Nos. 10-4569, 10-4683, 11-1564 & 11-1742

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

GRAPETREE SHORES, INC. d/b/a
DIVI CARINA BAY RESORT

Respondent/Cross-Petitioner

ON APPLICATIONS FOR ENFORCEMENT AND CROSS-PETITIONS FOR REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These consolidated cases are before the Court on the applications of the National Labor Relations Board ("the Board") to enforce, and the cross-petitions of Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort ("the Company") to review, two Orders that the Board issued against the Company. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the

National Labor Relations Act, as amended ("the Act").[1] The Decision and Order in the case involving the Company's refusal to bargain with the certified union (hereinafter "the refusal to bargain case"), issued on December 7, 2010, and reported at 356 NLRB No. 47 (A. 40a-d),[2] is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3] The Decision and Order in the case involving the unlawful preelection announcement of a 401(k) benefit (hereinafter "the unfair labor practice case"), issued on December 29, 2010, and reported at 356 NLRB No. 60 (A. 40h-s), is also a final order with respect to all parties under Section 10(e) and (f) of the Act.[4]

A prior decision in the refusal to bargain case was issued by a two-member quorum of the Board. The Board filed an application for enforcement of that Order with this Court and the Company cross-petitioned for review. The parties fully briefed the case. The Supreme Court, on June 17, 2010, issued its decision in *New Process Steel, L.P. v. NLRB*,[5] holding that Chairman Liebman and Member

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[1] 29 U.S.C. §§ 151, 160(a).

[2] "A." references are to the Appendix that the Company filed. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's brief.

[3] 29 U.S.C. § 160(e) and (f).

[4] *Id.*

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

Schaumber, acting as a two-member quorum of a three-member group delegated all the Board's powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. The Court granted the Board's motion for remand based on *New Process*. The Board then issued its September 28, 2010 Decision and Notice to Show Cause that adopts and incorporates by reference the Board's July 30, 2008 decision, including the judge's decision to overrule the election objections, and certified the Union pursuant to that decision. (A. 254-55). Thereafter, the Company continued to refuse to bargain with the certified union, and the Board issued its December 7, 2010 Decision and Order in which it determined that the Company violated the Act by refusing to bargain with the union. (A. 40a-d.)

As the Board's Order in the refusal to bargain case is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case No. 24-RC-8566) is also before this Court pursuant to Section 9(d) of the Act.[6] Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board."[7] The Board retains authority under Section 9(c) of the Act[8] to resume

[6] 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

[7] 29 U.S.C. § 159(d).

processing the representation case in a manner consistent with the rulings of the Court.[9]

On December 8, 2010, the Board filed an application for enforcement of the Board's December 7, 2010 Order. The application was docketed as Case No. 10-4569. On or about December 16, 2010, the Company filed a cross-petition for review of that same Order, and the matter was docketed as Case No. 10-4683.

On March 2, 2011, the Board filed its application for enforcement of its December 29 Order, and the Company filed its cross-petition for review of that same Order on March 21, 2011. Those cases were docketed as Case Nos. 11-1564 and 11-1742, respectively. On March 21, the Company filed a motion to consolidate the cases, which this Court granted on April 21, 2011. All applications for enforcement and cross-petitions for review were timely; the Act places no time limit on the institution of proceedings to enforce or review Board orders.[10] This Court has jurisdiction under Section 10(e) and (f) of the Act,[11] because the unfair labor practices arose in the U.S. Virgin Islands.

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[8] 29 U.S.C. § 159(c).

[9] *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999); *River Walk Manor, Inc.*, 293 NLRB 383, 383 (1989); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

[10] *Citizens Publ'g and Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001) (citing *Schaefer v. NLRB*, 697 F.2d 558, 560-61 (3d Cir. 1983)).

[11] 29 U.S.C. § 160(e) and (f).

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings underlying its certification of the Union's election victory, and therefore whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union following the Board's certification of the Union as the exclusive-bargaining representative.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by announcing an improved 401(k) plan two days before a representation election where the announcement had a tendency to coerce employees in the exercise of their Section 7 rights under the Act.

STATEMENT OF RELATED CASES

As discussed *supra*, Case Nos. 10-4569 and 10-4683 were previously before this Court in Case Nos. 09-3234 and 09-3423, respectively. Both parties submitted full briefs on the merits but the Court remanded the case prior to a decision. Board counsel are not aware of any other related case or proceeding that is completed, pending, or about to be presented to this Court, any other court, or any federal or state agency.

STATEMENT OF THE CASE

Following a July 13, 2007 election among the Company's employees, both the Company and the Virgin Islands Workers Union ("the Union") filed timely objections alleging that the other's preelection conduct tainted the election results and challenges to several voters' eligibility. Moreover, the Union filed an unfair labor practice charge that alleged, among other things, that the Company had violated Section 8(a)(1) of the Act[12] when it announced an improved 401(k) benefit to employees two days before the election. (A. 243.)

The Regional Director for Region 24 directed that a hearing be conducted regarding two of the challenged ballots, two of the Union's objections, and four of the Company's objections. Later, the Regional Director consolidated those objections with the unfair labor practice case regarding the preelection announcement of the improved 401(k) plan and another one of the Company's objections.

After a hearing, the administrative law judge issued a decision on February 8, 2008, rejecting the Company's challenge to the potentially-determinative ballot Felicia Dixon cast, overruling the Company's objections to the Union's pre-election conduct, sustaining the Union's objection as it related to announcement of the improved 401(k) plan, and sustaining the allegation that the Company had

[12] 29 U.S.C. § 158 (a) (1).

violated Section 8(a)(1) of the Act in the unfair labor practice case. (A. 29-30, 40m.) The Company filed timely exceptions. (A. 16, 42.)

Thereafter, on July 30, 2008, the two-member Board (then-Chairman Schaumber and Member Liebman) issued an unpublished Decision, Order, and Direction that severed the representation case from the unfair labor practice case.[13] Resolving the representation case, the Board sustained the judge's finding that the Company failed to support its election objections with competent evidence, and, having agreed that the objections should be overruled on that basis, the Board found it unnecessary to pass on any alternative grounds for overruling those objections. Further agreeing with the judge, the Board directed the Regional Director to open the ballots cast by four challenged voters, including Dixon, whom the judge had found eligible, and serve upon the parties a revised tally. (A. 18-19.)

On August 8, 2008, the Regional Director opened and comingled the ballots, and issued a revised tally showing that the Union won the election by a vote of 46 to 45. On August 18, the Regional Director certified the Union as the exclusive

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[13] The Company's statement (Br. 6) that this July 30, 2008 Order "adopted the ALJ's decision to uphold [the Union's] election objections to the extent they alleged that two days prior to the election [the Company] unlawfully announced that the Governor approved the EDC contract," is factually incorrect. The July 30, 2008 Order states (A. 18): "To expedite the resolution of 24-RC-8566, however, we have decided not to rule at this time on the judge's unfair labor practice finding or his recommendation to sustain the Charging Party's Objection 4. Rather, we shall sever and remand Case 24-RC-8566 to the Regional Director for Region 24 for further processing[.]"

representative of the Company's "full-time and regular part-time production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds [employees]." (A. 40, 254; 75g, 49.) The Union requested bargaining and sought relevant information.

The Company refused to bargain with the Union solely to challenge the Union's election victory. Based on the Union's ensuing unfair labor practice charge, the Board's General Counsel issued an unfair labor practice complaint, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and, provide requested information to, the Union. (A. 40a.) The Company admitted its refusal to bargain but challenged the validity of the Union's certification for the reasons it advanced in the representation proceeding. Thereafter, the General Counsel filed a motion for summary judgment, the Board issued a notice to show cause, and the Company filed a response raising the same defenses as in its answer. (A. 3, 40a.)

On April 10, 2009, the two sitting members of the Board determined that the Company had violated Section 8(a)(5) and (1) of the Act, by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of the Company's employees, following the Union's certification, and the Company sought review of that order in this Court. (A. 3-5.) On June 17,

2010, the United States Supreme Court issued its decision in *New Process Steel*.[14] Thereafter, this Court granted the Board's motion for remand based on *New Process*. On December 7, 2010, after recertifying the Union's earlier victory, the three-member Board issued its Decision and Order. (A. 40a.)

On December 29, 2010, the Board returned to the part of the judge's original decision that it had severed in July 2008, and affirmed his finding that the Company violated Section 8(a)(1) of the Act[15] when it announced the improved 401(k) plan benefit two days before the election. The Board ordered that the Company cease and desist from the unlawful conduct and take other affirmative remedial action. (A. 40h-i.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; The Company's Prior Economic Development Commission Agreements; The Parties Consent to an Election

The Company operates a hotel and casino resort facility in Christiansted, St. Croix, U.S. Virgin Islands and has 140 to 150 employees. (A. 40j; 85.) It is uncontested that the Company had, since 1996 and 1999, been party to two Economic Development Commission ("EDC") agreements with the Government of the U.S. Virgin Islands, under which the Company received favorable tax

[14] 130 S. Ct. 2635.

[15] 29 U.S.C. § 158(a)(1).

treatment for ten years in exchange for meeting certain requirements. (A. 40j; 85a-85b.) The 1996 and 1999 agreements were set to expire in 2006 and 2009 respectively. (A. 85b.) The Government of the U.S. Virgin Islands requires that all recipients of tax benefits under EDC agreements negotiate new agreements with the EDC if the recipient wishes to extend the tax benefits. (A. 40j; 85b.)

The Company began its application to extend the benefits in 2005. (A. 85b.) In February 2006, the EDC held a public hearing on the Company's application. (A. 40j; 85b, 85s.) Thereafter, the Company and the EDC began negotiations and subsequently reached a new agreement, which was then referred to the EDC executive committee. (A. 40j; 85e.) On August 11, 2006, the EDC executive committee met and voted to grant continued benefits to the Company. (A. 40j; 85e-f.) On May 14, 2007, the EDC forwarded the agreement to the Company, and pursuant to the EDC's request, the Company signed and returned the agreement by May 18. (A. 40j; 85k-85l.)

On June 1, 2007, the EDC forwarded the agreement to the Governor with the recommendation that he approve it. (A. 40j-k; 85q.) The Governor had a veto right and could make changes to the agreement, send it back for reappraisal, or refuse to sign it. (A. 40j; 85n, 85r, 215.) The Governor had previously rejected agreements between the Company and the EDC. (A. 40j & n.8; 85n.) On that same day, the Union filed with the Board's Regional Office in Puerto Rico a

petition seeking an election to represent the Company's production and maintenance employees. (A. 40j; 75g.) Thereafter, on June 7, the parties stipulated to hold an election on July 13, 2007. (A. 40j, 75g, 243; 50-51.)

The Governor signed and approved the agreement on July 10. On either July 10 or 11, Richard Patrick Henry, the general manager of the Company's resort, was informed by his supervisor that the Governor had approved the agreement. (A. 40k; 81, 85q.) With regard to the 401(k) benefit, the agreement reads: "After one year of employment [the Company] will provide its full time employees with a 401(k) or similar retirement plan whereby the employer will contribute up to 2 percent of the employees' base salary to the plan whether or not the employees contributes [sic]." (A. 259.)

B. The Company's General Manager Announced the Improved 401(k) Plan Benefit to Employees Two Days Before the Representation Election

On July 11, Henry gathered employees together during working hours for two one-hour meetings about the election. Twenty-five to thirty employees attended each meeting. (A. 40j; 82.) At these meetings, in addition to urging employees to vote in the upcoming election, Henry also announced that employees would be receiving enhanced benefits, including a new 401(k) retirement plan.[16]

[16] Although the Company had previously maintained a 401(k) plan for its employees, only one employee had participated in that plan and the Company did not make contributions to that plan. (A. 40k; 79-80.)

(*Id.*) Henry indicated to employees that the new benefits were connected to an EDC agreement that the Governor of the U.S. Virgin Islands had recently signed. (*Id.*) In addition to discussing the new benefits at the July 11 group meetings, Henry did so during individual meetings with employees, including during a July 12 meeting with Bernicedeen Bryan, one of the Company's room attendants. (A. 40j; 84, 85ee-85ff.)

As of the date of the unfair labor practice hearing, nearly four months after Henry's announcement to employees, the Company had not implemented the improved 401(k) plan. (A. 40k; 85jj-85kk.) The only detail the Company confirmed was that it would give all of the employees two percent of their 2007 earnings by April 15, 2008. (A. 40k, 40m; 85jj-85kk.)

C. The Election and Representation Case Proceeding

Pursuant to the parties' stipulation, on July 13, 2007, the Board conducted an election among the approximately 110 employees in the petitioned-for unit. The tally of ballots showed that 45 votes were cast for, and 43 against, representation by the Union. (A. 16.) There were seven challenged ballots, a number sufficient to influence the election's outcome. (A. 16; 52.)

Both parties filed election objections alleging that the other had engaged in acts of misconduct that were sufficient to have influenced the election's outcome. Simultaneously, the Union filed unfair labor practice charges alleging, among

other things, that the Company's announcement of the improved 401(k) plan two days before the election also violated the Act. (A. 16, 40i; 252-53.)

On September 19, the Board's Regional Director issued a report disposing of five ballot challenges and ordering that a hearing be held to resolve the challenges to the two remaining ballots. The Regional Director also directed a hearing on the unfair labor practice case and on two of the Union's election objections and five of the Company's, dismissing the rest. (A. 40i, 61-73.)

D. Following a Hearing, an Administrative Law Judge Finds that Employee Felicia Dixon was Eligible to Vote, Overrules the Company's Election Objections, and Concludes that the Company Unlawfully Promised Employees a New 401(k) Plan to Interfere with Their Free Choice

After a consolidated hearing on the representation and unfair-labor-practice case issues, a Board administrative law judge issued a recommended decision, resolving the remaining challenges, the election objections, and the unfair-labor-practice allegations. As relevant here—none of the other issues are before the Court—the judge rejected the Company's challenge to the potentially-determinative ballot Felicia Dixon cast, overruled the Company's objections, and determined that the Company had violated the Act by announcing the improved 401(k) plan two days before the election. (A. 29-30.)

1. The judge's finding that Felicia Dixon had not been discharged and, therefore, was eligible to vote as an employee on disability leave

Felicia Dixon, a housekeeping employee who had served as a union observer in a previous Board election, injured her right shoulder in June 2006 while working in the hotel's new wing, where she was required to lift particularly heavy doors. She went on disability leave at that time and returned to work in November 2006. (A. 28; 103, 117-18.) Before going on a 2-week vacation in late December of that year, Dixon presented her supervisor a doctor's note requesting that Dixon be put on "light duty" due to continued shoulder problems. (A. 28; 119.) Dixon returned to work on January 7 and, after working 3 hours, was directed to report to the office. There, she was handed a letter that stated that the Company had no light-duty assignments at that time and was therefore placing her on injury leave, effective immediately. (A. 28; 120-21.) Dixon then applied for and received disability benefits and remained on disability leave through the time of the election. (A. 28; 107-08.)

As the judge found, under settled Board policy,[17] Dixon was eligible to vote as an employee on disability leave unless the Company could establish that her employment had been terminated prior to the election. (A. 29-30.) The Company

[17] *See Home Care Network, Inc.*, 347 NLRB 859, 859 (2006) (reaffirming the Board's rule as articulated in *Red Arrow Freight Lines*, 278 NLRB 965, 965 (1986)).

claimed that Dixon had been discharged prior to the election pursuant to an extant Company policy mandating discharge after 6 months on disability leave (A. 143-44), but the judge discredited the Company's testimony. (A. 29-30.) The Company rested its entire case upon Henry's testimony, which the judge found untenable. (A. 29-30.) As the judge explained, Henry's claim that the Company discharged Dixon was undermined by his own testimony that no one had ever told Dixon about her alleged discharge and by the fact that the Company's own records did not contain a single entry memorializing such an occurrence. (A. 30; 154-55.) To the contrary, the weekly list of housekeeping employees the Company posted at the beginning of the very week that the election was held included Dixon's name and reported her as "out." (A. 180.)

The judge also emphasized that Henry could not produce any evidence, documentary or oral, to corroborate his claim that the Company actually had any policy requiring discharge after 6 months of disability leave. As the judge explained, the only piece of evidence the Company could offer to justify its claim that such policy existed was a copy of a draft collective-bargaining agreement the Company had unsuccessfully negotiated with a prior union. However, as the judge emphasized, Henry was forced to concede that the agreement had never even been executed, much less implemented, and that the provision, which dealt only with "layoff and recall" issues, by its express terms only provided for loss of seniority

after six months, not the penalty of discharge. (A. 30; 149-53.) Despite Henry's testimony to the contrary, the judge reasoned that the two were not the same thing. (A. 30.)

Having discredited Henry, the judge found that Dixon was eligible to vote and directed that the Regional Director open and count her ballot. (A. 30.)

2. The judge's finding that the Company failed to produce sufficient evidence to prove its allegations of objectionable conduct

The Company also argued that the election results should be discarded because union supporter Lucy Edward allegedly made threatening remarks to banquet employee Phyllis Blackman and six of her coworkers during the two weeks immediately prior to the election. At the hearing, the Company produced testimony from only one witness, Blackman, to support its assertions. (A. 32.) But, as the judge emphasized, Blackman began her testimony with what amounted to a direct refutation of the Company's claim–she answered "no" when asked if Edward had engaged her in any conversation about the Union prior to the election, and then testified that she was unaware even that Edward had any connection with the Union. (A. 32; 88.)

The judge further found that, in ensuing testimony, Blackman only identified Edward as among the group of employees, "most" of whom Blackman testified "would throw words at us" about the Union. (A. 32; 88-89.) But Blackman never

identified a specific instance in which Edward herself made a specific remark, threatening or otherwise, on that subject to Blackman and her coworkers. In this context, the judge concluded that Blackman's testimony was inadequate to satisfy the Company's burden to substantiate its election objections with reliable evidence. (A. 32-33.)

The Company's remaining objection alleged that Edward walked into the lunchroom while a different group of employees was present and, raising both hands above her head, loudly declared, "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." (A. 34.) The Company did not offer live testimony to support this allegation, which Edward vehemently denied, but instead relied on word-for-word identical affidavits from two employees. (A. 157-59.) The judge concluded that, while Edward was less than an ideal witness on this point, the Company's decision to rely exclusively on affidavit evidence was fatal. (A. 35.) Specifically, the judge found that the identical wording of the affidavits "detract[ed] somewhat from their weight" and that the failure of the affiants to take any action consistent with their identical assertions, namely, that "I firmly believe that she meant that she wanted to shoot openly anti-Union employees," by, for example, contacting company management or the police, made their affidavits particularly suspect. (A. 35.)

3. The judge's direction that a revised tally be conducted

Having overruled the Company's election objections, the judge directed that the four challenged ballots, including Dixon's ballot, be comingled, opened, and counted, and that, if the tally showed that the Union had won, that the Regional Director certify it as the employees' exclusive representative. (A. 38.) The Company filed timely exceptions to the judge's decision finding Dixon eligible and overruling its election objections.

4. The judge's conclusion that the Company's announcement of the 401(k) plan violated the Act

The judge concluded that the Company's announcement of the new 401(k) benefits during the critical period before the election gave rise to the strong inference that it was coercive in violation of Section 8(a)(1). (A. 40l.) The judge determined that it was incumbent upon the Company to establish that it announced the benefit when it did for some reason other than the upcoming election. The Company attempted to meet its burden by arguing that the reason it announced the improved 401(k) in the critical period was because the Governor had just approved the EDC agreement. (*Id.*)

The judge concluded that although Company's defense "had some facial appeal," the Company had not met its burden because the Company had not announced prior milestones in EDC agreement's negotiation process to employees, had not finalized the 401(k) benefit at the time of the announcement or four

months after the election when the trial occurred, and was not obligated by the language of the agreement to provide a full two percent contribution to employees. (A. 40l-40m.) Therefore, the judge concluded that the Company's announcement of the improved 401(k) benefit in the critical preelection period violated the Act, and, on that basis, sustained the Union's election objection relating to the announcement of the benefit plan. (A. 40m, 40o.) The Company filed timely exceptions to the judge's conclusion that the Company's announcement violated the Act and his decision to sustain the Company's election objection based on that conduct.

E. The Board's Decision in the Representation Case; The Revised Tally of Ballots Shows a Union Victory

On September 28, 2010, a three-member panel (Chairman Liebman and Members Becker and Pearce) of the Board issued a new decision that affirmed and incorporated the two-member Board's July 30, 2008 Decision. (A. 254-55.) In incorporating the July 30, 2008 decision, the Board reiterated that it had previously severed the representation case from the unfair labor practice case, and sustained the judge's finding that the Company failed to support its election objections or ballot challenge with competent evidence and overruled them on that basis. (*Id.*) The Board reaffirmed its prior direction to the Regional Director to open and comingle the ballots, and the previous tally showing that the Union won the

election by a vote of 46 to 45, and the Regional Director's certification of the Union as the exclusive representative of the Company's employees. (*Id.*)

F. The Refusal-to-Bargain: The Company Refuses to Bargain and the Union Files Charges

In December 2008, following the Regional Director's initial certification of the Union, the Union requested that the Company bargain and provide pertinent bargaining information. The Company refused the information request and stated that it would not recognize and bargain with the Union.

Based upon the Union's unfair labor practice charge, on January 28, 2009, the Board's General Counsel issued an unfair labor practice complaint, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and, provide requested and pertinent bargaining information to, the Union. The Company filed an answer admitting its refusal to bargain but contending that the Union's certification was impaired for the reasons advanced in the representation proceeding. Thereafter, the General Counsel filed a motion for summary judgment, the Board issued a notice to show cause, and the Company filed a response raising the same defenses as in its answer. (A. 40a.)

Following the Board's affirmation of the Union's certification, on September 29, 2010, the Union again requested that the Company recognize it and provide pertinent bargaining information. (A. 40b.) Thereafter, the Company continued to refuse to recognize and bargain with the Union and refused to provide

pertinent bargaining information in order to challenge the Union's election victory. Thereafter, the Acting General Counsel filed an amended complaint and notice of hearing. The Company failed to file an answer to the amended complaint.

I. THE BOARD'S CONCLUSIONS AND ORDERS

A. The Refusal to Bargain Violation

On December 7, 2010, the Board (Chairman Liebman and Members Becker and Pearce) issued a Decision and Order, granting the Acting General Counsel's motion for summary judgment and finding that the Company's refusals to bargain and provide the requested bargaining information violated Section 8(a)(5) and (1) of the Act.[18] (A. 40b-c.) The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order requires the Company to provide the Union with the requested bargaining information and to bargain with the Union, upon request; to embody any resulting understanding in a signed agreement; and to both physically and electronically post and maintain an appropriate remedial notice, if the Company customarily communicates with its employees through electronic means.

[18] 29 U.S.C. § 158(a)(5) and (1).

B. The Unlawful Promise of Benefits Violation

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Hayes) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act[19] when Henry announced the improved 401(k) plan two days before the election where the Company had neither established the details of the improved 401(k) plan nor settled on a date for implementation before announcing it. (A. 40h.) The Board ordered that the Company cease and desist from conduct it found unlawful and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights; and to both physically and electronically post and maintain an appropriate remedial notice, if the Company customarily communicates with its employees through electronic means. (*Id.*)

STANDARD OF REVIEW

This Court "must 'accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence.'"[20] This requirement is satisfied if "it would have been possible for a

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[19] 29 U.S.C. § 158(a)(1).

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

reasonable jury to reach the Board's conclusion."[21] Thus, the Court may not displace the Board's choice between fairly conflicting views of evidence "even though the court would justifiably have made a different choice had the matter been before it *de novo*."[22]

This Court is particularly deferential to the Board's credibility determinations.[23] As a result, the judge's credibility determinations, which the Board has reviewed and adopted, are not to be reversed "unless inherently incredible or patently unreasonable."[24] And while this Court exercises plenary review over legal questions, it gives "due deference to the Board's expertise in labor matters."[25]

SUMMARY OF ARGUMENT

1. The Company's defense of its refusal to bargain following the Union's certification consists, in the main, of a frontal assault on the administrative law

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[21] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1988); *see Universal Camera*, 340 U.S. at 488.

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

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

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

[25] *Atl. Limousine*, 243 F.3d at 715.

judge's credibility determinations, which the Board affirmed. Given the deference due to such findings on review, the Company's attacks must fail.

First, the Company's claim that employee Dixon had been discharged and, thus, was not eligible to vote, turns on testimony that the administrative law judge, as affirmed by the Board, discredited as untenable. The Company produced not a stitch of evidence to corroborate Henry's improbable claim that Dixon had been discharged pursuant to a rule requiring termination of employees after six months on disability leave. Indeed, Henry conceded that the rule had not been committed to writing and, insofar as it appears, was known only to him. Henry conceded that Dixon had never been informed that she had been discharged and that the Company's records contained not a single entry of such an occurrence.

The document that Henry put forth as memorializing a rule providing for discharge after an employee had been on leave for six months did nothing of the sort, but rather was a stale draft collective-bargaining agreement that had never been implemented. Even if that agreement had been implemented, it only called for a loss of seniority after six months of disability leave, not discharge. Finally, the Company's suggestion that the Court reject the Board's well-settled *Red Arrow* rule remarkably fails to mention that this Court embraced the Board's *Red Arrow* rule 15 years ago in *Calvert Acquisition Co. v. NLRB.*[26]

[26] 83 F.3d 598 (3d Cir. 1996).

Next, the Board properly found that the Company presented no competent or credible evidence sufficient to prove either allegation of election misconduct by union supporter Lucy Edward. The law is clear that a party seeking to upset the results of a secret ballot election bears a heavy burden, which the judge correctly found was not met here.

The judge reasonably concluded that banquet employee Phyllis Blackman—the Company's lone witness in supporting its claim that Edward had threatened Blackman and six of her coworkers—effectively denied the allegation at the beginning of her testimony: She answered a question about whether Edward had engaged her in conversation about the Union with a stark "No." And, while Blackman later testified that Edward was among a *group* of employees who allegedly harassed Blackman about the union election, Blackman never put any specific words in any employee's mouth, and her general testimony about what had been said was, as the judge found, a complete "muddle" that lacked detail, consistency, and coherence.

The Company's remaining contention that Edward allegedly made an antiunion threat of violence was inexplicably supported by no live testimony whatsoever. Rather, the Company relied on identically worded affidavits that the judge found raised more questions than they answered and declined to credit. At the same time, Edward denied the allegation on the stand, subject to cross-

examination. Given that the very reason that the Board holds hearings is to permit the finder of fact to assess witness demeanor and determine whether a witness's testimony can hold up under scrutiny, the Company cannot fault the judge for declining to find merit to an allegation of election misconduct based solely upon out-of-court declarations. Clearly then, the Board's conclusion that the Company did not establish the alleged objectionable conduct with sufficient particularity to justify overturning the election was reasonable and supported by substantial evidence.

2. Substantial evidence on the record as a whole supports the Board's finding that the Company interfered with and coerced employees in the exercise of their free choice when it announced an improved 401(k) plan to employees two days before a Board election. It is undisputed that the Company made this announcement fewer than forty-eight hours before the representation election, when the Company had neither established the details of the improved 401(k) plan nor settled on a date for implementation, thus giving rise to an inference that the timing of the announcement was intended to coerce employees and discourage Union support.

The burden was on the Company to show a legitimate, union-neutral reason for announcing this benefit two days before the election. The Company failed to meet this burden. The Company has attempted to piggy-back the timing of its

decision to enter into negotiations with the government of the U.S. Virgin Islands on its decision to improve its 401(k) plan. Although it is uncontested that Company began the process of renewing its EDC benefits approximately two years before the Union came onto the scene, the Company did not commit itself to giving employees an improved 401(k) plan until the Governor of the U.S. Virgin Islands signed and approved the EDC agreement. Even then, the Company did not finalize the plan before the election, as evidenced by the lack of final documents over four months later when this case was tried before the administrative law judge. Accordingly, when the Company announced the new benefit to employees, it was not an existing or "pre-determined" benefit—rather, the Company merely announced the benefit without establishing the details or settling on a date certain for its implementation.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

The record amply demonstrates that the Board reasonably certified the Union, and therefore properly found that the Company violated the Act when it refused to bargain with the Union in order to test that certification.

As an initial matter, in the Summary of Argument section of its opening brief (Br. 27-28), the Company seems to assign error—for the first time—to the

Board's decision to have a properly-constituted three-member panel decide the case and adopt the earlier decisions, claiming that the Board "rubber-stamped" those earlier decisions. The Company, however, failed to raise this concern to the Board in a motion for reconsideration, and the Court therefore may not consider it under Section 10(e) of the Act.[27] Moreover, consistent with Rule 28 of the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived.[28] And "'to assure consideration of an issue by the court, the [petitioner] must both raise it in

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[27] *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party in a motion for reconsideration before the Board). *See also New York and Presbyterian Hosp. v. NLRB*, Nos. 10-1278, 10-1291, 2011WL 2314955, at *8, __F.3d __ (D.C. Cir., June 14, 2011) (claim that Board's adoption of earlier decision was not reasoned decision-making was barred by Section 10(e) in the absence of a motion for reconsideration). *See generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

[28] *United States v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006); *United States v. Irizarry*, 341 F.3d 273, 305 (3d Cir. 2003); *See e.g., Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994); *see also Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n. 3 (10th Cir. 2003); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000); *accord Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (passing reference to an issue, without discussion and supporting legal authority, constitutes a waiver).

the 'Statement of Issues' and pursue it in the 'Argument' portion of the brief."' [29] As the Seventh Circuit stated: "A skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."[30] In any event, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."[31] It is well-established that courts presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary." [32] Here, the Company fully briefed the case before the Board, had an opportunity to raise any new concerns in a motion for reconsideration, and received a fair hearing. Its

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[29] *Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc.*, 931 F.2d 1002, 1011 (3d Cir. 1991) (quoting 16C Wright & Miller, *Federal Practice and Procedure* § 3975, at 421-22 (1st ed. 1977)); *see also United States v. Albertson*, No. 09-1049, 2011 WL 1662786, at *2, __F.3d __ (3d Cir. May 4, 2011); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

The cited section of Wright & Miller currently appears at 16AA Wright & Miller, *Federal Practice and Procedure* § 3974.1, at 240-43 (4th ed. 2008).

[30] *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (internal citation omitted), *cited with approval in United States v. Hoffecker*, 530 F.3d 137, 162 (3d Cir. 2008).

[31] *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519, 544 (1978).

[32] *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.").

unsupported claims of administrative irregularity are not properly before this Court.

A. The Board Reasonably Certified the Union, and Therefore Properly Found That the Company Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain With the Union Following That Certification

1. Applicable principles

An employer violates Section 8(a)(5) and (1) of the Act[33] by refusing to bargain with the duly-certified collective-bargaining representative of its employees.[34] In the present case, the Company admits (Br. 31) its refusal to bargain but contends that the Board improperly certified the Union in the underlying representation proceeding. Accordingly, if the Company's attacks on the Board's certification of the Union fail, as they must, then the Company's

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[33] 29 U.S.C §§ 158(a)(5) and (1). Section 8(a)(5) of the Act (29 U.S.C § 158(a)(5)) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) of the Act (29 U.S.C § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7" of the Act. Section 7 of the Act (29 U.S.C § 157), in turn, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1). *See generally NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 n.1 (3d Cir. 1941).

[34] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *North Am. Directory Corp. v. NLRB*, 939 F.2d 74, 76 (3d Cir. 1991); *NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 59 (3d Cir. 1983) (en banc).

refusal to bargain was unlawful and the Board is entitled to enforcement of its Order. [35]

As the Supreme Court has long recognized, Congress entrusted the Board with a "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[36] That discretion necessarily encompasses the development and application of Board rules defining voter eligibility and the determination of election misconduct that could warrant a new election.

The party claiming that an employee should have been deemed ineligible to vote or that election misconduct occurred that interfered with employee free choice–here, the Company–bears the burden of proof.[37] Moreover, there is a strong presumption that the results of an election are valid, and a party claiming otherwise has an especially heavy burden.[38]

Here, the Board properly discredited the testimony upon which the Company relied to support its claims that employee Dixon was ineligible to vote and that the election misconduct occurred. The Company has not established that those

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[35] *See Calvert Acquisition Co. v. NLRB*, 83 F.3d 598, 600-01, 610 (3d Cir. 1996).

[36] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

[37] *See, e.g., Calvert Acquisition Co.*, 83 F.3d at 607; *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1156 (3d Cir. 1993).

[38] *See NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (per curiam).

credibility resolutions should be disturbed on review, and, accordingly, the Company's challenges to the Board's certification of the Union, and to the ensuing unfair labor practice findings against the Company, must fail.

2. Applying established Board doctrine, the Board reasonably concluded that Felicia Dixon was presumptively eligible to vote as an employee on disability leave and that the Company failed to rebut that presumption by proving that it had discharged Dixon

The Board has long adhered to the bright line rule that an employee on sick or disability leave "is presumed to continue . . . [employee] status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned."[39] The *Red Arrow* test's bright-line rule–allowing employees on medical leave to vote unless the evidence shows that they have been discharged or quit, rather than asking whether their medical condition might one day permit a return to work–"avoids unnecessary litigation and 'endless investigation into states of mind or future prospects.'"[40] The courts of appeals–including this Court–repeatedly have embraced the Board's rule.[41]

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[39] *Red Arrow Freight Lines*, 278 NLRB 965, 965 (1986). *Accord Home Care Network, Inc.*, 347 NLRB 859, 859 (2006); *Supervalu, Inc.*, 328 NLRB 52, 52 (1999); *Vanalco, Inc.*, 315 NLRB 618, 618 (1994).

[40] *Home Care Network, Inc.*, 347 NLRB at 859 (quoting *Vanalco, Inc.*, 315 NLRB at 618 n.4).

[41] *See Abbott Ambulance of Ill. v. NLRB*, 522 F.3d 447, 450-51 (D.C. Cir. 2008); *Calvert Acquisition Co.*, 83 F.3d at 602-07; *NLRB v. Newly Wed Foods*, 758 F.2d

The Company argues (Br. 30) that statutory interests would be better served by a more nuanced rule that turns on a fact-intensive inquiry into whether the employee "has a reasonable expectation of recall." Yet, in so arguing, it flatly ignores this Court's approval of the Board's *Red Arrow* rule as a proper exercise of the Board's discretion.[42] Accordingly, the Company's suggestion, based on nothing more than a dissenting Board member's views, that this Court should scrap the *Red Arrow* rule in favor of a "reasonable expectation of recall" test, should be rejected as inconsistent with the settled law of the circuit.[43]

Thus, all that remains of the Company's argument that Dixon should have been deemed ineligible to vote is the Company's claim that, pursuant to *Red Arrow*, Dixon had been discharged. However, as discussed earlier, the administrative law judge, in a well-reasoned decision that the Board affirmed, expressly discredited the sole evidence the Company produced to support its claim.

The Company's entire case rested upon Henry's improbable testimony that the Company discharged Dixon pursuant to a supposed rule requiring automatic termination after 6 months of disability leave that, insofar as it appears, nobody

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4, 7-10 (1st Cir. 1985); *Medline Indus., Inc. v. NLRB*, 593 F.2d 788, 790 (7th Cir. 1979).

[42] *Calvert Acquisition*, 83 F.3d at 602.

[43] *See* Third Circuit I.O.P. 9.1 ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels.").

else had ever heard of. That claim, of course, became all the more improbable, as the judge emphasized (A. 29-30), in light of Henry's admission that Dixon herself had not been informed of her alleged discharge. Nor did the Company's own records mention the alleged discharge. Indeed, the company official responsible for housekeeping apparently was unaware of any such action regarding Dixon, as he included her name on the housekeeping roster he posted the week of the election. And, Henry's inability even to state the date on which Dixon was discharged—as the judge noted, the best he could do was to provide two possible dates (A. 30; 146-47) —was emblematic of a company claim that the judge reasonably concluded was spun of whole cloth.

Moreover, not only was there no evidence that Dixon had been discharged, but also there was no evidence that the Company had ever promulgated the rule calling for the discharge of an employee on disability leave after 6 months, as Henry claimed. Although the Company insists (Br. 32-33) that the Board was obliged to accept Henry's claim that he never bothered to memorialize the rule in writing, the judge reasonably rejected Henry's testimony as just so much doublespeak. The record shows that the Company maintained an employee "Handbook" and "rules and regulations" (A. 188), but Henry never attempted to explain why, if such a policy had been adopted, it had not been committed to

writing. Nor was there any evidence of the Company terminating any employee prior to Dixon's pursuant to this "policy."

To the extent Henry relied upon a provision in a collective-bargaining agreement that had never been executed or implemented, the judge properly rejected that evidence as non-probative. He rightfully emphasized that the contract provision Henry noted only governed seniority as it pertained to layoff and recall priorities, and then only provided for the loss of seniority, not discharge, for an employee's "[f]ailure to work for the Employer for a period of six (6) consecutive months." (A. 30; 149-53, 185.) In the absence of a stitch of evidence to corroborate a single word that Henry said, the judge reasonably declined to accept Henry's explanation that the Company had automatically discharged Dixon after six months of disability leave. The Board therefore reasonably concluded that, under *Red Arrow*, Dixon remained eligible to vote as an employee on disability leave at the time of the election.

3. The Board reasonably concluded that the Company failed to establish with sufficient particularity that union supporter Edward, or anyone else, made threats against anti-union voters

In its objections, the Company alleged that union supporter Lucy Edward made several threatening comments to a group of banquet employees prior to the election. The Board reasonably found that the Company failed to introduce

sufficient credible evidence to prove these election objections and properly upheld the election results.

Specifically, the Company asserted that Edward irreparably interfered with the election by telling banquet employees that they were to blame for an earlier union defeat and that they would see what would happen to them if the Union lost the current election. The Company chose to prove its case through a lone witness, banquet employee Phyllis Blackman, whose testimony the administrative law judge, affirmed by the Board, found inadequate to prove with specificity that Edward or anyone else had made such a remark.

As the judge emphasized, Blackman all but eliminated herself as a witness in support of the Company's allegations when she answered with a simple, "No," when counsel asked at the outset, "[D]id you ever have any conversations with Ms. Edward concerning . . . the Union." (A. 32; 88.) Indeed, while Blackman went on to identify Edward as among a *group* of employees whom she said made remarks that she and her coworkers regarded as threatening, Blackman never testified that *Edward* made any specific remarks that would support the Company's objection.

To the contrary, the judge reasonably found that Blackman's testimony as to what the generalized employee group had said was a confused and conflicted "muddle" that completely failed to prove the Company's case. (A. 32; 88-89.) As the judge emphasized, Blackman confined herself to the broadest generalities,

mentioning no names of anyone but Edward and herself, and speaking only of what the collective "they" had said. (A. 32-33; 88-90.) Blackman made no effort to identify specific incidents and how events might have unfolded–whether the offending employees all were speaking in unison or just at the same time, or whether any, Edward included, might have been silent during key aspects of exchanges Blackman recounted in the most general terms imaginable.

In fact, the sum total of Blackman's testimony as to what was said consisted of two conflicting answers. The first of which, while somewhat supportive of the Company's objections, was difficult to parse–Blackman testified that "they said that the union is coming back and we should [b]e with the union didn't get in the first time and if we don't let them in this time, we will see." (A. 89.) Blackman's ensuing attempt to clarify what was said had greater clarity but effectively undermined the Company's claim–Blackman testified this time that "they've been telling us . . . the Union is coming back and they know the last–we's the one that get the union not to be there and if we get them there this time, we will see." (A. 90.)

The Company never attempted to secure from Blackman a clarification of which version was correct, much less to provide sufficient specifics to form a coherent picture of what allegedly occurred. Nor did the Company offer any explanation for failing to provide substance to its case by calling any of the other

six banquet employees, none of whom Blackman identified in her testimony. Thus, the judge was left with two generalized statements from the same witness about what pronunion employees had said, which could not have been further apart in their import–one which might be parsed to constitute an accusation that something was said to convey an unspecified threat if the Union lost and the other a clear account establishing nothing more than that the employees had made a permissible solicitation of prounion votes by telling employees that they would see how much good the Union would do if it won. In this context, the Board reasonably affirmed the judge's conclusion that Blackman's testimony was unreliable and failed to prove that Edward made specific remarks.

4. The Board reasonably concluded that the two affidavits in lieu of live testimony were inadequate to prove the Company's remaining objections

Next, the Company alleged that Edward interfered with the election by saying "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry." Inexplicably, however, to prove this allegation, the Company relied exclusively on affidavits from two witnesses, neither of whom was alleged to have been unavailable to testify in person, and offered no live testimony. On this thin record, the Board reasonably refused to disturb the election results.

The Board, adopting the judge's decision, had strong reasons for declining to credit those out-of-court declarations against Edward's live testimony denying the allegations. As the judge emphasized, the affidavits, which someone other than the affiants themselves likely crafted, raised more questions than they answered. Both affidavits report that the affiant somehow interpreted Edward's supposed comment–"I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry"–as a threat against employees with an antiunion bent. On their face, however, the affidavits do not state that Edward made the alleged comment in reference to the Union in any way, nor do they state how any affiant knew that Edward had any connection to the union effort. More to the point, as the judge emphasized, each affiant's identical assertion–"I firmly believe that she meant that she wanted to shoot"–begged the question why, if they thought that Edward was about to go on a shooting rampage, neither reported the alleged threat to company officials or the police. (A. 35; 189-92.)

The Company argues (Br. 40) that the Board was required to credit the affidavits because counsel for the General Counsel stipulated that the witnesses, if called, would testify consistently with the affidavits they had signed. Stipulating that the witnesses would testify consistently with their affidavits, however, does not mean that they would have been credible or stood up to cross-examination. At the hearing, the judge expressed skepticism over the Company's decision to refrain

from introducing live testimony (A. 157-59), which he explained in his decision: "[S]ince neither witness took the stand, there was no opportunity to address the possibility that, as employees of the [Company], they felt pressured to sign declarations that were favorable to [the Company]." (A. 35.)

Thus, in these circumstances, the judge reasonably declined to credit the out-of-court affidavits "over the [disavowal] Edward provided during her live testimony," a disavowal from "a somewhat, but not highly credible witness."[44] (A. 34.) Indeed, it was precisely because of judicial resistance to the Board's now-discarded rule permitting Regional Directors to make credibility resolutions on the basis of affidavits that the Board adopted its current rule requiring a hearing so that live testimony can be evaluated–exactly the circumstances presented here.[45] The Board therefore reasonably concluded that the Company's unexplained failure to call the declarants to testify was fatal to the Company's case. (A. 35; 189-92.)

To the extent that the Company suggests (Br. 40) that the declarants were unavailable at the time of the hearing, the record contains no support for that claim. Counsel made no representation at the hearing that those witnesses were

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[44] *See NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) ("nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony) (Hand, J.), *vacated and remanded on other grounds*, 340 U.S. 474 (1951).

[45] *See NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 70-78 (3d Cir. 1983) (en banc) (dissenting opinion).

unavailable, but rather proposed that the Company was prepared to dispose of live testimony if the Union stipulated that the employees would have testified consistent with their affidavits. (A. 157-59.) Nor was there any reason why the Company could not have produced live testimony from any of the other 12-13 employees whom the declarations stated were present when the alleged remarks were made. (A. 190, 192.)

Finally, while the Company argues (Br. 41) that Edward was the Union's agent and that the conduct it alleged—but failed to prove—was objectionable under established election standards, the Board expressly found it unnecessary to address either issue in light of the judge's credibility findings. (A. 254 n. 4.) Thus, the Company's arguments on these points are not before this Court.[46]

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY ANNOUNCING AN IMPROVED 401(k) BENEFIT TWO DAYS BEFORE AN ELECTION

The record amply demonstrates that the Board reasonably found that the Company's announcement of an improved 401(k) plan two days before the

[46] If the Court concludes that the Company proved that Edward made the alleged comments, it should remand the case to the Board to pass on the judge's alternative findings. As he explained in his opinion, the judge found that, even if Edward was regarded as an agent and the Company's evidence was credited, neither of the incidents constituted objectionable interference requiring a new election. (A. 35-36.)

representation election violated the Act by coercing employees in the exercise of their Section 7 rights.

A. The Company's Announcement of the Improved 401(k) Plan Was Unlawful

1. Applicable Principles

Section 8(a)(1) of the Act[47] makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their statutory rights. It is settled that an employer violates the Act by conferring benefits upon employees while a representation election is pending because, as the Supreme Court stated almost 50 years ago, such action carries "the suggestion of a fist inside the velvet glove" and "the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."[48]

The granting of benefits, even during a union organizational campaign, is lawful if motivated by reasons unrelated to the union activity.[49] But "both the granting of the benefit and the timing of the grant must occur in the normal course of business."[50] Even where an employer has valid business reasons for granting

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[47] 29 U.S.C § 158(a)(1).

[48] *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

[49] *Pedro's Inc. v. NLRB*, 652 F.2d 1005, 1010 (D.C. Cir. 1981).

[50] *Id.* at 1008 n.9.

wage increases or other benefits, benefits may not "be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' free choice."[51] Thus, where the announcement of new benefits is calculated to interfere with employee free choice, it is unlawful even where the decision to grant the benefits was lawful; the decision and the announcement are two separate issues.[52] The timing of a grant or announcement of benefits raises a "strong presumption" of intent to interfere with employee rights.[53] When the grant or announcement occurs while an election petition is pending, the Board will presume such unlawful motivation unless the employer sustains its burden of establishing a justifiable motive.[54]

The Board will treat the announcement of new benefit as akin to the lawful announcement of a predetermined benefit or an existing benefit when the employer establishes the details of the new benefit or settles on a date certain for its

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[51] *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 272, 280 (1st Cir. 1975).

[52] *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998) (quoting *St. Francis Fed'n of Nurses and Health Prof'ls v. NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984)).

[53] *St. Francis Fed'n of Nurses*, 729 F.2d at 850; *see also Dlubak Corp.*, 307 NLRB 1138, 1161-62 (1992), *enforced mem.*, 5 F.3d 1488 (3d Cir. 1993).

[54] *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), *enforced*, 573 F.2d 702 (1st Cir. 1978); *see also Snap-On Tools, Inc.*, 342 NLRB 5, 14 (2004) (quoting *Arrow Elastic Corp.*, 230 NLRB at 113).

implementation before announcing it.[55] In those cases, the benefits are "'pre-determined' in the sense that they were already existing or that the employers had made a binding commitment to put the benefits into effect regardless of the outcome of the election."[56] An announced plan that is "barren in detail" does not satisfy this definition.[57] The employer's burden is "to show that its announcement was reasonably timed as a sequential step in, and a byproduct of, a chronology of conception, refinement, preparation, and adoption, so as to lead one reasonably to conclude that the announcement would have been forthcoming at the time made even if there were no union campaign."[58]

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[55] *See, e.g., Arrow Elastic Corp.*, 573 F.2d 702, 705 n.4 (1st Cir. 1978) (discussing Board and Court cases that determined that the benefit was existing or akin to an existing benefit); *Am. Sunroof Corp.*, 248 NLRB 748, 748-50 (1980) (where employer had been preparing new 401(k) plan for over two years, federal law required that the employer give employees written notice of the plan no fewer than 30 days before the end of its fiscal year, and employer announced plan at other facilities not involved in union campaign at the same time, employer's announcement of new 401(k) plan one day before the election was not unlawful).

[56] *Arrow Elastic Corp.*, 573 F.2d at 705 n.4 (citing and distinguishing *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116, 119 (9th Cir. 1972); *Schab Foods, Inc.*, 223 NLRB 394, 397-98 (1976); *Big G Supermarket*, 219 NLRB 1098, 1108 (1975); *Domino of Cal., Inc.*, 205 NLRB 1083, 1086-87 (1973); *Sanford Finishing Corp.*, 175 NLRB 366, 366 (1969); and *Southbridge Sheet Metal Works*, 158 NLRB 819, 821-25 (1966), *enforced*, 380 F.2d 851 (1st Cir. 1967)).

[57] *Arrow Elastic Corp.*, 573 F.2d at 706.

[58] *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), *enforced*, 573 F.2d 702 (1st Cir. 1978); *see also Snap-On Tools, Inc.*, 342 NLRB at 14 (quoting *Arrow Elastic Corp.*, 230 NLRB at 113).

Whether an employer's conduct is coercive within the meaning of Section 8(a)(1) of the Act[59] is a factual question for the specialized expertise of the Board.[60] Likewise, an employer's motivation for granting or announcing benefits is a factual question and the Board's findings are therefore conclusive if supported by substantial evidence on the record as a whole.[61] Finally, the Board's factual findings and inferences are not to be disturbed, even if the reviewing court would have made a contrary determination had the matter been before it *de novo*.[62]

2. The Company's Unlawful Announcement of the 401(k) Plan

The Board reasonably found (A. 40h) that the Company violated Section 8(a)(1) of the Act[63] when it announced the improved 401(k) plan to employees two days before the election. The Board found (*id.*) that the announcement of this

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[59] 29 U.S.C § 158(a)(1).

[60] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969); *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001).

[61] *See Pedro's Inc. v. NLRB*, 652 F.2d 1005, 1007 (D.C. Cir. 1981); *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 393-94, 395 (8th Cir. 1994). *See generally NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164 n.6 (3d Cir. 1977) ("The substantial evidence standard also applies to inferences made from findings of fact.").

[62] *See Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001); *Quick v. NLRB*, 245 F.3d 231, 240 (3d Cir. 2001).

[63] 29 U.S.C § 158(a)(1).

decision had a tendency to interfere with employee free choice and was therefore unlawful. As shown below, the record fully supports this finding.

The Company announced its decision to give employees additional benefits, including the improved 401(k) plan, during two different meetings held two days before the election. (A. 40j; 82-83.) The closer a "benefit comes to the day of the election, the harder it will be for the union to answer, and the greater the danger that the benefit will be manipulated to sway the election."[64] In *NLRB v. Styletek, Division of Pandel-Bradford, Inc.*, the employer announced a wage increase 17 days before the Board election.[65] The court held that "the burden was very much on the company to satisfy the Board" that its timing was legitimate.[66] The court's reasoning applies *a fortiori* where, as here, the Company announced the improved 401(k) the announcement two days before the election, thus making it virtually impossible for the Union to respond at all.

In these circumstances, the burden was on the Company to show a legitimate, union-neutral reason for announcing the benefits specifically on July 11, rather than on some date after the election. At trial, Henry asserted that he made the announcement because the Company was excited about the opportunity

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[64] *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 272, 281 (1st Cir. 1975).

[65] 520 F.2d at 278-279.

[66] *Id.* at 271.

to provide the new benefits and he could not announce them earlier because the deal was not finalized. (A. 40k;85jj-85kk.) But Henry did not specifically deny that the reason he thought it was important that employees be informed about the benefits on July 11, rather than on a later date closer to implementation, was that he hoped hearing about the new benefits before the July 13 election would influence how employees voted. (A. 40k; 85jj-85kk.) Thus, the Company has failed to meet its burden.

The Company's primary contention (Br. 44) is that its announcement was lawful because it had begun the process for securing tax benefits with the EDC before the Union came onto the scene, and it could not announce the benefits before the Governor approved the agreement. It also argues that (Br. 47-48) the employees would have received the benefits even if the Union were not on the scene.

The Company's argument misses the mark in two important respects. First, it presupposes that because its decision to grant the benefit may have been lawful under the Act, its announcement of the benefit—before it had settled on a date certain for implementation or sufficiently established the details of the 401(k) plan—was automatically lawful. But Board precedent, enforced by the courts, establishes that where the announcement of new benefits is calculated to interfere with employee free choice, it is unlawful even where the decision to grant the

benefits was lawful.[67] Here, the fact that Henry did not specifically deny that he hoped announcing the new benefits to employees before the July 13 election would influence how they voted, in addition to the timing of the announcement, supports the Board's reasonable inference that the Company sought to interfere with employee free choice. (A. 40k-l; A 85jj-85kk.) As such, assuming *arguendo* that the Company's decision to grant the benefits was lawful, the Company's premature announcement of the improved 401(k) plan in the critical period before the election was unlawful because it was calculated to interfere with employee free choice.

Second, the Company relies on cases (Br. 44-47) where, unlike here, the employer established that the benefit should be treated as existing because it had worked out its details or settled on a date for implementation before the employer announced it.[68] Specifically, the Company makes comparisons to *Weather Shield of Connecticut*,[69] *Raley's, Inc. v. NLRB*,[70] and *NLRB v. Tommy's Spanish Foods*,[71] each of which is factually distinguishable from this case.

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[67] *See, e.g., Perdue Farms*, 144 F.3d at 836 (quoting *St. Francis Fed'n of Nurses*, 729 F.2d at 850); *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 151 (2d Cir. 1981).

[68] *See Arrow Elastic Corp.*, 573 F.2d at 705 n.4 (distinguishing cases such as *Tommy's Spanish Foods* where the Board and courts determined that the announced benefit was akin to a preexisting benefit).

[69] 300 NLRB 93, 96-97 (1990).

[70] 703 F.2d 410, 414-15 (9th Cir. 1983).

[71] 463 F.2d 116, 118-19 (9th Cir. 1972).

In *Weather Shield*, a parent company had purchased the employer several months before the union campaign commenced, and nearly one year before the election.[72] When the parent company acquired the employer, the companies agreed that the employer's employees would become eligible for the parent corporation's pension plan one year from the purchase date.[73] In those circumstances, the Board found its precedent, which holds that an employer does not run afoul of the Act when it publicizes existing benefits to employees, controlling.[74] Specifically, the Board in *Weather Shield* concluded that the pension plan, although not actually in existence at that time, was akin to an existing benefit.[75] As the Board ably explained in this case, the employer's announcement of the pension plan in *Weather Shield*, unlike the one here, was more akin to the announcement of an existing benefit "because the details of the pension plan were

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[72] 300 NLRB at 96.

[73] *Id.*

[74] *See Scotts IGA Foodliner*, 223 NLRB 394, 394 n.1 (1976) (determining that employer's announcement during a union campaign of existing insurance benefits did not violate Section 8(a)(1), even though employees were previously unaware of such benefits, because prohibiting such activity would deprive the employer of a legitimate campaign strategy necessary to counter the union's claim that it offers better benefits), *enforced mem.*, 549 F.2d 805 (7th Cir. 1977).

[75] 300 NLRB at 96.

already known and the plan was to become effective on a date certain, shortly after the election."[76] (A. 40h.)

Raley's and *Tommy's Spanish Foods* are also distinguishable. In *Raley's*, the court found that the employer did not violate the Act by explaining existing insurance benefits to employees when the benefits had been lawfully granted pursuant to a collective-bargaining agreement that the employer had entered into with the incumbent union two years earlier.[77] Thus, the employer could establish that it had previously settled on a date certain for implementing the new benefits (e.g., the date when the employer granted increased benefits to Nevada employees). And in *Tommy's Spanish Foods*, the undisputed evidence established that before the petition for election was filed, the employer "had begun to explore the possibility of expanding the employees' insurance coverage and had contacted two insurance brokers for this purpose."[78] Therefore, the employer could establish

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[76] *See Audubon Reg'l Med. Ctr.*, 331 NLRB 374, 374 fn. 5 (2000) (distinguishing *Weather Shield* and finding the employer's election-eve announcement of new benefits unlawful, where those benefits were conditioned on future action by the employer and critical details, including their effective date, were not set until months later); *KOFY TV-20*, 332 NLRB 771, 792-93 (2000) (distinguishing *Weather Shield* and finding the employer's preelection announcement of a new 401(k) benefit unlawful because the employer was still negotiating with providers at the time and did not select a provider until 2 months later).

[77] 703 F.2d 410, 412-14 (9th Cir. 1983).

[78] 463 F.2d 116, 118-19 (9th Cir. 1972).

that it had begun to fix the details of the expanded insurance coverage well before the union campaign began.

In contrast, here, the Company cannot establish that the improved 401(k) plan is akin to a predetermined or existing benefit because it had not established the details of the 401(k) plan or settled on a date for implementation prior to announcing it. First, the undisputed evidence establishes that the Company was not obligated to provide the improved 401(k) benefit until its agreement with the Government was finalized. And in arguing that it could not announce the pendency of the benefit at an earlier date (Br. 17, 49-50), the Company admits that this agreement was not final or legally binding until the Governor approved it. (A. 40j-k & 40j n.8; 85n, 85r, 215.)

To be sure, the Company was free to determine whether or not it would design and implement the improved 401(k) plan irrespective of whether the Governor approved the EDC agreement. And it is undisputed that the Governor had a veto right and could make changes to the agreement, send it back for reappraisal, or refuse to sign it. (A. 40j; 85n, 85r, 215.) Indeed, the Governor had previously rejected prior agreements between the Company and the EDC. (A. 40j & n.8; 85n.) But, where, as here, the Company's justification for why it did not announce the benefit to employees at an earlier date rests on the fact that the Governor could change his mind, that very justification belies its argument that the

improved 401(k) should be treated as an existing or pre-determined benefit. Thus, when the Company announced the new benefit in the critical period before the election, it had not sufficiently established the details of the plan before the announcement.

Second, the Company's lack of a legally-binding or otherwise established benefit plan on the date of the announcement is evidenced by the fact that the EDC agreement itself did not require a full 2 percent contribution, as the Company announced to employees. Rather, the text of the EDC agreement provides that "[a]fter one year of employment [the Company] will provide its full time employees with a 401(k) or similar retirement plan whereby the employer will contribute *up to 2 percent* of the employees' base salary to the plan whether or not the employees contributes [sic]." (A. 259, emphasis added.) Clearly then, it cannot be said that the EDC agreement created a legally-enforceable commitment for the Company to make a 2 percent contribution because the language of the EDC agreement states "*up to 2 percent*." (A. 40k; 259.) As such, the Company's argument (Br. 49) that it could not have ignored its legal obligation under the agreement to provide the 2 percent contribution regardless of the outcome of the election must fail because there was no legal obligation to provide a full 2 percent contribution.

Finally, at the trial—nearly four months after the Company announced this supposed "existing benefit" to employees—the Company had not implemented the improved 401(k) plan and was still in the process of not only selecting a provider, but also ensuring that the improved plan would meet federal requirements and comply with the EDC agreement. (A. 40k; 85jj-85kk.) The only detail that the Company could confirm was that, pursuant to the terms of the EDC agreement, it would give all of the employees 2 percent of their 2007 earnings by April 15, 2008—9 months after the preelection announcement. (A. 40k, 40m; 85kk.)

Accordingly, the Company cannot show that it had established the details of the 401(k) plan or settled on a date for implementation prior to announcing it. As such, the Company's reliance on *Raley's* and *Tommy's Spanish Foods* to establish that its conduct was permissible under the Act is misplaced. Instead, the absent factual predicate of details for the plan as well as an implementation date amply demonstrate that the 401(k) was not an existing or predetermined benefit. As such, the Company's announcement two days before the election constituted unlawful coercion under the Act.

B. Because the Company Failed to Argue in its Initial Brief That Its Announcement of the Improved 401(k) Plan Was Protected Under Section 8(c) of the Act, It Has Waived that Argument

Federal Rule of Appellate Procedure Rule 28(a)(9)(A) provides that the argument portion of an appellant's opening brief "must contain" the "appellant's

contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." [79] Indeed, as noted above, "'to assure consideration of an issue by the court, the [petitioner] must both raise it in the "Statement of Issues" and pursue it in the "Argument" portion of the brief.'" [80] The failure to raise and argue the issues in that manner constitutes waiver of that issue on appeal.[81] Finally, passing references to issues[82] and skeletal arguments that are really nothing more than assertions do not preserve claims.[83]

Here, to the extent the Company suggests that the Act's free speech provision, Section 8(c), privileged its announcement of the 401(k), it has not come close to meeting the requirement that it raise that defense in both the Statement of

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[79] *See Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) (citing *Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991)).

[80] *Inst. for Scientific Info.*, 931 F.2d 1002, 1011 (3d Cir. 1991) (quoting 16C Wright & Miller, *Federal Practice and Procedure* § 3975, at 421-22 (1st ed. 1977)); *see also United States v. Albertson*, No. 09-1049, __F.3d __ , 2011 WL 1662786, at *2 (3d Cir. May 4, 2011); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

[81] *Albertson*, 2011 WL 1662786, at *2 (quoting *United States v. Pellulo*, 399 F.3d 197, 222 (3d Cir. 2005)).

[82] *See e.g., Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994); *United States v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006).

[83] *United States v. Hoffecker*, 530 F.3d 137, 162 (3d Cir. 2008) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

Issues and Argument sections of its brief. First, its statement of issues lacks any reference to Section 8(c). Second, the Company only makes two references to Section 8(c) in the remainder of its brief. The first reference is a single conclusive statement in its summary of argument (Br. 29) that the Board's decision "also violates [the Company's] right to free speech and [the Company's] statements on this topic were protected by Section 8(c) of the NLRA." The Company's only other reference to Section 8(c) (Br. 44) is in the parenthetical of a string citation in which it states the holding of a Ninth Circuit case. These references lack specific or substantive argument and are not sufficient to raise the issue before this Court. [84] Rather, the references are just that—passing references, or at most, skeletal arguments that do not preserve arguments under this Court's precedent.[85] As such, the Company has waived its right to make any argument that the Company's announcement was permitted or protected under Section 8(c) of the Act.

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[84] *Simmons v. City of Philadelphia*, 947 F.2d at 1065 (citing *Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d at 1298 and FED. R. APP. P. 28(a)); *see also Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (failure to present specific and distinct arguments regarding particular claims waives any challenge to underlying decision).

[85] *See, e.g., Laborers' Int'l Union*, 26 F.3d at 398; *DeMichael*, 461 F.3d at 417; *Hoffecker*, 530 F.3d at 162.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant its applications for enforcement, deny the Company's cross-petitions for review, and enter a judgment enforcing the Board's Orders in full.

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June 2011

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FOR THE THIRD CIRCUIT

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	*	10-4683
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	*	11-1742
	*	
	*	Board Case Nos.
GRAPETREE SHORES, INC. d/b/a DIVI CARINA BAY RESORT	*	24-CA-11101
	*	24-CA-10700
	*	
Respondent/Cross-Petitioner	*	

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

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32, the Board certifies that its final brief contains 13,362 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003. Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court, and the .pdf file was scanned for viruses using Symantec Endpoint Protection, version 11.0.6100.645, and according to that program, was free of viruses.

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Dated at Washington, DC
this 28th day of June, 2011

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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those 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 addresses listed below:

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this 28th day of June, 2011