No. 10-3579

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST
Intervenor

v.

REGENCY HERITAGE NURSING AND REHABILITATION CENTER
Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce an Order of the Board issued against Regency Heritage Nursing and Rehabilitation Center ("the Center"). The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of

the National Labor Relations Act, as amended ("the Act").[1] This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act,[2] because the unfair labor practices occurred in New Jersey.

Previously, a two-member panel of the Board issued a Decision and Order in this case on February 27, 2009.[3] (A 245–55.)[4] The Center petitioned the D.C. Circuit for review of that Order and the Board cross-applied for enforcement. On June 17, 2010, before the parties had filed briefs, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*,[5] holding that a Board delegee group must maintain at least three members in order to exercise the delegated authority of the Board.[6] In light of *New Process*, the Board issued an August 17, 2010 order setting aside the two-member Decision and Order (A 262–63) and filed a motion to dismiss the case before the D.C. Circuit. The Board's motion to dismiss was granted on August 19, 2010.

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[1] 29 U.S.C. §§ 151, 160(a).

[2] 29 U.S.C. § 160(e).

[3] *Regency Heritage Nursing and Rehab. Ctr.*, 353 NLRB 1027 (2009).

[4] "A" references are to the Joint Appendix filed by the Center. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br" references are to the Center's brief.

[5] 130 S. Ct. 2635 (2010).

[6] *Id.* at 2640–42.

On August 25, 2010, a three-member panel of the Board issued the Order that is now before the Court (A 2),[7] which incorporated by reference the February 27, 2009 Decision and Order. (A 245–55.) That Order is a final order with respect to all parties under Section 10(e) of the Act.[8] The Board filed its application for enforcement on August 27, 2010. The application for enforcement is timely, as the Act does not impose a time limit on such filings. 1199 SEIU United Healthcare Workers East ("the Union"), the charging party before the Board, has intervened on the Board's behalf.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Center violated Section 8(a)(5) and (1) of the Act by refusing to deal with its employees' union representative, Hector Pena.

2. Whether the Board acted within its discretion in declining to defer this case to arbitration.

STATEMENT OF THE CASE

Acting upon an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Center had violated Section

[7] 355 NLRB No. 103, 2010 WL 3365297 (Aug. 25, 2010).

[8] 29 U.S.C. § 160(e).

8(a)(5) and (1) of the Act,[9] by refusing to deal with Union Representative Hector Pena and by unilaterally terminating a past practice regarding non-employee representative access to its facility. (A 186–90.) The Center filed an answer denying the allegations and raising the affirmative defense that the Board should defer the matter to arbitration. After a hearing, an administrative law judge found that the Center violated the Act as alleged. (A 247–55.)

On review, the Board agreed with the administrative law judge that the Center unlawfully refused to deal with Union Representative Pena by barring him from the facility and refusing to permit him to engage in his representational duties on the premises. The Board also agreed that this matter was not deferrable to arbitration. (A 245.) The Board, however, dismissed the allegation that the Center unilaterally terminated a past practice of granting certain nonemployee union representatives access to its facility. (A 245–46.) The facts supporting the Board's Order are summarized below, followed by a summary of the Board's Conclusions and Order. Other facts relating to the Center's affirmative defense will be discussed in the Argument.

[9] 29 U.S.C. § 158(a)(5) and (1).

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Delivers a 10-Day Strike Notice; the Center Bans Union Representative Pena from the Facility; the Union Investigates the Center's Allegations Regarding Pena

The Center, which operates several nursing homes throughout New Jersey, purchased and began operating its facility in Somerset, New Jersey on March 1, 2007. (A 247; A 17, 144.) The Union had a collective-bargaining agreement with the Center's predecessor covering its nonprofessional employees. (A 247; A 15–16.) The Center recognized the Union after a majority of employees agreed to certain new employment terms. (A 159–60, 167, 237–40.) Those terms were laid out in a letter to the employees that also explained that the Center disavowed all "terms of any predecessor contract," and "specifically reject[ed] any agreement to arbitrate disputes." (A 238.)

Shortly thereafter, the parties agreed to begin negotiations for a new collective-bargaining agreement. On June 19, the Center and the Union held an unsuccessful bargaining session, at which the Union gave the Center a 10-day notice that it intended to strike on June 30 and July 1. (A 248; A 19–21, 80–81.) From that day forward, the Center refused to allow the union representatives to access its facility.[10] (A 248; A 164.)

[10] The Center made a one-time exception to allow Pena to conduct a contract ratification vote at the facility in March 2008. *See* p. 9.

On June 21, Union Representative Pena and Union Secretary-Treasurer Marvin Hamilton visited the facility to meet with employees regarding the 10-day strike notice. (A 248; A 21–22, 81–82.) After they arrived, one of the Center's assistant administrators instructed them to leave. (A 248; A 23–24, 83.) They refused, explaining that they represented the employees at the facility. (A 248; A 24, 84.) Center owner David Gross arrived a few minutes later, demanding that Pena and Hamilton leave and stating that the Union did not have a contract with the Center. (A 248; A 25, 85–86.) When they asked him about some employees who had been fired that day, allegedly for wearing union buttons, Gross stated that Pena and Hamilton did not represent his employees. (A 248; A 25–26, 86–87.) Pena and Hamilton left the facility when the police arrived. (A 248; A 26, 87.)

On June 22, the employees received a letter signed by Owner Gross, stating that "Union representatives, members and anyone on strike are not employees of [the Center] and are not permitted on our property." (A 248; A 27.) Later that day, Pena arrived to distribute flyers from the sidewalk adjoining the facility. (A 248; A 27–29.) Again, the Center's managers told him that they would call the police if he did not leave. (A 248; A 28–29.) The police were summoned several times but said that Pena could remain because he was on public property. (A 248; A 28, 31.)

On June 23, Pena and Hamilton returned to the facility to speak with the residents' visitors as they arrived for Sabbath services and family visits. (A 248; A 33–34, 88–89.) For several hours, they distributed leaflets describing the Union's labor dispute with the Center and requesting the visitors' support. (A 248; A 34–36, 90–92, 227.) Pena and Hamilton left the facility together at about 2:00 p.m. without having spoken to anyone from the Center's administration. (A 249; A 37, 91–92.)

About two weeks later, the Center alleged that Pena had engaged in misconduct while outside the facility on June 23 by holding up an offensive sign stating "Fatah." (A 249; 93.) The Union's president asked Hamilton to investigate. (A 249; A 94.) Hamilton interviewed the Center's witnesses and spoke to Pena about the Center's allegations. (A 249–50; A 111–14, 123–32.) Based on the results of this investigation, the Union determined that the allegations were false. (A 249; A 94.)

B. The Parties Enter into a Standstill Agreement; the Parties Arbitrate the Center's Barring of Pena from Two of Its Other Facilities

On July 2, the parties entered into a standstill agreement that would be effective until November 15 while they continued to negotiate the terms of a collective-bargaining agreement. (A 251; A 109, 231–33.) Under the standstill agreement, the Union withdrew its strike notice and agreed to negotiate with the

Center, and the Center agreed to certain terms, including the reinstatement of the employees who had been terminated on June 21. (A 251; A 231–33.) On November 13, the parties extended the standstill agreement to December 31, 2008, and added a new provision for binding arbitration of any dispute over the standstill agreement's terms. (A 251; A 234.)

Also on November 13, an arbitration was conducted concerning the Center's barring of Union Representative Pena from two other nursing homes owned by Gross. (A 250; A 42, 45, 243.) The arbitration did not involve the Center's barring of Pena from the Somerset facility because there was no collective-bargaining agreement at that facility that would allow for arbitration of the dispute. (A 250; A 42, 45–46, 96–97.)

C. The Union and the Center Enter Into a Collective-Bargaining Agreement; the Center Continues To Bar Pena from the Facility

After continuing negotiations on the terms of a collective-bargaining agreement, the parties reached accord in early 2008. (A 251; A 235–36.) That agreement contained a grievance and arbitration provision, limited to disputes arising during the contract's term, March 1, 2008, through February 28, 2011. (A 251; A 236, 204–05.)

The Center has continuously barred Union Representative Pena from the facility since June 21, 2007, two days after the Union issued its 10-day strike

notice, with one exception. (A 252.) The Center granted Pena one-time access to the facility on March 14, 2008, to facilitate the employees' contract ratification vote. (A 41, 77–78.) Pena participated in nearly all of the off-site bargaining sessions with the Center for the parties' collective-bargaining agreement. (A 251; A 44–45.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 25, 2010, the Board (Chairman Liebman and Members Schaumber and Hayes) issued its decision (A 2) incorporating by reference the previously set-aside Decision and Order reported at 353 NLRB 1027 (2009). (A 245–55.) The Board found, in agreement with the administrative law judge, that the Center violated Section 8(a)(5) and (1) of the Act,[11] by refusing to deal with Union Representative Pena. (A 245.) The Board also agreed with the judge that the matter was not deferrable to arbitration. (A 245.) The Board, however, reversed the judge's finding that the Center violated Section 8(a)(5) by unilaterally terminating an alleged past practice regarding nonemployee representative access to its facility. (A 245–46.)

The Board's Order requires the Center to cease and desist from refusing to deal with union representatives duly appointed by the Union to represent the Center's employees and from, in any like or related manner, interfering with,

[11] 29 U.S.C. § 158(a)(5) and (1).

restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.[12] (A 246.) The Order affirmatively requires that the Center recognize and deal with Pena as a duly-appointed representative of the Union for the Center's employees, providing him access to the facility to perform his representative duties in accord with the provisions of the parties' current collective-bargaining agreement. The Order also requires the Center to notify the Union that it will deal with Pena on request, and to post copies of a remedial notice. (A 246.) The Center filed a motion for reconsideration, which the Board denied.

STATEMENT OF RELATED CASES

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

STANDARD OF REVIEW

This Court "must 'accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence.'"[13] Thus, the Court may not displace the Board's choice between fairly conflicting views of the evidence "even though the court would justifiably have

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[12] 29 U.S.C. § 157.

[13] *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002) (quoting *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994)); *see also* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951).

made a different choice had the matter been before it *de novo*."[14] The Court is particularly deferential to the Board's credibility determinations.[15] As a result, the judge's credibility determinations, which have been reviewed and adopted by the Board, are not to be reversed "unless inherently incredible or patently unreasonable."[16] The principles applicable to review of a Board determination not to defer a matter to arbitration are similarly well settled. In short, this Court will "review the Board's decision not to defer by an abuse of discretion standard."[17]

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Center violated Section 8(a)(5) and (1) of the Act by refusing to deal with Union Representative Pena. The Center does not dispute that the Act requires it to deal with the Union's representatives, nor does it dispute that it has refused to deal with Pena by barring him from its facility and refusing to permit him to engage in his representational duties on its premises since the end of June 2007. In its defense, the Center merely attacks the Board's credibility determinations and presses its own view of the

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[14] *Universal Camera*, 340 U.S. at 488; *accord Stardyne*, 41 F.3d at 151 (citing *Universal Camera*, 340 U.S. at 488).

[15] *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir. 1989) ("The Board's credibility determinations in particular merit great deference.").

[16] *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718–19 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994)); *ABC Trans-Nat'l Transp., Inc.*, 642 F.2d 675, 684–86 (3d Cir. 1981).

[17] *Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120, 1125 (3d Cir. 1983).

underlying facts, a view which was considered and reasonably rejected by the Board. The Center has failed to demonstrate that the Board's credibility determinations were incredible or patently unreasonable. Nothing in its defense presents the Court with any basis to disturb the Board's finding that the Center unlawfully refused to deal with Pena.

The Board's rejection of the Center's affirmative defense is also supported by substantial evidence. Contrary to the credited evidence, the Center contends that Pena engaged in two acts of egregious misconduct that destroyed its ability to bargain with him. In reasonably rejecting its first claim, the Board found that the Center continued to deal with Pena after his first alleged act of misconduct—a remote incident in 2005 when Pena distributed a leaflet that the Center found objectionable at another of the Center's facilities—and therefore rejected the Center's claim that the incident permanently destroyed its ability to bargain in good faith with Pena. Regarding its second claim—that Pena stood outside the facility holding an offensive "Fatah" sign—the Board reasonably determined, based on the credited evidence, that the alleged misconduct never occurred. The Board therefore reasonably rejected the Center's affirmative defense.

Finally, the Board did not abuse its discretion by declining to defer its proceedings in this case to arbitration. The Board evaluated this case against well-settled law and determined that deferral was not appropriate. Importantly, the

parties did not have a collective-bargaining agreement in place when this dispute arose, and the Board will only defer to arbitration when a dispute is governed by a collectively-bargained arbitration provision. Although the Center urges several alternate theories as to why the Board should have deferred to arbitration, those matters were considered and reasonably rejected by the Board as meritless.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO DEAL WITH ITS EMPLOYEES' UNION REPRESENTATIVE, HECTOR PENA

A. Applicable Principles

Employees have the right "to bargain collectively through representatives of their own choosing" under Section 7 of the Act.[18] The Board has construed this guarantee to include a union's unilateral right to choose the individuals it wants to act as its agents,[19] a right that is "fundamental to the statutory scheme."[20] Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of its employees."[21] As this Court has

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[18] 29 U.S.C. § 157.

[19] *See, e.g., Long Island Jewish Med. Ctr.*, 296 NLRB 51, 71–72 (1989); *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), *aff'd sub nom. UAW v. NLRB*, 670 F.2d 663 (6th Cir. 1982); *KDEN Broad. Co.*, 225 NLRB 25, 35 (1976).

[20] *Gen. Elec. Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969).

[21] 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the

explained, "[t]he general law on good-faith bargaining is quite clear. . . . Each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent."[22]

The Act requires an employer to deal with whomever the union designates as its representative for collective bargaining, and failure to do so violates Section 8(a)(5) of the Act, except in certain extraordinary circumstances.[23] An employer wishing to justify its refusal to deal with its employees' representative bears the burden of demonstrating such an extraordinary circumstance.[24] As one court has explained, this burden is "considerable" because of the "strong public policy

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rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) produces a "derivative" violation of Section 8(a)(1). *See NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 & n.1, 267 (3d Cir. 1941).

[22] *NLRB v. ILGWU*, 274 F.2d 376, 378 (3d Cir. 1960); s*ee also Prudential Ins. Co. of Am. v. NLRB*, 278 F.2d 181, 183 (3d Cir. 1960) ("[t]he Union has the right to designate its representative for handling grievances").

[23] *See, e.g., Prudential Ins. Co. of Am. v. NLRB*, 278 F.2d 181 (3d Cir. 1960) (employer violated Section 8(a)(5) and (1) by refusing to negotiate grievances with a local official it deemed objectionable); *Gen. Elec. Co.*, 412 F.2d 512 (2d Cir. 1969) (employer violated Section 8(a)(5) and (1) by refusing to deal with a union negotiating committee which included members of other unions); *Minn. Mining and Mfg. Co. v. NLRB*, 415 F.2d 174 (8th Cir. 1969) (employer violated Section 8(a)(5) and (1) by refusing to bargain with a union negotiating committee that included representatives from other plants); *NLRB v. David Buttrick Co.*, 399 F.2d 505 (1st Cir. 1968) (employer violated Section 8(a)(5) and (1) by refusing to meet with a union on the grounds of a possible conflict of interest).

[24] *NLRB v. Ind. & Mich. Elec. Co.*, 599 F.2d 185, 190 (1979); *Gen. Elec. Co.*, 412 F.2d at 516–17.

favoring the free choice of a bargaining agent by employees" which "is not lightly to be frustrated."[25] An employer may lawfully refuse to deal with a particular union representative, however, "if there is persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible."[26] In order to justify that "rare" exception to the general rule, the employer must demonstrate that the union representative's conduct was "sufficiently egregious."[27] As we show below, the Center presented no such evidence.

B. The Board Reasonably Found that the Center's Refusal to Deal with Union Representative Pena Was Unlawful

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by its refusal to deal with Union Representative Pena, and in doing so, rejected the Center's affirmative defense. (A 245.) The Center does not dispute that it is obligated to deal with the Union as its employees' representative. (Br 8, 17, 19, 33.) Moreover, the Center admits (Br 19, 20–21, 23, 32) that it has refused to deal with Pena by barring him from its facility and refusing to permit him to engage in his representational duties on its premises since June 21, 2007. Accordingly, if the

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[25] *David Buttrick Co.*, 399 F.2d at 507.

[26] *King Soopers, Inc.*, 338 NLRB 269, 269 (2002) (quoting *KDEN Broad. Co.*, 225 NLRB at 35 (emphasis omitted)); *see also UAW v. NLRB*, 670 F.2d 663, 664 (6th Cir. 1982); *Gen. Elec. Co.*, 412 F.2d at 517.

[27] *Gen. Elec. Co.*, 412 F.2d at 517.

Board reasonably found that the Center failed to carry its considerable burden of showing an extraordinary circumstance that would justify its refusal to deal with Pena, the Board's finding that the Center acted unlawfully must stand.

The Center contends (Br 23–34) that it met that burden by showing that Pena engaged in two discrete acts of misconduct which were so egregious and created such ill-will as to destroy the Center's ability to bargain with him in good faith. First, citing a single incident otherwise remote to the facts of this case, the Center argues (Br 18, 27–30) that Pena distributed a leaflet in 2005 at another of the Center's facilities that contained "false assertions" (Br 28) about Center owner Gross. Second, the Center contends (Br 24–26, 32–34) that on June 23, 2007, Pena stood outside the Somerset facility holding a "Fatah" sign. The Center asserts (23–34) that these two incidents were acts of egregious misconduct which privileged it to refuse to deal with Pena.[28]

This affirmative defense must be rejected by the Court, as it was by the Board, because it is contrary to the credited evidence. Indeed, the Board reviewed and adopted the judge's finding that "Pena engaged in no such improper

[28] The Center only summarily raises, but fails to develop, an additional claim of misconduct by Pena by asserting (Br 27) that he "never bothered to comply with even the predecessor contract's visitation and notice requirements." The Center waived this claim by failing to analyze or support it in its opening brief. *See, e.g.*, *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000). Even if this claim were developed, however, it would be meritless. As shown, the Board reasonably adopted the judge's finding (A 253) that Pena engaged in no misconduct.

misconduct" (A 253), let alone the sort of egregious misconduct that would allow the Center lawfully to refuse to deal with him. Now before this Court, the Center presents no basis to disturb the Board's finding that the Center violated the Act.

The Board rejected the Center's first contention, that Pena's 2005 leaflet distribution destroyed the possibility of good-faith bargaining, because the Center continued to deal with Pena after the fact. (A 245 n.3.) Pena had distributed the union leaflet (A 229) at the Center's Regency Grande facility in 2005 in response to the Center's unlawful dealings with a union that had not been chosen by its employees.[29] The leaflet, which was prepared by the Union's communications office (A 64–65), stated that the Board had found Owner Gross "guilty of stealing" Regency Grande employees' dues money through a "sweetheart deal" with an unlawfully recognized union. (A 229.) The Board found that "the activity described did not create 'such ill will that good-faith bargaining is virtually impossible . . . ,'" because "[t]he [Center] continued to deal with Pena in negotiations for the Somerset facility after the [2005] incident." (A 245 n.3 (citation omitted).)

The Center cites (Br 30) two inapposite cases in support of its claim regarding the 2005 leaflet. In both cases, the courts held that a party could

[29] *See Regency Grande Nursing and Rehab. Ctr.*, 347 NLRB 1143 (2006), *aff'd sub nom., NLRB v. Regency Grande Nursing and Rehab. Ctr.*, 265 Fed. Appx. 74 (3d Cir. 2008).

lawfully refuse to deal with the other party's bargaining representative because of the parties' past dealings.[30] Pena, unlike the representatives in the cited cases, has never been found by the Board to have evinced hostility toward the Center or any of its representatives, nor has he ever been found to have worked for the Center in any capacity. Moreover, the Center continued to deal with Pena as a participant at the collective-bargaining table even after it began refusing to allow him to engage in his representational duties on its premises (A 253; A 44), a point which the Center concedes (Br 33). Indeed, it is clear that Pena's presence did not render those contract negotiations futile, given that they yielded a signed collective-bargaining agreement and the Center allowed Pena one-time access to the facility to conduct an employee vote on the contract. (*See* p. 9.) These undisputed facts belie the Center's claim that there was no possibility of good-faith bargaining between the parties if Pena were involved.

The Board also reasonably rejected the Center's second argument (Br 24–26, 32–34), based on Pena's alleged holding up of an offensive "Fatah" sign, because the Board determined that it was contrary to the credited evidence. The Board

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[30] *NLRB v. ILGWU*, 274 F.2d 376, 379 (3d Cir. 1960) (employers' association "displayed an absence of fair dealing" by "selecting and insisting upon" a bargaining representative who had previously held highly confidential positions within the union); *NLRB v. Ky. Utilities Co.*, 182 F.2d 810, 813–14 (6th Cir. 1950) (employer did not commit an unfair labor practice by refusing to bargain with a union representative who was a former employee of the employer and who expressed a desire to destroy the employer financially).

adopted the judge's finding "that the record as a whole, including the credible testimony, in conjunction with the inherent probabilities of the situation, establishes that Pena did not carry a "Fatah" sign at the [Center's] premises . . . ." (A 252.) Because the Board found "that Pena did not, in fact, hold up a sign that said 'Fatah,'" the Center's refusal to deal with him based on this alleged misconduct was unlawful. (A 245 n.3.) Finally, the Board also rejected that contention because Owner Gross admitted that he barred Pena from the Center's facility since June 21, 2007, several days before the "Fatah" incident was alleged to have occurred. (A 252; A 164.)

Specifically, the Board found that on June 23, 2007—the day on which the Center alleges that Pena held the "Fatah" sign—Pena and Hamilton spent several hours outside the Center's facility distributing leaflets describing the Union's labor dispute with the Center. (A 248; A 34–36, 90–92, 227.) Pena credibly denied having displayed a sign bearing the word "Fatah" on this or any other occasion. (A 251; A 36.) According to his credited testimony, Pena did not even know at the time what the word "Fatah" signified, and had to "look[] it up on the internet." (A 36, 40, 68.) Hamilton, who arrived minutes after Pena (A 248; A 32–33, 88–89, 171–72) and remained with Pena until they left the Center's facility at 2:00 p.m., (A 249; A 91–92) also credibly denied seeing a "Fatah" sign. (A 251; A 91.)

The Center has failed to demonstrate—as it must before this Court—that the judge's determinations to credit Pena's and Hamilton's testimony were "inherently incredible or patently unreasonable."[31] This Court gives great weight to the administrative law judge's credibility determinations, "because he or she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.'"[32] The Court is particularly deferential to a judge's credibility findings where, as here, the credited testimony is corroborated by other testimony.[33] As the judge explained, Pena and Hamilton were "credible and believable witnesses, who appeared to be testifying in an honest and forthright manner on both direct and cross examination." (A 251–52.) Pena and Hamilton corroborated one another in all material respects, and the judge found also that "the surrounding facts and circumstances tend[ed] to support their account of events." (A 252.) In contrast, the judge found Center owner Gross, whom the Center put on the stand to testify that the "Fatah" incident had occurred, to be "an evasive and argumentative witness whose testimony lacked reliability." (A 252.) She found him "argumentative and unresponsive" (A 249) and noted that his memory seemed

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[31] *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718–19 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994)).

[32] *ABC Trans-Nat'l Transp., Inc. v. NLRB*, 642 F.2d 675, 684 (3d Cir. 1981) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

[33] *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298–99 (3d Cir. 2005).

to fail him under cross examination. (A 249.) All of the judge's credibility determinations were reviewed and adopted by the Board. (A 245.)

The Center, on the other hand, does not rely on any credited testimony to advance its affirmative defense. Instead, the Center attacks or ignores the Board's credibility determinations without demonstrating that they are "inherently incredible or patently unreasonable," as it must.[34] The Center's only evidence in support of its "Fatah" allegation came from the arbitration testimony of two witnesses who claimed to have seen the sign (A 243–44), neither of whom testified in this case. Although the judge correctly declined to "make a determination regarding demeanor so as to credit or discredit unseen witnesses" (A 252), she also noted that the arbitration testimony was inconsistent with the credited testimony of Pena and Hamilton, witnesses whose testimony she could properly assess.[35] (A 252.)

The Center cites inapplicable cases (Br 28–33) that do not support its affirmative defense. Indeed, *People Care, Inc.*, which the Center cites (Br 30),

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[34] *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718–19 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994))

[35] The Center asserts (Br 32) that the administrative law judge erred in not crediting their arbitration testimony as stipulated to by the Union and the Center. (A 243–44.) But the parties merely stipulated to the content of the witnesses' testimony, not to the veracity of that testimony. Moreover, the General Counsel was not party to the stipulation nor to the underlying arbitration. Accordingly, it has no controlling weight in this case.

supports rejecting its affirmative defense because there, like here, the Board found no misconduct and on that basis rejected the affirmative defense.[36] The remaining cases cited all involved union representatives who engaged in extraordinarily violent and threatening misconduct, such as participating in a death threat against the employer's president,[37] throwing a meat hook, a knife, and a 40-pound piece of meat,[38] or assaulting the employer's personnel director during a grievance meeting.[39] In another dissimilar case, the union representative falsely reported to the employer's bank that the employer was engaged in financial fraud and distributed a newsletter to the employees accusing the employer of involvement with prostitution and drugs.[40] In stark contrast, the Board here found no misconduct. (A 253.)

In sum, there is simply no basis for the Center's affirmative defense (Br 34) that good-faith bargaining with Pena would have been futile. Because the Center has not sustained its considerable burden of justifying its refusal to deal with Pena, the Board's finding must be enforced.

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[36] *People Care, Inc.*, 327 NLRB 814, 814, 825 (1999).

[37] *Pan Am. Grain Co., Inc.*, 343 NLRB 205 (2004).

[38] *King Soopers, Inc.*, 338 NLRB 269 (2002).

[39] *Fitzsimons Mfg. Co.*, 251 NLRB 375 (1980), *aff'd sub nom. UAW v. NLRB*, 670 F.2d 663 (6th Cir. 1982).

[40] *Sahara Datsun, Inc.*, 278 NLRB 1044 (1986), *aff'd Sahara Datsun, Inc. v. NLRB*, 811 F.2d 1317 (9th Cir. 1987).

II. THE BOARD DID NOT ABUSE ITS DISCRETION IN DECLINING TO DEFER THIS CASE TO ARBITRATION

Contrary to the Center's contention (Br 34–42), the Board, applying well-settled principles, reasonably declined to defer this case to an arbitration proceeding. Under Section 10(a) of the Act,[41] the Board has plenary authority to decide unfair labor practice cases, and this authority is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[42] The Board, however, may in its discretion defer a dispute to arbitration where it appears that arbitration will resolve both the contractual and the unfair labor practice issues "in a manner compatible with the purposes of the Act.'"[43] The Board requires the party urging deferral to demonstrate its willingness to resolve the dispute through arbitration before the Board will defer.[44] Generally, "[w]hen the parties have provided for arbitration . . . in their collective bargaining agreement the Board will not pursue unfair labor practice proceedings until arbitration has run its course."[45] At the very least, the parties must have a collective-bargaining agreement in effect that "provides for

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[41] 29 U.S.C. § 160(a).

[42] *See also Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120, 1125 (3d Cir. 1983).

[43] *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 n.9 (3d Cir. 1974) (quoting *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) (citations omitted)).

[44] *Wonder Bread*, 343 NLRB 55, 55 (2004) (citing *United Technologies Corp.*, 268 NLRB 557, 558 (1984)).

[45] *DaimlerChrysler Corp.*, 288 F.3d 434, 438 (D.C. Cir. 2002).

arbitration of a very broad range of disputes" and "clearly encompasses the dispute at issue" for deferral to arbitration to be appropriate.[46]

In this case, the requisite for deferral that there be an existing collective-bargaining agreement with an applicable arbitration provision covering the dispute simply has not been met. The parties were not subject to a collective-bargaining agreement in June 2007, when the Center began its unlawful refusal to deal with Union Representative Pena. (A 247; A 17–18, 144, 237–38.) Indeed, none of the three agreements that the Center points to—the later collective-bargaining agreement, the standstill agreement, and the standstill extension agreement—were yet in existence in June 2007. As a result, the parties had no valid provision for arbitration when the dispute arose, and it was therefore well within the Board's discretion to decline to defer the matter.

Regardless, in arguing that the Board abused its discretion by failing to defer this case to arbitration, the Center raises the same three contentions that the Board reasonably, and within its discretion, rejected. For example, the Center argues (Br 38) that the Board should have deferred to arbitration as provided for in the parties' current collective-bargaining agreement, ignoring the fact that its arbitration provision only applies to disputes which arise during the course of the agreement. (A 251; A 204–05, 236.) As shown at pp. 5–8, the Center's unlawful conduct

[46] *Wonder Bread*, 343 NLRB at 55 (citing *United Technologies Corp.*, 268 NLRB at 558).

began in June 2007 and the agreement was signed nearly a year later, in March 2008. The current agreement's arbitration provision therefore cannot provide for arbitration of this dispute.

The Center's reliance (Br 34–35) on the parties' standstill agreement (A 232–33) is similarly ill-founded. The standstill agreement, signed in July 2007, contained only an agreement that employees of either the Center or the Union who were found to have engaged in racial, ethnic, or cultural slurs were to be removed from their positions, and did not provide for arbitration.[47] Rather, it called for each party to investigate and act upon allegations against its own employees. (A 232–33.) As shown at p. 7, the Union conducted an investigation into the "Fatah" allegation in accordance with the agreement, and concluded that the allegations had no merit—a determination that was borne out by the Board's subsequent findings.

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[47] The agreement provided, in relevant part:

> The parties acknowledge each of them has experienced reports . . . relaying accounts of comments that are unacceptable. Racial, ethnic and cultural slurs are unacceptable and each party, upon notice of such complaints from the other party, shall investigate and use their best efforts to stop such behavior, if found to be true. It is expressly understood that comments and slurs have no place in these parties' relationships. Employees found to have engaged in these unacceptable behaviors shall be removed from their positions working for the Home or servicing the employees working at the Home.

(A 232–33.)

Despite the Center's urging (Br 37), the extension to the standstill agreement (A 234) also cannot provide for arbitration of the Center's unlawful refusal to deal with Pena. First, the provision provides for arbitration of disputes "concerning the terms of th[e] extension agreement," and is therefore inapplicable to the dispute over the Center's unlawful refusal to deal with Pena, which is not addressed in that agreement. (A 234.) Further, the extension agreement was not signed until November 2007, several months after the Center's unlawful conduct began. (A 251; A 234.)

It also bears noting that the Center's own actions prevented this case from being arbitrated, a fact that renders their argument disingenuous. Upon its takeover of the facility, and prior to its refusal to deal with Pena, the Center specifically rejected the provision of its predecessor's contract with the Union that provided for arbitration.[48] *See* p. 5. Moreover, the parties arbitrated a factually congruous dispute—Pena's expulsion from two of the Center's other nursing home facilities over the alleged "Fatah" incident—on the same day that they signed the standstill extension agreement. *See* pp. 7–8. According to Pena's unrebutted testimony, which was credited, they did not include the facility at issue in this case because it was not subject to an arbitration provision under a collective-bargaining agreement and therefore the parties could not be compelled to submit the issue to

[48] "[The new owners] . . . specifically reject any agreement to arbitrate disputes." (A 238.)

arbitration. (A 250; A 45–46.) The Center could have agreed to include the issue of Pena's access to the Somerset facility in the arbitration but declined to do so. (A 253.) As the judge noted, "this does not indicate a willingness to utilize arbitration to resolve the dispute, but suggests precisely the opposite." (A 253.)

In any event, the Board always retains its plenary authority to prevent unfair labor practices under the Act, and it has the discretion to determine whether or not to defer its resolution of a dispute to arbitration.[49] The Center has failed to identify any agreement between the parties that provided a mechanism for arbitration of the Center's unlawful conduct that began in June 2007, let alone one that would satisfy the Board's standards for deferral.[50] The Board was well within its discretion in declining to defer to arbitration under these circumstances.

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[49] *See* nn. 41–42, and accompanying text.

[50] *Wonder Bread*, 343 NLRB at 55 (citing *United Technologies Corp.*, 268 NLRB at 558).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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December 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
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Petitioner	*	
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and	*	
	*	Board Case No.
1199 SEIU UNITED HEALTHCARE WORKERS EAST	*	22-CA-27992
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	*	
Intervenor	*	
v.	*	
	*	
REGENCY HERITAGE NURSING AND REHABILITATION CENTER	*	
	*	
.	*	
Respondent	*	

COMBINED CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME REQUIREMENT AND CONTENT AND VIRUS SCAN REQUIREMENT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 5312 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court, and the .pdf file was scanned for viruses using Symantec Antivirus Corporate Edition, program 10.0.2.2000 version June 18, 2009 rev.4, and according to that program, was free of viruses.

/s/ Linda Dreeben

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Dated at Washington, DC
this 23rd day of December 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by electronic filing and by overnight mail the required number of copies of the Board's brief in the above-captioned case, and has served that brief by electronic filing upon the following counsel:

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