

# No. 10-1989

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

v.

**McELROY COAL CO.**

**Respondent**

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**ON 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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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement of the issue presented .....	2
Statement of the case.....	2
I. The Board’s findings of fact.....	4
A. The parties’ collective-bargaining agreement and its subcontracting clause; the parties’ disputes over McElroy’s use of subcontractors.....	4
B. The Union files numerous grievances over subcontracting; most of the grievances settle; McElroy prevails in several arbitration proceedings; new grievances are filed .....	5
C. At a Union meetings, Union president Sparks suggests putting signs on employees’ vehicles to send a message to management about subcontracting; suggestions include messages saying “we don’t want scabs” .....	5
D. Sparks sends subcontracting complaints to supervisor Adkins; White has signs made for his truck and informs Sparks .....	6
E. White parks his truck with the signs in the parking lot and Adkins sees the signs; White parks his truck with the signs in the lot twice more .....	7
F. Adkins Tells White to remove his truck because of the signs; Akdins says the truck will be towed if it returns with the signs .....	7
G. White removes the signs and tells coworkers about the incident; the Union continues to grieve McElroy’s use of subcontractors .....	8
II. The Board’s conclusions and order.....	8
Summary of argument.....	9

**TABLE OF CONTENTS**

<b>Headings --cont'd</b>	<b>Page(s)</b>
Argument.....	11
Substantial evidence supports the Board’s finding that McElroy violated Section 8(a)(1) of the Act by restricting employees when it threatened White with having his vehicle towed from McElroy’s parking lot because he engaged in the protected activity of displaying signs saying “we don’t want scrabs” to protest McElroy’s use of nonunion subcontractors .....	11
A. The Act prohibits an employer from restricting employees in the exercise of their Section 7 rights absent special circumstances not present here .....	12
B. McElroy unlawfully threatened White for displaying signs in support of the Union’s position on subcontracting.....	15
C. The Board reasonably rejected the Company’s claims that White lost the protection of the Act .....	17
i. White did not lose the protection of the Act by using the term “scab”.....	18
ii. McElroy’s reliance on <i>Atlantic Steel</i> is not properly before this court, and is inapposite in any event.....	21
iii. McElroy did not meet its burden of showing special circumstances to justify its threat .....	22
iv. No exceptional circumstances warrant overturning the Board’s credibility determinations .....	30
Conclusion .....	35

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Allentown Mack Sales &amp; Service, Inc. v. NLRB</i> , 522 U.S. 359 (1998) .....	14
<i>Americare Pine Lodge Nursing &amp; Rehabilitation Ctr. v. NLRB</i> , 164 F.3d 867 (4th Cir. 1999) .....	19
<i>Anheuser-Busch, Inc. v. NLRB</i> , 338 F.3d 267 (4th Cir. 2003) .....	18
<i>Armstrong Cork Co. v. NLRB</i> , 211 F.2d 843 (5th Cir. 1954) .....	27
<i>Atlantic Steel Co.</i> , 245 NLRB 814 (1979) .....	21,22
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978) .....	11,14,22
<i>Beverly Farm Foundation, Inc.</i> , 323 NLRB 787 (1997), <i>enforced</i> , 144 F.3d 877 (7th Cir. 1998) .....	16
<i>Caterpillar Tractor Co. v. NLRB</i> , 230 F.2d 357 (7th Cir. 1956) .....	19,20
<i>Chamber of Commerce of the United States v. Brown</i> , 128 S. Ct. 2408 (2008) .....	19
<i>Colonial Stores</i> , 248 NLRB 1187 (1980) .....	29
<i>Consolidated Diesel Co. v. NLRB</i> , 263 F.3d 346 (4th Cir. 2001) .....	17
<i>Consumers Power Co.</i> , 282 NLRB 130 (1986) .....	18

## TABLE OF AUTHORITIES

<b>Cases --cont'd</b>	<b>Page(s)</b>
<i>Coors Container Co.</i> , 238 NLRB 1312, <i>enforced</i> , 628 F.2d 1283 (10th Cir. 1983) .....	20,27,28
<i>Davison-Paxon Company v. NLRB</i> , 462 F.2d 364 (5th Cir. 1972) .....	29
<i>District Lodge 91, International Association of Machinists v. NLRB</i> , 814 F.2d 876 (2d Cir. 1987) .....	14,16,27
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	12,13,25
<i>Evergreen America Corp. v. NLRB</i> , 531 F.3d 321 (4th Cir. 2008) .....	31,34
<i>Fabri-Tek, Inc. v. NLRB</i> , 352 F.2d 577 (8th Cir. 1965) .....	28,29
<i>Fieldcrest Cannon, Inc. v. NLRB</i> , 97 F.3d 65 (4th Cir. 1996) .....	31
<i>Firestone Tire &amp; Rubber Co.</i> , 238 NLRB 1323 (1978), <i>enforced mem.</i> , 651 F.2d 1172 (6th Cir. 1980) .....	13,17,29
<i>Grinnell Fire Protection System Co. v. NLRB</i> , 236 F.3d 187 (4th Cir. 2000) .....	14
<i>Guardsmark LLC v. NLRB</i> , 475 F.3d 369 (D.C. Cir. 2007) .....	34
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	13

## TABLE OF AUTHORITIES

<b>Cases --cont'd</b>	<b>Page(s)</b>
<i>International Bus. Machine Corp.</i> , 333 NLRB 215, <i>enforced</i> , 31 Fed. Appx. 744 (2d Cir. 2002) .....	16
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), <i>enforced mem.</i> , 203 F.3d 52 (D.C. Cir. 1999).....	16
<i>Linn v. United Plant Guard Workers</i> , 383 U.S. 53 (1966) .....	13,19,20,21
<i>Mead Corp.</i> , 314 NLRB 732 (1994), <i>enforced</i> , 73 F.3d 74 (6th Cir. 1996) .....	20,23,27,28
<i>Medeco Sec. Locks, Inc. v. NLRB</i> , 142 F.3d 733 (4th Cir. 1998) .....	15,17
<i>NLRB v. Air Contact Trans., Inc.</i> , 403 F.3d 206 (4th Cir. 2005) .....	14
<i>NLRB v. Air Prod. &amp; Chemical, Inc.</i> , 717 F.2d 141 (4th Cir. 1983) .....	15,31
<i>NLRB v. City Disposal System, Inc.</i> , 465 U.S. 822 (1984) .....	18
<i>NLRB v. HQM of Bayside, LLC</i> , 518 F.3d 256 (4th Cir. 2008) .....	21,22
<i>NLRB v. Mead Corp.</i> , 73 F.3d 74 (6th Cir. 1996) .....	20

**TABLE OF AUTHORITIES**

<b>Cases --cont'd</b>	<b>Page(s)</b>
<i>NLRB v. The Babcock &amp; Wilcox Company</i> , 351 U.S. 105 (1965) .....	13
<i>NLRB v. Waco Insulation, Inc.</i> , 567 F.2d 569 (4th Cir. 1977) .....	18
<i>NLRB v. Washington Aluminum</i> , 370 U.S. 9 (1962) .....	18
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010).....	3
<i>Nor-Cal Beverage Co.</i> , 330 NLRB 610 (2000).....	20
<i>Olathe Healthcare Ctr., Inc.</i> , 314 NLRB 54 (1994).....	16
<i>Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin</i> , 418 U.S. 264 (1974) .....	11,13,18,19,20,23
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	11,13,14
<i>Sam's Club v. NLRB</i> , 173 F.3d 233 (4th Cir. 1999).....	31
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....	14
<i>Vance v. NLRB</i> , 71 F.3d 486 (4th Cir. 1995) .....	26
<i>Virginia Power and Electric Company v. NLRB</i> , 703 F.2d 79 (4th Cir. 1983) .....	29

**TABLE OF AUTHORITIES**

<b>Cases --cont'd</b>	<b>Page(s)</b>
<i>WXGI, Inc. v. NLRB</i> , 243 F.3d 833 (4th Cir. 2001) .....	14,15
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982) .....	21

<b>Statutes</b>	<b>Pages(s)</b>
-----------------	-----------------

**National Labor Relations Act, as amended**  
(29 U.S.C. § 151 et seq.)

Section 1 (29 U.S.C § 151) .....	2
Section 7 (29 U.S.C. § 157) .....	9,12
Section 8(a)(1) (29 U.S.C. § 158(a)) .....	2,8,12,15,16,17
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2,14,21,33

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board order issued against McElroy Coal Company (“McElroy”) on August 25, 2010, and reported at 355 NLRB No.

121. (JA 217.)<sup>1</sup> The Board filed its application for enforcement on August 27, 2010. The Board’s filing was timely; the Act imposes no time limit on such filings.

The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § § 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Glen Easton, West Virginia.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board’s finding that McElroy violated Section 8(a)(1) of the Act by restricting employees when it threatened employee White with having his vehicle towed from McElroy’s parking lot because he engaged in the protected activity of displaying signs stating “We Don’t Want Scabs” to protest McElroy’s use of nonunion subcontractors.

### **STATEMENT OF THE CASE**

Acting on a charge filed by the United Mine Workers of America Local Union 1638, AFL-CIO, CLC (“the Union”), the Board’s General Counsel issued a complaint alleging that McElroy violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening its employees with having their vehicles towed from the

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<sup>1</sup> “JA” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

parking lot if they displayed signs in support of the Union's position on subcontracting. (JA 203; 129.) Following a hearing, the administrative law judge issued a decision and recommended order, finding that McElroy had violated the Act as alleged. (JA 211.) McElroy filed exceptions. (JA 166-78.) The Board affirmed the judge's rulings, findings and conclusions, and adopted his recommended remedial order with one modification. (JA 202.) *See McElroy Coal Co.*, 353 NLRB No. 108 (2009).

In Fourth Circuit Case Nos. 09-1332, 09-1427, McElroy petitioned this Court for review of the Board's 2009 order and the Board filed a cross-application for enforcement. On March 25, 2010, following briefing, a panel consisting of Circuit Judges Michael and Davis and District Judge Beaty heard oral argument.

On June 24, 2010, the Board filed an unopposed motion to remand the case in light of the Supreme Court's decision in *New Process Steel, L.P. v. National Labor Relations Board*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. This Court granted McElroy's petition for review and vacated and remanded the Board's order on August 20, 2010. On August 25, 2010, a three-member panel of the Board issued the decision and order that is now before the Court. In its decision and order, the Board affirmed the administrative law judge's rulings, findings, and conclusions, and adopted his recommended order to the

extent and for the reasons stated in the 2009 order, which the Board incorporated by reference. (JA 217.)

After the Board filed an application for enforcement of its August 25, 2010 decision and order, the parties filed a joint Stipulation to Submit Case to Original Panel on Earlier Briefs and Oral Argument. On September 10, 2010, this Court granted the parties leave to file corrected briefs to correct the case numbers and to make any other changes to the briefs that the parties deem appropriate.

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

### **A. The Parties' Collective-Bargaining Agreement and Its Subcontracting Clause; the Parties' Disputes Over McElroy's Use of Subcontractors**

McElroy operates a coal mine in Glen Easton, West Virginia, where the Union represents over 700 production and maintenance employees, who work in three shifts around the clock. (JA 203-04, 210; 10, 19.) McElroy and the Union are parties to a collective-bargaining agreement that includes a grievance and arbitration provision and a clause governing subcontracting. (JA 203; 11-12, 152-62.) The meaning of this clause has caused longstanding disputes between the parties, which intensified in 2007 when McElroy began to increase its use of subcontractors. (JA 203, 210; 11-12.) Employees had previously seen contractors working at the mine surface, but not underground. (JA 203; 11.) In June or July, there started to be an influx of subcontractors underground. (JA 203; 11-12, 44.) Subcontractors were working on all shifts at the mine. (JA 204; 46.)

**B. The Union Files Numerous Grievances Over Subcontracting; Most of the Grievances Settle; McElroy Prevails in Several Arbitration Proceedings; New Grievances Are Filed**

By the end of September, the Union had filed over 100 grievances in 2007 over McElroy's subcontracting practices in that year. (JA 210; 13, 88.) For the Union, grievances are filed and handled by the "mine committee," which acts as a grievance committee. (JA 203; 10.) Clifford White, a belt man in the mine, acted as a mine committeeman beginning in June 2007 and wrote multiple grievances over subcontracting in his area of the mine. (JA 203-04; 38.)

Most of the grievances filed by White and other committeemen were settled, in many instances with McElroy paying back wages to unit members. (JA 203-04, 210; 30, 54-55.) Of the seven grievances that went to arbitration in 2007, the Union won two cases, although one of them was later reversed in a judicial proceeding. McElroy prevailed in the remaining cases. (JA 210; 31, 88, 100.) New grievances continued to be filed after the arbitration rulings issued. (JA 203; 33.)

**C. At a Union Meeting, Union President Sparks suggests Putting Signs on Employees' Vehicles To Send a Message to Management About Subcontracting; Suggestions Include Messages Saying "We Don't Want Scabs"**

On September 16, the Union held its regular monthly membership meeting, which was attended by 35 to 40 employees, including Union President Roger Sparks, and mine committeemen White and Terry Lewis. (JA 204; 13-14.) Sparks and the union members discussed how to send a message to management that they did not want

subcontractors in the mine doing unit work. (JA 204; 13.) Sparks suggested that employees could put signs on their personal vehicles when they parked in McElroy's lot to protest the subcontractors' presence at the mine. (JA 204; 13, 60.)

Messages suggested by members included "We don't want scabs; leave scabs; UMWA only." (JA 204; 14.) Employees discussed the meaning of the word "scab," and shared different definitions, among them that the subcontractors' employees were nonunion workers performing bargaining unit work. (JA 204; 35-36, 40.) White's definition was "it's a union coal mine; it should be union work." (JA 204; 56.)

#### **D. Sparks Sends Subcontracting Complaints to Supervisor Adkins; White Has Signs Made for His Truck and Informs Sparks**

Less than 2 weeks later, on September 27, Sparks sent two signed complaints over subcontracting, and an information request relating to subcontracting, to Human Resources Supervisor Jason Adkins. (JA 210; 147-49.) Adkins later responded by letter acknowledging that he received the complaints on September 28. (JA 210; 145-46.)

In the meantime, White had two signs made to span the length of the bed of his full-size pickup truck. (JA 210; 16, 39, 164.) The plywood signs were two feet by eight feet, painted white with blue lettering, and each read, "WE DON'T WANT SCABS." (JA 204; 39, 164.) White called Sparks to let him know that the signs were made. (JA 204; 48.)

**E. White Parks His Truck with the Signs in the Parking Lot and Adkins Sees the Signs; White Parks His Truck with the Signs in the Lot Twice More**

On September 27, White drove his truck with the signs to work for his regular afternoon shift and parked in McElroy's lot, about 50 feet from the main entrance. (JA 204; 49.) Employees asked White about the signs that day, and White saw Adkins walk by, stop, and put his hands on his hips while looking at the truck. (JA 204; 49.)

On September 28, White again worked the afternoon shift and parked his truck with the signs in the lot, this time about 200 feet from the entrance. (JA 204; 50.) On his next work day, October 1, White parked near the main entrance to the parking lot where the miners drive by. (JA 204; 50.) The mine parking lot is not visible from the road leading to the mine. (JA 205; 52.)

**F. Adkins Tells White To Remove His Truck Because of the Signs; Adkins Says the Truck Will Be Towed If It Returns With the Signs**

On the third day, White got word from coworkers that Adkins wanted to see him. (JA 210; 39.) At the end of his shift, White, accompanied by Committeeman Lewis, went to Adkins' office, where Adkins told White to remove his truck from the parking lot because of the signs. (JA 210-11; 19-20, 50, 76.) White responded, "It's a freedom of speech, ain't it?" (JA 211; 20, 50.) Adkins repeated that the truck had to be removed. When White asked whether he could bring it back the next day, Adkins replied that he could do so as long as the signs were not on it. (JA 211; 20, 51.)

The only reason Adkins gave for demanding the signs' removal was that they were on private property. (JA 211; 20, 25.) Adkins further stated that he would have the truck towed at White's expense if White brought it back to the parking lot with the signs on it. (JA 211; 20, 51, 76.)

**G. White Removes the Signs and Tells Coworkers About the Incident; the Union Continues To Grieve McElroy's Use of Subcontractors**

White removed the signs and did not return to McElroy's parking lot with them on his truck. (JA 205; 51.) White and Lewis told fellow employees that Adkins had ordered White to remove the signs, and that if he did not, the truck would be towed at White's expense. (JA 205; 21, 51-52, 66.) No other employees put signs on their vehicles. (JA 205; 48, 51, 61, 66.) The Union continued to file grievances over McElroy's subcontracting practices. (JA 203; 33.)

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

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Hayes) found, in agreement with the administrative law judge, that McElroy violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by restricting employees by threatening White with having his vehicle towed from its parking lot because White engaged in the protected activity of displaying signs stating "We Don't Want Scabs" in support of the Union's position on subcontracting. (JA 202; 217.)

The Board's order requires McElroy to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the order requires McElroy to post copies of a remedial notice at its Glen Easton facility. (JA 202, 212.)

### **SUMMARY OF ARGUMENT**

Supreme Court and Board precedent has long recognized that use of the term “scab” to refer to nonunion workers is protected speech under the Act. Consistent with this precedent, the Board reasonably found that White engaged in protected union activity when he posted signs on his personal truck saying “We Don’t Want Scabs” to protest McElroy’s ongoing use of nonunion subcontractors. The record shows that amidst a flurry of grievances, settlements, arbitrations, and more grievances, union members discussed putting signs on employee vehicles opposing McElroy’s actions. In a concerted act, White parked his truck with the anti-subcontractor signs in the company lot during his shifts over the course of 3 days before McElroy threatened him for engaging in this protected activity. As the Board found, McElroy’s threats were unlawful because they tended to interfere with employees’ Section 7 right to protest an employment practice that adversely affected their wages, hours and working conditions.

The Board properly rejected McElroy's attempts to justify its unlawful threat. As the Board reasonably found, McElroy failed to meet its burden of showing any special circumstances to justify its abridgement of employees' Section 7 rights. McElroy could only muster subjective speculation by two company officials, whom the judge largely discredited, that they were concerned about potential hostilities or work stoppages as a result of the signs, despite the fact that no disruptions or complaints of any kind arose in the 3 days before White removed the signs under threat. Finally, McElroy's attempt to rewrite the judge's credibility determinations in favor of its own witnesses are unacceptable, given that McElroy cannot show any exceptional circumstances warranting reversal of the judge's rational and well-articulated findings.

**ARGUMENT****SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT McELROY VIOLATED SECTION 8(a)(1) OF THE ACT BY RESTRICTING EMPLOYEES WHEN IT THREATENED WHITE WITH HAVING HIS VEHICLE TOWED FROM McELROY’S PARKING LOT BECAUSE HE ENGAGED IN THE PROTECTED ACTIVITY OF DISPLAYING SIGNS SAYING “WE DON’T WANT SCABS” TO PROTEST McELROY’S USE OF NONUNION SUBCONTRACTORS**

One of the basic rights that employees enjoy under the Act is the right to discuss issues related to collective bargaining with their coworkers. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-99, 803-04 & n.10 (1945). The Supreme Court’s decision in *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (“*Austin*”), makes clear that, in exercising their *Republic Aviation* rights, employees commonly use confrontational language, which does not remove them from the Act’s protection. Indeed, in *Austin* itself, the Court recognized that use of the term “scab” to describe nonunion workers is “protected under federal law.” *Id.* at 282. Therefore, to justify a restriction on such protected speech, an employer must show “special circumstances which make the rule necessary to maintain production or discipline.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978).

Here, McElroy admits (Br 15) that it threatened White with having his truck towed if he did not remove signs saying “We Don’t Want Scabs.” Before the Board, McElroy’s witnesses conceded that if the signs had used the term

“subcontractors” instead of “scabs,” McElroy would not have placed the restriction on White. (JA 207-08; 98.) Thus, McElroy’s argument turns on White’s choice of the term “scab”—a choice that he was protected in making under well-settled precedent. As we show below at pp. 22-30, the Board reasonably found that McElroy failed to establish any “special circumstances” warranting its restriction on White’s use of the word “scab.”

**A. The Act Prohibits an Employer from Restricting Employees in the Exercise of Their Section 7 Rights Absent Special Circumstances Not Present Here**

Section 7 of the Act (29 U.S.C. § 157) protects employees’ 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.” Those rights are protected even when employees “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of those rights.

Furthermore, well-settled law “gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.” *Austin*, 418 U.S. at 283. In particular, use of the term “scab” has been found by the Supreme Court to be “common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA.” *Id.* (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60-61 (1966)). The Court has also recognized that “naming” nonunion workers as scabs is “literally and factually true” because “[o]ne of the generally accepted definitions of ‘scab’ is ‘one who refuses to join a union.’” *Austin*, 418 U.S. at 283 (citing Webster’s Third New International Dictionary (unabridged ed. 1961)).

When an employee exercises his Section 7 rights while legally on an employer’s property pursuant to his employment, the balance to be struck is “only *vis-a-vis* the employer’s managerial rights . . . [which] prevail only where [an employer] can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of [the employer’s] operations.” *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1323 (1978) (citing *Eastex*, 437 U.S. at 570-71), *enforced mem.*, 651 F.2d 1172 (6th Cir. 1980); *Hudgens v. NLRB*, 424 U.S. 507, 521, n.10 (1976); *NLRB v. The Babcock & Wilcox Company*, 351 U.S. 105, 113 (1965)); *see also Republic Aviation*, 324 U.S. at 803. “Managerial

rights decisions make clear that any restriction of employees’ on-premises communication in nonworking areas during nonworking hours ‘must be presumed to be an unreasonable impediment to self-organization—in the absence of evidence that special circumstances make the rule necessary.’” *District Lodge 91, Int’l Ass’n of Machinists v. NLRB*, 814 F.2d 876, 880 (2d Cir. 1987) (“*United Technologies*”) (quoting *Republic Aviation*, 324 U.S. at 803-04 & n.10). *See also Beth Israel Hosp.*, 437 U.S. at 492-93.

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). *See also NLRB v. Air Contact Trans., Inc.*, 403 F.3d 206, 210 (4th Cir. 2005). A reviewing court may not displace the Board’s choice between conflicting views, “even if the court would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Air Contact*, 403 F.3d at 210. Thus, the Board’s findings will not be overturned if “it would have been possible for a reasonable jury to reach the [same] conclusion.” *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998)).

Further, a reviewing court owes “due deference” to the Board’s inferences drawn from the facts. *Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000). Indeed, “[i]t is well settled that absent exceptional

circumstances, the [administrative law judge's] credibility findings, when adopted by the Board are to be accepted by the reviewing court." *NLRB v. Air Prod. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983) (citation omitted).

This Court will "give deference to the Board's interpretation of the Act 'if it is reasonably defensible.'" *WXGI*, 243 F.3d at 840 (internal quotation omitted). In a case involving a violation of Section 8(a)(1), the "question of [w]hether particular conduct is coercive is a question essentially for the specialized experience of the NLRB," and this Court "grant[s] considerable deference to [the Board's] determinations." *Medeco Sec. Locks v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (internal quotation omitted).

**B. McElroy Unlawfully Threatened White for Displaying Signs in Support of the Union's Position on Subcontracting**

The Board reasonably found that McElroy violated Section 8(a)(1) of the Act when it threatened White with having his vehicle towed for engaging in the protected activity of displaying signs on his truck that used the term "scab." The Board relied on several undisputed factors in reaching its conclusion. It is undisputed that McElroy, through its agent and supervisor Adkins, threatened White with having his personal vehicle towed at White's expense, even though he was entitled to park in the lot, which was not visible from the main road, during his shifts. (JA 205-06, 211; 73, 76.) It is undisputed that McElroy and the Union had been engaged in an ongoing dispute about subcontracting resulting in over 100 grievances in the 9-month period

preceding White's display of the signs, and that White's actions were concerted in nature. (JA 210; 68, 88.) Based on these undisputed factors, the Board reasonably found that White engaged in protected union activity when he parked his truck in the mine lot for 3 days, and that Adkins' threat restricted employees' exercise of their Section 7 rights.

McElroy also does not dispute that its parking lot, as a natural congregating area for off-duty employees, is a key protected forum for employee expression. *See, e.g., Lafayette Park Hotel*, 326 NLRB 824, 828-29 (1998) (prohibiting employer from maintaining a rule denying employees access to parking lots after their shift), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 795-96 (1997) (concluding that employer acted unlawfully by preventing employees from distributing literature in employee parking lots), *enforced*, 144 F.3d 877 (7th Cir. 1998); *Olathe Healthcare Ctr., Inc.*, 314 NLRB 54, 54-55 (1994) (finding unlawful employer's discipline of prounion employee for distributing literature near parking lot entrances).

This protection applies equally to employees who place prounion (or antiunion) signs in or on their vehicles. *See United Technologies*, 814 F.2d at 879 (approving Board's conclusion that employee engaged in protected activity when he displayed prounion sign on his van); *Int'l Bus. Mach. Corp.*, 333 NLRB 215, 219-21 (employer violated Section 8(a)(1) by informing employees that they could

not display large prounion signs on their vans in employee lot), *enforced*, 31 Fed. Appx. 744 (2d Cir. 2002); *Firestone Tire*, 238 NLRB at 1323 (employer could not lawfully discipline employee for parking in employee lot with several prominent signs saying “Support [the Union]” and “Don’t Buy Firestone Products” affixed to his car).

Based on undisputed facts and the precedent discussed above, the Board reasonably found that McElroy’s threats to tow White’s truck for engaging in protected speech plainly tended to coerce, not only White, but also his coworkers, who learned about the threat and decided against displaying signs for fear of having their vehicles towed. *See Consolidated Diesel Co. v. NLRB*, 263 F.3d 346, 352 (4th Cir. 2001); *Medeco Sec. Locks*, 142 F.3d at 747. Moreover, as we now show, the Board properly rejected McElroy’s claims that White’s choice of words somehow deprived him of the Act’s protections, or that special circumstances justified its threat. Accordingly, by threatening White, McElroy violated Section 8(a)(1) of the Act.

### **C. The Board Reasonably Rejected the Company’s Claims that White Lost the Protection of the Act**

McElroy variously asserts (Br 18, 25) that White’s statement on the signs was not protected because he used the term “scab,” and that special circumstances justified its restriction on employees’ Section 7 rights. As we now show, the Board reasonably rejected those assertions. As we further show, McElroy’s attack on the judge’s

credibility determinations must fail, as it points to no exceptional circumstances to warrant overturning his well-reasoned determinations.

**i. White did not lose the protection of the Act by using the term “scab”**

The Board rejected (JA 211) McElroy’s claim that White lost the protection of the Act by using the term “scab” instead of “subcontractors” on the signs. As discussed above, use of this term in a labor dispute is “protected under federal law.” *Austin*, 418 U.S. at 282. Further, as this Court has emphasized, speech will remain protected unless it is “unlawful, violent, in breach of contract, or indefensible,” *NLRB v. Waco Insulation, Inc.*, 567 F.2d 569, 599 (4th Cir. 1977) (citing *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962)), or so “egregious . . . or of such character as to render the employee unfit for further service.” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). *See also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984). As the Board reasonably found (JA 211), White’s use of the term “scab” does not fit under this exception; on the contrary, it falls within the range of speech protected by Board and court precedent.

In seeking to foster industrial peace, Congress intended the Act to encourage “free debate on issues dividing labor and management.” *Austin*, 418 U.S. at 272. The Supreme Court has “stress[ed] that ‘freewheeling use of the written and

spoken word . . . has been expressly fostered by Congress and approved by the NLRB.” *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408, 2413-14 (2008) (quoting *Austin*, 418 U.S. at 272-73). Indeed, as this Court has similarly recognized: “[P]ermitting the fullest freedom of expression by each party’ nurtures a healthy and stable bargaining process.” *Americare Pine Lodge Nursing & Rehabilitation Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) (internal quotation omitted).

Because labor disputes “are ordinarily heated affairs . . . frequently characterized by bitter and extreme charges, countercharges, vituperations, personal accusations, misrepresentations and distortions,” the Act recognizes that affording the competing parties “wide latitude” in the language they use to communicate their positions is essential for resolving labor disputes in the workplace. *Linn*, 383 U.S. at 58, 60. The protections due labor speech are so broad that otherwise defamatory or profane speech may enjoy immunity from sanction. *Id.* at 58; *Austin*, 418 U.S. at 272. Consequently, the Board has repeatedly “concluded that epithets such as ‘scab,’ . . . are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7.” *Linn*, 383 U.S. at 60-61.<sup>2</sup> As the Supreme Court stated, although “the word

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<sup>2</sup> To the extent that McElroy relies (Br 27-28) on *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956), and its apparent per se rule that the term “scab” is inherently disruptive of the workplace, the Supreme Court’s subsequent decisions

[‘scab’] is most often used as an insult or epithet . . . federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.” *Austin*, 418 U.S. at 283.

Consistent with the foregoing principles, the Board reasonably found that White was engaged in protected activity when he used the word “scab” on the sign, and that his use of that term, standing alone, did not remove him from the Act’s protection. (JA 211.) Thus, as the Board noted here (JA 210), it has long recognized that “the term ‘scab’ is not so opprobrious as to justify barring its use in the workplace.” *Coors Container Co.*, 238 NLRB 1312, 1319, *enforced*, 628 F.2d 1283 (10th Cir. 1983) (employees who displayed sign saying “Boycott Coors-Scab Beer” were unlawfully barred from employer’s property; employer was not justified in restricting employees’ right to engage in activities to improve their working conditions). *Accord Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000) (use of word “scab” does not remove employee from Act’s protection unless accompanied by threats or physical gestures); *Mead Corp.*, 314 NLRB 732, 733 (1994) (employees were protected when they wore “no scab” buttons in part to

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in *Linn* and *Austin* make clear that use of the term is not without the protection of the Act absent additional factors showing special circumstances that require a ban to maintain discipline. *See, e.g., NLRB v. Mead Corp.*, 73 F.3d 74, 79-80 (6th Cir. 1996) (rejecting an employer’s post-*Linn* reliance on *Caterpillar Tractor* as stating a per se rule).

protest collectively-bargained “flex” program), *enforced*, 73 F.3d 74 (6th Cir. 1996). McElroy cannot cite even a single post-*Linn* case in which an employee’s use of the term “scab,” standing alone, caused him to lose the Act’s protection.

**ii. McElroy’s reliance on *Atlantic Steel* is not properly before this Court, and is inapposite in any event**

McElroy’s assertion (Br 19-25)—that under the multi-factor test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), White’s communication was so “indefensible” as to forfeit the protection of the Act—is not properly before this Court, as McElroy made no such argument to the Board. Pursuant to Section 10(e) of the Act, “[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). *Accord NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008). The statutory prohibition creates a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

In the exceptions that McElroy filed with the Board, it did not assert that White’s conduct was “indefensible,” nor did it invoke the *Atlantic Steel* factors in form or substance. (JA 172-73.) This Court recognizes that “generalized exceptions . . . do not satisfy § 10(e), for they fail[] to provide the Board ‘adequate

notice of the argument [a party] seeks to advance on review.’”<sup>3</sup> *HQM of Bayside*, 518 F.3d at 262 (citation omitted). Accordingly, Section 10(e) of the Act bars judicial review of McElroy’s claim.

In any event, McElroy fails in its belated attempt to show that White’s message was indefensible under the *Atlantic Steel* test. The parking lot is undisputedly private and is not visible from the road. Thus, White’s communication was not made in public. As to the subject matter and nature of the sign, as shown above at pp. 15-17, the Board reasonably found, based on long-standing precedent, that White, after concertedly discussing the matter with coworkers, displayed the signs to protest McElroy’s subcontracting practices, and therefore that his use of the term “scab” did not fall outside the Act’s protection.

**iii. McElroy did not meet its burden of showing special circumstances to justify its threat**

McElroy seeks to restrict employees’ rights to engage in protected speech in its parking lot—a nonwork area. White was exercising his Section 7 rights while legally parked in McElroy’s lot while on the job. Thus, as shown above at pp. 12-14, McElroy could not lawfully order White to remove his signs without demonstrating special circumstances necessitating the restriction. *See Beth Israel*, 437 U.S. at 483. McElroy did not meet this burden.

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<sup>3</sup> Likewise, McElroy’s reliance (Br 24 n.8) on the standard for comments directed to third parties was not raised to the Board and is not properly before this Court, nor is that standard applicable to White’s sign in any event.

McElroy's proffered (Br 29-31) "special circumstance" is that White used the term "scab" in a non-customary manner and in bad faith. McElroy claims (Br 28-29) that, because the term "scab" is commonly used to refer to a worker who crosses a picket line and there was no strike or picket line at the mine, the context in which White used the term was enough to incite employees to engage in violence or other improper actions. In making this argument, however, McElroy ignores other common, protected usages of the term "scab" that apply here. Indeed, as noted above at p. 13, the Supreme Court has recognized that a generally accepted definition of "scab" includes a nonunion worker. *See Austin*, 418 U.S. at 283. Thus, in *Austin* itself, employees used the word "scab" in a newsletter to refer to coworkers who did not join the union; there was no strike or picket line. *Id.* at 267-68. Similarly, in *Mead Corp.*, cited by the Board here (JA 211), employees were protected when they wore "no scab" buttons in part to discourage coworkers from participating in a training program. 314 NLRB at 733. Thus, the Board appropriately rejected (JA 211) McElroy's claim that White's use of the term "scab" to refer to a subcontractor's nonunion employees establishes "special circumstances."

As the Board further found, White used the term in good faith to register a legitimate complaint against McElroy's continued practice of giving unit work to nonunion subcontractors. White credibly testified that he used the word "scab" to

“represent nonunion workers taking the work of union members.” (JA 211; 56.)

Given the undisputed evidence that employees discussed McElroy’s subcontracting practices at a union meeting and suggested White’s “scab” sign, his compatriots plainly understood that he used the term to refer to the subcontractors’ employees. Accordingly, McElroy cannot plausibly contend (Br 29) that White’s sign would incite an illegal work stoppage. (JA 204; 35-36, 40.) In short, the Board, considering the circumstances surrounding White’s decision to display the signs—“including numerous grievances that were not resolving an ongoing dispute concerning the alleged loss of bargaining unit work”—, reasonably concluded that White did not use the term “scab” either recklessly or in bad faith. (JA 211.)

McElroy’s other assertions (Br 27-29) that White’s signs could have led to violence are likewise based on unwarranted speculation. Thus, in claiming that White was attempting to foment an illegal strike, rather than protest subcontracting, McElroy suggests (Br 9) that White could not have been referring to subcontractors because all subcontracting grievances assertedly were withdrawn prior to September 2007. McElroy, however, inaccurately characterizes the record, which shows that the Union actually continued to file new grievances over subcontracting. (JA 203; 33.) Indeed, one of those grievances was settled just a week before the October 2008 hearing in this case. (JA 203; 33.)

McElroy also does not help its argument by relying (Br 9) on the testimony

of labor consultant Gregory Dixon about the timing of the grievances. Dixon equivocated, conceding that he did not “remember for sure if they got withdrawn pre-September of 2007 or after September,” and he acknowledged that “[e]ven thereafter, there have been some subcontracting grievances.” (JA 90.) Moreover, McElroy forgets that even if the grievances had all been resolved, which they were not, employees would still have been engaged in protected union activity by continuing to protest McElroy’s subcontracting practices. *See Eastex*, 437 U.S. at 565.

McElroy also does not gain traction by professing (Br 23, 29) that its officials were unclear whether the signs referred to the subcontracting dispute, and thus feared they would lead to violence or illegal work stoppages. (JA 209.) Even Adkins conceded that he “assumed” White’s signs referred to subcontractors, not some other dispute. (JA 206, 211; 74.) Moreover, given Adkins’ admitted receipt of the union president’s letters of protest about subcontracting the day after White first brought his signs to the lot, the judge properly found that Adkins was aware of the signs’ meaning. (JA 209; 145-46.) Dixon’s testimony also does not support McElroy’s claim that it did not realize White’s signs referred to the parties’ subcontracting dispute. As the judge noted, Dixon “equivocated as to whether he was aware of the subject of White’s protest, but incredibly claimed he could not recall seeking clarification from Adkins.” (JA 208; 94.) The judge reasonably

disregarded Dixon's "ambiguous" testimony as little more than "an effort to support [McElroy's] legal argument." (JA 209.)

In sum, Adkins' and Dixon's testimony amounts to no more than sparse, completely subjective speculation that the Board reasonably rejected as insufficient to justify the threatened restriction on Section 7 rights. Contrary to McElroy's assertion (Br 26), the Board was not required to accept their conjecture at face value simply because it was "unrebutted." *See Vance v. NLRB*, 71 F.3d 486, 493 (4th Cir. 1995) (upholding Board's rejection of "uncontradicted testimony"). Furthermore, the judge considered (JA 208) Adkins' and Dixon's demeanor in making his credibility determinations, and found it wanting. *Id.* at 491 ("the Board . . . attaches great weight to a [judge's] credibility findings insofar as they are based on demeanor"). The judge, concluding (JA 208) that Adkins' testimony was not "particularly convincing" and that Dixon's recall was "poor," thus reasonably found (JA 209) that McElroy knew that White's protest concerned subcontracting.

Importantly, McElroy introduced no objective evidence to demonstrate the alleged harm White's sign would cause. McElroy offered no evidence that the signs provoked any hostile behavior or otherwise disrupted work in the 3 days that they were displayed. McElroy failed to show even a threat of disruption. Adkins conceded that he received no complaints from subcontractors about the signs. (JA

211; 85.) McElroy's claim that White's signs could cause an illegal work stoppage was therefore "more fanciful than real," *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 848 (5th Cir. 1954), and ignores the reality of employee relations at the mine.

Contrary to McElroy's assertions (Br 33), the Board never required McElroy to wait until actual violence or hostilities occurred to justify its restrictions on employee speech. Rather, the Board only demanded that McElroy witnesses do more than merely speculate that the signs might cause workplace disruptions. As the Board and Courts have consistently held, "[t]he mere assertion by an employer that special circumstances exist is, of course, insufficient to justify curtailment of the employee's guaranteed rights." *Coors Container Co.*, 628 F.2d at 1286. Consequently, an employer must proffer more than just its opinion that a restriction on Section 7 rights is necessary to prevent the degradation of an important managerial interest, even though it has no obligation to wait for actual harm to befall its enterprise. *See United Technologies*, 814 F.2d at 882 (warning that an employer must put forth "substantial evidence that some restriction of employee speech was necessary"). In sum, the Board reasonably found that McElroy failed to show any special circumstances justifying its restriction on its employees' exercise of their Section 7 rights.

McElroy fails to cite even a single case where use of the term "scab" alone established special circumstances. To the contrary, in *Mead Corporation*, the

Board rejected an employer's defense of special circumstances where the employer failed to link vandalism at its facility, including the word "scab" spray-painted on a supervisor's locker, with the "no scab" messages on employee buttons. 314 NLRB at 734. Similarly, in *Coors Container Co.*, the employer failed to show special circumstances where a boycott sign with the term "scab" was displayed inside a truck and there were no incidents among the employees arising out of the strike. 238 NLRB at 1319. Likewise, McElroy can point to "no reaction to the sign or any disruption of work." (JA 211.) As discussed, McElroy only mustered unsupported conjecture in its attempt to show special circumstances. In short, McElroy "failed to demonstrate that 'special circumstances,' such as violence, interference with training or production, or threats thereof, caused the [Company's] interests in plant discipline to outweigh the employees' rights." *Mead Corp.*, 314 NLRB at 734.

The cases cited by McElroy (Br 27-28) illustrate the established rule relied on by the Board, requiring the employer to meet its burden of showing "special circumstances" to justify a restriction of protected activity, and necessitate no different result here. For instance, in *Fabri-Tek, Inc. v. NLRB*, the employer banned employees from wearing large, eye-catching buttons in the workplace, asserting that the display of the particular insignia distracted employees and led to an increase in poorly produced products. *See* 352 F.2d 577, 583 (8th Cir. 1965).

The employer prevailed because it offered evidence showing that its production process required extreme concentration and that, after the button's initial dissemination, at least six employees had left the production floor during their shifts to examine them, potentially undermining plant production. *Id.* at 583-84.

Similarly, in both *Virginia Power and Electric Company v. NLRB*, 703 F.2d 79, 82-83 (4th Cir. 1983), and *Davison-Paxon Company v. NLRB*, 462 F.2d 364, 369 (5th Cir. 1972), the employers prevailed in court because they, like the employer in *Fabri-Tek*, were able to provide specific examples of employee conflicts justifying the prohibition on provocative buttons worn by a receptionist and a department-store sales clerk. Both companies asserted as a justification for prohibiting the buttons a fear that prounion and antiunion employees would engage in public combat, thereby endangering the employers' public image.<sup>4</sup> In all of these cases, the employer was not required to show an actual injury to reputation,

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<sup>4</sup> To the extent that visitors might see union signs on employee vehicles, the contact is only incidental while they travel into the mine. Although McElroy states (Br 28) that the signs "erroneously conveyed to third parties that McElroy was involved in a work stoppage," the case law demonstrates that outsiders almost always see employee signs when protected activity occurs in employer parking lots, and that this is not sufficient to justify a restriction on employees' protected activity. *See, e.g., Colonial Stores*, 248 NLRB 1187, 1188-89 (1980) (finding no "special circumstances" where an employee parked in the first space outside a retail store and affixed a sign complaining that the store "has no regard for its employees' rights"); *Firestone Tire*, 238 NLRB at 1323 (noting that "the record indicates that other persons parked [in the employee parking lot] as well, as shown in part by the existence of three spaces designated as visitor spaces").

image, discipline, or sales. Rather, the employer was obligated, as was McElroy here, to produce concrete evidence demonstrating that it was reasonably foreseeable that the protected speech would create a problem (e.g., distracted employees on a sensitive production line) impacting a legitimate managerial interest (e.g., diminished productivity). The Board reasonably found that McElroy failed to make such a showing.

**iv. No exceptional circumstances warrant overturning the Board's credibility determinations**

The Board found that, despite Adkins' professed concern about violence or illegal work stoppages, he waited 3 days before telling White to remove the signs or his truck would be towed. (JA 208.) In making this finding, the judge reasonably credited White's testimony that Adkins saw the truck on the lot 3 days before their meeting and reasonably discredited Adkins' claim that he acted immediately. (JA 208.) The judge further discredited Adkins' claim that he discussed work conduct rules with White at the meeting. (JA 208; 78-79.) Before this Court, McElroy challenges (Br 35-40) these credibility rulings, hoping that Adkins' discredited version of events would somehow assist it in proving "special circumstances" to justify its threat. As we now show, McElroy fails to establish any basis for disturbing the judge's reasonable determinations to discredit Adkins' testimony, which, in any event, does not establish special circumstances.

“It is well settled that absent exceptional circumstances, the [judge’s] credibility findings, ‘when adopted by the Board are to be accepted by the [reviewing] court.’” *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 331 (4th Cir. 2008) (quoting *NLRB v. Air Prods. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983)). As this Court has stated, “balancing of witnesses’ testimony is at the heart of the factfinding process” and, thus, “it is normally not the role of the reviewing court to second-guess a fact-finder’s determinations about who appeared more ‘truthful’ or ‘credible.’” *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 71 (4th Cir. 1996). Quite simply, the judge was in the best position to assess the credibility of the witnesses who appeared before him. To overturn a credibility determination, the Court must find that the determination “is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Sam’s Club v. NLRB*, 173 F.3d 233, 240 (4th Cir. 1999) (citation omitted). Here, the judge’s credibility determinations contradict no other findings of fact, and are based on well-articulated reasons.

The judge reasonably credited White because he testified with “specificity, good recall, and in a credible fashion” about when and where he parked his vehicle with the signs. (JA 208.) As the judge also noted, White’s testimony that he first brought the signs to the lot on September 27 is corroborated by evidence that Union President Sparks sent Adkins his written complaints on the same day—

indicating a “coordinated effort” by the Union to combat McElroy’s subcontracting practices. (JA 208.)

In contrast, the judge reasonably discredited Adkins’ proffered timeline because McElroy presented no corroborating evidence to support Adkins’ assertion that he immediately acted to have the signs removed from the lot. (JA 208.) For instance, although Adkins asserted that he immediately took a photograph of the truck and emailed it to Dixon, the photograph is undated and no such email was introduced into evidence, nor did Dixon recall when he received the photograph. (JA 208; 72, 164.) Additionally, McElroy is simply wrong (Br 13) in claiming “no testimony” established Adkins’ failure to meet with White the first time he saw the signs. As shown above, White credibly testified that Adkins saw the signs on September 27 but did not meet with him and Lewis until October 1. (JA 208; 49-50.) Given all of these factors, the judge reasonably discredited Adkins’ testimony as to when he first saw the truck and met with White.

McElroy’s reliance (Br 35-36) on Dixon’s testimony is equally unavailing because the judge reasonably discredited his uncertain account as to when Adkins confronted White about the signs. (JA 208.) As the judge found, Dixon’s “testimony about the timing and content of his conversation with Adkins was hazy at best . . . [his] recall as to the event was poor.” (JA 208.) Indeed, Dixon could

not even remember if Adkins contacted him before or after threatening to have White's truck towed. (JA 208; 79, 92-93.)

McElroy gets no further in attacking (Br 38) the judge's findings by relying on Adkins' statement that he cited to a work rule in his meeting with White. The judge discredited Adkins' testimony, which came in response to a leading question, in the face of Lewis' credible testimony that Adkins "did not" cite to a work rule and White's corroborating testimony that Adkins gave no reason for demanding the signs' removal other than that they were on private property. (JA 208; 50-52, 78, 105.) The judge credited White and Lewis' "consistent" accounts of their October 1 meeting with Adkins based on the "demeanor of the witnesses, and the evidence of the record as a whole." (JA 208.) McElroy errs (Br 39-40) in relying on Lewis' preliminary response ("not that I recall") when he was questioned about whether Adkins ever mentioned work rules in their meeting. (JA 105.) When the judge asked Lewis to clarify his testimony, he unequivocally responded, "No, [Adkins] did not" cite a work rule. (JA 105.)

McElroy next argues (Br 40) that, even if Adkins did not cite a company work rule in the meeting, the rule nevertheless justified Adkins' threat to have White's truck towed. McElroy, however, failed to raise this meritless contention before the Board. Thus, McElroy is precluded from raising its claim for the first time on review, and it is not properly before this Court. *See* 29 U.S.C. § 160(e),

and cases cited above at p. 21. In any event, the existence of a posted work rule at the mine would not have established McElroy's "special circumstances" defense. As discussed previously, White was not urging an illegal work stoppage or any other inappropriate, hostile behavior. Besides, interpreting a work rule as barring White's use of the term "scab" would be unlawful in itself because, as the Board found, his use of the term was protected under the Act. *See* pp. 15-17 above and *Guardsmark LLC v. NLRB*, 475 F.3d 369, 372 (D.C. Cir. 2007) (where employer promulgates work rules "likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice").

In sum, McElroy has not established any "exceptional circumstances," *Evergreen Am. Corp.*, 531 F.3d at 331, to justify overturning the judge's well-reasoned credibility determinations. In any event, the discredited testimony on which McElroy relies would not have shown, as it asserts (Br 38), that White's signs would have led to "violence, unrest, or an improper work stoppage." The Board reasonably found that McElroy failed to meet its burden of establishing special circumstances sufficient to justify threatening White for engaging in protected activity.

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying McElroy's petition for review and enforcing the Board's order in full.

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National Labor Relations Board

September 2010

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

No. \_\_\_\_\_ **Caption:** \_\_\_\_\_

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### **All Case Participants Are CM/ECF Participants**

I hereby certify that on \_\_\_\_\_, I electronically filed the foregoing  
with the Clerk of Court using the CM/ECF System, which will send notice of such  
filing to the following registered CM/ECF users:

s/ \_\_\_\_\_