

Nos. 11-1054, 11-1088

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

STEPHENS MEDIA, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**HAWAII NEWSPAPER GUILD LOCAL 39117,
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO**

Intervenor

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

| | | |
|--|---|---------------------|
| STEPHENS MEDIA, LLC, d/b/a HAWAII |) | |
| TRIBUNE-HERALD |) | |
| |) | |
| Petitioner/Cross-Respondent |) | |
| |) | |
| v. |) | Nos. 11-1054 |
| |) | 11-1088 |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent/Cross-Petitioner |) | |
| |) | |
| and |) | |
| |) | |
| HAWAII NEWSPAPER GUILD LOCAL 39117, |) | |
| COMMUNICATIONS WORKERS OF AMERICA, |) | |
| AFL-CIO |) | |
| |) | |
| Intervenor |) | |

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**

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

A. Parties and Amici: Stephens Media, LLC, d/b/a Hawaii Tribune-Herald was the respondent before the National Labor Relations Board (“the Board”) and is the petitioner/cross-respondent herein. Newspaper Guild Local 39117, Communications Workers of America, AFL-CIO, was the charging party before the Board, and is the intervenor herein. The Board is

the respondent/cross-petitioner herein; the Board's General Counsel was a party before the Board.

B. Rulings Under Review: The case under review is a Decision and Order of the Board issued on February 14, 2011, and reported at 356 NLRB No. 63.

C. Related Cases: This case has not previously been before this court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

s/ Linda Dreeben
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Dated at Washington, DC
this 12th day of October 2011

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GLOSSARY

| | |
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| A | Appendix |
| Act | National Labor Relations Act |
| Board | National Labor Relations Board |
| Br | Company's opening brief |
| Company | Stephens Media, LLC, d/b/a Hawaii Tribune-Herald |
| Union | Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL-CIO |

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**BRIEF FOR
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Stephens Media, LLC, d/b/a Hawaii Tribune-Herald (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on February 14, 2011, and reported at 356 NLRB No. 63. The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”).

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Order is final even though a severed complaint allegation remains pending before the Board. The severed claim, which no party challenges on review, concerns the Company’s duty to furnish employee statements it obtained while investigating purported misconduct by employees Koryn Nako and Hunter Bishop. The severed matter involves a discrete legal issue—namely, whether such statements are “witness statements” under Board precedent and, if not, whether they are nevertheless attorney work product. (A 1380.) Resolution of that question has no bearing on the issues before the Court. Thus, regardless of how the severed claim is ultimately resolved, it will not affect the issues raised and obligations imposed by the Order. *Pub. Utils.*

Comm'n v. FERC, 894 F.2d 1372, 1377 (D.C. Cir. 1990) (order final where remaining proceedings are not “analytically entangled with” issues before the court). Accordingly, under the Court’s “pragmatic” approach to finality determinations, the Order is final because it imposes immediate obligations on the Company and review at this time will not “disrupt the orderly process of adjudication.” *Exportal LTDA v. U.S.*, 902 F.2d 45, 47-48 (D.C. Cir. 1990) (internal quotation marks omitted); see *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1021, 1027 (D.C. Cir. 1991).

The Company filed its petition for review on February 17, 2011; the Board filed its cross-application for enforcement on March 24, 2011. Both were timely, as the Act imposes no time limit on such findings. Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL-CIO (“the Union”) has intervened on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board’s findings that the Company:

1. violated Section 8(a)(1) of the Act by discriminatorily enforcing its access policy, and by interrogating employee Nako; and violated Section 8(a)(3) and (1) by disciplining her for engaging in union activity;

2. violated Section 8(a)(3) and (1) by suspending and discharging employee Bishop because of his union and protected concerted activity;
3. violated Section 8(a)(1) by interrogating employees Sur, Smith, Ing, and Loos about their union and protected concerted activity, and by promulgating a rule banning secret audio recordings of conversations; and violated Section 8(a)(3) and (1) by suspending Sur and Smith, and discharging Smith, because of their union and protected concerted activity;
4. violated Section 8(a)(1) by discriminatorily prohibiting employees from wearing buttons and armbands in support of discharged or suspended employees; and
5. violated Section 8(a)(5) and (1) by refusing to provide or delaying the provision of relevant information requested by the Union.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed numerous violations of the Act. Following a hearing, a judge issued a recommended

decision finding merit to most of the allegations. (A 1383-1404.)¹ The Company filed exceptions; the General Counsel filed limited exceptions.² On review, the Board affirmed the judge's findings, with certain modifications. (A 1378-82.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company publishes a newspaper in Hawaii. Ted Dixon is the publisher, and David Bock, who reports to Dixon, is the editor. Bock manages the 15-person news staff. (A1383;9-10,837-38.)

The Union has long represented a unit of employees at the Company. (A1383;487, 838.) Employees Koryn Nako, Hunter Bishop, and Dave Smith have served as union stewards. (A1383;32,108,262.)

¹ "A" refers to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² The Court directed the parties to address in their briefs the Company's motion to supplement the record with the brief it filed below in support of its exceptions. Under Section 102.45(b) of the Board's Rules and Regulations (29 C.F.R. § 102.45(b)), briefs in support of exceptions are not part of the agency record. Contrary to the Company (Br92), 29 C.F.R. § 102.46(b)(1) does not define the contents of the agency record; instead, it simply describes the contents of exceptions and other pleadings.

B. Under the Company’s Access Policy, Employees Do Not Need Management Permission To Bring “Outside Organizations of Any Kind” Into the Building

In March 2004, Publisher Dixon issued a memorandum to employees outlining company policy on building access. The policy granted access to customers and non-customers as long as an employee met them in the lobby and accompanied them thereafter. In particular, the policy stated that in addition to customers, “[a]ll others, whether vendors, outside organizations of any kind, friends, family or acquaintances,” had to “call for the employee they wish to meet.” Under the policy, “[o]nce contact is made,” the employee “will come up and meet the person, allow them access, and take them back to their access gate.” The policy did not mention unions, and did not require employees to obtain management permission before bringing anyone into the building. (A1384;1081.)

In keeping with this policy, employees regularly brought others—including friends, family members, and vendors—through the building’s employee entrance and into the newsroom, without obtaining prior permission from a manager. (A1384,1391,1394;58,214-15,252,254-59,340,414-20, 428-34,447-48,452,456.) These visits occurred at all times and in view of company managers. Prior to October 18, 2005, the Company had never told employees that they needed management’s permission before

bringing a noncustomer visitor into the building.

(A1384,1391,1394;56,58,339,341, 414-15,420-21,427-28,457-58,875.)

C. Shop Steward Nako Brings a Union Representative Into the Building; Editor Bock Announces that She Violated Company Policy and Tells Her To Meet with Him; Union Steward Bishop Asks Bock If the Meeting Will Involve or Lead to Discipline; Bock Says It Is None of Bishop's Business

On October 18, 2005, Union Representative Ken Nakakura asked to meet with Shop Steward Nako, who wanted to give him a note that listed Circulation Department employees. They met in the parking lot, where Nako asked Production Manager Arlen Vierra if she could bring Nakakura into the building. Vierra shrugged, which Nako interpreted as a "yes." They proceeded to the employee break room, joined by employee Sharon Maeda and Shop Steward Bishop, who had entered to eat lunch. (A1384;41-42,108-12.)

Minutes later, Editor Bock, accompanied by Advertising Director Alice Sledge, asked the employees what was going on and who had admitted Nakakura. Nako volunteered that she had let him in so that he could get a note from her. Bock said it was a violation of company policy to bring a union representative into the building. Repeating that Nakakura was not allowed in the building, Bock escorted him out. (A1384;42-43,113-14.)

Bock returned a few minutes later, asking to speak with Nako. As she exited the break room, Maeda asked Shop Steward Bishop, a reporter, if someone should accompany Nako during her meeting with Bock. Nako looked at Bishop and said, “okay.” (A1384-85;44-45,113-16.)

When Bock turned around, he noticed that Bishop was following Nako. Bock told Bishop that the matter did not involve him. Bishop, who was trying to ascertain whether Nako would need a union witness during the meeting, asked Bock if it would involve discipline. Bock replied that it was just a discussion that did not involve Bishop. Bishop asked for clarification about whether the discussion would lead to discipline. Bock said it was none of Bishop’s business. As Bishop walked away, he told Nako that if she needed a witness—because it turned out to be a disciplinary meeting—she should get him. Bishop did not yell at Bock, threaten him, or use profanity at any point during their brief encounter. (A1385-86,1397;46,48,116,118-20,221,250.)

D. Bock Questions Nako about Her Union Activities and Announces that Union Representatives Need Management Permission and an Appointment Before Entering the Building

Bock met with Nako in his office, where he asked why she had let Nakakura into the building. Nako replied that it was because she had a note for Nakakura. Bock asked if she knew that union officials were not allowed

on company property.³ He said union representatives needed management permission and an appointment before entering the facility; this was the first time Nako had heard of such a requirement. (A1385&n.6;121-22,126,138,213.)

**E. Circulation Director Crawford Interrogates Nako;
the Company Disciplines Her for Letting Nakakura
into the Building Without Management Permission**

Company managers continued to question Nako. On October 19, Sledge and another manager asked her to describe the October 18 interaction between Bock and Bishop. Sledge prepared a written statement summarizing Nako's account and asked her to sign it.

(A1385;126,128,131.)

Two days later, Circulation Director William Crawford, Nako's direct supervisor, summoned her to a meeting in his office with Bock and Shop Steward Smith, who served as Nako's witness. Crawford said he was investigating the events of October 18 and started questioning her, asking why she had let Nakakura into the building. Nako replied that it was to give him a note. Crawford asked if she knew about the Company's "gate policy" and if she received Publisher Dixon's March 2004 memorandum, which she

³ Bock was referring to Publisher Dixon's February 2004 letter to the Union saying it could meet with employees in the lobby area, provided they were on break. The letter, which was not disseminated to employees, did not say they needed management approval. (A1384;921.)

had. Crawford also asked if she was aware of the Company's policy regarding union officials; Nako replied that Bock had told her about it on the 18th. Crawford asked if she had prior management approval to bring Nakakura into the building; if there had been any planning associated with the visit; and if the visit's purpose was to challenge Bock. (A1385;134-39,264.)

Crawford continued to question Nako, asking her if Nakakura was going to meet with particular employees and why. When he asked about the contents of her note, she balked, but he said she had to answer "if it was regarding Union business." Finally, Crawford asked her if she intended to challenge the Company's policy regarding meeting with union officials on company property. (A1385&n.9;139-40,218.)

On October 26, the Company disciplined Nako for letting Nakakura into the building without management's advance permission. The warning stated that under no circumstances should Nako allow a nonemployee past security without permission. (A1385;147-48,878.)

**F. The Company Suspends and Discharges Bishop
for Insubordination, and Orders Employees To
Stop Wearing Buttons Protesting His Discharge**

Meanwhile, on October 19, Bock told Bishop that his conduct on October 18 was unprofessional, insubordinate, and disrespectful, and that the

Company was suspending him indefinitely without pay. On October 25, Bock sent Bishop a letter stating that he was discharged because of his October 18 conduct. (A1386;50-52,870.)

To express their displeasure, employees started wearing buttons at work that featured Bishop's photo and asked the Company to "Bring Hunter Back." They continued wearing the buttons for about five days, until Editor Dixon issued a memorandum banning them during "working time." (A1387;158,160,163-64,207,268-69,423,880,879.)

The Company does not have a dress code. Previously, employees had worn various types of buttons and pins without consequence. (A1387;20,170-71,270,444-45.)

G. The Union Requests Information about the Disciplinary Actions against Bishop and Nako; the Company Belatedly Furnishes One Item

After filing a grievance over Bishop's suspension, the Union asked the Company the reason for its action and the information it considered in making its decision. In response, the Company gave the Union Bock's October 25 letter to Bishop. (A1389;907-09.)

After amending the grievance to reflect the discharge, the Union renewed its previous information request, and also requested the following items: what Bishop did to cause his suspension and discharge; copies of

policies he violated; the names of employees who witnessed the event and who were interviewed during any investigation; the information provided by those employees; and a copy of Bishop's personnel file. Bock responded that the reasons for the discharge were set forth in the October 25 letter. (A1389;910-12.)

On November 14, the Union renewed its information request. The next day, the Union asked Bock for specific information about what Bishop said or did that was insubordinate or interfered with Bock's meeting with Nako. Bock replied that he would not give the Union any of this "minutiae." (A1389;489-90,913.)

On November 15, after filing a grievance over Nako's discipline, the Union requested copies of any company policies she violated; the statement she signed on October 19; and any other material considered in disciplining her. Circulation Director Crawford replied that the Company would not provide the Union with any of the information. (A1389;914-16.)

At a subsequent grievance meeting, the Union again requested information about the Company's reasons for disciplining Nako. In response, the Company provided Dixon's February 14, 2004 letter to the Union and his March 2004 memorandum. (A1389-90;492-93.)

On January 26, 2006, the Company gave the Union Bishop's personnel file, but it never furnished the other requested information.

(A1389.)

**H. Crawford Questions Nako about Her Grievance;
Bock Cites Two New Reasons for Bishop's Discharge**

In February 2006, Crawford brought Nako into his office for questioning about the grievance that the Union had filed over her warning for bringing Nakakura into the building. Crawford asked her why she let the Union file the grievance if she had "acknowledged" her discipline, and told her that he had posed the same question to the Union. He also asked if she knew what was happening with the grievance, which he said the Union could not pursue without her permission. (A1385,1394;156-57.)

Later that month, Bock sent Bishop a letter citing two new reasons for his October 2005 discharge. Saying that he did not assess Bishop's productivity before discharging him, Bock announced that he had since discovered that it had been inadequate. Bock added that Bishop had spoken disparagingly about the Company at a university forum in December 2005. (A1386;55,876.)

I. Bock Meets With Employees To Warn Them About Their Productivity, but Does Not Let Them Bring a Witness; Shop Steward Smith and His Co-Workers Decide that Smith Should Record His Meeting with Bock To Safeguard Employees' *Weingarten* Rights

On March 3, 2006, employee Jason Armstrong told Shop Steward Smith, a reporter, that Bock was about to give Armstrong a warning.

Armstrong asked Smith to serve as his witness. Smith tried to accompany Armstrong, but Bock said it was not a "*Weingarten*" meeting and ordered Smith to get out. Bock also told Smith that they needed to meet after Bock finished with Armstrong. Smith then called the union administrator, who advised him to take notes if Bock would not let him have a witness.

(A1387,1391;271,274-75.)

Smith mentioned these developments to several co-workers, including Peter Sur, who had already heard about the Armstrong meeting. Sur suggested that Smith use Sur's tape recorder in Smith's meeting with Bock. Smith wanted to record the meeting to make sure that there was an accurate record if he was not allowed a witness. Reporter Christine Loos and photographer William Ing agreed with this plan. Another reporter, Karen Welsh, overheard their conversation. (A1387;275,282-83,365-67,401-03,464.)

Later that day, when Smith met with Bock, he put the recorder in his shirt pocket to record the meeting. Smith asked Bock if he could have a witness present; Bock said no and asked why Smith needed a witness. Smith replied that it seemed warranted under the circumstances. Bock gave Smith an oral warning for low productivity. When Smith questioned the basis for this discipline, Bock told him to calculate his own story count. (A1387;304-07.)

**J. The Company Interrogates Employees about
the Recording, Suspends Sur and Smith, and
Announces a Policy Prohibiting Secret Recordings**

On March 9, three days after Welsh told Bock about Smith's tape recording, Bock separately summoned Sur, Smith, Ing, and Loos to his office for questioning. Bock asked them what they knew about the recording; who was involved in the matter; what had prompted them to ask Smith to make the recording; and where the recorder was. Immediately after questioning Sur and Smith, the Company suspended them. On March 15, the Company announced a ban on employees secretly recording conversations. (A1387-88,1392;310,313-20,371-78,406-08,414,461,A922.)

K. Employees Wear Armbands To Show Support for Smith, but the Company Orders Them to Stop; the Company Questions and Discharges Smith

On March 10, an employee went to the union hall to ask Bishop if the Union could do something to support Smith. Bishop suggested that employees wear red armbands to demonstrate their support for Smith. The armbands were distributed, and on March 13, all of the Advertising Department employees wore them to a meeting with Sledge. Later that day, Dixon issued a letter prohibiting employees from wearing armbands during working time. (A1388;579,592-96,881.)

On March 27, Bock again questioned Smith, asking him when he gave the recorder to the Union and who had it; whether Sur had authorized him to turn the recorder over to the Union; and whether anyone had recorded other meetings. The next month, the Company discharged Smith for making the secret recording. (A1389;335-37,871-73,886.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Liebman and Members Becker, Pearce, and Hayes), in agreement with the judge, found that the Company violated Section 8(a)(1) of the Act by interrogating employees; disparately enforcing its access policy against the Union; discriminatorily prohibiting employees from wearing buttons and armbands in support of discharged or suspended

employees; and promulgating a rule banning secret audio recordings of conversations. (A1378.)

The Board majority also found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act by issuing Nako a written warning; suspending Sur; and suspending and discharging Bishop and Smith.⁴ Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide or delaying the provision of relevant information requested by the Union. (A1378,1380.)

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 their rights guaranteed in Section 7 of the Act. The Board's Order also includes affirmative remedies for the violations.⁵ (A1381-82.)

⁴ Member Hayes stated that he “would find that, even in the absence of an existing rule, the [Company] lawfully suspended and discharged Smith.” (A 1378n.3.)

⁵ In its issue statement, the Company (Br26-27) says it challenges the Board's Order directing compound interest and electronic distribution of the remedial notice. However, its brief does not contain any argument concerning those issues. Due to this omission, the Company has waived any challenges to those aspects of the Board's Order. *See* Fed. R. App. P. 28(a)(9)(A) (brief must contain party's “contentions and the reasons for them”); *Dunkin Doughnuts Mid-Atlantic Distrib. Center, Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (party waives argument it fails to make in its opening brief).

SUMMARY OF ARGUMENT

This case involves a series of unlawful actions that the Company took against employees in response to their exercise of statutorily protected rights. To begin, the Company violated the Act by announcing that employees could not bring union representatives into the facility without management approval—in contravention of the Company’s own policy, which expressly granted access to “outside organizations of any kind.” The Company made the pronouncement upon discovering that employee Nako had let a union representative into the building to give him a note. The Company’s selective misreading of its policy in direct response to her union activity amounted to antiunion discrimination.

Substantial evidence supports the Board’s further finding that the Company coercively interrogated Nako about her and her coworkers’ union activities, persistently asking her to reveal the note’s contents. The Company also violated the Act by disciplining her, ostensibly for breaching the access policy, which did not in fact require her to obtain prior approval before admitting the union representative.

Substantial evidence likewise supports the Board’s finding that the Company unlawfully suspended and discharged Bishop for the allegedly disrespectful manner in which he attempted to assist Nako during her

interrogation. The Board reasonably found that Bishop did not engage in the sort of opprobrious behavior that would justify stripping an employee of the Act's protections under *Atlantic Steel*. The Board also rejected as a belatedly discovered pretext the Company's purported discovery, four months after Bishop's discharge, that his productivity had been subpar. And the Board rejected the Company's contention that Bishop was not entitled to reinstatement or backpay based on allegedly disparaging remarks that he made about the Company after his discharge. In so ruling, the Board applied the "unfit for further service" standard articulated some 40 years ago in *O'Daniel Oldsmobile*. This standard governs allegations of postdischarge disloyalty by former employees, who no longer owe fealty to their wrongdoing employers.

Substantial evidence supports the Board's further finding that the Company took unlawful action against Sur, Smith, Ing, and Loos, who agreed that Smith should record a meeting with Editor Bock in order to safeguard employees' *Weingarten* rights. The Company coercively interrogated them, suspended Sur and Smith, and discharged Smith in response to that concerted activity. The Board reasonably rejected the Company's argument that the employees' activity was unprotected. As the Board explained, the employees had a reasonably-based belief that Bock was

denying them *Weingarten* witnesses; secret recordings are not illegal in Hawaii; and the Company did not have a rule prohibiting them. In short, the activity was a lawful means for employees to protect themselves by memorializing meetings in which, they reasonably thought, their rights were being violated.

The Board also found that the Company unlawfully banned employees from wearing buttons and armbands supporting Bishop and Smith. The Board appropriately rejected the Company's claim that it did not know the paraphernalia was to protest those unlawful actions.

Finally, the Board reasonably found that the Company violated the Act by refusing to provide or delaying the release of information requested by the Union in connection with grievances filed on Nako's and Bishop's behalf. The Company's arguments, such as its claim that the Union had all the information it needed, and that the requests were an improper form of prearbitration discovery, are unfounded.

STANDARD OF REVIEW

The Board's findings of facts are conclusive if supported by substantial evidence on the record as a whole.⁶ The Board's decision "is to be reversed only when the record is so compelling that no reasonable

⁶ See Section 10(e) of the Act; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

factfinder could fail to find to the contrary.”⁷ The Board’s reasonable inferences are also entitled to considerable deference.⁸ Further, the judge’s credibility determinations should not be disturbed unless they are “hopelessly incredible, self-contradictory, or patently insupportable.”⁹ Finally, the court must defer to the Board’s reasonable interpretation of the Act.¹⁰

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED THE ACT BY ENFORCING ITS SECURITY POLICY IN A DISCRIMINATORY MANNER, BY INTERROGATING NAKO, AND BY DISCIPLINING HER FOR ENGAGING IN UNION ACTIVITY

A. The Company Violated Section 8(a)(1) by Discriminatorily Enforcing Its Access Policy

1. Applicable principles

Under Section 7 of the Act, employees 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

⁷ *United Steelworkers of Am., Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (internal citation omitted).

⁸ *Allentown Mack Sales & Serv. Indus. v. NLRB*, 522 U.S. 359, 378 (1998); *Halle Enters., Inc. v. NLRB*, 247 F.3d 268, 271 (D.C. Cir. 2001).

⁹ *Federated Logistics & Operations, Inc. v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005).

¹⁰ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996).

mutual aid or protection.” Section 7 “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”¹¹ The workplace is “uniquely appropriate” for such activity because it “is the one place where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life”¹²

At the same time, the Act recognizes the employer’s private property rights and its legitimate interest in managing its business and maintaining production and discipline.¹³ Thus, it is well established that an employer may, as a general rule, exclude nonemployee union representatives from its private property without running afoul of the Act,¹⁴ in addition to limiting employees’ union activity on the premises in ways not relevant here.¹⁵

There is, however, an important exception to this general rule—namely, that an employer may not bar access in a manner that discriminates

¹¹ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *accord Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007).

¹² *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978).

¹³ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

¹⁴ *See* cases cited above n.13.

¹⁵ For example, an employer may limit or ban solicitation in the workplace during working time. *See Republic Aviation v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

against union activity.¹⁶ It is settled that an employer violates Section 8(a)(1) of the Act¹⁷ by enforcing a rule in a manner that singles out union activity alone for discriminatory treatment.¹⁸ Thus, an otherwise valid rule may be unlawful if it is enforced in a way that only bars union-related activity.¹⁹

2. The Company, in contravention of its access policy, invoked the policy to impose a discriminatory requirement on employees seeking to admit a union representative

On October 18, 2005, Editor Bock admonished Nako that the Company's access policy prohibited employees from bringing union representatives into the building without management permission. As the Board explained, however, the policy itself did not mention anything about employees needing managerial approval before admitting anyone. To the contrary, the policy expressly granted access to "outside organizations of any kind" as long as an employee met them in the lobby and accompanied them into the facility. (A1391;1081.) This written policy accorded with the

¹⁶ See cases cited above n.14.

¹⁷ 29 U.S.C. § 158(a)(1) (making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7).

¹⁸ See, e.g., *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 228-29, 233 (1949) (discrimination present where employer had never enforced its ostensible rule restricting use of meeting hall until union organizer sought access).

¹⁹ See, e.g., *Guardsmark, LLC v. NLRB*, 475 F.3d at 374; *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947-48 (D.C. Cir. 1999); *Guardian Ind. Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995).

Company's practice, which was to let employees bring friends, family, and other guests into the building without prior approval. There was no evidence that the Company had ever required employees to obtain approval before admitting anyone.²⁰ (A1384-85,1391;58,214-15,252,254-59,340,414-20,428-34,447-48,452,456.)

The Company changed course on October 18, however, when it grafted a new—and discriminatory—requirement onto its access policy. Thus, upon learning that Nako had let Union Representative Nakakura into the building to give him a note, Editor Bock told her that union representatives were not allowed on company property without prior management permission. (A1384-85.) Eight days later, the Company disciplined Nako for her action.

The Board reasonably found that the Company, by invoking its access policy in this manner, effectively imposed a new hurdle that only applied to employees seeking to engage in union activity: they now needed management approval before letting a union representative into the building. As the Board found, the Company's selective misinterpretation of its

²⁰ The Company errs in citing (Br33) its February 17, 2004 letter to the Union, which granted it access to the building lobby and authorized employees to meet there during breaks. (A921.) In any event, as the Board found, the letter—which the Company never disclosed to employees—was superseded by the Company's March 3, 2004 access policy. (A1391.)

anything-goes access policy amounted to ““anti-union discrimination by anyone’s definition””²¹ because the Company misconstrued the document as only proscribing union activity.²² (A1394.)

3. The Company’s contentions lack merit

There is no merit to the Company’s claim (Br54) that the complaint, which alleged that the Company discriminatorily enforced its security policy on October 18, is time-barred because the Union never filed unfair labor practice charges alleging that the written policy itself, which the Company adopted on March 3, 2004, violated the Act. The written policy, however, was not the problem. It was the Company’s misinterpretation and invocation of the policy on October 18 in a discriminatory manner that prompted the Union to file a timely charge just three months later.

More fundamentally, the Company errs in relying (Br55) on an employer’s right under *Babcock & Wilcox*²³ and its progeny to restrict access by union organizers to its private property. The Company’s security policy, far from preserving that right, actually permitted access by “outside organizations of any kind” without management approval. (A1391;1081.) It

²¹ A1394, quoting *Guardian Ind. Corp. v. NLRB*, 49 F. at 321.

²² See *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d at 947-48 (unlawful to discipline employee for violating policy that did not exist; even if policy had existed, selective enforcement against employee engaged in union activity was unlawful).

²³ 351 U.S. 105 (1956).

was not until Nako brought Nakakura into the building on October 18 that the Company suddenly and selectively invoked its policy as a basis for excluding union-related activity only. In these circumstances, the Company errs in contending (Br58) that it did not engage in the sort of discrimination “along Section 7 lines” prohibited by *Babcock & Wilcox* and subsequent cases.

For the same reason, the Company errs in relying (Br57-58) on *The Register-Guard*, where the Board noted that “nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis.”²⁴ In the cited case, the Board recognized that an employer may, for example, “draw lines between business-related and non-business-related use,” or “between invitations for an organization and invitations of a personal nature.”²⁵ However, that is not what the Company did. Instead, it had a policy that allowed access by “outside organizations of any kind”—but later selectively misconstrued its policy to exclude the Union alone. (A1393.)

²⁴ 351 NLRB 1110, 1118 (2007), *enf't denied in part on other grounds*, 571 F.3d 53 (D.C. Cir. 2009).

²⁵ 351 NLRB at 1118.

B. The Company Unlawfully Interrogated Nako

1. Applicable principles

An employer violates Section 8(a)(1) by coercively interrogating employees about their own or their coworkers' union activities.²⁶ The basic test is whether, under all of the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.²⁷ In applying this test, the Board examines factors such as the presence of employer hostility toward union activity; the interrogator's position in the hierarchy; the place, timing, and method of interrogation; the nature of the information sought; whether a valid purpose for the questioning was communicated; and whether assurances against reprisals were provided.²⁸ These factors serve as a "starting point for assessing the totality of the circumstances."²⁹

²⁶ *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991).

²⁷ *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *affirmed sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)

²⁸ *Perdue Farms, Inc. Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). *See also Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

²⁹ *See* n.28.

2. The Company coercively questioned Nako about her and her coworkers' union activities

Substantial evidence supports the Board's finding that company officials unlawfully interrogated Nako beginning on October 18, when Editor Bock, upon discovering that she had let Union Representative Nakakura into the building to give him a list of Circulation Department employees, summoned her to his office for a closed-door meeting. During the meeting, he asserted that she had violated the Company's security policy, and directly asked her why she had brought a union representative into the building. (A1391.)

The Board reasonably concluded that Bock's questioning was coercive. It was simply an unwarranted attempt to learn more about Nako's union activity. Thus, as the Board emphasized, Bock had "no valid basis" for asking why she had let a union representative into the building. (A1391.) Contrary to the Company (Br70-71), the questioning could not have been part of a legitimate investigation because the Company's access policy did not require employees to obtain managerial permission before admitting a union representative.³⁰ But even if there had been such a requirement, Bock

³⁰ The Company errs in contending (Br55-56) that Nako "bypassed the written procedures" and that she knew union representatives needed prior management permission. The judge reasonably credited her testimony that the first time she heard of such a requirement was when Bock announced it

had no reason to ask why she was meeting with a union representative—other than the illicit one of discovering her union activity. (A1391.) In these circumstances, the Company errs in asserting (Br70-71) that Bock’s questioning was purely “informational.” The meeting’s venue—the office of a high-ranking official—and Bock’s failure to provide assurances against reprisals, compound the coercive effect.³¹

As the Board reasonably found, the Company continued its coercive questioning two days later, when Circulation Director Crawford ordered Nako to meet in his office. During their lengthy meeting, Crawford barraged her with questions about her and her coworkers’ union activities, asking her why Nakakura was in the building; why he was meeting with Circulation Department employees; who else he was planning to meet with; why he had called her; whether she intended to challenge the Company’s access policy; if Bishop knew Nakakura was coming to the facility; and whether this was to challenge Bock. (A1385,1394.) Crawford even asked Nako about the contents of the note she intended to give Nakakura. Despite Nako’s reluctance to divulge that protected information, which indicated a

to her after seeing Nakakura in the building on October 18. (A1385;212-13.)

³¹ See *Timco, Inc. v. NLRB*, 819 F.2d 1173, 1178-79 (D.C. Cir. 1987) (questioning by high-ranking official in his office); *Perdue Farms*, 144 F.3d at 835 (failure to communicate legitimate reason for questioning or provide assurances against reprisal).

fear of retaliation,³² he insisted that she do so if the note involved “Union business.” (A1385.)

The Board reasonably found Crawford’s pointed inquiries coercive and unlawful. He repeatedly and directly sought to extract information from Nako about her and her coworkers’ union activities. He persisted in questioning her about the contents of the note she gave to the union representative. His questioning was not part of any legitimate investigation, and he failed to provide her with assurances against reprisals. (A1394.)

Substantial evidence supports the Board’s further finding that the Company again interrogated Nako coercively in February 2006. During that incident, Crawford pressed her about the grievance that the Union had filed over her October 26, 2005 warning for bringing Nakakura into the building. Crawford asked her why she let the Union file the grievance if she had “accepted” her discipline, and said he had posed the same question to the Union. (A1394.) He also asked if she knew what was happening with the grievance, which he said the Union could not pursue without her permission. These lines of questioning, by a high-ranking manager during a closed-door meeting, were coercive. They were nothing more than another “unwarranted attempt to discover Nako’s union activity.” (A1394.)

³² See *NLRB v. J. Coty Messenger Service*, 763 F.2d 92, 97-98 (2d Cir. 1985).

The Company labels the February meeting a “fiction” and claims that the questioning could not have been coercive because Nako “said she never felt threatened by Crawford.” (Br72.) However, the Board’s analysis focuses on whether conduct reasonably tends to coerce employees—not their subjective reactions.³³ Further, the judge provided sound reasons for crediting Nako’s testimony that the meeting took place as described above. He based on his determination on her demeanor, noting that she testified “in an honest and forthright manner with great detail and precision and without inconsistency.” (A1385n.12.) The Company provides no basis for disturbing this credibility ruling.³⁴

C. The Company Unlawfully Disciplined Nako Because of Her Union Activity

1. Applicable principles

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership.” An employer violates Section 8(a)(3) and (1)³⁵ by taking an

³³ See case cited n.26.

³⁴ See *Shamrock Food Co. v. NLRB* 346 F.3d 1130, 1133 (D.C. Cir. 2003) (deferring to Board’s credibility-based finding that conversation took place, based on witnesses’ testimony).

³⁵ A violation of Section 8(a)(3) constitutes a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

adverse employment action against an employee for engaging in protected union activity.³⁶

The Board focuses its inquiry on the employer's motive, using the test articulated in *Wright Line, a Division of Wright Line, Inc.*,³⁷ and approved by the Supreme Court.³⁸ Under that test, if substantial evidence supports the Board's finding that the employee's protected activity was a factor motivating the employer's decision, the Board's conclusion that the action was unlawful must be affirmed, unless the employer demonstrates that it would have taken the same action even in the absence of its unlawful motive.

The Board may properly rely on circumstantial evidence to infer unlawful motivation.³⁹ Evidence that supports a finding of unlawful motivation includes the employer's knowledge of the employee's union activities;⁴⁰ employer hostility, as evidenced by its other unfair labor

³⁶ See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983). Accord *Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987).

³⁷ 251 NLRB 1083 (1980), *enf'd on other grounds*, 662 F.2d 899 (1st Cir. 1981).

³⁸ *Transp. Mgmt.*, 462 U.S. at 397-98, 400-03.

³⁹ *Southwire Co.*, 820 F.2d at 460.

⁴⁰ *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001).

practices;⁴¹ the timing of the adverse action;⁴² and the employer's departure from established policies and practices.⁴³

2. Substantial evidence supports the Board's finding that the Company disciplined Nako because of her union activity

On October 26, the Company gave Nako a written warning for letting Union Representative Nakakura into the building, even though the Company's security policy permitted access by "outside organizations of any kind" and did not impose any requirement for management approval. The Board reasonably found (A1396-97) that the Company based its decision to discipline her on an unlawful motive—namely, her union activity, which consisted of meeting with a union representative. Substantial evidence supports this finding.

As the Board explained, there is no doubt that Nako was engaged in union activity when she met with Nakakura on October 18, and that the Company knew about it. (A1396-97.) The Company's hostility toward union activity is apparent from the contemporaneous interrogations that officials conducted in an effort to learn more about Nako's and her coworkers' union activities. Based on this coercive questioning, the Company discovered more protected activity—i.e., that Nako had given

⁴¹ *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

⁴² *Tasty Baking Co.*, 254 F.3d at 126.

⁴³ *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996).

Nakakura a note regarding a union matter, and that she was escorting him to meet with other employees. (A1396.) Armed with this knowledge of her union activity, the Company disciplined her expressly for engaging in it. Just five days after interrogating her, the Company gave her a written warning for letting Nakakura into the building.

As the Board found, the Company had “no valid basis” for disciplining Nako. (A1396.) The security policy did not require prior management permission for anyone to enter the facility. It was not until after Nako had brought Nakakura into the building on October 18 that the Company grafted a new requirement for advance approval onto its policy. Moreover, the new requirement only applied to employees seeking to meet with union representatives, and it was created specifically in response to Nako’s union activity. In these circumstances, the Board reasonably concluded that Nako’s alleged violation of the security policy was not the real reason for her discipline. Accordingly, the Company failed to show that it had a lawful reason for disciplining her.⁴⁴ (A1396-97.)

⁴⁴ See *Laro Maint. Corp.*, 56 F.3d at 231.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED THE ACT BY SUSPENDING AND DISCHARGING BISHOP FOR ENGAGING IN UNION AND PROTECTED CONCERTED ACTIVITY

A. Applicable Principles

As explained above, an employer violates Section 8(a)(3) and (1) by taking adverse action against an employee for participating in union and protected concerted activity. However, an employee will lose the Act's protection if, during the course of that activity, he engages in such sufficiently "opprobrious conduct."⁴⁵ Yet, it is well established that an employee's right to engage in union and concerted activity "may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."⁴⁶ Accordingly, in determining whether an employee's conduct is sufficiently egregious to forfeit the Act's protection, the Board weighs the following factors: the place and subject matter of the discussion; the nature of the outburst; and whether it was provoked by an unfair labor practice.⁴⁷

⁴⁵ *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

⁴⁶ *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

⁴⁷ *Atlantic Steel Co.*, 245 NLRB at 816.

B. The Company Retaliated Against Bishop for Acting as a Shop Steward, and He Did Not Forfeit the Act's Protection

The Board reasonably found (A1378,1397-98) that the Company violated the Act by suspending and discharging Bishop. As the Company knew, he was engaged in union activity on October 18 when he attempted to assist a coworker, Nako, by asking Editor Bock if he intended to discipline her during a meeting. Nako had indicated that she wanted Bishop to accompany her to the meeting, and "as union steward, Bishop was fulfilling his union duties toward Nako in seeking to be present" during what turned out to be an investigatory session that prompted the Company to discipline her. (A1397.)

The next day, the Company suspended Bishop indefinitely, alleging that he had acted in a rude, unprofessional, and insubordinate manner by questioning Bock about the meeting. About a week later, it discharged him for the same reason. (A1397.)

The Company does not dispute that it suspended and discharged Bishop for engaging in union activity by trying to help Nako. Instead, it argues that the manner in which Bishop conducted himself while engaging in such activity caused him to forfeit the Act's protection. (Br59-60&n.12.) The Board, however, reasonably found that Bishop's encounter with Bock

was not so “opprobrious” as to strip him of the Act’s protection. (A1397-98.)

Applying the *Atlantic Steel* analysis, the Board first noted that although the confrontation occurred in the newsroom, a large open area, there was no evidence that it prevented employees from working. Importantly, the subject matter involved protected activity: Bock was seeking to question Nako about why she had talked to a union representative; she had indicated that she wanted Bishop to accompany her; and Bishop was trying to determine whether Nako was entitled to union representation under *NLRB v. J. Weingarten*.⁴⁸ (A1397.) As for the nature of the alleged outburst, the Board reasonably concluded that at most Bishop was merely assertive in seeking to exercise his duties as shop steward. (A1397-98.) Although he may have raised his voice at one point so that Nako could hear him across a crowded newsroom, he did not remotely engage in the type of conduct that would cause an employee to lose the Act’s protection.⁴⁹ Significantly, the judge credited the testimony of

⁴⁸ 420 U.S. 251, 257-258 (1975) (employee requesting union representation is entitled to it if he reasonably believes investigatory meeting will result in disciplinary action).

⁴⁹ Indeed, as the Board noted (A1397), when an employee is acting in a representative capacity, even using strong, profane and foul language, or acting discourteously, does not cause him to lose the Act’s protection. *See, e.g., Max Factor & Co.*, 239 NLRB 804, 818 (1978).

multiple witnesses who stated that Bishop never yelled during his encounter with Bock, never used profanity, and made no threats of any kind.

(A1386,1397.) Additionally, Bishop did not impede Bock from meeting with Nako. He accepted Bock's decision to exclude him from the meeting and walked away from the newsroom without incident. (A1386;47.)

There is no merit to the Company's assertion (Br60) that Bishop engaged in a "spectacular display of disobedience." In so claiming, the Company ignores the judge's credibility-based finding that Bishop never yelled at or threatened anyone, and never used profanity. (A1386,1397;46-47,118,120,250-51,397,399.) The Company provides no basis for disturbing this demeanor-based ruling.

Examining the final *Atlantic Steel* factor, the Board noted (A1398) that Bishop was attempting to ascertain whether Nako was entitled to union representation during a meeting with Bock that in fact served as an investigatory interview leading to disciplinary action against her. In these circumstances, the Board reasonably concluded that Bishop, who was acting in his capacity as shop steward, did not lose the Act's protection by vigorously attempting to find out from Bock whether the meeting would be one that triggered Nako's *Weingarten* rights. (A1397-98.) Accordingly, the

Company violated the Act by disciplining and discharging him for his union and protected concerted activity. (A1397.)

C. The Board Reasonably Rejected the Post-Discharge Rationales Cited by the Company

After discharging Bishop, the Company proffered additional rationales to justify its action. In February 2006—four months after the discharge—the Company claimed it discovered that Bishop’s productivity had been subpar during the 18 months preceding his discharge. The Company contended that this purported discovery would have warranted his discharge, or at least should have served as a basis for denying him reinstatement with backpay. The Company also claimed that after his discharge, Bishop made disparaging comments about the Company at a university forum. Later, while litigating the case before the Board, the Company claimed that Bishop made disparaging remarks on his blog. The Company argued that these post-discharge comments relieved it of the duty to reinstate him with backpay. (A1397.) The Board reasonably rejected these contentions.

1. The Company’s post-discharge “discovery” of Bishop’s low productivity was pretextual

The Board reasonably viewed as nothing more than a “belatedly discovered pretext” the Company’s purported discovery after his discharge

that his productivity had been subpar during the 18 months preceding his discharge. (A1398.) As the Board noted, the Company had been carefully monitoring Bishop's productivity for years. Accordingly, the Board found "implausible" the Company's claim that it had "no idea of Bishop's productivity" from May 6, 2004 until October 27, 2005, the date of his discharge. Instead, as the Board reasonably inferred, it was more likely that the Company "was well aware of Bishop's productivity at the time he was discharged and did not find it a basis for his termination." (A1398.)

On review, the Company provides no basis for overturning this finding or unsettling the Board's reasonable inferences, which are entitled to deference. Accordingly, the Company failed to meet its burden of establishing that, after Bishop's discharge, it discovered conduct that would have resulted in a lawful decision to terminate him.⁵⁰

2. The Board reasonably concluded that Bishop's post-discharge remarks did not relieve the Company of its obligation to reinstate him with backpay

The Board also reasonably rejected the Company's claim that it was relieved of its obligation to reinstate Bishop with backpay based on remarks

⁵⁰ See *Berkshire Farm Cntr. & Svcs. for Youth*, 333 NLRB 367 (2001). See also *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) (reinstatement with backpay is terminated as of date employer "first acquired knowledge of the misconduct"), *enf'd in relevant part* 39 F.3d 1312, 1316-17 (5th Cir. 1994). In this case, the Board reasonably inferred that the Company knew about Bishop's low productivity well before discharging him.

he made at a university forum two months after his discharge and on his blog a year later. (A1379.) During a December 2005 meeting at a university student center, Bishop voiced his opinion that the Company had failed to staff the newsroom adequately, causing mail and faxes to pile up. (A1399.) In April 2007, he complained on his blog that the Company's "silence on the issues of journalism and First Amendment rights," its "failure to support its photographer" in one instance, and its "apparent lack of interest in reporting all that's happening in the community," were "sorry reflections on the local daily newspaper's role in the community." (A1399;979.) Additionally, referring to a recent article, he commented: "why the Tribune-Herald allows statements like these to go into print without challenge or qualification is stupefying." (A1399;977.) In September 2007, referring to a different article, he lamented that "no one" had mentioned a court order on the subject. (A1387;980.)

The Board agreed with the judge's conclusion that the Company had failed to prove that Bishop engaged in post-discharge misconduct that would relieve the Company of its duty to reinstate him with backpay. (A1378-79.) In so ruling, the Board found it appropriate to address the relevance of *NLRB*

*v. Electrical Workers Local 1229 (Jefferson Standard)*⁵¹ in evaluating the impact of Bishop’s postdischarge statements. The Board reasonably found that the *Jefferson Standard* analysis does not govern here, because Bishop made the contested remarks *after* the Company had already discharged him unlawfully. As discussed below, the Board found that instead, the applicable test for analyzing post-discharge conduct is the one stated in *O’Daniel Oldsmobile, Inc.* and its progeny.⁵²

As the Board explained, *Jefferson Standard* addressed a different question—the duty of loyalty owed by *current* employees to their employer. *Jefferson Standard*, unlike the instant case, involved disparaging comments that were part and parcel of what would otherwise have constituted the employees’ protected concerted activity. By contrast, when Bishop made his remarks, he was no longer the Company’s employee—the Company had already discharged him months earlier for engaging in union activity. Thus, as the Board noted, “[t]here can be no issue whether [Bishop’s alleged] disparagement could have justified that discharge. Bishop’s discharge was

⁵¹ 346 U.S. 464, 477-78 (1953). In *Jefferson Standard*, the employer discharged employees based on the content of a handbill they distributed during a labor dispute. The Court held that employees may lose the Act’s protection by attacking their employer in such a way that it constitutes “insubordination, disobedience, or disloyalty,” which “is adequate cause for discharge.” *Id.*

⁵² 179 NLRB 398 (1969).

unlawful.” (A1379.) Instead, the only question was whether he could be denied reinstatement with backpay based on his post-discharge remarks.

(*Id.*)

The Board reasonably distinguished between *Jefferson Standard*, which involved current employees, and cases like the instant one, which involves a former employee who made allegedly disparaging remarks after his unlawful discharge. As the Board noted, *Jefferson Standard*, unlike the instant case, “turned on the duty of loyalty employees owe their employers—‘the underlying contractual bonds and loyalties of employer and employee.’”⁵³ Thus, in *Jefferson Standard*, the challenged employee remarks concerned “the very interests which the attackers were being paid to conserve and develop.”⁵⁴

By contrast, former employees—particularly those who have been discharged unlawfully—owe their wrongdoing former employer no such fealty. By the time Bishop made his remarks, he was no longer being paid to “conserve and develop” the Company’s interests; the Company had long since discharged him for union activity. As the Board aptly noted, employees who have been discharged unlawfully “often say unkind things about their former employers;” any “evaluation of post-discharge

⁵³ A 1379 (quoting *Jefferson Standard*, 346 U.S. at 473).

⁵⁴ *Id.* at 476.

misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge.’’⁵⁵ Accordingly, the Board reasonably concluded that employers “who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims’ natural human reactions to the unlawful acts.” (A1379.)

For these reasons, the Board concluded that *Jefferson Standard* does not govern the instant case.⁵⁶ Instead, the appropriate standard is the one articulated some 40 years ago in *O’Daniel Oldsmobile*,⁵⁷ where the Board explained why *Jefferson Standard* does not apply to post-discharge misconduct. In *O’Daniel Oldsmobile*, the Board observed that an employer has a heavier burden when it seeks to cut off its obligation to reinstate an unlawfully discharged employee (as opposed to trying to justify the discharge in the first place). In the former situation, unlike the latter, the

⁵⁵ A 1379, quoting *Trustees of Boston Univ.*, 224 NLRB 1385, 1409 (1976), *enf’d*, 548 F.2d 391 (1st Cir. 1977).

⁵⁶ For the same reasons, the Company errs in relying (Br 67&n.16) on *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006), which also involved an employer that discharged an employee for statements made during the course of his employment.

⁵⁷ 179 NLRB 398 (1969).

employer “has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.”⁵⁸

As the Board noted, over the past 40 years, it has applied the “unfit for further service” standard in many cases involving post-discharge misconduct.⁵⁹ Applying that standard here, the Board reasonably (A 1380) concluded that Bishop’s post-discharge statements, “considered singly or collectively,” did not render him “unfit for further service, or a threat to efficiency in the plant.”

Before the Board, the Company never exercised its right to file a motion for reconsideration under Section 102.48(d)(1) of the Board’s Rules and Regulations (29 C.F.R. § 102.48(d)(1)) challenging the Board’s findings that *O’Daniel Oldsmobile* governs the instant case, and that Bishop’s post-discharge remarks did not bar his reinstatement or toll backpay under that standard. Accordingly, the Court lacks jurisdiction to consider such an argument.⁶⁰

⁵⁸ *Id.* at 405.

⁵⁹ *See* A 1379&n.8 (citing cases).

⁶⁰ *See* Section 10(e) of the Act (“no objection that has not been urged before the Board . . . shall be considered by the Court” absent extraordinary circumstances); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 645 (1982) (appeals court jurisdiction to consider issue not raised in motion for reconsideration); *W&M Props. Of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (Court lacks jurisdiction to consider issue not raised

Moreover, in its brief, the Company fails to explain why Bishop's post-discharge remarks would justify depriving him of reinstatement or backpay. It never examines the actual comments. It therefore provides no basis for challenging the Board's reasonable conclusion that Bishop's comments were nothing more than a form of criticism that did not render him "unfit for further service."⁶¹ (A1380.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY INTERROGATED SMITH, SUR, ING, AND LOOS; SUSPENDED SUR AND SMITH; DISCHARGED SMITH; AND PROMULGATED A RULE PROHIBITING EMPLOYEES FROM MAKING SECRET RECORDINGS

A. Overview of the Company's Unlawful Conduct

The Board reasonably found that Smith, Sur, Ing, and Loos engaged in protected concerted and union activity when they discussed their reasonable belief that the Company was refusing to honor employees' rights under *NLRB v. J. Weingarten*,⁶² and agreed that Smith should tape record his upcoming meeting with Editor Bock in order to safeguard those rights. Based on the employees' discussion, Smith secretly recorded a meeting during which Bock warned him about his productivity. The Company then

in motion for consideration) (citing *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975)).

⁶¹ See n. 5.

⁶² 420 U.S. 251 (1975).

interrogated all four employees about their role in the recording—and discovered the extent of their involvement in the matter. Armed with this ill-gotten information, the Company, citing the recording incident, promptly suspended Sur and Smith and later discharged Smith. In response to this protected concerted activity, the Company also promulgated a rule prohibiting secret audio recordings. The Board reasonably found that the Company, by taking these actions, violated Section 8(a)(1) and (3) of the Act. (A1391-93,1396,1399.)

The Company does not dispute that its employees' actions were concerted.⁶³ Nor does it dispute interrogating them about those activities; taking adverse action against Sur and Smith precisely because they engaged in those activities; and promulgating a rule barring recordings in response to those activities. Instead, the Company claims that the employees' activities were not protected under Section 7 of the Act. Based on this flawed premise, the Company asserts (Br77-89) that it was justified in interrogating, suspending and discharging the participants, and in promulgating the rule

⁶³ In determining whether activity is concerted, the Board examines whether the employee “acted with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus., Inc.*, 268 NLRB 493, 493 (1984) (“*Meyers I*”), *remanded on other grounds sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *on remand, Meyers Indus. Inc.*, 281 NLRB 882 (1986) (explaining and reaffirming *Meyers I*), *enf’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1981).

against audio recordings. The Board reasonably rejected the Company's arguments.

B. The Board Reasonably Found that the Employees' Concerted Conduct Was Protected under the Act

The Supreme Court, in examining whether employees' concerted activities are for the purpose of "mutual aid or protection" under Section 7 of the Act, has indicated that the phrase should be liberally construed to safeguard activities directed at a broad range of employee concerns.⁶⁴ At the same time, the Court has also indicated that concerted activities may not be protected if they are "unlawful, violent, or in breach of contract," or can "can be characterized as 'indefensible'" because they "show such a disloyalty to the workers' employer" that they are "deemed unnecessary to carry on the workers' legitimate concerted activities."⁶⁵

The Board reasonably found that in the circumstances, the actions of Smith, Sur, Ing, and Loos were protected. (A1378,1391-93.) Thus, Smith and his co-workers became concerned that Editor Bock might be depriving employees of their right to a *Weingarten* witness during meetings which, they believed, were investigatory and could result in discipline. Their belief was not unfounded, as Bock had just rebuffed employee Armstrong's

⁶⁴ *Eastex, Inc. v. NLRB*, 437 U.S. at 563-68 & n.17.

⁶⁵ *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962) (quoting *Jefferson Standard*, 346 U.S. at 477).

request that Smith witness the meeting in which Bock warned Armstrong. (A1387.) Smith—who had also been ordered to meet with Bock later that day—spoke to his co-workers about Bock’s refusal to let employees have a witness. Because they suspected that Bock would likewise prohibit Smith from having a witness, they determined that Smith should secretly record his meeting with Bock to safeguard his *Weingarten* rights. Thus, as the Board noted (A1391-92), the employees “uniformly agreed that the recorder would take the place of a witness in what they reasonably believed could be an investigatory meeting leading to discipline.” (A1392.) As it turned out, during the meeting, Bock did warn Smith about his productivity, although he permitted Bock to challenge the warning.⁶⁶ (A1387.)

In finding that the conduct was protected, the Board also relied on the fact that Hawaii does not make it illegal to surreptitiously record a conversation, as long as one participant is aware of the recording. (A 1392, *citing* Haw. Rev. Stat. § 803-42(b)(4)). Thus, there was nothing unlawful about the employees’ concerted activity. Further, as the Board majority observed, there was no company policy prohibiting such recordings. (A1391-92.) Finally, the Board noted that, under Board law, recording a

⁶⁶ *See, e.g., Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) (*Weingarten* right attaches where employer seeks information to bolster its decision).

conversation with an employer is not “improper per se.”⁶⁷ (A1392.) In sum, the Board reasonably found that, in the circumstances, the employees engaged in protected activity by discussing, planning, and ultimately recording a meeting in order to protect their *Weingarten* rights.

In contending that the employees’ activity was unprotected, the Company asserts (Br 83) that “[s]urreptitious recording . . . is a dubious, self-help tactic that should never be sanctioned” Plainly, the Company is not in favor of secret tape recordings as a general matter. The Company, however, overlooks the context in which the events at issue occurred—a context in which, as the Board found, employees reasonably believed that Editor Bock was failing to honor their *Weingarten* rights. As the Board also explained, Smith had a reasonably-based belief that his meeting with Bock could result in discipline, but that Bock would deny his request for a witness,

⁶⁷ See, e.g., *Opryland Hotel*, 323 NLRB 723 n.3 (1997) (absent employer rule prohibiting secret recordings, such conduct, which is not “malum in se,” would not justify employee’s discharge or defeat his right to reinstatement); *Williamhouse of California, Inc.*, 317 NLRB 699, 699 n.1 (1995)(secret audio tapes admissible as evidence); *McAllister Bros. Inc.*, 278 NLRB 601 n.2 (1985) (same).

The Company errs in relying (Br82) on *Sam’s Club*, 342 NLRB 620, 620 (2004), where the Board did not find a surreptitious recording unprotected, but found instead that it was not *concerted*. The Company also errs (Br 82) in citing *Garvey Marine*, 328 NLRB 991, 991 (1999), where the Board found that a warning issued to an employee who had tried to secretly tape a conversation was based on an unlawfully-instituted disciplinary system.

just as he had denied Armstrong’s request earlier that day. As it turned out, Smith was right. At bottom, the employees were concerned that Bock did not “understand”—as Ing put it to Bock—the application of *Weingarten* rights. By deciding that Smith should record his meeting with Bock, they were seeking to document “what they perceived to be a potential violation of employee rights” under *Weingarten*. (A1378.)

In this context, the Board reasonably found that the employees’ actions were not indefensible. And there was certainly nothing unlawful or violent about their conduct. The Company may not agree that surreptitious recordings should ever be allowed, but its views cannot override the fact that such recordings are not illegal under Hawaii law or improper per se under Board law.⁶⁸ Moreover, the Company did not have a policy prohibiting such recordings, so employees were not behaving wrongly in that respect either.⁶⁹

⁶⁸ The Company errs in relying (Br84) on Board cases involving an employers’ coercive use of hidden cameras and microphones to record employees’ Section 7 activities. The Board was called upon to determine whether Smith’s recording was protected—not whether the Company engaged in coercion.

⁶⁹ The Company also errs in relying (Br83-84) on cases noting that an employer may issue discipline even absent a rule specifically prohibiting the misconduct. The absence of a rule remains probative evidence that the employees’ conduct was not so indefensible as to render it unprotected.

The Company also notes (Br82) that certain courts have concluded that secret recordings are repugnant to other statutory schemes. However, the cited cases do not take into account the countervailing right of employees under Section 7 of the Act to engage in concerted activity for mutual aid or protection—here, to safeguard their *Weingarten* rights. Accordingly, the cited cases are distinguishable.⁷⁰ (A1392.)

Finally, the Company errs in contending (Br77-80) that the Board should have ignored evidence that the employees were concerned about their *Weingarten* rights because the General Counsel's complaint did not allege that the Company separately violated the Act by denying that right. The absence of a *Weingarten* allegation in the complaint did not preclude the Board from examining probative background evidence in ruling on the complaint allegations that the Company unlawfully interrogated and disciplined the employees. The Company's discussion of Section 10(b) is similarly beside the point, because there is no dispute that the complaint allegations at issue were based on timely-filed charges. In sum, the Board did nothing more than properly consider the employees' belief that their

⁷⁰ Contrary to the Company (Br 83), the 1984 advice memorandum it cites concluded that a particular tape recording was not *concerted* activity, not that it provided a legitimate basis for discharging an employee. In any event, advice memoranda are not binding authority. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002).

Weingarten rights were being violated as background evidence that was probative of other complaint allegations.⁷¹

C. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Interrogated Smith, Sur, Ing, and Loos

Substantial evidence supports the Board's finding that the Company unlawfully interrogated Smith, Sur, Ing, and Loos about the protected concerted and union activities that they and their coworkers engaged in, starting on March 9, when Bock questioned them separately about the events leading to Smith's recording. (A1392-93.) For example, Bock asked each employee about their involvement in the decision to use the recorder; who else was involved; and where the recorder was. (A1392.) Bock continued the interrogation on March 27, when he questioned Smith about why he gave the recorder to the Union and the identity of the union member who took custody of it. (A1393.)

The Board found that, in the totality of the circumstances, Bock's questioning tended to be coercive. Thus, as the Board explained, the purpose of the interrogation was to discover who was involved in the concerted activity, and the extent of their involvement. (A1393.) As the

⁷¹ See, e.g., *NLRB v. So-White Freight Line, Inc.*, 969 F.2d 401, 404 n.5 (7th Cir. 1992) (suspension that was not the subject of a charge served as relevant background evidence).

Board further noted, the Company “failed to make reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into the employees’ union and protected/concerted activities and failed to clearly communicate to the employees the limitations on the employer’s inquiry.” (A1393, citing *United Services Automobile, Ass’n.*⁷²) Thus, the questioning—in closed-door meetings with high-ranking managers present—tended to be coercive.

The Company does not contest the Board’s finding that Bock asked employees all of these questions. Instead, it contends (Br87) that his inquiries were “merely an investigation of misconduct in the workplace.” As shown above, however, the Board reasonably rejected the Company’s claim that the employees’ activity was unprotected. In any event, even if the Company was “merely” investigating, the questioning was still unlawful because it was not circumscribed in accordance with *United Services Automobile Ass’n.* (A 1393.)

**D. The Company Unlawfully Suspended Sur and Smith,
and Discharged Smith, for Protected Conduct**

Immediately after unlawfully interrogating employees on March 9, the Company suspended Sur and Smith for their role in the recording incident. At the end of April, the Company discharged Smith for the same unlawful

⁷² 340 NLRB 784, 785-86 (2003), *enf’d*, 387 F.3d 908 (D.C. Cir. 2004).

reason. (A1388-89,1399-1400.) As the Board explained (A1378), in this context—where it is undisputed that the Company was aware of Sur and Smith’s protected concerted and union activity, and there is no dispute that the Company targeted them for that reason—the relevant question was whether their conduct was “sufficiently egregious to remove it from the protection of the Act.”⁷³

The Board reasonably found that it was not. In so finding, the majority reiterated that secret recording was not illegal under state law, and the Company had no rule barring it. (A1378.) Accordingly, the Board reasonably found that the Company’s adverse actions against Smith and Sur were unlawful.

E. The Company Unlawfully Promulgated a Rule Banning Secret Recordings

It is settled that an employer’s promulgation of a work rule violates Section 8(a)(1) if the rule “would reasonably tend to chill employees in the exercise of their Section 7 rights.”⁷⁴ In particular, it is unlawful for an

⁷³ (A 1378) (quoting *Hacienda Hotel*, 348 NLRB 854, 854 n.1 (2006)). *Accord Stanford Hotel*, 344 NLRB 558, 558 (2005) (“[w]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.”) *See generally Atlantic Steel Co.*, 245 NLRB 814 (1979).

⁷⁴ *See Guardsmark, LLC v. NLRB*, 475 F.3d at 374.

employer to promulgate a rule in response to employees' Section 7 activities.⁷⁵

As the Board found (A1396), there is no dispute that immediately in response to its employees' decision to record Smith's meeting with Bock—concerted conduct that was protected under Section 7 of the Act (*see* pp.47-51 above)—the Company issued a rule banning such recordings. (A1396.) The Board reasonably concluded that the rule was therefore an attempt to restrict employees from exercising their Section 7 rights.⁷⁶

The Company challenges the Board's finding by asserting (Br88-89) that the rule “in no way affected or chilled legitimate Section 7 activity,” and claiming that it did not enact the rule in response to protected activity. At bottom, the Company argues, yet again, that the employees' action was unprotected—a claim that the Board reasonably rejected. And the temporal

⁷⁵ *See, e.g., Stanadyne Automotive Corp.*, 345 NLRB 85, 86-87 (2005) (even if rule does not on its face bar Section 7 activity, it may nonetheless violate Section 8(a)(1) if it was promulgated in response to such activity); *City Market*, 340 NLRB 1260 (2003) (promulgating otherwise lawful rule violates Section 8(a)(1) where employer instituted new rule in response to organizing activities).

⁷⁶ *See Gallup, Inc.*, 334 NLRB 366, 366 (2001) (rule prohibiting audio/video taping violated Section 8(a)(1) where it was promulgated right after employer discovered employees' organizing efforts), *enf'd. mem.*, 62 Fed.Appx. 557 (5th Cir. 2003); *City Market*, 340 NLRB 1260, 1260 (2003) (rule unlawful where it was instituted in response to employees' organizing activities); *Ward Mfg., Inc.*, 152 NLRB 1270, 1271 (1965) (same).

link between the employees' action and the rule banning it is clear evidence that the Company imposed the ban in an effort to chill their protected activity.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY PROHIBITING EMPLOYEES FROM WEARING BUTTONS AND ARMBANDS TO SUPPORT BISHOP AND SMITH

It is settled that employees have a presumptive right to wear union-related buttons, pins, and other insignia while at work as a form of protected concerted activity.⁷⁷ An employer seeking to ban the display of such items bears the burden of demonstrating that "special circumstances" justify the prohibition.⁷⁸ Absent such evidence, an employer violates Section 8(a)(1) by prohibiting employees from wearing union-related insignia.⁷⁹

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by banning employees from wearing buttons and armbands to protest the Company's unlawful actions against Bishop and Smith. As shown below, the Board reasonably found that in both instances, employees engaged in protected concerted activity by wearing the insignia.

⁷⁷ See *Republic Aviation Corp. v. NLRB*, 324 U.S. at 802-03 &n.7; *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d at 946; *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 958 (6th Cir. 2000).

⁷⁸ See, e.g., *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009).

⁷⁹ *Id.*

Further, the Company failed to meet its burden of showing that special circumstances justified the discriminatory bans that it imposed in reaction to its employees' support for Bishop and Smith.

A. By Wearing Buttons and Armbands To Protest the Company's Adverse Actions against Bishop and Smith, Employees Engaged in Protected Concerted Activity

The Board reasonably found that Bishop's coworkers, by wearing pro-Bishop buttons to protest his unlawful discharge, engaged in protected concerted activity. As the Board explained (A1395; A879), the buttons—which displayed Bishop's photo and bore the message “Bring Hunter Back”—reflected his colleagues' collective disappointment with the Company's action. They wore the buttons in direct response to his discharge, and as a show of support for their coworker and union steward. (A1395.)

The Company professes (Br89) that it did not know what the buttons meant—that they could not have been a form of protected concerted activity because company officials lacked “any notice or explanation regarding the purpose of the button.” This assertion is fanciful. As the Board noted, even

a “cursory look at the button . . . establishes its purpose. The button was a request by [employees] to return Bishop to work.”⁸⁰ (A 1396.)

Substantial evidence likewise supports the Board’s finding that employees, by wearing red armbands to protest Smith’s suspension, were engaged in protected concerted activity.⁸¹ (A1395.) The Company has no basis for asserting (Br90) that the armbands were too “attenuated” from a “labor dispute” to qualify as protected concerted activity. Employees donned the armbands just four days after Smith’s suspension. Indeed, about an hour after they collectively wore the armbands during their morning meeting with Advertising Director Sledge, Publisher Dixon issued a memorandum prohibiting them. (A1388,1396.) Given the timing of this edict, and the fact that the Company had never previously outlawed armbands, the Company is hardly in a position to claim that it could not connect the dots.

There is no more merit to the Company’s assertion that because the buttons and armbands did not explicitly use the word “union,” employees

⁸⁰ The Company errs in relying on *Five Star Transp.*, 349 NLRB 42, 44-45 (2007), *enf’d*, 522 F.3d 46, 51 (1st Cir. 2007), which did not involve union-related insignia. *Five Star* addressed whether employees acted concertedly in writing individual letters to a third party. In the instant case, the employees’ actions were plainly concerted.

⁸¹ See *Guard Publ’g Co.*, 571 F.3d at 61-62 (affirming Board finding that employer violated Section 8(a)(1) by prohibiting employee from wearing green armband).

had no right to wear them. As the Board explained, the Company's argument cannot be reconciled with the Court's reasoning in *Republic Aviation*, which is grounded in Section 7's guarantee of the right to engage in concerted activities for the purpose of mutual aid and protection.⁸²

(A1395.) Viewed in context, it was plain that the buttons and armbands were to protest of the Company's treatment of Bishop and Smith—and therefore an exercise of the employees' Section 7 rights. (*Id.*) The Company cannot cite a single case to support its formalistic claim that employees can only express their union sympathies by talismanically invoking a particular term.

B. The Company Failed To Establish that Special Circumstances Justified Its Discriminatory Imposition of the Bans against Buttons and Armbands

The Board reasonably concluded that the bans against buttons and armbands, which the Company imposed soon after learning that employees were wearing those items to protest the Company's unlawful treatment of Bishop and Smith, were discriminatory. (A1395.) It is undisputed that the Company had previously permitted employees to wear a variety of pins, buttons, and insignia. Indeed, the Company did not even have a dress code. (A1395;170-71,444-45,480-82.)

⁸² *Republic Aviation Corp. v. NLRB*, 324 U.S. at 802-03 & n.7.

Moreover, the Board reasonably found that the Company presented no evidence of any special circumstances justifying a prohibition against buttons and armbands. (A1395-96.) Instead, Publisher Dixon simply declared in a letter that the buttons were “distracting” employees from their jobs, and “potentially and/or actually” disrupting their work. (A1387,1395;880.) The Company failed to come forward with any evidence to support this assertion. Nor did the Company present any evidence that wearing armbands adversely affected business or employee safety or discipline. (A 1396.) On review, the Company does not contend that special circumstances justified either edict; accordingly, the Company has waived any argument in that respect.⁸³

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY FAILING TO PROVIDE OR DELAYING INFORMATION REQUESTED BY THE UNION

A. Applicable Principles

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 representative of his employees”⁸⁴ An employer’s duty to bargain in

⁸³ See, e.g., *W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 49 (D.C. Cir. 1998).

⁸⁴ A violation of Section 8(a)(5) of the Act results in a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 463 U.S. 693, 698 n.4 (1983).

good faith includes the obligation to “provide information that is needed by the bargaining representative for the proper performance of its duties.”⁸⁵ An employer violates Section 8(a)(5) and (1) by failing to provide a union with requested information relevant to the performance of its collective-bargaining duties.⁸⁶

In particular, an employer is obligated to provide information sought by the union in connection with its administration of a collective-bargaining agreement—including information needed to investigate and process grievances. This type of information is presumptively relevant.⁸⁷ The Board’s judgment on the question of relevance is entitled to great deference, because determining whether a party has violated its duty to confer in good faith is particularly within the Board’s expertise.⁸⁸

B. The Company Unlawfully Failed To Provide or Delayed the Release of Relevant Information

As shown in the Statement, the Union, in conjunction with the grievances that it filed challenging the Company’s adverse actions against Bishop and Nako, requested various items of information. Concerning

⁸⁵ *NLRB v. Acme Indus.*, 385 U.S. 432, 435-37 (1967).

⁸⁶ *See id.*; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956). *Accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191-92 (D.C. Cir. 2000).

⁸⁷ *See, e.g., NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153-54; *Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1295-97 (D.C. Cir. 2000).

⁸⁸ *See n. 86.*

Bishop, the Union first sought information about his suspension in an October 19, 2005 letter asking the reason for the Company's action and the information on which it relied in making its decision. The Union renewed its request on November 3, at which time it also asked for information relating to Bishop's October 27 discharge.⁸⁹ On November 15, the Union requested information concerning the Company's claimed reasons for the discharge. (A1400;907,910-11,913.) Concerning Nako, who was disciplined on October 26, the Union requested by letter dated November 15 copies of any policies she allegedly violated, her October 19 statement to managers, and any other material considered by the Company in disciplining her. (A1400;915.)

The Board reasonably found that the Company violated Section 8(a)(5) and (1) by failing to provide the Union with the information it requested on October 19, November 3, and November 15. As the Board explained, this information was presumptively relevant to the Union's grievance-processing duties as the employees' bargaining representative.

⁸⁹ Specifically, the Union asked for information explaining what Bishop did that caused the Company to suspend and discharge him; copies of the policies Bishop allegedly violated; the names of employees who witnessed the event; Bishop's personnel file; and information provided by witnesses interviewed during the investigation. (A1400.)

(A1401-02.) The Board also found that the Company's 12-week delay in turning over Bishop's personnel file was unlawful.⁹⁰ (A1401-02.)

The Company mounts a limited challenge to the Board's findings. First, it seeks to excuse its lengthy delay in providing Bishop's personnel file, citing Editor Bock's claim that his dilatoriness was not intentional as December-January was a busy time of year. (Br74;740.) The Board, however, reasonably rejected this assertion because it was "vague and unsupported." (A1401.)

Second, the Company claims (Br73) that it was under no obligation to provide the Union with the names of employees who witnessed Bishop's alleged misconduct and who were interviewed by the Company in connection with its investigation. The Board, however, appropriately noted that such information is presumptively relevant, contrary to the Company's claim.⁹¹ (A1401.) Equally meritless is the Company's hyper-technical suggestion (Br73) that because it might not have had an actual "list" of witnesses, it had no duty to provide the Union with the names of employees it interviewed.

⁹⁰ See cases cited at A1401.

⁹¹ See, e.g., *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 n.5; *Transport of New Jersey*, 233 NLRB 694, 694-95 (1977).

The Company also errs in contending that it did not have to provide the Union with any information because, in its opinion, the Union “had enough” (Br75) and the requested information was not “truly necessary” (Br76). As the Board observed, it is not for the Company to “decide what is necessary and relevant to the Union’s duty as collective bargaining representative.” (A1400.)

There is no more merit to the Company’s final claim, which is that the Union was not entitled to the information because the Union in effect was trying to obtain “pre-arbitration discovery.” (Br75-76.) As the Board noted, the Company’s argument suffers from a fatal chronological flaw. When the Union requested the information on October 19 and November 3 and 15, 2005, the grievances had not been referred to arbitration. Nako’s grievance was not referred until November 29, 2005, and Bishop’s not until January 14, 2006. The Union’s information requests therefore could not have been for pre-arbitration discovery.⁹² (A1401.) The cases cited by the Company (Br75-76) are not on point, and do not undermine the Board’s

⁹² See *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 789 (2001) (because grievances were not pending arbitration when union requested information, it could not be said that union was seeking pretrial discovery).

finding that the Company was obligated to provide the requested information.⁹³

⁹³ For instance, *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 721-22 (D.C. Cir. 1981), quoted extensively by the Company (Br75-76), is distinguishable. It involved an employer's demand that an employee submit to a pre-arbitration investigatory interview.

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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National Labor Relations Board
October 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHENS MEDIA, LLC)
)
Petitioner/Cross-Respondent) Nos. 11-1054, 11-1088
)
v.)
)
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
HAWAII NEWSPAPER GUILD LOCAL 39117,)
COMMUNICATIONS WORKERS OF AMERICA,))
AFL-CIO)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,724 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
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Dated at Washington, DC
this 12th day of October 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| STEPHENS MEDIA, LLC |) | |
| |) | |
| Petitioner/Cross-Respondent |) | Nos. 11-1054, 11-1088 |
| |) | |
| v. |) | |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | Board Case No. |
| Respondent/Cross-Petitioner |) | 37-CA-07043 |
| |) | |
| and |) | |
| |) | |
| HAWAII NEWSPAPER GUILD LOCAL 39117, |) | |
| COMMUNICATIONS WORKERS OF AMERICA, |) | |
| AFL-CIO |) | |
| |) | |
| Intervenor |) | |

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 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 the counsel of record, who are registered CM/ECF users, through the CM/ECF system:

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Dated at Washington, DC
this 12th day of October, 2011

STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. §157):

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

Section 8(a)(1), (3) and (5) (29 U.S.C. §158(a)(1) and (5)):

It shall be an unfair labor practice for an employer--

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

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

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 10(a) (29 U.S.C. §160(a)):

The Board is empowered, as hereinafter provided, to prevent any Person from engaging in any unfair labor practice...affecting commerce....

Section 10(e) (29 U.S.C. §160(e)):

The Board shall have the power to petition any court of appeals of the United States...wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of

such order....No objection that has not been urged before the Board...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....

Section 10(f) (29 U.S.C. §160(f)):

Any person aggrieved by a final order of the Board granting or Denying in whole or in part the relief sought may obtain a review of such order in 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 of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside....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.

Board's Rules and Regulations Section 102.45(b) (29 C.F.R. § 102.45(b)):

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

Board's Rules and Regulations Section 102.46(b)(1) (29 C.F.R. § 102.46(b)(1)):

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).

Board's Rules and Regulations Section 102.48(d)(1) (29 C.F.R. § 102.48(d)(1)):

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing