations to sign a decertification petition, and then discharged them, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). Second, because it was not first presented to the Board, the Company's challenge to the Board's Order is jurisdictionally barred from review under Section 10(e) of the Act and the settled precedent of this Circuit.

Thus, the only issue outstanding for the Court to decide is the Company's challenge to the Board's finding (A. 350-51) that it unlawfully withdrew recognition from the Union in violation of Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), because it relied on a decertification petition that it directly tainted by actively soliciting and coercing employees to sign. Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; the Company Purchases the Property from Wyndham, and Assumes Its Labor Contract with the Union**

The Company owns and operates a hotel near the San Francisco International Airport that it purchased from Wyndham International in March 2004. When the Company purchased the hotel, it assumed Wyndham's obligations under the collective-bargaining agreement with the Union that was effective through November 2004 and covered 24 of its housekeeping and maintenance employees. In August 2004, the Union gave notice of its intent to renegotiate the agreement, and the parties agreed that the contract would remain in effect during bargaining. (A. 348, 353; 24-33, 226-34, 321-45.)

The collective-bargaining agreement contained a union-security clause requiring employees to pay dues as a condition of employment. On August 23, 2005, the Union demanded that several housekeeping employees, who had fallen behind in their union dues payments, be discharged as required under the agreement, unless the employees paid the outstanding dues amounts. (A. 348, 353; 317, 321-44.)

### **B. Company Managers Chaudhry, Vargas, and Aquino Ask Employees Valencia, Maldonado, and Taloma To Sign Antiunion Petitions, with Accompanying Threats and Promises of Benefits**

On August 31, General Manager Afzal Chaudhry called two of those employees, Christina Valencia and Maria Maldonado, into his office to discuss

payment of their union dues. He also asked Banquet Manager Naomi Grace Vargas to attend to serve as an interpreter. When Valencia and Maldonado arrived, Chaudhry informed them that they owed the Union \$400 in dues and that the Union could have them fired if they did not pay the outstanding amounts. He then stated that the Union was “no good,” that the Union was costing the Company a lot of money, and that they could sign a petition to “deunionize.” Chaudhry told Valencia and Maldonado to go have lunch and then come back later to sign “the paper.” They did not return to his office and did not sign the antiunion petition.

Two hours later, Banquet Manager Vargas approached Valencia while she was cleaning a room and said that Chaudhry was awaiting their response and had expected them back in his office. Vargas asked Valencia if she was going to sign “the paper,” and also why she and Maldonado did not want to “de-unionize.” (A. 348-49, 354; 80-81, 84-91, 98-107, 126-28, 316.)

Around the same time, in late August, Assistant General Manager Leah Aquino approached housekeeping employee Margarita Taloma at work and asked her to sign an antiunion petition. Aquino said that Taloma’s situation might get worse if the hotel stayed unionized because the Union might only let her work part time. Aquino said that, if Taloma signed the petition, she would help Taloma keep her hours. Taloma refused to sign the petition. That evening, Aquino unexpectedly

arrived at Taloma's home, and again asked her to sign the antiunion petition.

Taloma again refused. (A. 349, 354; 45-60, 62-66, 216-20, 309.)

**C. General Manager Chaudhry and Owner Yokeno Ask Employee Contreras Why She Is Telling Employees Not To Sign the Antiunion Petition and Threaten Her with Discharge; Chaudhry Discharges Employees Valencia and Maldonado**

By September 3, several union disaffection petitions had begun circulating at the hotel, all of which stated: "We no longer want to be represented by [the Union]." (A. 270-73.) On September 6, housekeeping inspectress Consuelo Contreras, who served on the Union's negotiating committee, urged a coworker not to sign the antiunion petition. Two hours later, General Manager Chaudhry and Eric Yokeno, an owner of the Company, approached Contreras while she was working and asked why she was telling employees not to sign the antiunion petition. Chaudhry told Contreras that she could be fired for doing that on worktime. The Company, however, did not have a work rule against solicitation. (A. 349, 355; 26-27, 34-35, 39-41, 119-21, 134-39, 147-48.)

On September 7, General Manager Chaudhry called into his office Valencia and Maldonado, the employees whom Chaudhry had solicited to sign the union decertification petition 2 weeks earlier. Chaudhry asked employee Contreras to attend and serve as an interpreter. When they arrived, Chaudhry handed Valencia and Maldonado their final paychecks and discharged them. Contreras, who was the employee most knowledgeable about their work, had never been asked about

their work performance and thought Valencia and Maldonado were both good workers. (A. 349, 354; 37-38, 122-31, 140-46, 310-13, 315.)

The discharges differed from the Company's normal practices. Typically, each year in early September, the hotel will lay off a few employees because of the seasonal decrease in its occupancy rate after mid-August; when business picks up again later, it will recall those employees. The Company departed from that practice when it discharged Valencia and Maldonado rather than laying them off. (A. 349, 355; 141-44.)

**D. The Company Withdraws Recognition After a Majority of Employees Have Signed Antiunion Petitions; Manager Aquino Asks Employee Verdin To Sign an Antiunion Petition in Order To Have Her Vacation Request Approved; Verdin Signs the Petition on October 4, But Aquino Dates Her Signature as September 14; the Union Files Unfair Labor Practice Charges**

On September 14, the Company notified the Union that it was withdrawing recognition based on four antiunion petitions signed by 13 of its 24 unit employees that stated that they no longer wished to be represented by the Union. (A. 349, 355; 269-73, 320.)

On October 4, housekeeping employee Luz Verdin asked Assistant Manager Aquino about a vacation request that she had submitted in August. Aquino replied by asking Verdin to sign an antiunion petition. Aquino told Verdin that most employees had already signed the petition, and that if Verdin would sign it, then Aquino would sign Verdin's vacation request. Verdin quickly signed the petition,

and Aquino signed the vacation request. Aquino then wrote September 14 as the date Verdin signed the petition, to make it appear that she had signed it contemporaneously with the Company's withdrawal. (A. 349, 355; 68-79, 132-34.)

On October 14, the Union filed an unfair labor practice charge, which it subsequently amended, alleging that the foregoing violated the Act. On March 1, 2006, on the basis of the amended charge, the Board's General Counsel issued a complaint alleging that the Company's conduct violated Section 8(a)(1), (3), and (5) of the Act. After a hearing, the administrative law judge issued a decision finding that the Company violated the Act, as alleged. (A. 353-60; 255-66.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On March 20, 2008, the Board (Members Liebman and Schaumber) issued its Decision and Order, finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by soliciting employees to sign union disaffection petitions, and threatening employees with discharge or loss of benefits, and promising benefits, in order to coerce them into signing those antiunion petitions. The Board also found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily selecting employees Valencia and Maldonado for discharge and then discharging them because they refused to sign the antiunion petition. Also in agreement with the judge, the Board

found that the Company unlawfully withdrew recognition of the Union in violation of Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), concluding that the Company could not rely on the employees' petitions, given its own actions in unlawfully encouraging employees to sign them. (A. 348-51.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to bargain with the Union upon request, to make employees Valencia and Maldonado whole for the losses they suffered as the result of the Company's discrimination and offer them reinstatement, to remove from its files any reference to the unlawful discharges, and to post a remedial notice. (A. 351-52.)

### **STANDARD OF REVIEW**

The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*." *United States Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). See Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, the credibility

determinations of an administrative law judge, when adopted by the Board, “may not be overturned [by the reviewing court] absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.” *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996)).

The Board’s reasonable interpretation of the Act must be affirmed, and a reviewing court is to “uphold a Board rule as long as it is rational and consistent with the Act, even if [the court] would have formulated a different rule.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (internal citation omitted). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997). As this Court has explained, the Board’s interpretation of the Act must be upheld “unless it conflicts with the unambiguously expressed intent of Congress or is otherwise not a permissible construction of the [Act].” *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1098-99 (D.C. Cir. 2001) (quoting *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 716 (D.C. Cir. 2000) (internal marks omitted)). See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 843 n.11 (1984). In other words, if the Act does not expressly and unambiguously address an issue, then what “is necessary to garner deference from the [C]ourt,” is a “rationale underlying

the [Board's] decision . . . [that] is both clear and reasonable.” *Epilepsy Foundation*, 268 F.3d at 1102.

### **SUMMARY OF ARGUMENT**

Many issues in this case are not before the Court. For instance, the Board is entitled to summary enforcement of its numerous uncontested findings that the Company violated Section 8(a)(1) of the Act by its multiple and repeated unlawful solicitations of employees to sign petitions to decertify the Union. Those solicitations were exacerbated by the Company's also-unchallenged efforts to coerce employees into signing the petitions by threatening discharge or loss of benefits, and also by promising benefits. Also not properly before the Court is the Company's summarily-raised challenge in its fact statement to the Board's findings that it discriminatorily selected two employees for discharge because they refused the Company's repeated solicitations to sign antiunion petitions, and then discharged them, in violation of Section 8(a)(3) and (1) of the Act. Lastly, the Company's challenge to the Board's Order is jurisdictionally barred from review under Section 10(e) of the Act because it was not presented to the Board in the first instance.

The only substantive issue for the Court to decide is the Company's challenge to the Board's finding that it unlawfully withdrew recognition from the Union in violation of Section 8(a)(5) of the Act by relying on decertification

petitions that the Company's active solicitation and coercion of employees directly tainted. It is well settled that such direct participation and unlawful assistance by an employer in a decertification campaign will taint the employer's reliance upon the resulting petitions. Contrary to the Company's mistaken assertions, under those circumstances, a decertification petition will be found tainted even if there is no showing that the petition signers knew of the employer's unlawful conduct. Moreover, the Board's test articulated in *Master Slack Corp.*, 271 NLRB 78 (1984), is inapplicable because that test addresses the very different question of whether an employer's prior, unremedied unfair labor practices later contributed to an erosion of union support among employees. As such, the Company's challenge to the Board's finding of taint must be rejected as erroneous, and the Board's Order should be enforced in its entirety.

**ARGUMENT****I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY COMMITTED NUMEROUS UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8(a)(1), AS WELL AS ITS FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3), WHICH THE COMPANY HAS ONLY SUMMARILY CHALLENGED**

Before the Board, the Company did not contest the administrative law judge's findings that it committed a number of violations of Section 8(a)(1) of the Act, and the Board is therefore now entitled to summary enforcement of those findings. (A. 348 n.3.) Specifically, the Company filed no exceptions to the judge's findings that it committed the following unfair labor practices:

- Soliciting employee Taloma to sign an antiunion petition;
- Threatening Taloma with a reduction in hours if the employees chose to remain unionized;
- Promising Taloma benefits if she would sign an antiunion petition;
- Soliciting employee Verdin to sign an antiunion petition;
- Threatening to withhold approval of Verdin's vacation request, unless she signed an antiunion petition;
- Promising to approve Verdin's vacation request, if she signed an antiunion petition; and
- Threatening employee Contreras with discharge if she continued telling employees not to sign antiunion petitions.

As this Court has made clear, because the Company did not file exceptions with the Board to those findings by the judge (A. 348 n.3), the Company is now

jurisdictionally barred from obtaining review of them. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008).

Further, before the Court in its opening brief, the Company does not contest the following Board findings that it violated Section 8(a)(1) of the Act:

- Soliciting employees Valencia and Maldonado to sign an antiunion petition; and
- Promising Valencia and Maldonado benefits if they did sign the petition.

The Company therefore has waived any defense to those Board findings. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997). Accordingly, the Board is entitled to summary enforcement of the portions of its Order remedying these uncontested findings.

Finally, in the facts section of its opening brief, the Company seemingly challenges (Br. 13-15) the Board's findings that it discriminatorily selected employees Valencia and Maldonado for discharge, and then discharged them, because they refused to sign antiunion petitions. Specifically, the Company's statement of facts recounts (Br. 14) its contentions before the Board, and then claims (Br. 15), contrary to the credited evidence, that the "paper" General

Manager Chaudhry asked Valencia and Maldonado to sign was a union application form, not an antiunion petition. It never mentions this implicit challenge to the credited evidence again.

This Court has “repeatedly held that [it] will not address an ‘asserted but unanalyzed’ argument because ‘appellate courts do not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties.’” *SEC v. Banner Fund Int’l*, 211 F.3d 602, 613 (2000) (collecting cases). *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (a party must do more than “merely mention a possible argument in the most skeletal way, leaving the court to do counsel’s work”). Accordingly, the Court has held arguments waived where, as here, they consist only of a claim “alluded to . . . in the statement of facts.” *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.\*\* (2000).<sup>3</sup> The Board is therefore entitled to summary enforcement of its uncontested, and insufficiently contested, findings.

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<sup>3</sup> However, even if the Company had not merely summarily raised that contention, the Company’s claim is insufficient to overturn the administrative law judge’s decisions (A. 354) to credit Valencia’s testimony that the “paper” she was asked to sign was to “deunionize” the hotel, and to discredit the contrary denials of Chaudhry and Vargas. *See U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007), and discussion at pp. 10-11.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY WITHDREW RECOGNITION OF THE UNION IN VIOLATION OF SECTION 8(a)(5) OF THE ACT**

The Company's principal challenge (Br. 18-34) is to the Board's finding (A. 350-51) that the antiunion petitions were tainted by the Company's direct participation and unlawful assistance in the decertification drive. That conduct included the Company's multiple and repeated unlawful solicitations of employees to sign antiunion petitions, coercive threats of discharge or loss of benefits if they did not sign the petitions, and promises of benefits to them if they did. The Company contests none of that conduct, nor does it dispute that it withdrew recognition of the Union based on the employee petition that it encouraged. Therefore, if the Board reasonably found that the antiunion petitions were tainted by the Company's admittedly unlawful conduct, the Company's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

**A. An Employer May Not Lawfully Withdraw Recognition on the Basis of a Petition Signed by a Majority of Employees, If the Employer Is Found To Have Directly Participated and Unlawfully Assisted in the Decertification Campaign**

The principles governing an employer's withdrawal of recognition from an incumbent union are well settled. Section 8(a)(5) of the Act<sup>4</sup> (29 U.S.C. § 158(a)(5)) requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. To promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). *Accord Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Auciello Iron Works*, 517 U.S. at 785-87. *Accord Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1187 (D.C. Cir. 2008).

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<sup>4</sup> 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) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]," which includes employees' "right . . . to bargain collectively through representatives of their own choosing," 29 U.S.C. § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

Consistent with these principles, the Board, in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001), held that an employer may lawfully withdraw recognition from an incumbent union, and defeat the rebuttable presumption of majority support, by showing that the union, in fact, lacked majority support at the time recognition was withdrawn. *See, e.g. Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006); *Levitz*, 333 NLRB at 717. As this Court has cautioned, however, “an employer . . . withdraws recognition at its peril,” because, if the employer fails to prove that the union had, in fact, lost majority support at the time the employer withdrew recognition, its withdrawal of recognition will have violated the Act. *Flying Food Group, Inc.*, 471 F.3d at 182 (quoting *Levitz*, 333 NLRB at 725).

Generally, a petition signed by a majority of the employees stating that they no longer wish to be represented by the union will suffice to meet that burden, absent countervailing evidence. *See Flying Food Group, Inc.*, 471 F.3d at 182; *Levitz*, 333 NLRB at 725 n.49. Indeed, the Board has long held, with court approval, that such petitions signed by a majority of employees “will afford an employer a reasonable basis for withdrawing recognition from a labor organization, provided that, prior thereto, the employer has not engaged in conduct designed to undermine employee support for, or cause their disaffection with, the union.” *Hearst Corp.*, 281 NLRB 764, 764 & n.7 (1986) (citing *Master Slack*

*Corp.*, 271 NLRB 78, 78 n.1 (1984)), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988).

However, where an employer has engaged in unlawful conduct designed to cause employee disaffection—such as initiating a decertification petition, soliciting signatures for such a petition, or lending more than minimal support to the petition effort (*see NLRB v. United Union of Roofers, Waterproofers & Allied Workers Local No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990))—“the decertification petitions will be found to have been tainted by the employer’s unfair labor practices and the [employer] will be precluded from relying on the tainted petitions as a basis for . . . withdrawing recognition.” *Hearst Corp.*, 281 NLRB at 764. *See also Hancock Fabrics*, 294 NLRB 189, 192 (1989) (same), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990); *Manhattan Eye, Ear & Throat Hosp.*, 280 NLRB 113, 115 (1986) (same), *enforced mem.*, 814 F.2d 653 (2d Cir. 1987).<sup>5</sup> Indeed, as this Court has observed, “an employer that has itself orchestrated the union ousting campaign cannot rely on the pendency of a decertification petition or the loss of majority status to justify its withdrawal of recognition.” *Microimage Display Div. of Xidex Corp. v. NLRB*,

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<sup>5</sup> *See also Weisser Optical Co.*, 274 NLRB 961, 961-62 (1985) (petition tainted by employer’s involvement in decertification drive which amounted to more than ministerial aid), *enforced mem.*, 787 F.2d 596 (7th Cir. 1986); *Crafttool Mfg. Co.*, 229 NLRB 634, 636-38 (1977) (employer’s participation in circulation of antiunion petitions tainted its withdrawal).

924 F.2d 245, 253 (D.C. Cir. 1991) (quoting *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 5 (D.C. Cir. 1980)).

Under those circumstances, the Board has held, with court approval, that an employer's "withdrawal of recognition predicated on such a 'tainted' petition will be held unlawful because, under those circumstances, the petition does not represent 'the free and uncoerced act of the employees concerned.'" *United Union of Roofers, Waterproofers & Allied Workers*, 915 F.2d at 512 n.6 (quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985)). *See also V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999) (citing cases). Further justifying its rule prohibiting an employer from relying on a decertification petition that it helped foment, the Board has explained that it is "unwilling to allow [an employer] to enjoy the fruits of its violations . . . , but rather shall hold it responsible for the predictable consequences of its misconduct, i.e., its employees' rejection of [the union] as their bargaining representative." *Hearst Corp.*, 281 NLRB at 765. Given those "predictable consequences," the Board's finding that an employer unlawfully participated or assisted in a decertification effort "is not predicated on a finding of actual coercive effect, but rather on the 'tendency of such conduct to interfere with the free exercise of employee rights under the Act.'" *Id.* (quoting *Amason, Inc.*, 269 NLRB 750, 750 n.2 (1984), *enforced mem.*, 758 F.2d 648 (4th Cir. 1985)).

Moreover, the courts have acknowledged that the Board's rule is well settled. As one court has explained, "[t]he Board has long taken the view that an employer-assisted decertification petition ought to be canceled and the party returned to the status quo ante. The petition, tainted by the employer's unfair labor practices, is a nullity." *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993). See *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1235-36 (5th Cir. 1984) (petition tainted where the employer unlawfully assisted in its circulation and encouraged employees to sign); *V & S ProGalv, Inc.*, 168 F.3d at 276-77 (citing cases); *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1433-34 (8th Cir. 1991) (petitions tainted where employer "actively supported the decertification effort" and solicited signatures).

**B. The Board Reasonably Determined that the Antiunion Petitions Were Tainted by the Company's Admitted Unlawful Solicitation of Employee Signatures, and Its Threats and Promises Made To Coerce Employees To Sign the Petitions**

Based on the unfair labor practices found, the Board reasonably determined (A. 350-51) that the Company engaged in conduct that "unlawfully assisted" the decertification effort and "directly tainted the disaffection petitions." Accordingly, the Board reasonably concluded (A. 351) that the petitions "could not provide a valid basis for the [Company]'s withdrawal of recognition," which therefore violated Section 8(a)(5) of the Act. The Board's findings are amply supported by substantial evidence, and fully consistent with Board and court precedent.

As shown, the Company solicited employees to sign a decertification petition and directed threats and promises towards employees to coerce them to support it, all in violation of Section 8(a)(1). Specifically, General Manager Chaudhry solicited employees Valencia and Maldonado to sign an antiunion petition. Assistant General Manager Aquino repeatedly solicited employee Taloma to sign such a petition both at work and at Taloma's home, and accompanied those solicitations with threats and promises of benefits. Also, Chaudhry, acting together with Owner Yokeno, threatened employee Contreras with discharge for opposing the petitions. On those facts, which are not in dispute, the Board reasonably determined that the Company had engaged in conduct that unlawfully assisted the decertification effort and therefore could not rely on the petitions. Thus, the Board reasonably found (A. 350-51) that the Company's withdrawal of recognition was unlawful under settled precedent, which, as shown at pp. 18-22, holds that an employer may not lawfully withdraw recognition where it directly participated and unlawfully assisted in the decertification effort.

The Company contends (Br. 30-34) that the Board's finding of taint (A. 350) is not based on substantial evidence, but does so inadequately, by mischaracterizing the Board's finding, and by asserting a view of the facts rejected by the Board. For instance, the Company mistakenly states (Br. 32) that the Board's finding of taint is based, in part, on the Company's unlawful discharge of

employees Valencia and Maldonado, and the unlawful October 4 solicitation of employee Verdin. That claim, as shown above, is simply not true. Moreover, to the extent that the Company asks (Br. 30-34) the Court to accept a view of the facts different from the Board's view—such as its suggestions (Br. 30-31) of various reasons why the employees might have signed the petitions other than its coercive conduct—the Company ignores its own unlawful conduct, improperly asks the Court to engage in factfinding, and fails to recognize that it is the Board's, and not the Court's, "role to find the facts." *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 818 (2d Cir. 1980). Indeed, this Court "will not 'displace the Board's choice between two fairly conflicting views [of the record evidence], even though the Court would justifiably have made a different choice had the matter been before it de novo.'" *United Food & Commercial Workers Union, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). See also cases cited at pp. 10-11.

The Company also mistakenly complains to the Court (Br. 26-34), as it did to the Board (A. 350), that the Board's finding of taint is flawed because there is no evidence that the Company's unlawful conduct "was known to those [employees] who signed the petition." (Br. 32.) Contrary to that contention, however, a decertification petition will be found tainted "even though a majority of the petition signers profess ignorance of their employer's conduct." *Hancock*

*Fabrics*, 294 NLRB 189, 192 (1989), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990).  
See generally *Lee Lumber & Bldg. Materials Corp.*, 322 NLRB 175, 177 n.23  
(1996) (evidence of actual impact on employees of employer’s unlawful conduct is  
not required because the Board’s test is an objective one), *affirmed in relevant part*,  
117 F.3d 1454 (D.C. Cir. 1997).

As the Board explained (A. 350-51), it rejected an analogous contention in  
*Hearst Corp.*, 281 NLRB 764 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir.  
1988). There, the Board held that, given the foreseeable consequences of  
providing unlawful assistance and employee coercion to a decertification effort,  
“[a]n employer that has engaged in [such] unlawful conduct . . . cannot expect to  
take advantage of the chance occurrence that some of its employees may be  
unaware of its actions.” *Id.* at 765. Under well-settled law, because “an actual loss  
of majority status [is] an ‘affirmative defense’ to an unlawful withdrawal-of-  
recognition claim, it is the [employer] that ‘has the burden of establishing that  
defense’” by demonstrating that the petition was valid. *Flying Food Group, Inc.*,  
471 F.3d at 184 (quoting *Levitz*, 333 NLRB at 725)). Where, as here, an employer  
has directly participated in the decertification effort, the Board will find evidence  
of a “chance occurrence” that some petition signers were unaware of the  
employer’s unlawful conduct, “insufficient to meet the employer’s ‘burden of

showing that the petition was untainted.” (A. 350-51, quoting *Hearst*, 281 NLRB at 765.)

Accordingly, the Board reasonably concluded (A. 351) that, “[a] fortiori, the absence in this case of affirmative evidence that the petition signers were aware of the unfair labor practices is insufficient to meet [the Company]’s burden of showing that the petition was untainted.” The Company therefore has presented no viable evidentiary basis for disturbing the Board’s finding of taint.

**C. The Company’s Contention that the Board Applied the Wrong Line of Precedent Is Mistaken**

The Company misperceives (Br. 18-30) the settled law applicable to this case, which, as shown above, holds that an employer may not lawfully withdraw recognition where the Board has found that the employer directly participated and unlawfully assisted in the decertification effort. Specifically, the Company contends (Br. 30) that “the Board abused its discretion by failing to analyze the facts of this case pursuant to its *Master Slack* line of authority,” and then cites three circuit cases that, it claims, have applied the *Master Slack* test to “unlawful activity similar to what was found in this case.” (Br. 27.) The Company’s contention is wrong on both counts.

First, contrary to the Company's claim, the Board's four-factor test articulated in *Master Slack Corp.*, 271 NLRB 78 (1984) ("*Master Slack*"),<sup>6</sup> addresses the very different question of whether an employer's previous, unremedied unfair labor practices—specifically, unlawful conduct that, unlike here, did not primarily involve the employer's direct assistance or participation in the decertification effort—"contributed to the erosion of support for the union," thereby "tainting the [subsequent] decertification petition." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737-38 (D.C. Cir. 2000). The inquiry is designed to determine the existence of a "causal connection." *Id.*

In contrast, here, the Board found that the petitions were *directly* tainted by the Company's actual, simultaneous, *and* unlawful participation in the decertification effort that resulted in the petitions. Thus, no causal connection need be inferred between any prior, unremedied unfair labor practices and the decertification petition, as is typical in *Master Slack* cases. *See, e.g., Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 496 (D.C. Cir. 1996)

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<sup>6</sup> Those factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency of the unfair labor practices to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Master Slack Corp.*, 271 NLRB at 84. *Accord Sullivan Indus. v. NLRB*, 957 F.2d 890, 899 (D.C. Cir. 1992).

(noting that *Master Slack* involves the question “whether an unfair labor practice had a ‘meaningful impact’ upon employees’ adherence to the union”).

Second, the Company mistakenly contends (Br. 27) that the unlawful conduct assessed under *Master Slack* in three decisions of this Court is the same type of conduct at issue in this case. None of those cases supports the Company’s proposition. Indeed, *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178 (D.C. Cir. 2006), did not even involve the Board’s *Master Slack* test, as the Company claimed. And in *Quazite*, 87 F.3d 493, the unlawful promises of benefits cited by the Company were not simultaneous with a decertification effort, but occurred a year or more before the employees rejected the union after a lengthy strike and numerous other unlawful activities. *Id.* at 496. Only one of the cited cases, *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74 (D.C. Cir. 1999), involved an unlawful solicitation finding; that finding, however, was not at issue and had no relevance to the Board’s *Master Slack* analysis that was under review. *See id.* at 79 n.\* (noting that the Board did not treat that violation “as an independent source of taint,” but only as conduct consistent with the general “antiunion atmosphere” created by the employer’s prior unlawful conduct at issue).

Finally, the Company also complains (Br. 27) that the Board has provided no “cogent explanation” for why its unlawful conduct was found to “automatically taint” the petitions. To the contrary, the rationale for the Board’s well-established

rule applied in this case is that an employer, in withdrawing recognition, may not rely on a decertification petition tainted *directly* by its own unlawful conduct.

Allowing the employer to do so would create perverse incentives by encouraging reliance on a petition that the employer itself unlawfully promoted, thereby undermining the free and uncoerced choice of the employees. *See Eastern States Optical Co.*, 275 NLRB 371, 372 (1985), and cases cited at pp. 20-22.

Accordingly, the Board's finding of taint should be upheld.

### **III. THE COMPANY'S CHALLENGE TO THE BOARD'S ORDER IS JURISDICTIONALLY BARRED FROM REVIEW UNDER SECTION 10(e) OF THE ACT**

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides 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.” As is well known, the Supreme Court has interpreted Section 10(e) as depriving a reviewing court of jurisdiction over objections not presented to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Here, as shown at p. 10, the Board's Order requires (A. 351-52) the Company to cease and desist from the unfair labor practices found, affirmatively to bargain with the Union, to make whole employees Valencia and Maldonado and offer them reinstatement, and to post a remedial notice. For the first time, the

Company now contends (Br. 35-38) that the Board's Order was rendered moot by an order issued by the United States District Court on March 1, 2007, which was filed in a separate proceeding against the Company in which the Board's General Counsel sought and obtained temporary injunctive relief under Section 10(j) of the Act (29 U.S.C. § 160(j)). The Company, however, could have presented that argument to the Board before the Board issued its March 20, 2008 Decision and Order, but failed to do so. (A. 348 n.4.) Accordingly, under Section 10(e) of the Act, the Company's challenge to the Board's remedial order is barred from review. *See Woelke & Romero Framing*, 456 U.S. at 665-66; *J.J. Cassone Bakery, Inc. v. NLRB*, \_\_\_ F.3d \_\_\_, 2009 WL 153220, at \*2-3 (D.C. Cir. Jan. 23, 2009). *Accord W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (refusing to consider newly-raised challenge to Board's choice of remedy).<sup>7</sup>

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<sup>7</sup> Similarly mistaken is the Company's insufficient attempt (Br. 38 n.14) to now save its challenge to the Board's Order "in its entirety," by claiming that its failure to make a more specific objection to the Board was excused by "extraordinary circumstances." *See* 29 U.S.C. § 160(e). Beyond restating its claim that the Board's Order is moot, the Company offers nothing to justify that contention, which therefore must fail. Moreover, because the Company's mootness challenge is waived, its failure to specifically challenge the affirmative bargaining order before the Board renders that portion of the Board's order untouchable now, as the Board noted (A. 348 n.4). *See Highlands Hospital Corp. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007).

In any event, the Company's contention (Br. 35-39) that the Board's Order is moot on the basis of the District Court Section 10(j) order is meritless. That court order automatically expired upon the issuance of the Board's Decision and Order on March 20, 2008, and no longer has any legal effect. *See* Section 10(j) of the Act (in extraordinary circumstances, a petition for temporary relief of severe unfair labor practices may be sought, but the temporary injunction expires upon the issuance of a final Board order). That prior temporary order therefore cannot serve to moot the Board's Order. Moreover, insofar as the Company contends (Br. 35-39) that the Board's Order is moot due to the Company's compliance with the District Court order, that argument must fail. It is well settled that even full and unqualified compliance does not render a Board order moot because a Board order imposes a continuing obligation. *See NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-69 (1950). *Accord NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1163 (7th Cir. 1996). In sum, having presented this Court with no basis to disturb the Board's findings, the Board is entitled to enforcement of its Order.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

s/Fred B. Jacob

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**NATIONAL LABOR RELATIONS BOARD**

February 2009

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SFO GOOD-NITE INN, LLC	*
	*
Petitioner/Cross-Respondent	* Nos. 08-1148,
	* 08-1170
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 20-CA-32754
	*
Respondent/Cross-Petitioner	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its final brief contains 7,168 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben  
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Dated at Washington, DC  
this 26th day of February 2009

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SFO GOOD-NITE INN, LLC	*
	*
Petitioner/Cross-Respondent	* Nos. 08-1148,
	* 08-1170
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 20-CA-32754
	*
Respondent/Cross-Petitioner	*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by hand delivery the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that final brief by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC  
this 26th day of February 2009

## STATUTORY ADDENDUM

**Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:**

**Sec. 3.** [29 U.S.C. § 153]

....

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . .

**Sec. 7.** [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

**Sec. 8.** [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

....

**Sec. 10** [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

....

(e) The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .

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