

Nos. 10-1261 & 10-1286

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

**TRUMP MARINA ASSOCIATES, LLC,
doing business as TRUMP MARINA HOTEL AND CASINO**

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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National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC, d/b/a TRUMP MARINA HOTEL AND CASINO	*	
	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 10-1261,
	*	10-1286
v.	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No.
	*	4-CA-36528
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. ***Parties and Amici:*** Trump Marina Associates, LLC, d/b/a Trump Marina Hotel and Casino (“the Company”) is the petitioner before the Court. The Company was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board.

B. ***Ruling Under Review:*** The case involves the Company’s petition to review, and the Board’s application to enforce, a Decision and Order the Board issued on August 23, 2010 (355 NLRB No. 107), which adopted and incorporated by reference its prior decision reported at 354 NLRB No. 123 (2009).

C. ***Related Cases:*** This case has previously been before this Court. On December 31, 2009, a two-member panel of the Board issued a Decision and Order

in this case. *Trump Marina Associates, LLC*, 354 NLRB No. 123 (2009). The Company petitioned this Court for review of that Order on January 19, 2010, and the Board cross-applied for enforcement (Case Nos. 10-1012 & 10-1015). Before the Board filed the record, the Court placed the case in abeyance. On June 17, 2010, while the case remained in abeyance, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that a Board delegee group must maintain at least three members to exercise the delegated authority of the Board. *Id.* at 2640–42. In light of *New Process*, the Board issued an August 17, 2010 order setting aside the two-member Decision and Order in *Trump Marina* and filed a motion to dismiss the case pending in the D.C. Circuit. The Court dismissed the case on August 19, 2010.

Prior to the instant case, the Board issued a decision finding that the Company committed numerous unfair labor practices, including unlawfully suspending employee Mario Spina for his protected union activities. *See Trump Marina Associates, LLC*, 353 NLRB 921 (2009) (“*Trump I*”), incorporated by reference, 355 NLRB No. 208 (2010). In *Trump I*, the Board also found that those violations warranted setting aside the representation election that the Board had conducted among the Company’s employees, and ordered a new election. The new election has not been held yet because the Company filed a petition for review of the Board’s Order in *Trump I*, which is now pending before this Court (Case No.

10-1317).

In the case now on review, the Board's General Counsel issued a second complaint against the Company, this time alleging that it had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining and enforcing two work rules that unlawfully restrict employee rights under Section 7 of the Act (29 U.S.C. § 157). The complaint also alleged that the Company violated Section 8(a)(1) by interrogating Spina regarding his protected communications with the media about the decision in *Trump I*. After a hearing, an administrative law judge issued a decision and recommended order, finding that the Company committed the alleged unfair labor practices. On review, the Board adopted the judge's decision and recommended order. *See Trump Marina Associates, LLC*, 355 NLRB No. 107 (2010) ("*Trump II*"), incorporating by reference 354 NLRB No. 123 (2009).

s/Linda Dreeben
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Dated at Washington, DC
this 6th day of April 2011

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GLOSSARY

1. A. The parties' Joint Appendix
2. ActThe National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)
3. BoardThe National Labor Relations Board
4. Br.The Opening Brief of Trump Marina Associates, LLC to this Court
5. CompanyTrump Marina Associates, LLC, doing business as Trump Marina Hotel and Casino
6. Media RequestsThe Public Speaking/Media Requests Policy maintained in the Company's employee handbook
7. Rule 36Rule 36 in the Company's employee handbook
8. UnionInternational Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Trump Marina Associates LLC (“the Company”) to review, and the application of the National Labor Relations Board (“the Board”) to enforce, an Order the Board issued against the Company. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C.

§§ 151, 160(a)) (“the Act”). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Previously, a two-member panel of the Board issued a Decision and Order in this case on December 31, 2009. *Trump Marina Associates, LLC*, 354 NLRB No. 123 (2009). The Company petitioned the D.C. Circuit for review of that Order on January 19, 2010, and the Board cross-applied for enforcement (Case Nos. 10-1012 & 10-1015). Before the Board filed the record, the Court placed the case in abeyance. On June 17, 2010, while the case remained in abeyance, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that a Board delegatee group must maintain at least three members to exercise the delegated authority of the Board. *Id.* at 2640–42. In light of *New Process*, the Board issued an August 17, 2010 order setting aside the two-member Decision and Order in *Trump Marina* and filed a motion to dismiss the case pending in the D.C. Circuit. The Court dismissed the case on August 19, 2010.

On August 23, 2010, a three-member panel of the Board issued the Order that is now before the Court, which adopted and incorporated by reference the prior December 31, 2009 Decision and Order. (A 13-18.)¹ *See* 355 NLRB No.

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

107 (Aug. 23, 2010). That Order is final with respect to all parties. The Company filed its petition for review on August 25, 2010, and the Board filed its cross-application for enforcement on September 14, 2010. The petition and the cross-application are timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing unlawfully broad rules that prohibit employees from releasing statements to the media without prior approval, and authorize only certain company representatives to speak with the media.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by interrogating employee Mario Spina about his protected statements to the media regarding a Board decision.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

In 2009, the Board issued a decision finding that the Company committed numerous unfair labor practices during a union organizing campaign, including unlawfully suspending employee Mario Spina for his protected union activities. *See Trump Marina Associates, LLC*, 353 NLRB 921 (2009) (“*Trump I*”), *incorporated by reference*, 355 NLRB No. 208 (2010). In *Trump I*, the Board also found that those violations warranted setting aside the representation election that the Board had conducted among the Company’s employees, and ordered a new election. (A 15.) The new election has not been held yet because the Company filed a petition for review of the Board’s Order in *Trump I*, which is now pending before this Court (Case No. 10-1317).

Subsequently, in the case now on review, the Board’s General Counsel issued a second complaint against the Company, this time alleging that it had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining and enforcing two work rules that unlawfully restrict employee rights under Section 7 of the Act (29 U.S.C. § 157). (A 15; A 5-6.) The complaint also alleged that the Company violated Section 8(a)(1) by interrogating Spina regarding his protected communications with the media about the decision in *Trump I*. After a hearing, an administrative law judge issued a decision and recommended order, finding that the Company committed the alleged unfair labor practices. On review, the Board

adopted the judge's decision and recommended order. *See Trump Marina Associates, LLC*, 355 NLRB No. 107 (2010) ("*Trump II*"), incorporating by reference 354 NLRB No. 123 (2009).

I. THE BOARD'S FINDINGS OF FACT

A. **Background; the Board's Prior Unfair Labor Practice Findings In *Trump I*; Shift Manager Lew Unlawfully Suspended Employee Mario Spina for His Union Activities**

The Company operates a hotel and casino in Atlantic City, New Jersey.

(A 15.) In early 2007, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") attempted to organize the Company's dealers and other employees performing related work. Mario Spina, a company dealer for over 20 years, was an open and active union supporter. As a result of the Union's campaign, the Board conducted a representation election among the employees on May 11, 2007, which the Union lost by a narrow margin (183 to 175). The Union filed unfair labor practice charges and election objections, claiming that the Company's unlawful conduct tainted the election results. The Board's General Counsel issued a complaint, and a hearing on these allegations was held before an administrative law judge in which Spina testified. (A 15; A 20, 82-136.) *See Trump I*, 353 NLRB at 921.

On July 18, 2008, the administrative law judge issued a decision and recommended order in *Trump I*, which the Board adopted in relevant part, finding

that the Company had committed numerous unfair labor practice violations.

(A 15.) Among those violations was the Board’s finding that Shift Manager Karen Lew discriminatorily issued Spina a suspension and final warning after summoning him to her office. (*Id.*) As shift manager, Lew oversees the operation of the entire casino floor (or “pit”), which includes supervising the dealers, supervisors and pit managers. (A 15; A 39.) The judge also found, and the Board agreed, that the Company’s numerous violations warranted setting aside the election. (A 15.)

B. The Company Maintains Rules in Its Employee Handbook that Prohibit Employees from Releasing Statements to the Media Without Prior Approval, and Authorize Only Certain Company Representatives to Speak with the Media

The parties stipulated that the Company’s employee handbook contains the following two rules regarding contacting the media, which apply to all Trump employees. (A 15; A 69.) First, Employee Conduct Rule 36 (“Rule 36”) bars employees from “[r]eleasing statements to the news media without prior authorization.” (A 15.) Second, the Public Speaking/Media Requests Policy (“Media Requests Policy”) provides that only certain named company managers are “authorized to speak with the media”—its “Chief Executive Officer, the respective property’s Chief Operating Officer, General Manager or Public Relations Director/Manager.” (*Id.*) The handbook also warns that “any departure” from a company policy or rule “will subject employees to disciplinary action up to and including discharge.” (*Id.*)

C. The Union Contacts Employee Spina for His Comments on the Judge's Decision in *Trump I* for a Union Publication

In late July 2008, a union representative called Spina to ask for his comments on the administrative law judge's recent decision in *Trump I*. (A 15; A 23-26, 33-35.) Spina, who understood that his comments could be used in a union publication, stated that the judge had gotten "it exactly right," referring to the finding that the Company had unlawfully discriminated against him. (*Id.*) On July 29, the Union issued a press release favorably describing the judge's decision, and quoting Spina as saying, "[t]he judge got this one exactly right." The press release also quoted him as saying that "the Company broke all kinds of rules and interfered with our right to vote—and we're not going to allow them to get away with it." (A 15; A 137.)

In late July or early August, the Associated Press published an article about the judge's decision that appeared in the Atlantic City Courier Post and contained Spina's statements from the Union's press release. (A 15; A 41, 139.) Shift Manager Lew read the article and was concerned that Spina violated company rules about speaking to the media. Lew took the lead in investigating the possible violation, and brought the article to the attention of two senior company managers, Don Brown, the vice president of operations, and Barbara Hulsizer, the director of employee relations. Hulsizer instructed Lew to speak with Spina about the possible rules infraction. (A 15; A 58-60.)

D. The Company Summons Spina to Shift Manager Lew's Office, Where She Interrogates Him About His Comments on the Decision in *Trump I*, and Warns Him To Get Company Approval Before Speaking to the Media Again

On August 12, Spina was in the middle of his shift dealing cards at a Texas Hold'em table when a fellow dealer tapped him on the shoulder. The dealer told Spina to stop work, leave the pit floor, and report to the pit manager. The pit manager then instructed Spina to go to the shift manager's office. (A 15; A 21-22.) The Company typically uses that office to discipline employees, and it is where the Company sent Spina when Shift Manager Lew issued him a suspension and final warning the year before. (A 15; A 22-23.)

When Spina reported to the office, he found Lew and Casino Administrator Mark Walter waiting for him. (A 15; A 23.) Lew asked Spina several questions about his statements in the Courier Post article. (A 15-16; A 23-25.) She asked Spina if he had, in fact, spoken to the media. Spina responded that he had only spoken to a union representative, and that he had told the representative that the Board "got it exactly right" in *Trump I*. (A 15; A 23-24.) Lew then asked Spina whether he had allowed himself to be quoted and whether he was aware of the company rule against talking to the media without prior authorization. She also asked whether he was a representative of the Trump dealers or of Trump, and Spina replied that he had made no such statement. (A 15-16; A 24-25.) During the meeting, Lew also declared that Spina had violated company policy by speaking to

the media without first obtaining permission. She warned him that, in the future, “if you are going to make statements to the media, you would need to receive prior authorization.” (A 16; A 24-26, 48, 52.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Schaumber and Pearce) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining and enforcing unlawfully broad rules prohibiting employees from releasing statements to the media without prior company permission, and authorizing only certain named company representatives to speak with the media. (A 13, 14 n.2, 16-17.) The Board found that the Company also violated Section 8(a)(1) by interrogating Spina about his protected statements to the media regarding the Board’s decision in *Trump I*. (A 17.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A 14, 17-18.) Affirmatively, the Order requires the Company to rescind the unlawful handbook provisions. The Order further requires the Company to furnish its current employees with inserts to the existing employee handbook, or publish and distribute revised employee

handbooks, that advise them that the unlawful rules have been rescinded or provide the language of lawful rules. The Board's Order also requires the Company to post a remedial notice. (A 18.)

STANDARDS OF REVIEW

The Court “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*.” *United States Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, this Court will adopt the Board’s assessment of witness credibility unless it is “hopelessly incredible” or “self-contradictory.” *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). The Court also will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99

(1996). Therefore, the Court’s review of the Board’s findings “is quite narrow.” *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

I. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing two rules that would reasonably tend to chill employees in the exercise of their Section 7 right to speak to the media about an ongoing labor dispute. Those media-access rules bar employees from releasing statements to the media without prior authorization, and permit only named company managers to speak to the media. Given their sweeping language, employees would reasonably construe the rules to bar them from contacting the media about an ongoing labor dispute and subject them to discipline for doing so. As such, the Company’s mere maintenance of these rules was unlawful according to settled law. Moreover, because the Company’s rules are unlawful, it committed an additional violation when Shift Manager Karen Lew enforced them against employee Mario Spina during the August 12, 2008 meeting.

The Company’s contentions must fail because they differ from the language of the rules, and are otherwise contrary to law. For example, its claim that its media-access rules cannot be reasonably construed to restrict protected conduct is belied by the broad terms of the rules themselves and the credited testimony of its own witnesses who viewed the rules broadly enough to restrict protected activities.

The argument that those rules are lawful because they only require prior authorization ignores settled law that prior-authorization rules unlawfully impede employees in the full exercise of their statutory rights. Finally, the Company's rules are not justified by the business need to maintain confidential and customer information because the breadth of the rules far exceeds the reasons offered to justify them.

II. Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) by interrogating Spina about his protected activities. Spina exercised his statutory rights when he commented to a union representative about a Board decision that found, among other things, that Shift Manager Lew had unlawfully suspended Spina. Once a newspaper article quoted his comments, Lew swiftly summoned Spina to same office in which she had suspended him, repeatedly questioned him about his protected statements without providing any assurances against further reprisal, declared that Spina had violated the media access rules, which provide for discipline, and warned him against speaking to the media again without company permission. Given these circumstances, the Board reasonably found that the interrogation was unlawful. Contrary to the Company's claims, the mere fact that Spina was an open union supporter does not bar the Board's finding. Rather, the Board assessed the totality

of the circumstances and reasonably found that the tendency to coerce of the Company's conduct far outweighs Spina's status as a known union supporter.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING AND ENFORCING UNLAWFULLY BROAD RULES THAT PROHIBIT EMPLOYEES FROM RELEASING STATEMENTS TO THE MEDIA WITHOUT PRIOR APPROVAL, AND AUTHORIZE ONLY CERTAIN COMPANY REPRESENTATIVES TO SPEAK WITH THE MEDIA

A. An Employer's Maintenance of a Work Rule Is Unlawful If the Rule Would Reasonably Tend To Chill Employees in the Exercise of Their Section 7 Rights, and an Employer's Enforcement of Such an Invalid Rule Is Itself Unlawful

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” In turn, Section 7 of the Act (29 U.S.C. § 157) guarantees employees 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 7 “organizational rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees

to improve their lot through third-party channels outside the immediate employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). *Accord Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 443 (D.C. Cir. 2003) (explaining that “both we and the Board have made clear that . . . [S]ections 7 and 8(a)(1) protect employee rights to seek support from nonemployees” during ongoing labor disputes).

The right to seek third-party support includes contacting the media about an ongoing labor dispute. As the Board has explained, “Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute,” and “includes communications about labor disputes to newspaper reporters.” *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252-53 (2007) (finding that an employee’s comments about an ongoing labor dispute that were made at a union press conference and later published in a newspaper article were protected), *enforced*, 358 F. App’x 783 (9th Cir. 2000). *Accord Community Hosp. of Roanoke Valley v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (unlawful warning notice issued to employee for comments protesting nurses’ working conditions made during television interview).

In accordance with these general precepts, the Board, with court approval, will find that an employer’s “mere maintenance” of a work rule violates Section 8(a)(1) of the Act if the rule “would reasonably tend to chill employees in the

exercise of their Section 7 rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999)). *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 106-07 (D.C. Cir. 2002). Thus, as here, an employer violates the Act by maintaining a rule that would reasonably tend to chill employees in the exercise of their Section 7 right to contact the media about an ongoing labor dispute. *See, e.g., Leather Center*, 312 NLRB 521, 525, 528 (1983) (finding unlawful the employer’s “mere maintenance” of work rules specifying that “[o]nly an officer of [the employer] is to make any comment to any member of the media,” and “[i]f you are approached by a member of the media for information, you should refer the individual to [such] an officer”).

The Board’s “inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7,” and “[i]f it does, [the Board] will find the rule unlawful.” *Lutheran Heritage*, 343 NLRB at 646. *Accord Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005) (rule unlawful where it expressly prohibited employees from discussing wages and working conditions); *Brockton Hosp.*, 294 F.3d at 107 (rule unlawful where it expressly prohibited employees from discussing information about themselves--“the very stuff of collective bargaining”).

Even if the challenged rule does not explicitly restrict Section 7 activity, the Board, with court approval, will find the rule unlawful upon a showing of any one of the following: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage*, 343 NLRB at 647. *Accord Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007) (mere maintenance of rule unlawful if, through reasonable interpretation, it is likely to chill Section 7 activity); *Guardsmark v. NLRB*, 475 F.3d 369, 374-76 (D.C. Cir. 2007) (same).

In assessing whether employees would reasonably construe the language of a challenged rule to prohibit Section 7 activity, the Board will “give the rule a reasonable reading,” “refrain from reading particular phrases in isolation,” and “not presume improper interference with employee rights.” *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park Hotel*, 326 NLRB at 825, 827). *Accord Community Hosps. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003). Any ambiguity in the challenged rule must be construed against the employer as the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828; *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1231 (5th Cir. 1976) (collecting cases). Further, it is settled that rules that require employees to obtain employer consent before

engaging in protected conduct impede employees in the full exercise of their rights. *See Brunswick Corp.*, 282 NLRB 794, 795 (1987) (collecting cases).

In turn, if a rule is unlawful under the foregoing principles, an employer's enforcement of that invalid rule is itself unlawful. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005) (“[W]e hold that a disciplinary action for violating an unlawful rule is itself a violation of the [Act].”); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 920 (3rd Cir. 1976) (a rule that is invalid on its face under Section 8(a)(1) “cannot be enforced”). As one court has explained, the Board’s rule that “all disciplinary actions imposed pursuant to an unlawful rule are unlawful, . . . reduces the chilling effect that results from imposition of overbroad rules.” *Double Eagle Hotel & Casino*, 414 F.3d at 1258. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945) (finding discharge pursuant to unlawfully overbroad no-solicitation rule was itself unlawful); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001) (collecting cases).

B. The Company Unlawfully Maintained and Enforced Overbroad Handbook Rules Prohibiting Employees From Contacting the Media Without Prior Company Approval, and Authorizing Only Certain Company Representatives to Speak to the Media

1. The Company Unlawfully Maintained Overbroad Rules

Substantial evidence and settled law support the Board’s finding (A 14 n.2, 16-17) that the Company violated Section 8(a)(1) of the Act by maintaining two overbroad rules that restrict employees’ exercise of their Section 7 right to speak to

the media about an ongoing labor dispute. In so finding, the Board reasonably applied that portion of the judicially-approved test established in *Lutheran Heritage* and *Lafayette Park Hotel* providing that an employer's mere maintenance of work rules is unlawful where, as here, employees could reasonably construe the language of the rules to prohibit Section 7 activity. *See* cases cited at pp. 16-17.

Given the sweeping language of the Company's media-access rules, the Board correctly concluded (A 14 n.2, 16-17) that employees would reasonably construe them to prohibit employees from contacting the media about an ongoing labor dispute. As shown at p. 6, Rule 36 bars employees from "[r]eleasing statements to the news media without prior authorization," and the Media Requests Policy authorizes only four managers "to speak with the media." Any departure from those rules, the employees are warned, will result in disciplinary action up to and including discharge. Given that language, there is no doubt that employees reading these handbook provisions could reasonably believe that they were restricted from contacting the media about *any* matter, including the ongoing labor dispute in their workplace. As shown, such employee activity is undisputedly protected by Section 7 of the Act. *See* cases cited at pp. 14-15.

Indeed, as the Board explained (A 16), this is a particularly strong case showing the rules' overbreadth because Spina's comments that Shift Manager Lew determined violated the rules directly pertained to the ongoing labor dispute that

had resulted in “an earlier Board case [*Trump I*] between [the Company] and the Union.” Specifically, Spina commented in the Courier Post article that “[t]he judge got this one exactly right,” that “the Company broke all kinds of rules and interfered with our right to vote,” and “we’re not going to allow them to get away with it.” Thus, as the Board noted (A 16), the media-access rules here are reasonably read to prohibit protected comments about the *Trump I* decision made by the very employee “who was found by [the] administrative law judge to have been discriminated against in that case.” Shift Manager Lew confirmed that this was indeed the Company’s own view of the wide reach of its rules when she informed Spina that he had violated company policy by speaking to the media about a Board decision without prior authorization and warned him that he needed prior approval before doing anything “like that.” (See A 14 n.2.) See pp. 8-9.

The Board’s finding is fully consistent with precedent. To be sure, the Company’s media-access rules are akin in their overbreadth to other rules the Board has found were unlawfully maintained. See, e.g., *Lutheran Heritage*, 343 NLRB at 646 & n.3 (unlawful to require employer permission for solicitation on employer property); *Leather Center, Inc.* 312 NLRB 521, 528 (1983) (unlawful to maintain rule barring employees from discussing employer or its policies with media representatives).

The Board also explained (A 16 n.3) that the fact that the Company’s prohibition on employees speaking to the media was only conditioned on first obtaining company permission “does not save the rules,” but instead supports the Board’s finding that the rules were unlawfully maintained. Thus, as the Board observed, “[t]o the extent that an employee is required to obtain permission before engaging in protected conduct, that requirement is an impediment to the full exercise of an employee’s Sec[ti]on 7 rights.” (A 16 n.3.) *See Brunswick Corp.*, 282 NLRB 794, 795 (1987) (rule was unlawful because it required employees to obtain permission from the employer before soliciting in lunch room). Yet the Company ignores this settled law in claiming (Br. 22) that its rule is lawful because it only requires “prior authorization.”²

The Board, therefore, reasonably concluded that the Company unlawfully maintained “broad rules prohibiting employees from releasing statements to the media without prior approval, and authorizing only certain representatives to speak with the media.” (A 14 n.2) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004)).

² The Company likewise errs in claiming (Br. 22) that its rule cannot be reasonably construed to prohibit protected conduct merely because it “does not address the standards for authorization or the circumstances under which authorization would be denied, if any.” Rather, the Company’s claim underscores how it maintains unfettered discretion to deny such authorization.

2. The Company Unlawfully Enforced Its Overbroad Rules

Because the Company's overbroad media-access rules were unlawful under the foregoing principles, the Company therefore committed an additional violation of the Act when it enforced those invalid rules against Spina. *See Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005) (disciplinary action for violating an unlawful rule is itself a violation of the Act); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 920 (3rd Cir. 1976) (a rule that is invalid on its face under Section 8(a)(1) "cannot be enforced"). Substantial evidence supports that finding (A 14 n.2, 16-17.)

As shown at pp. 8-9, after reading the Courier Post article containing Spina's comments about the judge's decision in *Trump I*, Shift Manager Lew quickly concluded that Spina had violated company policy by speaking to the press without first obtaining company approval. After other senior company managers agreed, Lew summoned Spina to her office and enforced the rules by unequivocally informing him in the presence of another company manager that he had violated the Company's rules by speaking to the media without prior permission. She also asked him whether, in so doing, he thought he represented the Company, obviously referring to the Media Request Policy's provision that only certain company managers were authorized to speak to the media. She then warned Spina that "if you are going to make statements to the media, you would need to receive prior

authorization.” This verbal warning was indeed significant given that the company handbook provides that “any departure” from company policy will subject an employee to discipline up to and including discharge. Accordingly, the Board reasonably found (A 16) that the Company’s actions left no doubt that it “not only maintained its unlawfully broad rules against talking to the media, but that it was enforcing them . . . to encumber communication related to an ongoing labor dispute,” which is itself an unlawful action. *See Jeannette Corp.*, 532 F.2d at 920.

In sum, the Board applied settled law to find that the Company violated Section 8(a)(1) of the Act by both maintaining and enforcing its overbroad media-access rules that would reasonably tend to chill employees in the exercise of their Section 7 right to contact the media about an ongoing labor dispute.

C. The Company’s Arguments Are Misplaced and Do Not Bar Enforcement of the Board’s Order

The Company fails to raise any contention that would warrant disturbing the Board’s findings. Instead, it ignores the relevant facts and the credited testimony of its own witnesses in claiming (Br. 22-23) that Rule 36 cannot be reasonably construed as restricting protected conduct. To the contrary, as shown at pp. 6, 18, Rule 36 forbids employees from making any “statements to the media” on any subject without first obtaining company approval. Employees would, therefore, reasonably construe it as barring them from exercising their Section 7 right to

speak to the media about an ongoing labor dispute without prior permission.³

Indeed, as the Company admits (Br. 21), this is exactly how Shift Manager Lew interpreted the rule when she applied it to Spina's protected statements about the Board's decision in *Trump I*, told him that he had violated the rule, and then warned him to get permission next time. Yet the Company turns a blind eye to this testimony when it nonetheless claims (Br. 22) that "the record is silent on how that rule would apply to Section 7 speech."

The Company likewise misses the mark when it asserts that what matters is what Lew "did not say," (Br. 21)—namely, that she did not criticize the substance of Spina's remarks or state that she would not have granted Spina permission to make those remarks had he sought it. However, no such evidence is required. In any event, the Company forgets that, regardless of the absence of an explicit prohibition, the applicable test is an objective one based on whether employees would reasonably construe the rules to prohibit protected conduct. *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). Similarly, the Company gains nothing by speculating (Br. 23 n.20, 32) that particularly bold employees who might be intent on publishing their pro-union views will not be deterred by the

³ Even if the rule was somehow ambiguous on this point, which it is not, any such ambiguity is to be construed against the Company as the promulgator of the rule rather than against the employees who are required to obey it. *See Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1231 (5th Cir. 1976) (collecting cases); *Lafayette Park Hotel*, 326 NLRB at 828.

Company's enforcement of a prior-authorization rule. *See Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1272 (D.C. Cir. 1998) (holding that just because some "union stalwarts" might be "unfazed" by employer's misconduct did not itself mean that others would not tend to be coerced).

The Company also errs in claiming (Br. 24-29) that the Board failed to address its business interest in maintaining Rule 36 to protect confidential and customer information. Rather, the Board addressed that claim and reasonably found (A 17) that "the breadth of the rules far exceeds the reasons offered to justify them." *See Cintas Corp.*, 482 F.3d at 470 (rejecting similar claim because "[a] more narrowly tailored rule" would "accomplish the Company's presumed interest in protecting confidential information"). Specifically, the Board acknowledged the testimony of the director of employee relations that the Company wished to protect "proprietary" information such as customer lists and marketing plans. (A 17.) Those concerns, however, do not support maintaining rules that restrain all employee communications with the media regardless of whether they involve confidential company or customer information. Moreover, the Company concedes (Br. 26-27) that Spina's comments about the Board's decision in *Trump I* "involved pure Section 7 speech" and "did not involve" its alleged business interests in Rule 36.

The Company does not further its position by relying (Br. 27-28, 31-32) on plainly distinguishable cases involving very different issues pertaining to an employer's property rights to limit employee use of bulletin boards, on-site facilities, and other employer-owned property. *See Int'l Union of Operating Eng'rs*, 341 NLRB 822, 824 (2004) (discussing balancing employees' right to distribute newsletter on employer's property against employer's property rights); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287 (1999) (permitting prior-authorization rule in connection with employee postings on internal hotel bulletin boards); *Lafayette*, 326 NLRB at 827 (finding lawful rule requiring approval before employees could use the restaurant or cocktail lounge for meetings when they were off duty). Undeterred, however, the Company sweepingly suggests (Br. 31) that media statements are the "bulletin board' to the world," and, thus, the Company may control its employees' access to the media much as it controls their access to its bulletin boards. There is simply no support for such a leap in labor law policy, which, in any event, would be a matter within the Board's authority in the first instance, and is contrary to current law.

The Company disingenuously claims (Br. 19) that the Board acted arbitrarily by, as it puts it, "conflating" the two media-access rules and reading them together. The Board reasonably rejected (A 14 n.2) that contention, explaining that the Company itself "acknowledged in its posthearing brief that the rules are part of a

bifurcated approach to limit employee statements to the media.” Similarly erroneous is the Company’s claim (Br. 16-19) that the Board’s reading of the rules somehow rendered Rule 36 a “nullity.” Rather, as shown, the Board’s finding is based on a fully reasonable reading of the two related media-access rules that gave full effect to the language of both rules and did not render either a nullity.

There is also no merit to the Company’s attack (Br. 14-16) on the Board’s finding that both rules had been unlawfully enforced. The Company relies on its factual assertion (Br. 14) that, contrary to the Board’s findings (A 14 n.2, 16-17), Shift Manager Lew never mentioned the Media Request Policy in her meeting with Spina. The Company, however, does little more than offer its own alternative view that is contrary to the credited evidence. As discussed at pp. 8-9, the credited evidence confirms that after Shift Manager Lew asked Spina if he had spoken to the media, Lew referenced both rules. The credited testimony was that Lew asked Spina if he represented the Company, and reminded him that in the future he would need prior approval before speaking to the media, thus “invoking both rules to restrict Section 7 activity.” (A 14 n.2.) As such, the Company has failed to prove, as it must, that the Board’s view is unsupported by substantial evidence.

Finally, the Company fails to comprehend (Br. 33-34) the import of the Board’s statement (A 13 n.3) that, in adopting the prior decision, it did not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2008), another case issued by a two-member

Board panel. As shown at pp. 18-20, the Board's findings that the Company unlawfully maintained and enforced overbroad rules that restrict employee access to the media are based on settled law. Thus, the Company errs in claiming that the Board's non-reliance on *Crowne* somehow rendered the Board's decision a nullity, and it has failed to provide the Court with any basis to disturb the Board's findings.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING SPINA ABOUT HIS PROTECTED STATEMENTS TO THE MEDIA REGARDING A BOARD DECISION

A. An Employer Violates Section 8(a)(1) of the Act by Coercively Interrogating Employees

An employer violates Section 8(a)(1) when it coercively interrogates its employees about their union activities or sentiments. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991). The test is whether the employer's statement reasonably tends to coerce, not whether the employee was in fact coerced.

Rossmore House, 269 NLRB 1176, 1178 n.20 (1984), *enforced sub nom. HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors that the Board will assess in making that determination include: the background of hostility to unionization; the interrogator's position in the employer's hierarchy; whether the information sought is of the kind that could be used to take action against the employee; the place and method of the interrogation, including whether the employee was called away from work to the boss's office; whether a valid purpose for the questioning

was communicated to the employee; and whether assurances against reprisals were provided to the employee. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). No one criterion is determinative; rather, these criteria serve only as a useful “starting point for assessing the totality of the circumstances.” *Id.* In reviewing Board findings of unlawful interrogation, this Court “‘must recognize the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.’” *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

B. The Company Unlawfully Interrogated Spina

Substantial evidence supports the Board’s finding (A 14 n.2, 17) that the Company violated Section 8(a)(1) when Shift Manager Lew coercively interrogated Spina about his protected activities. Indeed, the Board discussed several circumstances that clearly show the requisite tendency to coerce. For example, the background of the Company’s hostility to unionization, the timing and place of the interrogation, and the identity of the interrogator, all created a particularly coercive setting for the interrogation. As the Board noted (A 17), the administrative law judge had recently issued his decision in *Trump I*, which set aside a representation election because of the Company’s numerous unfair labor

practices, including Shift Manager Lew's unlawful suspension of Spina for his union activities. Within a couple of weeks of that decision (A 15, 17), a union representative called Spina to get his comments on the judge's decision, and Spina replied that, among other things, the judge got it "exactly right." As the Company concedes (Br. 25-26), Spina's statement is clearly protected by Section 7 of the Act.

Then, as the Board noted (A 17), once Shift Manger Lew read Spina's statements in the Courier Post Article, she quickly summoned him in the middle of his work shift to the "very office" where she had unlawfully suspended him the year before. The Board reasonably emphasized (*id.*) the coercive nature of Lew's conduct. *See Curlee Clothing Co.*, 240 NLRB 355, 361-62 (1979) (coercion found where employee called away from work station), *enforced*, 607 F.2d 1213 (8th Cir. 1979); *accord Perdue Farms*, 144 F.3d at 835. *See also Southwire Co.*, 820 F.2d at 456-59 (interrogations were coercive given employer's hostility to unionization and its reprisals against union supporters); *NLRB v. Los Angeles New Hosp.*, 640 F.2d 1017, 1019-20 (9th Cir. 1981) (interrogation part of "pattern of coercive conduct tending to inhibit the exercise of Section 7 rights").

The Board also explained (A 17) how the coercive timing and circumstances of the meeting were then amplified by the manner in which Lew conducted the interrogation, the nature of the information she sought, and how she was several

levels above Spina in the Company's hierarchy. *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178-79 (D.C. Cir. 1987) (coercion found where high-ranking official questioned employee). The Board reasonably found (A 17) that Lew proceeded to, in the presence of another senior manager, ask Spina a series of questions "that probed into [his] protected union activities." Thus, as shown at pp. 8-9, she inquired about his comments in the Courier Post article that the judge got it "exactly right," referring, in part, to the judge's finding in *Trump I* that Lew had unlawfully suspended Spina. Lew asked Spina if he had allowed himself to be quoted, whether he was aware of the rules barring him from speaking to the media without company permission, and whether he was a representative of Trump or a Trump employee authorized to speak on its behalf.

Further, Lew provided Spina with no assurances that this meeting would not result in further reprisals. *See Perdue Farms*, 144 F.3d at 835 (failure to provide assurances supports finding of coercion). In fact, the Board noted (A 17) how Lew did the exact opposite—she unequivocally told Spina that, by speaking to the media, he violated company policy, which would subject him to discipline. Moreover, as shown at pp. 21-22, Lew's interrogation of Spina was intertwined with her enforcement of overly broad rules that unlawfully restricted the employees' right to speak to the media. *See Los Angeles New Hosp.*, 640 F.2d at 1019-20 (interrogation part of pattern of coercive conduct). Thus, as the Board

aptly summarized it (A 17), Lew's interrogation was coercive because, in addition to repeatedly probing Spina's protected activities, it involved Lew's "effort to enforce an unlawfully broad rule" in the "very office" in which she had previously issued Spina an unlawful warning and suspension. Accordingly, given the totality of these circumstances, substantial evidence amply supports the Board's finding that Lew's interrogation of Spina had an unlawful tendency to coerce employees in the exercise of their statutory rights.

Contrary to the Company's contention (Br. 35-36), the fact that Spina was an open union supporter does not mandate reversal of the Board's finding, but is merely one factor among many to be considered as part of the totality of the circumstances. *See Perdue*, 144 F.3d at 835 (no one factor determinative); *Rossmore House*, 269 NLRB at 1177-78 & n.20 (unlawful to coercively question open union supporter). *See generally United Food and Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006) (employer unlawfully questioned known union supporter why he wanted union that could only cause trouble). As the Board reasonably found (A 17), the tendency to coerce created by the Company's conduct "far outweighs" the fact that Spina was an open union supporter. As just shown, moreover, the record evidence belies the Company's multiple assertions (Br. 36, 38) that the interrogation did not involve a threat or putting a "bullseye" on Spina, that Spina's union activities were not discussed, that

Spina was not asked to justify his conduct, or that no high-level company official was involved.

Thus, contrary to the Company's claim (Br. 36-37), its interrogation of Spina is clearly unlike the interrogation found lawful in *Southern Monterey County Hosp.*, 348 NLRB 327, 330 (2006), which involved no such threat or warning. Moreover, the Board's finding here is consistent with its findings in *Southern Monterey* (*id.* at 327 & n.5) that several other interrogations there were unlawfully coercive. Finally, the other case the Company cites (Br. 37-38)—*Starbucks Corp.*, 354 NLRB No. 99, 2009 WL 3577768, *1 n.3 (2009)—cannot serve as precedent because, as the Company itself notes (Br. 38), no exceptions were filed in that case to the judge's finding of no unlawful interrogation. *See Whirlpool Corp.*, 337 NLRB 726, 727 n.4 (2002) ("the Board's adoption of a portion of a judge's decision to which no exceptions are filed does not serve as precedent for any other case"). *Accord ESI, Inc.*, 296 NLRB 1319, 1319 n.3 (1989).

CONCLUSION

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

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April 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC, d/b/a TRUMP	*
MARINA HOTEL AND CASINO	*
	*
Petitioner/Cross-Respondent	* Nos. 10-1261,
	* 10-1286
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 4-CA-36528
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,385 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben
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Dated at Washington, DC
this 6th day of April 2011

UNITED STATES COURT OF APPEALS
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v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	4-CA-36528
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, I electronically filed the foregoing 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 certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 6th day of April 2011

STATUTORY ADDENDUM

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, et seq.

Sec. 7. [§ 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) [Section 158(a)(3) of this title].

Sec. 8(a). [§ 158(a).] [Unfair labor practices by employer] 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 [Section 157 of this title];

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(e). [§ 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, . . . within any circuit wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . . Upon the filing of such petition, the Court . . . shall have power to . . . make and enter a decree enforcing, modifying and enforcing as

so modified, or setting aside in whole or in part the order of the Board. 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.

10(f) [§ 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.