

No. 10-72478

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LEGACY HEALTH SYSTEM

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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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 the Board’s Order issued against Legacy Health System¹ (“the Company”). The Board found that the Company committed unfair labor practices by maintaining and enforcing a discriminatory hiring policy that deprived employees of job opportunities based on whether their current

¹ In its brief to the Court, the Company indicates that Legacy Health System changed its name and is now Legacy Health.

positions were union-represented, and by refusing to hire employees into positions for which they would have been hired but for the discriminatory policy.

The Board had jurisdiction over this case under Section 10(a) of the Act,² which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on August 9, 2010 and is reported at 355 NLRB No. 76. (SER 1.)³ It is a final order with respect to all parties under Section 10(e) of the Act.⁴ The Decision and Order incorporates by reference the Board's previous decision (SER 2-9) in this case, issued on July 13, 2009 and reported at 354 NLRB No. 45.

That prior decision was issued by a two-member quorum of the Board when there were no other sitting Board members. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*,⁵ holding that Board Chairman Liebman and Member Schaumber could not issue decisions when there were no other sitting Board members, as they did in the prior decision here. This Court granted the Board's motion for remand in light of *New Process*. The Board

² 29 U.S.C. §§ 151, 160(a).

³ "SER" references are to the Supplemental Excerpts of Record, filed with the Board's brief. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

⁴ 29 U.S.C. § 160(e).

⁵ 130 S. Ct. 2635 (2010).

then issued its August 9, 2010 Decision and Order that incorporated by reference the July 13, 2009 decision.

On August 10, 2010, the Board applied for enforcement of its Order issued against the Company. The application was timely, as the Act imposes no time limitation on such filings. This Court has jurisdiction over the application pursuant to Section 10(e) of the Act⁶ because the unfair labor practices occurred in Portland, Oregon.

STATEMENT OF THE ISSUES PRESENTED

1. In the absence of any challenge by the Company, whether the Board is entitled to summary enforcement of its Order finding that the Company violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a discriminatory hiring policy that deprived employees of job opportunities based on whether their current positions were union-represented, and refusing to hire three employees into positions for which they would have been hired but for the discriminatory policy.
2. Whether the Company waived its challenge to the Board's remedy by failing to present it to the Board.

⁶ 29 U.S.C. § 160(e).

RELEVANT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Based on a charge filed by Service Employees International Union, Local 49 (“the Union”) (SER 10-11), the Board’s General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act.⁷ (SER 12-21.) Following a hearing, the administrative law judge issued a decision and recommended order finding violations of the Act as alleged in the complaint. After considering the Company’s exceptions to that decision and supporting brief, the Board affirmed the judge’s decision, with some modification, and his recommended order. The facts supporting the Board’s decision, as well as the Board’s Conclusions and Order, are briefly summarized below.

STATEMENT OF FACTS

I. The Board’s Findings of Fact

A. The Company’s Operations and Collective-Bargaining Relationships; The Company’s Prohibition on Simultaneously Holding Union-Represented and Nonunion-Represented Positions

The Company operates five hospitals, a research facility, and a number of clinics and labs in the Portland, Oregon area, and has over 9,000 employees. It has

⁷ 29 U.S.C. § 158(a)(3) and (1).

seven different collective-bargaining agreements with various unions, two of which are with the Union involved in this case at Emanuel Hospital and Good Samaritan Hospital. It also has numerous positions and departments that are not represented by any union. (SER 5; 37-38.)

For at least nine years, the Company maintained an unwritten policy of prohibiting employees from simultaneously holding both union-represented and nonunion-represented positions. It does not, however, prohibit employees from holding multiple union-represented positions in different bargaining units under different collective-bargaining agreements. Likewise, employees may hold multiple nonunion-represented positions, which is a common occurrence. (SER 5; 33, 39-40, 83-85, 92-93, 97-98, 107-13.) The Company did not advise employees of its policy, nor did it advise the unions representing its employees. The Union in this case learned of the policy from an employee whom the Company denied a part-time nonunion position because she already held a union-represented position. (SER 5; 29, 48-49, 69-71, 79-80, 83-84, 112-13.)

B. The Company Enforces Its Policy and Refuses to Hire into Nonunion Positions Three Employees Who Already Held Union-Represented Positions

Three employees who held union-represented part-time positions with the Company applied for part-time non-represented positions, but the Company refused to hire them. With each employee, the only reason the Company gave for

its decision was that hiring them into those positions would violate its unwritten practice prohibiting employees from simultaneously holding union and nonunion positions.

One employee, Kathryn Milojevic, is a certified nursing assistant (CNA) at the Company's Emanuel Hospital, a union-represented position. In 2002, Milojevic also became a licensed massage therapist (LMT). Because Emanuel Hospital does not offer massage therapy, in January 2008, Milojevic applied for a part-time, nonunion position as a LMT at another company facility. She had an interview with Manager Cheryl Dotten, which went "very positively" and included a discussion of what hours she would be available to work. (SER 5; 41-43, 44-47.) But on January 15, Dotten sent Milojevic an email, stating in relevant part: "Our recruiter said: Unfortunately because [Milojevic] is in a union position at Emanuel [Hospital] we cannot put her in a non union position." (SER 5; 22, 47-48.) Milojevic followed up with the Company's employee relations consultant, who explained: "You could apply for any other positions covered by the union contract, but you cannot have one position under a union contract and one not under a contract." (SER 5; 23-24, 50-55, 60.)

Similarly, in February 2008, employee Nicole Hauge began working as a part-time emergency room technician, a union-represented position, while attending nursing school. (SER 6; 61-64.) In April, Hauge applied for the

Company's "Bridge to Practice" program, which provides paid externships to students who would be hired as registered nurses upon graduation. (SER 6; 25-28, 63-69.) Shortly after applying, company Recruiting Consultant Jamie Dreyer telephoned Hauge and explained that the Company had a policy against employees holding both a union and nonunion position. Dreyer advised Hauge that either she could leave her union position and maintain her application for the program, or keep her existing position and withdraw her application. Hauge did not want to risk her secure position before knowing whether she would be offered the externship, so she withdrew her application. (SER 6; 69-71.)

The third employee, William Youngren, works as unit secretary, another union-represented position, in Emanuel Hospital's Neonatal Intensive Care Unit (NICU). While working in the NICU, Youngren learned that the audiology department was short-staffed. On July 24, 2008, he applied for an on-call position as a hearing screening technician, a nonunion position. Shauna Anderson, a supervisor in the audiology department, called Youngren to schedule him for training. Later that day, however, someone from the Company's human resources department called Youngren and said he was ineligible for the position "because they just don't mix a union/nonunion job because ... it was a messy thing and they didn't like to do it." (SER 6; 73-82.)

C. The Company and Union Negotiate a New Contract for One Hospital Including a Provision Allowing Those Employees To Hold Simultaneous Union- and Nonunion-Represented Positions

Once the Union discovered the Company's policy prohibiting union members from concurrently holding nonunion positions, it requested information from the Company about that policy and requested bargaining over the issue. After lengthy negotiations, they agreed that the Union's members would not be precluded from holding nonunion positions, and incorporated that understanding in the 2008-2011 collective-bargaining agreement between the Union and Emanuel Hospital. The policy, however, continues to apply to employees not covered by that contract—that is, it still applies to employees at other facilities as well as nonunion employees at Emanuel Hospital. (SER 6; 29-31, 86-88, 89-91, 101-05.)

II. The Board's Conclusions and Order

Agreeing with the administrative law judge, the Board (Chairman Liebman and Members Schaumber and Pearce) found that the Company violated Section 8(a)(3) and (1) of the Act⁸ by maintaining and enforcing a hiring policy that deprived employees of job opportunities based on whether their current positions were union-represented, and by refusing to hire three employees into positions for which they would have been hired absent this policy.

⁸ 29 U.S.C. § 158(a)(3) and (1).

The Board's Order directs the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order requires the Company to rescind the policy and notify its employees and the unions involved that it has been rescinded. The Board also ordered the Company to offer employees Milojevic, Hauge, and Youngren the part-time positions for which they applied and would have been hired but for the unlawful enforcement of its hiring policy or, if those positions no longer exist, substantially equivalent positions. The Company must also make these employees whole for any loss of earnings and benefits. Finally, the Board ordered the Company to post copies of a remedial notice to employees.

STANDARD OF REVIEW

The Supreme Court recognized that it is the special function of the Board to apply "the general provisions of the Act to the complexities of industrial life."⁹ Likewise, this Court has acknowledged that the Board's decisions are entitled to deferential review.¹⁰ The Board's factual findings are conclusive if supported by

⁹ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)) (internal quotation marks omitted).

¹⁰ *NLRB v. Calkins*, 187 F.3d 1080, 1085 (9th Cir. 1999).

substantial evidence,¹¹ and the Board’s interpretations of the Act will be upheld as long as they are “rational and consistent” with the statutory language.¹²

SUMMARY OF ARGUMENT

First, the Board is entitled to summary enforcement of its Order finding that the Company violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing its discriminatory dual-assignment policy, and refusing to hire three employees into positions for which they would have been hired but for this policy. The Company waived its right to appellate review of these unfair labor practices because it did not contest these findings in its opening brief to the Court.

Second, the Company’s challenge to the Board’s reinstatement and backpay remedies based on the asserted temporary duration of the jobs at issue—the only argument in its brief to the Court—was never raised to the Board. Thus, the Company is precluded from making this new challenge here. In any event, even assuming that the Company had not waived this argument, it is premature at this stage of the litigation, as the Board’s established practice is to review and, if necessary, revise the particular details of implementing its remedy at the compliance stage of the proceedings. Accordingly, the Board’s Order should be enforced in full.

¹¹ *Id.*; 29 U.S.C. § 160(e).

¹² *Calkins*, 187 F.3d at 1085.

ARGUMENT

I. The Board is Entitled to Summary Enforcement of Its Order Finding that the Company Violated Section 8(a)(3) and (1) of the Act

In its opening brief to the Court, the Company did not contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a discriminatory dual-assignment policy that deprived employees of job opportunities based on whether their current positions were union-represented, and by refusing to hire employees into positions for which they would have been hired but for the discriminatory policy. (SER 2, 8.) The Federal Rules of Appellate Procedure, and the rules of this Court, require the Company to present its "contentions and the reasons for them" in its opening brief.¹³ A party's failure to raise an issue in the opening brief abandons it, and this Court will grant summary enforcement of the corresponding portions of the Board's order.¹⁴ Thus, by failing to challenge the Board's findings of unfair labor practices, the Company waived its

¹³ Fed. R. App. P. 28(a)(9)(A); 9th Cir. R. 28-1(a) ("Briefs shall be prepared and filed in accordance with the Federal Rules of Appellate Procedure. . . .").

¹⁴ *NLRB v. Sav-On-Drugs, Inc.*, 709 F.2d 536, 542 (9th Cir. 1983) (failure to challenge in opening brief the merits of Board decision and order constitutes waiver); *Gardner Mech. Serv., Inc. v. NLRB*, 115 F.3d 636, 642 n.2 (9th Cir. 1997) (same). *Cf. Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 436 (9th Cir. 1992) (declining to consider claim raised for the first time in reply brief); *Thompson v. Commissioner of Internal Revenue*, 631 F.2d 642, 649 (9th Cir. 1980) (same).

right to appellate review of those issues, and the Board is entitled to summary enforcement of the uncontested portions of its Order.¹⁵

II. The Company Waived its Challenge to the Board’s Remedial Order Because It Did Not Raise This Argument Before the Board

Section 10(e) of the Act states that “[n]o objection that has not been urged before the Board . . . shall be considered by the court. . . .”¹⁶ The Supreme Court has consistently held that a litigant’s failure to present a question to the Board precludes the Court from subsequently asserting jurisdiction over that issue.¹⁷ Adherence to this jurisdictional command of Section 10(e) results in “a win-win situation” because “it simultaneously enhances the efficacy of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship.”¹⁸

The Board’s Rules and Regulations set forth the requirements that a party must satisfy to preserve an issue for judicial review. To implement Section 10(e), the Board promulgated Rule 102.46(b), which states the requirements that every

¹⁵ See *NLRB v. Advanced Stretchforming Int’l Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000) (granting summary enforcement of the Board’s uncontested conclusions).

¹⁶ 29 U.S.C. § 160(e).

¹⁷ *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (consideration of claim waived because company did not raise it to Board). *Accord Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (same).

¹⁸ *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

exception to an administrative law judge's findings must meet.¹⁹ Under this rule, each exception must, among other things, "concisely state the grounds for the exception."²⁰ Indeed, to preserve a particular issue for review, a party must state with specificity its exception on that issue.²¹ The specificity required for a claim to escape the bar imposed by Section 10(e) is that which will "apprise[] the Board that the objector intended to pursue the issue later presented to the court."²² Exceptions that are not specifically raised before the Board are waived.²³

The Company waived its argument regarding the appropriateness of the Board's remedy because it only generally objected to the administrative law judge's recommended remedial order, and did not specifically raise this issue to the

¹⁹ 29 C.F.R. § 102.46(b)(1).

²⁰ *Id.*

²¹ *E.g., Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255-56 (1943) (a party's general objection to the judge's decision will not preserve a specific issue for judicial review); *NLRB v. Int'l Ass'n of Bridge Workers*, 473 F.2d 816, 817 (9th Cir. 1973) (*per curiam*) (same).

²² *Marshall Field & Co.*, 318 U.S. at 255.

²³ 29 C.F.R. § 102.46(b)(2); *Sever v. NLRB*, 231 F.3d 1156, 1171 (9th Cir. 2000) (failure to raise issue in exceptions to administrative law judge's decision constitutes waiver). *See NLRB v. Pinkerton's Nat'l Detective Agency*, 202 F.2d 230, 233 (9th Cir. 1953) (complete failure to raise issue below held insufficient to preserve it for appellate review).

Board.²⁴ In its brief to this Court, the Company argues for the first time that the Board's remedy is inappropriate—insofar as it orders the Company to instate the three employees to the positions for which they applied and to make them whole for lost earnings—because of the asserted “temporary” nature of those positions. (Br. 4-8.) However, neither the Company's exceptions to the judge's decision and recommended remedy nor its brief in support of those exceptions apprised the Board of the Company's now-asserted view that the remedy is inappropriate.

First, the Company's vague exception “to the ALJ's remedy” (SER 116) did not preserve for appellate review its argument that the Board's remedy inappropriately orders instatement of three discriminates and requires the Company to make them whole, since the Company failed to specifically state the grounds for its exception.²⁵ As the D.C. Circuit concluded: “Where . . . a party excepts to the entire remedy, and provides no indication of the basis for its objection, the exception alone provides insufficient notice to the Board of the party's particular arguments to satisfy [S]ection 10(e).”²⁶ Therefore, the Company's exception,

²⁴ *Saint-Gobain Abrasives, Inc.*, 426 F.3d at 460 (employer's general objection to remedial portion of judge's recommended order was “wholly insufficient” to put the Board on notice of specific arguments that the company presented to the court).

²⁵ See 29 C.F.R. § 102.46(b)(1)-(2); *Marshall Field & Co.*, 318 U.S. at 255-56; *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 33 (D.C. Cir. 2007); *Saint-Gobain Abrasives, Inc.*, 426 F.3d at 460.

²⁶ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 144 (D.C. Cir. 1999).

which generally objects to the entire remedy without any elaboration does not satisfy Section 10(e) or the Board's specificity requirements.

Second, in its brief in support of its exceptions,²⁷ the Company only asserted to the Board that the judge erred in finding violations of Section 8(a)(3) and (1) of the Act and did not challenge the appropriateness of the remedy. (SER 136-45.) Thus, nowhere in the Company's exceptions or supporting brief²⁸ filed with the Board did the Company mention the asserted temporary nature of the positions, upon which it now bases its entire argument to the Court. It also concedes to the Court that "the nature of the positions . . . was not one of the issues at the hearing." (Br. 6.) Because the Company never urged this claim to the Board, the Board

²⁷ The Board's motion to lodge with the Court the Company's brief in support of its exceptions is pending before the Court. (SER 118-47.) The Board explicitly considered that brief (SER 2) in reaching the decision now before the Court, but it is not part of the official agency record, unlike the exceptions themselves. *See* 29 C.F.R. § 102.45(b) (defining contents of the record before the Board). The Court's determination of whether the Company has waived its challenge to the Board's remedy depends upon a review of the Company's specific arguments raised to the Board in the exceptions and supporting brief. Thus, the Board requests that the Court lodge and review the Company's brief in support of exceptions.

²⁸ *See Saint-Gobain Abrasives, Inc.*, 426 F.3d at 460 (challenge to remedial order waived where company made "general objection to the remedy as a whole, and the supplemental brief add[ed] nothing of substance to it"). *See also NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953) (exception alleging only that decision was contrary to and unsupported by law held insufficient).

could not have been “apprised” of the Company’s intention to raise it later.²⁹ As such, pursuant to Section 10(e) of the Act,³⁰ the Company waived that argument and this Court cannot consider it.³¹

Even if the Company’s general exception was adequate to preserve the Company’s challenge to the remedy, its contention is premature and provides no basis to deny enforcement of the Board’s Order. As an initial matter, the Board’s established practice is to leave the particular details of its remedial orders to the compliance stage of the case, as issues concerning the implementation of the Board’s remedy often result in additional litigation.³² Accordingly, the Company raises an issue that, if necessary, can be addressed in a future compliance proceeding. Moreover, since this case only concerned the merits of the unfair labor practice charges (SER 2-3), the record does not indicate whether the positions sought by the discriminatees were short- or long-term positions. As

²⁹ See *Saint-Gobain Abrasives, Inc.*, 426 F.3d at 460; *Alwin Mfg. Co.*, 192 F.3d at 144. Accord *Marshall Field & Co.*, 318 U.S. at 255.

³⁰ 29 U.S.C. § 160(e).

³¹ See *Woelke & Romero Framing, Inc.*, 456 U.S. at 665-66 (consideration of claim waived because it was not raised before Board); *Sever*, 231 F.3d at 1171 (same); *Sparks Nugget, Inc.*, 968 F.2d at 998 (same).

³² See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). See also *NLRB v. Katz’s Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (likening compliance proceedings to the damages phase of a civil proceeding).

stated above,³³ the Company concedes (Br. 6) that the duration of the positions was not explored at the hearing. Thus, there is no basis for assessing the Company's claim that the positions were temporary.

Lastly, the Board acted within its broad discretion to devise remedies in ordering the Company to instate these employees and make them whole for lost earnings, a standard remedy for unlawful refusals to hire applicants. Under Section 10(c) of the Act,³⁴ the Board is charged with "the task of devising remedies to effectuate the policies of the Act."³⁵ The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review"³⁶ and the "particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board, not the courts, to determine.'"³⁷ For violations of Section 8(a)(3) of the Act,³⁸ when an employer unlawfully refuses to hire job applicants based on whether or not they are represented by a union, the Board's

³³ *See supra* at 15-16.

³⁴ 29 U.S.C. § 160(c).

³⁵ *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. at 346.

³⁶ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

³⁷ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (quoting *Int'l Ass'n of Machinists, Tool and Die Makers No. 35 v. NLRB*, 311 U.S. 72, 82 (1940)).

³⁸ 29 U.S.C. § 158(a)(3).

standard remedy requires the employer to offer the applicants those positions or, if the positions no longer exist, substantially equivalent positions.³⁹ Consistent with the traditional remedy, here the Board ordered the Company to instate Milojevic, Hauge, and Youngren to the positions they were discriminatorily denied, or substantially equivalent positions, and to make them whole for their lost earnings as a result of that unlawful discrimination. (SER 3.) Therefore, the Board's remedy is appropriate in light of the Company's unfair labor practices, and the Board did not exceed its authority in ordering that remedy.

³⁹ See *Phelps Dodge Corp v. NLRB*, 313 U.S. 177, 187-88 (1941) (under Section 10(c), which directs the Board to take such affirmative action to effectuate the policies of the Act, “[r]einstatement is the conventional correction for discriminatory discharges. . .”); *Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1377 (D.C. Cir. 2002) (instatement is a remedy that “follow[s] from” an unlawful refusal to hire); *Bill’s Elec., Inc.*, 350 NLRB 292, 297 (2007) (ordering instatement for applicant who employer unlawfully refused to hire).

CONCLUSION

The Company does not contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by maintaining and enforcing a discriminatory hiring policy and refusing to hire employees because of that policy. The Board is therefore entitled to summary enforcement of its Order. Also, the Company's objection to the Board's remedy cannot be considered by this Court, as it was never raised to the Board. Based on the foregoing, the Board respectfully requests that this Court enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

MARCH 2011

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Signature s/ Linda Dreeben

Attorney for National Labor Relations Board

Date March 9, 2011

9th Circuit Case Number(s) 10-72478

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ADDENDUM OF STATUTES, RULES, AND REGULATIONS

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

Sec. 7. [29 U.S.C. § 157]

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

Sec. 8. [29 U.S.C. § 158]

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

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

....

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

....

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

....

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and

to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.45 [29 C.F.R. 102.45]

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, shall constitute the record in the case.

Sec. 102.46 [29 C.F.R. 102.46]

(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with section 10(c) of the Act and §§ 102.111 and 102.112 of these rules) file with the Board in Washington, DC, exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b) (1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's

decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

....

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

....

Relevant provisions of the Federal Rules of Appellate Procedure are as follows:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

....

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)

....

Relevant provisions of the Ninth Circuit's Rules are as follows:

Circuit Rule 28-1. Briefs, Applicable Rules

(a) Briefs shall be prepared and filed in accordance with the Federal Rules of Appellate Procedure except as otherwise provided by these rules. See FRAP 28,

29, 31 and 32. Briefs not complying with FRAP and these rules may be stricken by the Court.