Nos. 10-1271 & 10-1303

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACKSON HOSPITAL CORPORATION
d/b/a KENTUCKY RIVER MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: Jackson Hospital Corporation d/b/a Kentucky River Medical Center, the petitioner/cross-respondent here, was a respondent in the case before the National Labor Relations Board. The Board is the respondent/cross-petitioner here, and the Board's General Counsel was a party in the case before the Board. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order issued on August 27, 2010, and reported at 355 NLRB No. 129.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are, however, aware of one related case currently pending before this Court (*NLRB v. Jackson Hospital Corp.*, No. 04-1019). That related case involves the Hospital's discharge of two union activists and is currently before a special master on the Board's petition for adjudication in civil contempt.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Jackson Hospital Corporation to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Hospital. In this unfair labor practice case, the Board found that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158 (a)(3) and (1)) by placing Registered Nurse Frances Lynn Combs on an indefinite investigatory suspension because of her union activities.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Board's Decision and Order issued on August 27, 2010, and is reported at 355 NLRB No. 129.[1] That Order is final under Section 10(e) of the Act. The Hospital filed its petition for review on August 31, 2010, and the Board filed its

[1] A 9-44. In this brief, "A" references are to the joint appendix, and "Br." references are to the Hospital's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

cross-application for enforcement on September 27, 2010. Both the Hospital's petition and the Board's cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

The Act prohibits employers from taking adverse employment actions against employees for engaging in protected union activity. After Combs joined the union bargaining committee, the Hospital suspended her indefinitely, purportedly to "investigate" whether she was entitled to representation during a meeting. The Hospital, however, had nothing to investigate because it knew all along that she lacked such a right. Therefore, the issue is whether substantial evidence supports the Board's finding that the Hospital violated the Act by indefinitely suspending Combs.

RELEVANT STATUTORY PROVISIONS

The Addendum attached to this brief contains all applicable statutes, as well as the relevant section of the Board's Rules and Regulations.

STATEMENT OF THE CASE

Acting on charges filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, the Board's General Counsel issued a complaint alleging in relevant part that the Hospital unlawfully suspended union activist Combs. (A 15-16.) Initially, the parties entered into a settlement agreement, but when the Hospital failed to comply with it, the Regional Director set it aside and reissued the complaint. (A 15 & n.1; A 142.)

Following a hearing, an administrative law judge found in relevant part that the Hospital violated the Act by suspending Combs indefinitely. (A 15.) After considering the Hospital's exceptions, the Board issued a Decision and Order affirming the judge's conclusion with respect to Combs and adopting his recommended order with modifications. (A 9, 13-14.) Summarized below are the Board's findings of fact.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Hospital Institutes a New Medication Policy and Revises It Based on Combs's Concerns; the Hospital Decides To Give Combs a Verbal Warning for Violating the New Policy

The Hospital operates a 55-bed acute-care hospital in Jackson, Kentucky, where it employs about 275 workers. (A 15.) Combs, a registered nurse with more than 30 years' experience, began working in the Hospital's medical-surgical unit in January 2003. (A 34; A 47, 48.) In April 2006, she joined the union bargaining committee. Later that year, she participated in several bargaining sessions on the Union's behalf. (A 35; A 49.)

On December 12, the Hospital distributed a new medication policy to the nursing staff. (A 35; A 162-63.) Combs was concerned that the new policy would be difficult to implement because it did not accommodate all types of medication, such as liquids and syringes. (A 35; A 67, 76.) She therefore highlighted her concerns on a copy of the policy and gave the document to Donald Rentfro, the Hospital's chief executive officer, who promised to discuss the matter with Debbie Linkous, the chief nursing officer. (A 35; A 68.) The next day, Combs met with Linkous and others about the policy. (A 35; A 69, 109.) Based on Combs's concerns, the Hospital revised the policy regarding syringes. (A 35; A 109.)

On January 10, 2007, Combs administered medication to a patient in a manner inconsistent with the new policy. Combs admitted this to her supervisor, Kathy Thacker, and said she would discuss the matter with Linkous. (A 35; A 51-53.) Within five minutes, Combs, accompanied by another nurse, Debra Adams, went to Linkous to explain her concern about being disciplined for violating the policy. (A 35; A 53.) Linkous replied that she had not yet heard from Thacker about the incident, but that she would review the policy and get back to Combs. Linkous also acknowledged that the policy "might need to be made a little more user friendly." (A 35; A 55.)

About a week later, Linkous discussed the incident with Thacker, as well as Naomi Mitchell, the director of human resources, and Don Carmody, the Hospital's counsel. (A 35; A 96-97.) They decided to give Combs a verbal warning, the first step in the Hospital's progressive discipline policy, for violating the new policy. (A 35; A 83, 152, 164.)

B. The Hospital Convenes a Meeting To Announce Its Decision To Give Combs a Verbal Warning; Combs Requests Representation During the Meeting; Officials Know She Is Not Entitled to Representation but Say Nothing; the Hospital Suspends Combs Indefinitely, Ostensibly To Investigate Whether She Had a Right to Representation

On January 18, Linkous, Thacker, and Mitchell gathered in Linkous's office to issue the verbal warning that the Hospital had already decided to give Combs. (A 35.) Before asking Combs to join them, Linkous—who knew that Combs was

"strong in the Union"—announced that if Combs refused to meet with them, she would suspend Combs indefinitely. (A 35, 38 n.60; A 85, 103-04, 137-38.) Combs had never before refused to meet with management, nor had any other employee in the past decade. (A 12, 39; A 104-05, 141.)

Linkous then called Combs and told her to report to the office. After completing rounds with a doctor, Combs arrived, accompanied by Adams. Linkous told Adams that she was not permitted to attend; Adams left. (A 36; A 60.) Combs then asked if it would "be possible to have a union representative there," and inquired about bringing in Randy Pidcock, the Union's district organizer and chief negotiator. (A 36; A 46, 50, 60.) Linkous again said no. Combs explained that it was her understanding that "for anything to do with a disciplinary discussion," she "had a right to representation." (A 36; A 61.) Combs added that she "did not understand why" Linkous was denying her request. (A 36; A 61.)

Officials at the meeting, including Human Resources Director Mitchell and Linkous herself, understood why Linkous had denied Combs's request: under hospital policy, which tracks Board law, employees are not entitled to representation if the purpose of the meeting is to announce a disciplinary decision that management has already made. Because this policy was unwritten and had not been distributed to employees, Combs was not aware of it. (A 12, 39; A 98, 135-

36.) Neither Mitchell nor any other official spoke up to clarify Combs's confusion. (A 12, 36, 39; A 136.) Instead, Linkous asked Combs if she was "refusing to go ahead with the meeting." (A 36; A 132.) Combs said yes, and added that while she had a lot to learn about labor relations, she believed she had a right to union representation at the meeting. (A 36; A 62, 132.) Combs's belief was mistaken, but no official pointed out her error at the meeting. (A 12; A 36, 39.)

Instead, Linkous informed Combs that she was being placed on an indefinite "investigatory suspension pending investigation." (A 36; A 89, 152-53.) Although Hospital officials indicated that the purpose of the investigation was to determine whether hospital policy entitled Combs to representation during the meeting, there was nothing for them to investigate. (A 40; A 118.) They knew before the meeting began that Combs had no such right. (A 37.)

In the meeting, Combs also asked whether she would receive backpay if the investigation showed that she was correct in her belief about her right to representation. (A 36.) This time, Mitchell spoke up and shared her knowledge of hospital policy with Combs, explaining that the Hospital's normal practice was to reimburse the employee if the investigation showed she had done nothing wrong. (A 36; A 106, 113.)

Before leaving, Combs said that she had "no personal issues" with Linkous. Combs also expressed her belief that Linkous had "treated [her] fairly," but that

insisting on representation was "a matter of employee rights." (A 36; A 62.) Combs then went to the nurses' station to give a report on her patients and clocked out. (A 36; A 62.)

C. Hospital Officials Promise To Communicate with Combs as They "Investigate" and Agree To Meet with Pidcock, but Never Contact Combs or Conduct an Investigation; Combs Remains Indefinitely on "Investigatory Suspension"

The next day, Combs told Pidcock about her suspension. (A 36; A 80.) Pidcock immediately asked if he and Combs could meet with Rentfro, the Hospital's chief executive officer, at his earliest convenience, "preferably late today or early next week." (A 36; A 122, 165.) Rentfro replied that although a meeting had not yet been scheduled with Combs, he would communicate with her as the investigation proceeded and provide Pidcock with copies of any written communications. (A 166.) He agreed to meet with Pidcock after he had "an opportunity to gather the facts underlying Ms. Combs' suspension, and consult with Counsel." (A 36; A 166.) Rentfro added that he would "defer making a final decision relative to Ms. Combs' suspension" until after Pidcock had been "afforded an opportunity to meet" unless Pidcock advised him to the contrary. (A 36, A 166.)

On January 22, Linkous sent a letter to Combs, confirming that she had been placed on unpaid investigatory suspension starting January 18 for "expressly refusing to meet with [Linkous] without being accompanied by Debra Adams, or, if not Debra Adams, then Randall Pidcock." (A 36; A 155.) In the letter, Linkous

also stated that she would "communicate further with [Combs] as the investigation progresses." (A 36; A 155.)

The Hospital and Union twice planned a meeting to discuss Combs's suspension, both times in conjunction with bargaining sessions. When the bargaining sessions were cancelled due to illness, so too were the meetings about Combs. (A 36; A 116-17.)

The Hospital never communicated with Combs, nor did it ever complete an investigation or alter her status. Under the Hospital's rules, an investigatory suspension is supposed to be an interim action pending the outcome of an investigation, which can take several weeks if the facts are complex. (A 12 & n.12, 40; A 120-21, 134, 152-53.) Combs has remained on an "investigatory suspension" since January 18, 2007. (A 36-37; A 63, 113.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, Members Schaumber and Pearce) found, in agreement with the administrative law judge, that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending Combs for engaging in union activities.

The Board's Order requires the Hospital to cease and desist from suspending or otherwise discriminating against Combs or any other employees for supporting the Union or any other labor organization, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order directs the Hospital to take the following actions: to rescind Combs's suspension and offer her full reinstatement to her former job; to make her whole for any loss of earnings and benefits suffered; to remove from the Hospital's files any reference to her unlawful suspension; and to post a remedial notice.

SUMMARY OF ARGUMENT

The Act prohibits employers from suspending employees because of their union activities. In this case, hospital officials placed Combs on an investigatory suspension that has lasted since 2007, assertedly to "investigate" whether she improperly invoked a right to union representation during a meeting where officials planned to announce their decision to issue a verbal warning on an

unrelated matter. The Board, however, reasonably inferred that the Hospital suspended Combs because she was a union activist—not because it needed to "investigate" her rights. Compelling evidence supports the Board's finding that the Hospital violated the Act by suspending Combs, including:

- Before the meeting began, hospital officials already knew the answer to the only issue they supposedly wanted to investigate—whether Combs had a right to representation.

- Despite the unprecedented length of Combs's suspension—now more than four years—the Hospital has yet to contact Combs or conduct the investigation that it was obligated to perform under its own rules.

Faced with this compelling evidence, the Hospital failed to provide any lawful reason for suspending Combs. Instead, the Hospital argues that it suspended Combs for insubordination—a claim not supported by the record. The Hospital also mistakenly attempts to shift blame for the suspension's unprecedented length onto the Union. The Board, however, reasonably found that both excuses were false, and simply a pretext to cover up the Hospital's real reason for suspending Combs—namely, her ongoing support for the Union and active participation as a member of the union bargaining committee.

Finally, Section 10(e) of the Act bars the Hospital from challenging for the first time on review the Executive Secretary's authority to issue an interim order automatically transferring this case from the administrative law judge to a three-member panel of the Board. When this case was before the Board, the Hospital

failed to raise the claim that it belatedly asserts here—namely, that *New Process Steel* prohibited the Executive Secretary from issuing the transfer order. In any event, the Hospital's claim is meritless: the transfer order is an interim, ministerial ruling whose validity is not affected by *New Process Steel*. Furthermore, the relief sought by the Hospital—a remand so that a three-member panel of the Board can consider its exceptions—would be pointless. A three-member panel of the Board has already considered the Hospital's exceptions, and found them to be without merit.

ARGUMENT

THE HOSPITAL VIOLATED THE ACT BY PLACING NURSE COMBS ON INDEFINITE INVESTIGATORY SUSPENSION BECAUSE OF HER UNION ACTIVITIES

On January 18, 2007, hospital officials placed Registered Nurse Frances Lynn Combs, an active member of the union bargaining committee, on an indefinite investigatory suspension, asserting at the time that it was because they needed to "investigate" whether she correctly invoked a right to union representation during a meeting. But as the Board found, the Hospital's claim that it needed to investigate was a mere pretext: hospital officials already knew that she had no right to representation under the Hospital's unwritten policy, which tracked Board law. Moreover, to date the Hospital has neither completed this "investigation" nor contacted Combs about its status. As shown below, substantial

evidence supports the Board's finding that the Hospital violated the Act by suspending Combs.

A. An Employer Violates the Act by Disciplining Employees for Engaging in Union Activity

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." An employer, therefore, violates Section 8(a)(3) and (1)[2] of the Act by taking an adverse employment action against an employee for engaging in protected union activity.[3] Unlawful employment decisions include the suspension of employees, when motivated by antiunion animus.[4]

In determining whether an adverse employment action violates the Act, the critical inquiry focuses on the employer's motivation for taking the adverse action, utilizing the test articulated by the Board in *Wright Line, a Division of Wright Line, Inc.,*[5] and approved by the Supreme Court.[6] Under that test, if substantial evidence

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[2] *See Metro. Edison Co. v. NLRB,* 460 U.S. 693, 698 n.4 (1983) (noting that "a violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1).").

[3] *See NLRB v. Transp. Mgmt. Corp.,* 462 U.S. 393, 397-98 (1983).

[4] *Southwire Co. v. NLRB,* 820 F.2d 453, 459 (D.C. Cir. 1987).

[5] *Wright Line, a Div. of Wright Line, Inc.,* 251 NLRB 1083 (1980), *enforced on other grounds,* 662 F.2d 899 (1st Cir. 1981).

[6] *Transp. Mgmt.*, 462 U.S. at 397-98, 400-03. *See also Tasty Baking Co. v. NLRB,*

supports the Board's finding that the employee's protected activity was "a motivating factor" in the employer's adverse action, the Board's conclusion that the action was unlawful must be affirmed, unless the employer demonstrates that it would have taken the same action even in the absence of its antiunion animus.[7] Of course, where, as here, it is established that the explanations advanced by an employer are pretextual, the inquiry is logically at an end.[8] Pretextual explanations necessarily mean that "the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."[9]

Because direct evidence of unlawful motive is seldom available, the Board may properly rely exclusively on circumstantial evidence to infer unlawful motivation.[10] Evidence that supports a finding of unlawful motivation includes the

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254 F.3d 114, 125 (D.C. Cir. 2001).

[7] *Transp. Mgmt.*, 462 U.S. at 395, 397-403; *Matson Terminals, Inc. v. NLRB*, 114 F.3d 300, 303-04 (D.C. Cir. 1997).

[8] *Wright Line*, 251 NLRB at 1083-84. *See also Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

[9] *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced* 705 F.2d 799 (6th Cir. 1982).

[10] *Southwire Co.*, 820 F.2d at 460 (citing *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941)); *see also Laro Maint.*, 56 F.3d at 229.

employer's knowledge of the employee's union activities,[11] the employer's failure to fully and fairly investigate the conduct that it asserts as grounds for the discipline,[12] its departure from established policies and practices in order to impose the discipline,[13] its disparate treatment of employees based on their union activities,[14] and its contrived or implausible explanation for the action.[15]

Board findings with respect to motive must be upheld if supported by substantial evidence on the record considered as a whole.[16] That standard is "highly deferential."[17] A decision of the Board "is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary."[18] Review of Board-approved credibility findings is even more

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[11] *Tasty Baking*, 254 F.3d at 126.

[12] *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001); *Cumberland Farms, Inc. v. NLRB*, 984 F.2d 556, 560 (1st Cir. 1993); *NLRB v. Advance Transp. Co.*, 979 F.2d 569, 575 (7th Cir. 1992).

[13] *Parsippany Hotel Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996).

[14] *Southwire Co.*, 820 F.2d at 460.

[15] *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1170 (D.C. Cir. 1993).

[16] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[17] *Laro Maint.*, 56 F.3d at 228-29.

[18] *United Steelworkers of Am., Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacaraias*, 502 U.S. 478, 483-84 (1992)).

deferential; such findings must be upheld unless they are "hopelessly incredible, self-contradictory, or patently insupportable."[19]

B. The Hospital Suspended Combs Because of Her Union Activities

Overwhelming evidence supports the Board's finding (A 11) that the Hospital suspended Combs because of her union activities. The Board, in making that finding, reasonably relied on the Hospital's undisputed knowledge of her union activities, the antiunion animus evident from the circumstances surrounding Combs's suspension, and the Hospital's false explanations for its action. (A 12-13.)

1. The Hospital knew about Combs's union activity

There is no question that the Hospital knew of Combs's involvement in the Union. (A 12, 38 & n.60.) Debbie Linkous, the chief nursing officer and official responsible for the suspension, learned that Combs was "strong in the Union" sometime before 2004. (A 38 n.60; A 85.) And she learned that Combs became an active representative on the union bargaining committee starting in the spring of 2006. (A 12; A 99-100.) Indeed, as the Board noted, Linkous readily admitted knowing about Combs's membership on the committee at the time of her

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[19] *Federated Logistics & Operations, a Div. of Federated Corporate Servs., Inc. v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005) (attributions omitted).

suspension. Thus, the elements of union activity and the Hospital's knowledge of it are clearly established.[20] (A 12.)

The Hospital admits its knowledge of Combs's union activity, but mistakenly claims (Br. 12-14) that it could not have harbored animus because on two occasions in 2005, it treated Combs favorably despite that knowledge. These incidents occurred before Combs joined and became active on the bargaining committee. Moreover, an employer's failure to take advantage of every opportunity to discriminate against a union adherent does not insulate its eventual decision to violate the Act.[21] The Hospital therefore errs in faulting the Board for not mentioning the earlier incidents, which are "of no moment," because they "could hardly rebut the pervasive and stark evidence of anti-union animus" discussed below.[22]

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[20] *See Schaeff, Inc. v. NLRB*, 113 F.3d 264, 266 (D.C. Cir. 1997).

[21] *Cf. FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1030 (7th Cir. 2005) ("A discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents."); *McGraw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 8 (1st Cir. 1997) (an employer "need not lay off all union supporters at once to violate § 8(a)(3)") (citing *NLRB v. Instrument Corp. of Am.*, 714 F.2d 324, 330 (4th Cir. 1983)).

[22] *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1284 (D.C. Cir. 1999).

2. The circumstances surrounding Combs's suspension demonstrate the Hospital's antiunion animus

The Board also found that the circumstances surrounding Combs's suspension strongly supported an inference that the Hospital was motivated by antiunion animus. (A 12.) Indeed, the Board found that the Hospital "set up" Combs by provoking her into "insisting on a *Weingarten* right that she did not in fact have." (A 12.)

The sequence of events on the day of Combs's suspension strongly supports the Board's inference that hospital officials were attempting to set up Combs. Linkous and Mitchell knew full well that under an unwritten hospital policy, Combs was not entitled to representation because the purpose of the meeting was simply to announce a decision they had already made. The Hospital's policy tracks the Board's rule, which the Supreme Court approved in *NLRB v. J. Weingarten, Inc.*[23] Under *Weingarten*, employees have a "right to the presence of a union representative at an *investigatory* interview in which *the risk* of discipline reasonably inheres."[24] (A 37; A 135.) But as the Board later clarified in *Baton Rouge Water Works Co.*, a *Weingarten* right does not attach where, as here, the employer has already reached a decision to impose discipline, and the purpose of

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[23] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[24] *Id.*, at 262 (emphasis added).

the meeting is "simply to inform him of, or impose, that previously determined discipline."[25] Both Linkous and Mitchell were well aware of these nuances in the Hospital's policy. By contrast, because the policy was unwritten and had never been distributed to employees, Combs did not know about it. (A 37; A 140-41.)

Moreover, before calling Combs into the meeting where they planned to announce their decision to issue the verbal warning, Linkous discussed with Mitchell and Thacker the possibility that Combs might refuse to participate without union representation. Linkous said she planned to suspend Combs in that event. (A 12; A 103-04, 137-38.) Yet, as the Board correctly noted, "there is no hospital policy or practice that authorizes the use of an investigatory suspension as punishment for a rules infraction." (A 12.)

The meeting with Combs then played out exactly as Linkous predicted. Linkous knew Combs would arrive with someone else because "normally when she came to my office, she did have someone with her." (A 104.) Combs did indeed arrive with another nurse, Debra Adams. When Linkous told Adams to leave, Combs requested that Randy Pidcock be allowed to represent her. Linkous refused that request, too.

But Linkous did not respond with an explanation when Combs said she "did not understand why" Linkous was refusing her request for representation. (A 36; A

[25] *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

61.) Linkous, of course, understood that she had denied Combs's request based on the Hospital's unwritten policy, which did not entitle Combs to representation during the meeting. (A 98, A 135-36.) Yet neither Linkous nor Mitchell, the director of human resources, offered to dispel Combs's confusion by sharing the Hospital's unwritten policy with her.

The Board (A 12) found Mitchell's silence particularly damning. After all, as human resources' authoritative representative, it was Mitchell's job to explain hospital policy. Indeed, she did not hesitate to do so later in the meeting when Combs asked about a less controversial matter (her right to backpay).

The Hospital misses the mark in arguing (Br. 18) that it was not required to explain Board law to its employees. The Board reasonably focused on Linkous and Mitchell's failure to explain an unwritten hospital policy (albeit one based on Board law) at a time when speaking up could have averted the entire problem. In particular, the Board reasonably viewed Mitchell's reticence with suspicion, given her willingness to explain Combs's backpay rights. In these circumstances, Mitchell's "strange and disturbing" silence supports the Board's finding that the Hospital acted with an "intention to provoke Combs into a misstep." (A 12.)[26]

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[26] *Cf. NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 144 (2d Cir. 1990) (finding that Board properly relied on employer's failure to explain the reasons for employee's discharge as evidence of antiunion animus).

The Board also reasonably relied on the Hospital's behavior during Combs's unusually long suspension to support an inference of unlawful motive. The Hospital concedes that the purpose of an investigatory suspension is not to keep employees in limbo. Instead, as Chief Executive Officer Rentfro admitted, the purpose is "to give time to actually get to the details of what occurred and then make appropriate actions from there." (A 12; A 112.) Similarly, Rentfro admitted that Combs's lengthy suspension is "very atypical." (A 120.) Instead of years, a month would "in most circumstances give time to conduct an investigation." (A 121.) Typical, uncomplicated investigatory suspensions last only a week or two. (A 40; A 134.) Even the investigation into employee James Fields's behavior, which required consultation with medical experts and a determination of facts, took only three weeks. (A 12 n.12; A 156-57.) In the circumstances, the Board reasonably relied on the disparity between the intended brevity of investigatory suspensions and the interminable length of Combs's suspension as evidence of animus.

The Hospital erroneously attempts to shift blame for the length of the suspension to the Union. The Board, however, reasonably regarded the Hospital's tactic as further evidence of animus. (A 12, 40 n.65, 41.) As the Board explained, "the Union never demanded that management postpone any action," and the Hospital promised to delay a decision only until the Union had been "afforded an

opportunity to meet." (A 40 n. 65.) Moreover, the Hospital was required, under its own policy, to conduct an investigation once it placed Combs on investigatory suspension.[27] Thus, it was the Hospital's duty to investigate, not the Union's. And as the Board reasonably found, "no action or inaction by the Union could alter the obligation owed by management to comply with its own rules and its direct promise to Combs." (A 13.)

In its continued attempt to shift blame to the Union, the Hospital misinterprets the exchange of letters between Rentfro and the Union, and makes the entirely baseless claim (Br. 2, 24-25) that the letters created a collective-bargaining agreement that prevented the Hospital from resolving Combs's suspension until the Union met with the Hospital. A simple exchange of letters in which a union business agent asks to meet about an employee, and an employer's promise of "an opportunity" to meet, hardly establish that the parties formed a labor agreement covering an entire unit of employees.[28] Indeed, it is undisputed

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[27] *See* A 153. Investigatory suspensions are to be used as "interim measures while waiting the outcome of an investigation or review" and may be for an indefinite period but only "while an issue remains unresolved."

[28] *See Transp.-Commc'n Employees Union v. Union Pac. R. Co.*, 385 U.S. 157, 160-61 (1966) (explaining that a collective-bargaining agreement "is not an ordinary contract" and "covers the whole employment relationship"); *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962) (noting that a labor contract under Section 301 "resolve[s] a controversy arising out of, and importantly and directly affecting, the employment relationship").

that despite the Union's certification as the bargaining representative in 1998, no collective-bargaining agreement was ever reached. (A 16.) Thus, as the Board reasonably found, the Hospital's attempt to blame the Union for the Hospital's own failure to conduct an investigation, and for the "very atypical" length of Combs's suspension, provide additional evidence of the Hospital's unlawful motive.[29] (A 13.)

Finally, the Hospital does not help itself by claiming (Br. 9) that officials suspended Combs for "insubordination." As the administrative law judge found, Combs "was not unconditionally refusing to participate in the meeting." (A 38; A 63.) Rather, she sought a postponement so that her supervisors could "confirm or modify their position that she was not entitled to representation." (A 38.) The Board upheld the administrative law judge's decision to credit Combs's testimony on these points. (A 9 n.2, 12, 36; A 61-63.) On review, this Court will not reverse the Board's adoption of a judge's credibility determinations unless they are "'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'"[30] The

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[29] *See Mississippi Transp., Inc. v. NLRB*, 33 F.3d 972, 979 (8th Cir. 1994) (employer's failure to investigate, in disregard of its own rules or policies, is evidence of unlawful motivation). *NLRB v. Advance Transp. Co.*, 979 F.2d 569, 574 (7th Cir. 1992) (failure to thoroughly investigate alleged misconduct and selective enforcement of disciplinary policies support are evidence of antiunion animus).

[30] *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

Hospital fails to meet this standard; it cannot present any basis for disturbing the Board's decision to credit Combs's testimony about the meeting.

Indeed, the record firmly establishes that even at the time of Combs's suspension, officials were not claiming that they took the action because Combs was insubordinate. After all, Linkous did not tell Rentfro that she had suspended Combs for insubordination—an action that would have required Rentfro's advance approval, which Linkous never sought. Rather, Linkous told Rentfro that she had put Combs on investigatory suspension "to further investigate the situation and get appropriate counsel as to the next steps." (A 118.) Moreover, under the Hospital's own rules, a disciplinary suspension—such as a suspension for insubordination—could not exceed 10 days. (A 152, 119.) Thus, considering all of the circumstances surrounding Combs's suspension, the Board reasonably found that the Hospital suspended her, not for insubordination or any of the other false rationales offered by management, but because of her union activity.

3. Because the Hospital's stated reasons for suspending Combs were pretextual, the Board reasonably inferred that its true motive was unlawful

Where, as here, the employer's stated reasons for its action are false and therefore pretextual, the Board may properly infer that the real motive "is one that the employer desires to conceal—an unlawful motive—at least where . . . the

surrounding facts tend to reinforce that inference."[31] As shown above, ample evidence supports the Board's finding (A 13) that the Hospital's stated rationales for suspending Combs were pretextual. Accordingly, the Board reasonably concluded that the Hospital's real reason for suspending Combs was not any of the excuses that it has variously professed since January 18, 2007. Instead, as the Board reasonably inferred, the Hospital's true motive was covert—namely, to get rid of an active member of the union bargaining committee. (A 12.)

C. Section 10(e) of the Act Bars the Hospital's Belated Challenge to the Executive Secretary's Authority To Issue a Ministerial Interim Order Automatically Transferring this Case to the Board; in any Event, the Hospital's Claims Are Meritless

The Hospital complains (Br. 2, 11) that because the Office of the Executive Secretary automatically issued the interim order transferring this case from the administrative law judge to the Board at a time when the Board had only two members, this case must be remanded so that the Board can rule on the Hospital's exceptions to the judge's decision—an action that the Board has already taken.[32] The Hospital, however, is jurisdictionally barred from raising its claim for the first time on review. And in any event, its claim is meritless.

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[31] *Laro Maint.*, 56 F.3d at 230 (quotation omitted).

[32] Order Transferring Proceeding to the National Labor Relations Board (July 29, 2008).

Section 10(e) of the Act prohibits the Court from entertaining any "objection that has not been urged before the Board, its member, agent, or agency," absent extraordinary circumstances.[33] Here, the Hospital failed to raise its argument regarding the Executive Secretary's transfer order in its exceptions before the Board. Moreover, it does not and cannot establish any extraordinary circumstances that justify its failure to raise its claim before the Board. Therefore, it cannot present its challenge on review.

In any event, the Hospital bases its argument on a misreading of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, which concerned the Board's authority to issue decisions, not to perform ministerial tasks.[34] The Court in that case did not, as the Hospital claims (Br. 11), hold that the Board "lacked the statutory authority to transact the agency's business when the Board was comprised of only two Members." Rather, the Court explicitly declined to interpret Section 3(b) of the Act (29 U.S.C. § 153(b)) as imposing "a membership requirement that must be satisfied or else the power of any entity to which the

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[33] 29 U.S.C. § 160(e). *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (noting that an appellate court has no jurisdiction to consider arguments not raised before the Board). *Accord Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

[34] *New Process Steel, L.P. v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635 (2010).

Board has delegated authority is suspended."[35] The Court clarified that it was "not cast[ing] doubt on the prior delegations of authority" to other officials within the agency.[36]

The Executive Secretary's transfer order is not invalid under *New Process Steel*. To begin, it must be noted that transfer orders are automatic actions required under Section 102.45 of the Board's Rules and Regulations.[37] Moreover, the Board gave this ministerial task to the Executive Secretary long before it dropped to two members in 2008. Upon its creation in 1941, the Office of the Executive Secretary was assigned "administrative" and "ministerial duties."[38] As the Board explained a few years later, the Executive Secretary's function was to "manage the mechanics of docketing cases, assigning cases, scheduling matters for consideration by the Board Members, and performing miscellaneous coordinating and liaison functions."[39] Thus, the Office of the Executive Secretary lacked

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[35] *Id.* at 2642 n.4.

[36] *Id*.

[37] *See* Sec. 102.45, Board's Rules and Regulations ("Upon the filing of the [administrative law judge's] decision, the Board shall enter an order transferring the case to the Board . . . .").

[38] *See Sixth Annual Report of the NLRB* 7 (1941) (creating the executive secretary's office); *Seventh Annual Report of the NLRB* 9 (1942) (describing the executive secretary's responsibilities).

[39] *Thirteenth Annual Report of the NLRB* 5 (1948).

discretion to decline to issue the ministerial transfer order during the period when the Board had only two members.

Moreover, the Hospital cannot show that it was harmed or prejudiced by the Executive Secretary's ministerial transfer order. The sole relief sought by the Hospital (Br. 11) is a remand so that a three-member panel of the Board can rule on its exceptions to the administrative law judge's decision. The Hospital, however, overlooks that this is exactly what the Board has already done: a three-member panel of the Board reviewed the Hospital's exceptions and issued a decision and order. In that decision and order, a three-member panel of the Board reasonably found that the Hospital violated the Act by indefinitely suspending union activist Combs for plainly pretextual reasons that officials cited to mask their true, unlawful motive. Because the Hospital has already received the Board review that it demands, a remand of this case would serve no purpose other than to delay the resolution of this case.

CONCLUSION

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

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February 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACKSON HOSPITAL CORPORATION d/b/a KENTUCKY RIVER MEDICAL CENTER	*	
Petitioner/Cross-Respondent	*	Nos. 10-1271, 10-1303
v.	*	Board Case No. 9-CA-42249
NATIONAL LABOR RELATIONS BOARD	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,335 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 29th day of March, 2011

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I certify that on March 29, 2011, I electronically filed the Board's final brief in this case with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the Board's final brief on the following counsel through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 29th day of March, 2011

ADDENDUM

STATUTES

Section 3(b) of the Act (29 U.S.C. § 153(b) provides in relevant part:

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

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

> 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 . . . .

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

> 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 . . . .

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

> (a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.
>
> * * *

(e) The Board shall have power to petition . . . for the enforcement of such order . . . . 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. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

BOARD RULES AND REGULATIONS

Administrative Law Judge's Decision and Transfer of Case to the Board
Sec. 102.45 *Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case*.— (a) After hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision. Such decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the Act. The administrative law judge shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. If the administrative law judge delivers a bench decision, promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.