

Nos. 11-1295 & 11-1325

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

SFO GOOD-NITE INN, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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)
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) Nos. 11-1295, 11-1325
 v.)
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 NATIONAL LABOR RELATIONS BOARD)
)
 Respondent/Cross-Petitioner)
 _____)

**THE BOARD’S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. SFO Good-Nite Inn, LLC, was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Unite Here! Local 2 was the Charging Party before the Board.

B. Rulings under Review

Good-nite is seeking review of a Decision and Order issued by the Board in case number 20-CA-32754 on July 19, 2011, and reported at 357 NLRB No. 16.

C. Related Cases

None.

s/Linda Dreeben
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Dated at Washington, DC
this 27th day of January 2012

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GLOSSARY

The Act	= The National Labor Relations Act (29 U.S.C. §§ 151 <i>et seq.</i>)
The Board	= The National Labor Relations Board
Br.	= SFO Good-Nite's Opening Brief
Good-Nite	= SFO Good-Nite Inn, LLC
The Union	= Unite Here! Local 2

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

These consolidated cases are before the Court on the petition of SFO Good-Nite Inn, LLC, to review a Decision and Order of the National Labor Relations Board issued on July 19, 2011, and reported at 357 NLRB No. 16. (A. 389.)¹ The Board found that Good-Nite illegally withdrew recognition from Unite Here! Local

¹ “A.” citations are to the Joint Appendix, and “S.A.” citations are to the Supplemental Appendix. References preceding a semicolon are to the Board’s findings, and references following it are to the supporting evidence.

2 (“the Union”) after committing a number of unfair labor practices. The Board has cross-applied for enforcement of its Order.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act,² which empowers the Board to prevent unfair labor practices. The Board’s Order is final under Section 10(e) and (f) of the Act.³ This Court has jurisdiction over the petition and the cross-application for enforcement pursuant to Section 10(e) and (f) of the Act. Good-Nite’s petition for review was filed on August 18, 2011. The Board’s cross-application was filed on September 15, 2011. Both were timely because the Act places no time limitations on such filings.

² 29 U.S.C. § 160(a).

³ 29 U.S.C. § 160(e) & (f).

STATEMENT OF THE ISSUES

1. **Summary Enforcement.** The Board found that Good-Nite committed numerous unfair labor practices in violation of Section 8(a)(1) and 8(a)(3) of the Act. Good-Nite failed to challenge a number of these findings before the Board and inadequately challenged others in its opening brief to this Court. Is the Board entitled to summary enforcement of these findings?

2. **Unlawful Solicitation with Promise of Benefits.** Management's solicitation of signatures for a decertification petition constitutes coercion, particularly when accompanied by promises of benefits, in violation of Section 8(a)(1) of the Act. The credited testimony shows that Good-Nite's general manager asked two housekeepers to sign an antiunion petition, while offering additional benefits. Does substantial evidence support the Board's finding that this conduct violated the Act?

3. **Withdrawal of Recognition.** It is illegal for employers to withdraw recognition from a union based on decertification petitions that they unlawfully assisted. Managers for Good-Nite repeatedly asked employees to sign a decertification petition, made threats and promises to induce signatures, threatened to fire an employee for opposing the petition, and subsequently withdrew recognition from the Union once a majority of employees signed the petition.

Does substantial evidence support the Board's finding that Good-Nite violated the Act by withdrawing recognition from the Union?

4. **The Remedy.** Because a Board Order imposes a continuing obligation, an employer's compliance does not make a case moot. Here, Good-Nite bargained with the Union for a period, pursuant to a temporary injunction, and then declared impasse. Is the Board's Order, which imposes continuing obligations such as the resumption of a bargaining relationship, entitled to enforcement?

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that Good-Nite violated Sections 8(a)(1), (3), and (5) of the Act⁴ by soliciting employees to sign a decertification petition, threatening employees with loss of benefits or promising new benefits in order to obtain their support for the decertification petition, firing two employees to discourage union activity, and withdrawing recognition from the Union and refusing to bargain based on the decertification petition. (A. 9.) Following a hearing, an

⁴ 29 U.S.C. § 158(a)(1), (3), & (5).

administrative law judge found merit to the General Counsel's allegations and issued a decision and recommended order. (A. 353.)

Good-Nite filed exceptions to some of those findings, and the General Counsel filed limited cross-exceptions. On March 20, 2008, Members Liebman and Schaumber, acting as a two-member quorum, issued a decision finding that Good-Nite violated the Act as alleged in the complaint. (A. 348.) Good-Nite petitioned this Court for review of the Board's order, and the Board cross-applied for enforcement. (A. 361.) The consolidated cases (case numbers 08-1148 and 08-1170) were briefed and then argued on April 16, 2009, before Chief Judge Sentelle and Circuit Judges Henderson and Brown.

On June 17, 2010, before this Court had issued a decision, the United States Supreme Court decided *New Process Steel, L.P. v. NLRB*,⁵ holding that the two-members of a three-member group delegated the Board's powers did not have authority to issue decisions when the group's (and the Board's) membership fell to two. This Court then vacated the Board's 2008 Decision and Order and remanded the case to the Board. (A. 382.)

On July 19, 2011, a three-member panel of the Board issued the Decision and Order currently before this Court, which incorporated by reference most of the Board's previous two-member panel decision and further explained why Good-

⁵ 130 S. Ct. 2635 (2010).

Nite's withdrawal of recognition, based on the decertification petition it unlawfully encouraged and assisted, violated the Act. (A. 389.) Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Good-Nite Purchased a Hotel and Assumed the Previous Owner's Labor Contract with the Union

In March 2004, Good-Nite purchased a hotel near the San Francisco International Airport. (A. 348; 31.) At that time, Good-Nite assumed the prior owner's obligations under a collective-bargaining agreement that was effective through November 2004 and covered 24 housekeeping and maintenance employees. (A. 348; 34.) In August 2004, the Union gave notice of its intent to renegotiate the agreement, and the parties agreed that the contract would remain in effect during bargaining. (A. 348; 226-34, 345.)

The collective-bargaining agreement contained a union-security clause requiring employees to pay dues as a condition of employment. (A. 348, 354; 323.) On August 23, 2005, while negotiations for a new contract were ongoing, the Union demanded that several housekeeping employees who had fallen behind in their dues payments make the required payments or be discharged as required under the contract. (A. 348, 354; 317.)

B. Managers Asked Three Housekeeping Employees To Sign Antiunion Petitions, Accompanied by Threats and Promises of Benefits

On August 31, 2005, General Manager Afzal Chaudhry met with Christina Valencia and Maria Maldonado, two of the housekeeping employees who owed union dues, to discuss payment of those dues. (A. 348; 84, 202-03, S.A. 8-9.) Banquet Manager Naomi Grace Vargas served as interpreter. (A. 348; 85, S.A. 8-9.) Chaudhry informed Valencia and Maldonado that they owed the Union \$400 in dues and that the Union would have them fired if they did not pay the outstanding amounts. (A. 348-49; 85.) He then stated that the Union was “no good,” that the Union was costing Good-Nite a lot of money, that he was willing to give employees additional benefits, and that they could sign a “paper” to “de-unionize.” (A. 349; A. 85, 105.) Chaudhry told Valencia and Maldonado to go have lunch and then come back later to sign “the paper.” They did not return to his office and did not sign any antiunion petition. (A. 349; 86-87.)

Two hours later, Banquet Manager Vargas approached Valencia while she was cleaning a room and said that Chaudhry was awaiting a response and had expected Valencia and Maldonado back in his office. (A. 349; 86.) Vargas asked Valencia if she was going to sign “the paper” and why she and Maldonado did not want to “deunionize.” (A. 349; 86.)

Around the same time, in late August, Assistant General Manager Leah

Aquino approached housekeeping employee Margarita Taloma at work and asked her to sign an antiunion petition. (A. 349; 45-51.) Aquino said that Taloma's situation might get worse if the hotel stayed unionized because the Union might only let her work part time. (A. 349; 46.) Aquino said that, if Taloma signed the petition, she would help Taloma keep her hours. Taloma refused to sign the petition. (A. 349; 46-47, 50.) A few days later, in early September, Aquino unexpectedly arrived at Taloma's home and again asked her to sign an antiunion petition. Taloma refused. (A. 349; 57-58, 216-20, S.A. 24-27.)

C. Word of Management's Solicitations Spread Through the Unit and Beyond

Maldonado and Valencia each told housekeeping inspector Consuelo Contreras, who was on the Union's negotiating committee, that the general manager asked them to sign a decertification petition. (A. 392 n.29; 87, 90, 126-28, 131.) Similarly, Maldonado told coworker Luz Verdin that she was afraid management would make her sign the decertification petition or lose her job. (A. 392 n.29; 80-81.) Housekeeper Taloma also told Contreras about management's solicitations. (A. 392 n.29; 50-52, 60, 132-34.) Word of these events spread through the unit and beyond. (A. 73, S.A. 1-3, 22-23.) One employee testified that "[t]here were rumors about signatures that were being requested for nonunionizing." (S.A. 1.) Even an employee who was on medical leave heard "rumors" about the petition. (S.A. 22-23.) By September 7, union

field representative Harry Young had heard that management had been asking employees to sign a decertification petition. (S.A. 28-29.)

The hotel's staff engaged in frequent conversation about whether the Union would be decertified and how that would affect employees. (A. 392 n.29.) The front desk staff (who were not in the bargaining unit) and the housekeeping staff ate lunch together everyday, and they regularly discussed the Union's status. (A. 156-57, 161, S.A. 3, 5-7, 10-12, 14-15.) One front desk employee testified that "everybody was talking about the union." (S.A. 10.) Even the banquet manager, whose job had nothing to do with housekeeping, testified that "[p]eople talk in the hotel, everybody talks to each other.... everybody talks about everything." (S.A. 12-13.)

D. Management Threatened To Fire an Employee for Urging Coworkers Not To Sign an Antiunion Petition and Fired Two Employees Who Previously Refused To Sign a Petition

On September 3, 2005, two employees started circulating union disaffection petitions, both of which stated: "We no longer want to be represented by [the Union]." (A. 356; 270-71.) On September 6, employee Contreras urged a coworker not to sign the petition. (A. 349; 134, 138-39.) Two hours later, General Manager Chaudhry and Eric Yokeno, an owner of Good-Nite, called Contreras into the office and asked why she was telling employees not to sign the antiunion petition. (A. 349; 26, 137.) Chaudhry told Contreras that she could be fired for

doing that during work time. (A. 349; 137.) Good-Nite did not have a work rule against solicitation. (A. 349; 40-41.)

On September 7, General Manager Chaudhry called housekeepers Valencia and Maldonado into his office, asking employee Contreras to serve as an interpreter. (A. 349, 355; 37, 127-28.) As noted above, Chaudhry had asked these employees to sign a union decertification petition just a week earlier, and they had refused. When Valencia and Maldonado arrived, Chaudhry handed them their final paychecks and fired them, citing a slow down in business. (A. 349, 355; 129.) Contreras, who was the employee most knowledgeable about their work, had never been asked about their work performance and thought they were both good workers. (A. 355; 122-24, 140-41.) Housekeepers Gies and Wu, who had less seniority than Valencia and Maldonado, signed the decertification petition and were not fired. (A. 355-57; 122-26, 270.)

The discharges differed from Good-Nite's normal practice when business slowed down. Typically, each year in early September, the hotel will lay off a few employees because of the seasonal decrease in its occupancy rate after mid-August; when business picks up again, it will recall those employees. (A. 349, 355; S.A. 17-21.) Good-Nite departed from that practice when it fired Valencia and Maldonado rather than laying them off.

E. Relying on Antiunion Petitions, Good-Nite Withdrew Recognition from the Union; Afterwards, a Manager Conditioned an Employee's Vacation Benefits on the Employee's Willingness To Sign an Antiunion Petition

On September 14, 2005, Good-Nite notified the Union that it was withdrawing recognition. Good-Nite based its withdrawal on four antiunion petitions signed by 13 of its 24 unit employees that stated they no longer wished to be represented by the Union. (A. 349, 355; 269-73, 320.)

On October 4, housekeeping employee Luz Verdin asked Assistant Manager Aquino about a vacation request that she had submitted in August. (A. 349; 71-72.) Aquino replied by asking Verdin to sign an antiunion petition. (A. 349; 73.) Aquino told Verdin that most employees had already signed the petition, and that if Verdin would sign it, then Aquino would sign Verdin's vacation request. (A. 349; 74.) Verdin quickly signed the petition, and Aquino signed the vacation request. (A. 349; 75-76.) Aquino then wrote September 14 as the date Verdin signed the petition, to make it appear that she had signed it contemporaneously with Good-Nite's withdrawal. (A. 349; 75-76.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 19, 2011, based on the above facts, the Board (Chairman Liebman and Members Pearce and Hayes) issued a Decision and Order, incorporating much of the reasoning and findings of the Board's 2008 order. The Board found, in agreement with the administrative law judge, that Good-Nite violated Section

8(a)(1) of the Act⁶ by soliciting employees to sign union disaffection petitions, and promising benefits and threatening employees with discharge or loss of benefits in order to coerce them into signing those antiunion petitions. The Board further found, in agreement with the judge, that Good-Nite violated Section 8(a)(3) and (1) of the Act⁷ by discharging employees Valencia and Maldonado to discourage union activities and membership. Also in agreement with the judge, the Board found that Good-Nite unlawfully withdrew recognition of the Union in violation of Section 8(a)(5) and (1) of the Act,⁸ concluding that Good-Nite could not rely on the disaffection petitions, given that its own unlawful actions undermined the petitions' reliability. (A. 348-51, 389-93.)

The Board's Order requires Good-Nite 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 by Section 7 of the Act.⁹ Affirmatively, the Order requires Good-Nite to bargain with the Union upon request, to make employees Valencia and Maldonado whole for the losses they suffered as the result of Good-Nite's discrimination and offer them

⁶ 29 U.S.C. § 158(a)(1).

⁷ 29 U.S.C. § 158(a)(3) and (1).

⁸ 29 U.S.C. § 158(a)(5) and (1).

⁹ 29 U.S.C. § 157.

reinstatement, to remove from its files any reference to the unlawful discharges, and to post a remedial notice. (A. 351-52.)

SUMMARY OF ARGUMENT

Good-Nite asked multiple employees to sign a decertification petition, made threats and promises to coerce their signatures, and threatened to fire an employee who spoke against the decertification effort. These actions are unlawful, and Good-Nite did not contest most of them before the Board or in its opening brief. The Board's Order regarding these unfair labor practices is therefore entitled to summary enforcement.

Good-Nite does contest, however, that it unlawfully asked employees Valencia and Maldonado to sign an antiunion petition while offering to provide them with benefits they were not then receiving. But the Board credited the testimony of Valencia about the incident and disbelieved the denials of Good-Nite's witnesses. The Board's finding is fully supported.

Good-Nite further challenges the Board's policy that an employer's direct participation and unlawful assistance in a decertification campaign will automatically taint the resulting petition and preclude the employer's reliance on it as a basis for withdrawing recognition from the Union. But the Board's rule is rational, consistent with the Act, and based on the Board's long experience, which

has made clear that an employer-assisted petition is an unreliable indicator of employee desire regarding unionization.

Good-Nite contends that the Board was required to apply the causation test articulated in *Master Slack Corp.*¹⁰ However, as this Court has recognized, *Master Slack* is inapplicable because it addresses the very different question of whether unfair labor practices unrelated to a decertification petition contributed to an erosion of union support among employees.¹¹

Finally, Good-Nite claims that the Board's Order is moot because it has supposedly complied with it by bargaining in 2007 pursuant to a temporary injunction, after which it declared impasse. The bargaining that took place does not fulfill Good-Nite's obligations under the Board's Order. Moreover, the Board's orders impose continuing obligations, and the Supreme Court has recognized that even full compliance is not grounds for refusing to enforce them. As such, Good-Nite's petition for review must be rejected, and the Board's Order should be enforced in full.

¹⁰ 271 NLRB 78 (1984).

¹¹ *Bentonite Performance Minerals, LLC v. NLRB*, No. 10-1265, slip op. at 2, 2012 WL 116808 (D.C. Cir. Jan. 10, 2012).

STANDARD OF REVIEW

The Supreme Court has recognized that “Congress made a conscious decision” to delegate to the Board “the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.”¹² For this reason, “[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts.”¹³ This is so “even if [the Court] would have formulated a different rule.”¹⁴ And courts must “give the greatest latitude to the Board when its decision reflects its ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management.”¹⁵

This Court gives great deference to the Board’s factual findings.¹⁶ They are conclusive if supported by substantial evidence on the record as a whole.¹⁷ Additionally, the Court defers “to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a

¹² *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

¹³ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991).

¹⁴ *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990).

¹⁵ *Litton*, 501 U.S. at 201-02 (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

¹⁶ *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008).

¹⁷ *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998).

different conclusion *de novo*.”¹⁸ Further, the credibility determinations of an administrative law judge, when adopted by the Board, ““may not be overturned [by the reviewing court] absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.””¹⁹

ARGUMENT

I. The Board Is Entitled To Summary Enforcement of the Uncontested Portions of Its Order, As Well As the Portions Good-Nite Has Only Summarily Challenged

Before the Board, Good-Nite did not contest the administrative law judge’s findings that it committed a number of violations of Section 8(a)(1) of the Act, and the Board is therefore now entitled to summary enforcement of those findings.²⁰

(A. 348 n.3.) Specifically, Good-Nite filed no exceptions to the judge’s findings that it committed the following unfair labor practices:

- Soliciting employee Taloma to sign an antiunion petition;
- Threatening Taloma with a reduction in hours if the employees chose to remain unionized;
- Promising Taloma benefits if she would sign an antiunion petition;

¹⁸ *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

¹⁹ *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996)).

²⁰ *See Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997).

- Soliciting employee Verdin to sign an antiunion petition;
- Threatening to withhold approval of Verdin’s vacation request unless she signed an antiunion petition;
- Promising to approve Verdin’s vacation request if she signed an antiunion petition; and
- Threatening employee Contreras with discharge if she continued telling employees not to sign antiunion petitions.

As this Court has made clear, because Good-Nite did not file exceptions to those findings. (A. 348 n.3.) Section 10(e) of the Act now jurisdictionally bars Good-Nite from obtaining review of them.²¹ Accordingly, the Board is entitled to summary enforcement as to these violations.

The Board is also entitled to summary enforcement of its order directing Good-Nite to reinstate unlawfully discharged employees Valencia and Maldonado. In the facts section of its opening brief, Good-Nite disputes (Br. 15-17) one fact related to the Board’s findings that it discriminatorily selected employees Valencia and Maldonado for discharge because they refused to sign antiunion petitions. Specifically, Good-Nite contends – contrary to the credited evidence – that it asked the employees to sign a union membership application, not an antiunion petition (discussed below, pp. 18-20). But it fails to challenge the Board’s determinations that the discharges were unlawful in the argument section of its brief.

²¹ *W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); 29 U.S.C. § 160(e)).

This Court has “repeatedly held that [it] will not address an ‘asserted but unanalyzed’ argument because ‘appellate courts do not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties.’”²² Accordingly, the Court has held arguments waived where, as here, they consist only of a claim “alluded to . . . in the statement of facts.”²³

II. Substantial Evidence Supports the Board’s Finding that Good-Nite Unlawfully Solicited Employees Valencia and Maldonado To Sign an Antiunion Petition Along with Promising Benefits

Section 7 of the Act²⁴ guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) of the Act²⁵ implements that guarantee by making it an unfair labor practice for employers to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” It is beyond dispute – and Good-Nite does not contend otherwise – that an employer violates Section

²² *SEC v. Banner Fund Int’l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (collecting cases); *see United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (a party must do more than “merely mention a possible argument in the most skeletal way, leaving the court to do counsel’s work”).

²³ *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

²⁴ 29 U.S.C. § 157.

²⁵ 29 U.S.C. § 158(a)(1).

8(a)(1) by soliciting signatures for a petition to decertify a union, and by making threats or promises in connection with such a solicitation.²⁶

Here, the record fully supports the Board’s finding (A. 349) that Good-Nite unlawfully solicited employees Valencia and Maldonado to sign a decertification petition. As Valencia testified, General Manager Chaudhry called Valencia and Maldonado into his office, said that the Union would have them fired for failing to pay their union dues, and said he was willing to give them “paid vacation, Kaiser [health insurance], and a free day,” benefits they were not then receiving. (A. 349; 85.) He then asked them to “sign a paper for him that would de-unionize the firm.” (*Id.*) The judge found Valencia’s testimony credible, and rejected Chaudhry’s denials because he was “an unreliable witness.” (A. 354 n. 5.)

Good-Nite does not claim that asking employees to sign a decertification petition while offering inducements is permissible. It argues instead (Br. 45-46) that this Court should reject the judge’s credibility determinations because, it

²⁶ *Wayneview Care Center v. NLRB*, No. 10-1398, ___ F.3d ___, 2011 WL 6450764 at *9 (D.C. Cir. Dec. 23, 2011) (“‘There is no question’ that an employer ‘promising better economic benefits’ to employees or ‘threatening [them] with the loss of their jobs’ to induce them to sign a decertification petition constitutes ‘ample grounds for a violation of section 8(a)(1) of the Act.’”) (quoting *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 3 (D.C. Cir. 1980)); *see also* *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 164 (1st Cir. 2005); *V&S Progalv v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999); *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991); *NLRB v. United Union of Roofers, Local 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990).

claims, no petition existed on August 31 so “the paper” mentioned by Chaudhry must refer to a union membership application, not a union disaffection petition. But Good-Nite concedes (Br. 45) – as it must – that a party seeking to reverse the Board’s credibility determinations bears a heavy burden. Indeed, such credibility determinations “may not be overturned [by the reviewing court] absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible.”²⁷

There is simply nothing incredible about Valencia’s testimony. She testified clearly and consistently that Chaudhry asked her and Maldonado to sign a paper to “de-unionize” or “get rid of the Union.” (A. 85, 105.) And despite Good-Nite’s claim (Br. 46), there was no contradiction between Valencia’s testimony and the affidavit she previously gave to the Board. Valencia did not testify that Chaudhry showed her and Maldonado a petition; he asked “if [they] were willing” to sign one. (A. 85.) Whether a petition already existed at that time or Chaudhry intended to create one if Valencia and Maldonado were willing to sign it, the credited testimony shows that Chaudhry unlawfully asked them to sign a decertification petition. The record therefore fully supports the Board’s findings, and Good-Nite’s attempt to manufacture inconsistencies in the testimony should be rejected.

²⁷ *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (alterations in original) (quoting *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996)).

III. The Board Reasonably Found that Good-Nite Violated Section 8(a)(5) and (1) by Withdrawing Recognition from the Union Based on Petitions Tainted by Good-Nite's Unlawful Conduct

The bulk of Good-Nite's brief (Br. 21-45) is devoted to attacking the Board's holding (A. 389) that an employer may not withdraw recognition based on a petition that it unlawfully assisted, even absent specific proof of the misconduct's effect on employee choice. As explained below, the Board's rule is rational, consistent with the Act, and based on the Board's long experience in this area. It is therefore entitled to deference from this Court.²⁸

A. If No Contract Is in Effect, an Employer with Clean Hands May Withdraw Recognition from a Union that Has Actually Lost Majority Support

The principles governing an employer's withdrawal of recognition from an incumbent union are well settled. Section 8(a)(5) of the Act²⁹ requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. To promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority

²⁸ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991).

²⁹ 29 U.S.C. § 158(a)(5). An employer who violates Section 8(a)(5) commits a derivate violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

status.³⁰ The presumption of majority status is irrebuttable for up to 3 years during the term of a collective-bargaining agreement; after 3 years or upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable.³¹

Once the presumption becomes rebuttable, an employer may lawfully withdraw recognition from a union if it has objective evidence that the union actually lacked majority support at the time recognition was withdrawn.³² This is an affirmative defense.³³ To make such a showing, the employer must come forward with “objective” evidence of the union’s loss of majority support, “evidence external to the employer’s own (subjective) impressions.”³⁴ Only by making such a showing may an employer “overcome the presumption that an incumbent union enjoys majority support.”³⁵

³⁰ *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007).

³¹ *Auciello*, 517 U.S. at 785-87; *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1187 (D.C. Cir. 2008).

³² See, e.g., *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001).

³³ *Flying Food*, 471 F.3d at 184 (quoting *Levitz*, 333 NLRB at 725); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (noting that an employer bears the burden of proving that it had sufficient justification for withdrawing recognition from the union).

³⁴ *Pacific Bell v. NLRB*, 259 F.3d 719, 723 (D.C. Cir. 2001).

³⁵ *Marion Hosp. Corp. v. NLRB*, 321 F.3d 1178, 1184 (D.C. Cir. 2003).

Generally, a petition signed by a majority of employees stating that they no longer wish to be represented by the union meets the employer's burden, absent countervailing evidence.³⁶ Indeed, the Board has long held, with court approval, that such petitions signed by a majority of employees "will afford an employer a reasonable basis for withdrawing recognition from a labor organization, provided that, prior thereto, the employer has not engaged in conduct designed to undermine employee support for, or cause their disaffection with, the union."³⁷ Accordingly, an employer who has committed no such unfair labor practices may withdraw recognition if it receives such a petition.³⁸

B. An Employer May Not Withdraw Recognition Based On a Petition that It Unlawfully Assisted, Supported, or Encouraged

The Board has long held that an employer cannot withdraw recognition based on a decertification petition that it has unlawfully assisted by "actively soliciting, encouraging, promoting, or providing assistance in the initiation,

³⁶ See *Flying Food*, 471 F.3d at 182; *Levitz*, 333 NLRB at 725 n.49.

³⁷ *Hearst Corp.*, 281 NLRB 764, 764 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988).

³⁸ See *Shaws Supermarkets, Inc.*, 350 NLRB 585, 585 (2007) (finding employer did not violate Act by withdrawing recognition based on petition where "[t]he General Counsel d[id] not contend that the petition was tainted by any unfair labor practices").

signing, or filing” of such a petition.³⁹ (A. 389-90.) This rule is well-settled, and Board decisions applying it have been enforced by this Court⁴⁰ and a number of others.⁴¹ As the Seventh Circuit explained, “[t]he Board has long taken the view that an employer-assisted decertification petition ought to be canceled and the party returned to the status quo ante. The petition, tainted by the employer’s unfair

³⁹ *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998), *enforced mem. sub nom. NLRB v. R.T. Blankenship & Assocs.*, 210 F.3d 375 (7th Cir. 2000).

⁴⁰ *Caterair Int’l v. NLRB*, 22 F.3d 1114, 1119 (D.C. Cir. 1994) (enforcing Board’s determination that employer was precluded from “relying upon the tainted decertification petition as the basis for withdrawing recognition of and refusing to bargain with the Union” where it actively solicited employees’ signatures); *Bentonite Performance Minerals, LLC v. NLRB*, No. 10-1265, slip op. at 2 (D.C. Cir. Jan. 10, 2012) (“The Board has multiple times ruled that employer solicitations of employer signatures on a decertification petition will ‘taint’ the petition and render it invalid.”).

⁴¹ *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281 (6th Cir. 1999) (stating that, where employer assisted decertification petition, “the petition was tainted and [the employer] therefore cannot in fact rely upon the petition as the basis of Union decertification”); *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993); *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433-34 (8th Cir. 1991) (stating employer’s “illegal solicitation of withdrawal cards tainted its withdrawal of recognition”); *United Union of Roofers, Waterproofers & Allied Workers Union No. 81 v. NLRB*, 915 F.2d 508, 512 n.6 (9th Cir. 1990) (stating it is illegal for an employer to solicit signatures for a petition, and that “[a]n employer’s withdrawal of recognition predicated on such a ‘tainted’ petition will be held unlawful”); *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1235 (5th Cir. 1984) (finding withdrawal of recognition illegal where “it was based upon the anti-union petition which had been tainted by the Company’s unlawful encouragement and assistance”); *Garrett R.R. Car & Equip. v. NLRB*, 683 F.2d 731, 737-38 (3d Cir. 1982) (“The two superintendents actively encouraged the petition. . . . Under these circumstances, the company cannot rely on the petition.”).

labor practices, is a nullity.”⁴² Accordingly, a withdrawal of recognition based on a tainted decertification petition violates Section 8(a)(5) and (1) of the Act.⁴³

The Board made clear in its decision here that its long-held policy is based on a “conclusive presumption” that an employer’s commission of such unfair labor practices taints the reliability of a resulting petition, and therefore there is no need for specific proof of the misconduct’s effect on employee choice. As the Board explained, that policy is reasonably premised on the foreseeable result of such employer misconduct. Moreover, such a clear rule encourages employers to comply with the law by preventing them from enjoying the fruits of their unfair labor practices. As shown below, the Board’s policy is reasonable, consistent with the Act, and based on decades of experience in this area. It is therefore entitled to deference from this Court.⁴⁴

1. An unlawfully assisted decertification petition is an unreliable indicator of employee choice

It has long been established that an employer may only withdraw recognition from a union based on “objective” evidence of a loss of majority support in its

⁴² *Ron Tirapelli*, 987 F.2d at 442.

⁴³ *Bentonite Performance Minerals*, 355 NLRB No. 104 (2010), enforced No. 10-1265, 2012 WL 116808 (D.C. Cir. Jan. 10, 2012); *Texaco*, 722 F.2d at 1235-36.

⁴⁴ *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002) (noting that courts “must accord [the Board’s] legal rules ‘considerable deference’”) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990)).

possession at the time of withdrawal.⁴⁵ The Board has determined that employer-assisted petitions are unreliable indicators of employee desire, and they therefore do not qualify as “objective evidence.” (A. 389-90.)

An employer-assisted petition does not represent “the free and uncoerced act of the employees concerned.” (See A. 389-90.) Rather, employees, due to “their economic dependence upon the Company, may feel the need to sign the petition in order to curry favor with or avoid disapprobation by Company officials.”⁴⁶

Accordingly, when an employer unlawfully thrusts itself into a decertification effort, “the objective ‘foreseeable consequence’ of [such] misconduct . . . is ‘an inherent tendency to contribute to the union’s loss of majority status.’” (A. 392 (quoting *Hearst Corp.*⁴⁷ and *Caterair International.*⁴⁸)) Such a petition is therefore “plagued with uncertainty because of the very nature of the employer’s unfair labor

⁴⁵ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987) (stating withdrawal must be based on objective evidence); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007).

⁴⁶ *Texaco*, 722 F.2d at 1233; see also *Briggs Plumbingware*, 286 NLRB 1189, 1201 (1987) (“A company-sponsored meeting to obtain antiunion evidence from employees would naturally attract employees attempting to gain favor with management.”).

⁴⁷ 281 NLRB 764, 765 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988).

⁴⁸ 309 NLRB 869, 880 (1992), *enforced in relevant part*, 22 F.3d 1114 (D.C. Cir. 1994).

practices,” and “is *per se* insufficient to rebut the presumption of continuing majority status.” (A. 391).⁴⁹

This is so even in cases where there is no direct evidence that any of the petition signers were aware of their employers’ unfair labor practices. (A. 392 n.29.) In the Board’s long experience in this area, and as this very case makes clear (see above pp. 8-9), employees regularly talk to each other about what goes on in the workplace,⁵⁰ and therefore “proving that [such conversations] occurred is not necessary to conclude that an employer’s coercive participation in a decertification effort undermines the reliability of a resulting petition.” (A. 392 n.29.) As the Board noted in *Caterair*, “it may be presumed that employees who signed the petition on the solicitation of other unit employees were aware of the

⁴⁹ See also *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991) (stating employer’s direct involvement in decertification effort “undermine[s] the probative value” of resulting petition); *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 443 (7th Cir. 1993) (noting “the rather remote possibility that an election conducted under these circumstances might reflect the desires of the employees”).

⁵⁰ See *C.T. Taylor Co.*, 342 NLRB 997, 1002 (2005) (witness testified that “word travels in the field like hotcakes”); *Precoat Metals*, 341 NLRB 1137, 1166 (2004) (witness testified that the “facility is a small plant and that people talk constantly”); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1487 (1992) (witness testified that employer “had no rules ‘prohibiting’ employees from ‘speaking to each other at work’ and it was ‘common to see people talk’ ‘all day long’”); *Gupta Permold Corp.*, 289 NLRB 1234, 1248 (1988) (witness testified that “word [of a dispute between manager and union organizers] spread rapidly to other employees inside the facility”); *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985) (employee testified “that he had heard ‘somebody went up to the front office, said there was threats going on, and it spread all over the shop’”).

[employer’s unlawful acts], and such knowledge is likely to have influenced their decision.”⁵¹ This Court agreed that such an inference was reasonable:

“Acknowledging testimony of the employee rumor mill, the ALJ reasoned that even those employees who had not personally been solicited by management had presumably been aware of and influenced by management’s full-scale efforts. . . . We find no cause to quibble with the ALJ’s conclusion.”⁵²

In holding the presumption of taint from unlawful employer involvement in a decertification petition to be conclusive, the Board also reasonably concluded that it would be inappropriate for an employer to attempt to prove the petition’s reliability by cross-examining the employees who signed it about their knowledge of their employer’s unfair labor practices.⁵³ As the Supreme Court has recognized, testimony about employees’ desire for union representation is inherently unreliable: “employees are more likely than not, . . . in response to questions by company counsel, to give testimony damaging to the union. . . . We therefore

⁵¹ *Caterair Int’l*, 309 NLRB 869, 880 (1992), *enforced*, 22 F.3d 1114 (D.C. Cir. 1994); *see also Hancock Fabrics*, 294 NLRB 189, 192 (1989), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990) (a decertification petition will be found tainted “even though a majority of the petition signers profess ignorance of their employer’s conduct”).

⁵² *Caterair*, 22 F.3d at 1119, 1121.

⁵³ *Hearst Corp.*, 281 NLRB 764, 765 (1986), *enforced mem.*, 837 F.3d 1088 (5th Cir. 1988).

reject any rule that requires a probe of an employee’s subjective motivations as involving an endless and unreliable inquiry.”⁵⁴

Finally, permitting such an after-the-fact inquiry into the evidentiary value of the petition would conflict with the requirement that the employer must possess objective evidence of lack of majority support “at the time of withdrawal.”⁵⁵

Allowing an employer to withdraw recognition first and ask questions later to find out whether its employees were influenced by its unfair labor practices turns this long-standing rule on its head.

2. The Board’s policy creates a strong incentive for employers to comply with the law

Further justifying the rule prohibiting an employer from relying on a decertification petition it helped foment, the Board has explained that it is “unwilling to allow [an employer] to enjoy the fruits of its violations . . . , but rather shall hold it responsible for the predictable consequences of its misconduct, i.e., its employees’ rejection of [the union] as their bargaining representative.”⁵⁶

⁵⁴ *NLRB v. Gissel Packing, Inc.*, 395 U.S. 575, 608 (1969).

⁵⁵ *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007) (employer must have “objective evidence” in its “possession at the time of withdrawal”).

⁵⁶ *Hearst Corp.*, 281 NLRB at 765; *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996) (enforcing rule “designed ‘to prevent the wrongdoer from enjoying the fruits of his unfair labor practices’”) (quoting *John Zink Co.*, 196 NLRB 942, 942 (1972)); *Pegasus Broad. of San Juan, Inc. v. NLRB*, 82 F.3d 511, 514 (1st Cir. 1996) (same).

Reasoning that “[a]ny other rule would . . . allow [the employer] to take advantage of its coercion so long as its victims remained silent” (A. 392), the Board adopted a clear rule that encourages compliance with the law.⁵⁷ Because employers will not be permitted to capitalize on their unlawful actions, they have a strong incentive to leave the decision to decertify a union to their employees.⁵⁸

Indeed, as the courts have recognized, permitting an employer “‘to retain the fruits of unlawful action’ . . . render[s] the guarantees embodied in the National Labor Relations Act ‘meaningless.’”⁵⁹ In fashioning its rules, “the Board should attempt to ‘both compensate the party wronged and withhold from the wrongdoer the ‘fruits of its violation.’”⁶⁰ The Board’s rule does just that.

⁵⁷ *See Resorts Int’l Hotel Casino v. NLRB*, 996 F.2d 1553, 1558 (3d Cir. 1993) (approving of decision that “allows all parties to rely on a clear rule and to adjust their behavior accordingly”).

⁵⁸ *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) (“It is for the employees alone to decide whether they wish to be represented by a union in the first instance The employer, although an interested party, has a limited role in the representational choice of employees.”).

⁵⁹ *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 275 (9th Cir. 1988) (quoting *NLRB v. Warehousemen’s Union Local 17*, 451 F.2d 1240, 1243 (9th Cir. 1971)); *see also A.W. Thompson, Inc.*, 651 F.2d at 1144 (permitting employer “to use the fruits of such a[n illegal] poll to support a withdrawal of recognition would be contrary to the purposes of the labor act”).

⁶⁰ *Mead Corp. v. NLRB*, 697 F.2d 1013, 1023 (11th Cir. 1983).

C. The Board Reasonably Found that Good-Nite’s Unlawful Assistance to the Decertification Effort Tainted the Petition and Prohibited Good-Nite from Withdrawing Recognition Based on that Unreliable Petition

As shown above (pp. 16-20), Good-Nite committed unfair labor practices that were “directly related to furthering” a decertification effort. (A. 391.) Good-Nite unlawfully coerced three of its housekeepers by asking them to sign a decertification petition, accompanied by promises of benefits and threats of reprisal, and threatened a fourth employee with discipline for urging her coworkers not to sign a petition. In that coercive context, a majority of employees subsequently signed a decertification petition. Under the Board’s policy, consistent with longstanding precedent, Good-Nite could not withdraw recognition based on the petition it rendered unreliable. (A. 389-92.)

Good-Nite’s claim (Br. 13-14, 29) that some of its unfair labor practices occurred after the Union lost majority support is irrelevant. When it asked employees Valencia and Maldonado to sign a petition on August 31, in the context of offering them additional benefits, asked employee Taloma to sign a petition in late August and again in early September, and when it threatened employee Contreras with discharge for opposing the decertification effort on September 6 – prior to any claim of loss of majority – SFO poisoned the well of any decertification movement, injecting substantial uncertainty into the resulting petitions. (*See* A. 389-90.)

Furthermore, while specific evidence that the petition signers were aware of their employer's unfair labor practices is not necessary (A. 392 n.29), Good-Nite's claim (Br. 15, 30) that its unlawful actions were never disseminated is contradicted by the record. All three housekeepers whose signatures were illegally solicited notified Contreras, who was on the Union's negotiating committee. (A. 392 n.29; 50-52, 60, 87, 90, 126-28, 131-34.) One of them also told housekeeper Luz Verdin. (A. 392 n.29; 80-81.) Talk of the decertification petition spread throughout the hotel. (S.A. 1-4, 22-23, 28-29.) As one witness testified, "[t]here were rumors about signatures that were being requested for non-unionizing." (S.A. 1.)⁶¹

Good-Nite next speculates (Br. 28, 30-31) that employees had legitimate reasons to decertify their union, such as the Union's enforcement of the union security clause requiring employees to be union members and employees' lack of health insurance, which Good-Nite asserts was causing "great concern." However, such conjecture about reasons employees might have had for signing the petition is irrelevant. Having unlawfully injected itself into the decertification effort, the "predictable result" was a "petition plagued with uncertainty." (A. 391.) Having

⁶¹ Although Good-Nite claims (Br. 11, 30 n.11) that language barriers impeded conversation among employees, a number of employees are multi-lingual and others are sufficiently proficient in English to discuss union matters. (A. 46, 54, 72-73, 128, 161, 201, S.A. 12-13, 16.)

created that uncertainty, Good-Nite cannot rely on speculation about why employees might have signed the petition.⁶² (See A. 391 n.19.) Rather, Good-Nite's unfair labor practices tainted the petition and precluded Good-Nite from relying on it to withdraw recognition.⁶³

D. Good-Nite's Claims that the Board Applied the Wrong Line of Precedent and Departed from Precedent Are Mistaken

1. *Master Slack* does not apply to cases of direct employer involvement in a decertification effort

Good-Nite misperceives (Br. 21-45) the settled law applicable to this case, which holds that an employer may not lawfully withdraw recognition based on a petition if it directly participates in and unlawfully assists a decertification effort. Good-Nite contends the Board should have applied the four-factor causation analysis from *Master Slack Corp.*⁶⁴ Good-Nite is wrong.

There are two ways a decertification petition by employees can become tainted by an employer's unfair labor practices and therefore an unreliable

⁶² See *House of Good Samaritan*, 319 NLRB 392, 396 (1995) (stating "any ambiguity as to whether employees would independently have arrived at the same decision would be decided against the employer engaging in the misconduct").

⁶³ Good-Nite's claim about health insurance is disingenuous given that Good-Nite failed to make contractually-required payments to the health and welfare fund. (A. 235-36, 239.) And contrary to Good-Nite's speculation, the only employee to testify to her reasons for signing the petition did not understand that it was a request to oust the Union. (S.A. 14.)

⁶⁴ 271 NLRB 78 (1984).

indicator of employee desire regarding unionization.⁶⁵ The first is explained above and demonstrated by the facts of this case: where an employer is directly involved in advancing a decertification petition, it may not lawfully withdraw recognition from the union based on the petition. (A. 389.) In these cases, the Board does not use the *Master Slack* test.⁶⁶

In the second type of case, the employer does *not* unlawfully assist a decertification petition; in fact, the employer may not even be aware that such a petition is being circulated.⁶⁷ But if the employer committed unfair labor practices *unrelated to the petition* that “contributed to the erosion of support for the union,” the Board will find the petition to be similarly “tainted.”⁶⁸ In such cases, the Board

⁶⁵ See *Bentonite Performance Minerals, LLC v. NLRB*, No. 10-1265, slip op. at 2, 2012 WL 116808 (D.C. Cir. Jan. 10, 2012).

⁶⁶ *Id.*; see also *Narricot Indus. L.P. v. NLRB*, 587 F.3d 654, 665 (4th Cir. 2009), *abrogated on other grounds by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), which, because it was a two-member decision, the Board relied on “for its persuasive value only” in explaining the differences between *Master Slack*’s causation analysis and the conclusive presumption applied in *Hearst* (A. 390 n.9). To the extent that the Board has occasionally applied *Master Slack* in cases involving direct participation in a decertification effort, the Board here clarified the proper analysis. (A. 393 n.33.)

⁶⁷ *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 183 (4th Cir. 2003) (applying *Master Slack* in case where manager “was unaware that the drivers were circulating [the petition]”).

⁶⁸ *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737-38 (D.C. Cir. 2000); accord *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 634 (2007) (no allegation employer unlawfully assisted petition); *NLRB v. Transpersonnel*, 349 F.3d 175, 188 (4th Cir. 2003) (same); *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 14 (1st

applies its four-factor *Master Slack* test to determine the existence of a causal connection between the employer’s unrelated unfair labor practices and the petition.⁶⁹ Where “there is no straight line between the employer’s unfair labor practices and the decertification campaign, . . . the *Master Slack* test must be used to draw one, if it exists.” (A. 390.) And if this analysis reveals a causal relationship between the employer’s wrongful conduct and the decertification effort, the employer cannot rely on the petition to withdraw recognition.⁷⁰

Here, the Board reasonably declined (A. 389) to apply *Master Slack*. Because the employer *directly* assisted and advanced the decertification effort – by coercively asking employees to sign a petition and unlawfully threatening to fire an employee for opposing it – the Board need not make a specific causation finding under the four-factor *Master Slack* test.⁷¹ Instead, as shown above, the Board

Cir. 2001) (same); *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 520 (4th Cir. 1998) (same).

⁶⁹ *Master Slack*, 271 NLRB 78, 78 n.1 (1984); *Bentonite Performance Minerals, LLC v. NLRB*, No. 10-1265, slip op. at 2 (Jan. 10, 2012) (recognizing that “the Board . . . has applied *Master Slack* to cases where unfair labor practices not directly related to the decertification process are claimed to have caused the vote in favor of decertification”).

⁷⁰ *Vincent Indus.*, 209 F.3d at 737-38.

⁷¹ *Bentonite*, No. 10-1265, slip op. at 2 (noting that the Board “has traditionally not used the *Master Slack*” test where employer is involved in decertification process itself); *see also Narricot*, 587 F.3d at 665, which the Board relied on “for its persuasive value only” in distinguishing *Master Slack* and *Hearst*. (A. 390 n.9.)

correctly found that Good-Nite’s unlawful participation in the decertification effort directly tainted the petitions. Good-Nite’s wrongful conduct was “not merely coincident with the decertification effort”; rather, Good-Nite “directly instigate[d] or propel[led] it.” (A. 390.) Accordingly, Good-Nite’s claim (Br. 28-29) that the General Counsel was required to establish a causal connection between Good-Nite’s unfair labor practice and the petition is incorrect.

Good-Nite essentially argues (Br. 39-41) that the Board is required to apply the *Master Slack* test in all circumstances involving a decertification petition in the context of any unfair labor practices. But the Board is entitled to apply different tests to circumstances that differ in material respects.⁷² In objecting (Br. 39) that the Board did not explain why its rule is “necessary,” Good-Nite misapprehends the standard of review here. The Board need not prove that its rule is necessary, only that the rule is rational and consistent with the Act.⁷³ Because the Board has “primary responsibility for developing and applying national labor policy,” this

⁷² Cf. *NLRB v. SRDC, Inc.*, 45 F.3d 328, 331 (9th Cir. 1995) (approving Board’s use of two different tests to determine voter eligibility, depending on the circumstances).

⁷³ *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011).

Court gives great deference to its rulings, even if the Court believes “a different rule” would be preferable.⁷⁴

2. The rule applied here is consistent with Board precedent

Good-Nite further claims (Br. 35-36) that the Board departed from precedent because the Board’s cited cases all involved petitions that would have foundered “but for” the employer’s assistance. This is mistaken. A review of these cases reveals that the Board has clearly and repeatedly, over the course of several decades, set out the rule it applied here without once suggesting such a “but for” analysis.⁷⁵ While Good-Nite claims (Br. 32) the Board “resurrected” a “little used

⁷⁴ *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)).

⁷⁵ *V&S ProGalv, Inc.*, 323 NLRB 801, 808 (1997) (stating employer violated the Act by “solicit[ing] its employees to circulate the petition” and therefore “the petition is tainted”), *enforced*, 168 F.3d 270 (6th Cir. 1999); *Tyson Foods*, 311 NLRB 552, 555 (1993) (where “employer aids or supports” petition, “the Board has held that the evidence of withdrawal or disaffection thus procured by the employer cannot serve as the requisite objective basis upon which a lawful withdrawal of recognition must be predicated”); *Am. Linen Supply*, 297 NLRB 137, 137-38 (1989) (stating employer’s “aid and support to employees in the filing of the withdrawal cards violated Section 8(a)(1) and thus tainted the Respondent’s withdrawal of recognition”); *Hancock Fabrics*, 294 NLRB 189, 192 (1989) (employer who solicited employees to sign petition may not “rel[y] on a tainted decertification petition”), *enforced*, 902 F.2d 28 (4th Cir. 1990); *Hearst*, 281 NLRB at 764 (stating employer “will be precluded from relying on the tainted petition as a basis for questioning the union’s continued majority status and withdrawing recognition from that labor organization”); *Weisser Optical Co.*, 274 NLRB 961, 961-62 (1985) (employer “implanted [idea for petition] in the employees’ minds” and therefore “could not rely on the tainted” petition), *enforced*, 787 F.2d 596 (7th Cir. 1986); *Texaco, Inc.*, 264 NLRB 1132, 1133

precedent” in citing *Hearst*, the rule applied in that case and numerous others is well established and accepted by this and other courts (*see* p. 24). In none of these cases did the Board make any finding that the decertification effort involved would have foundered “but for” the employer’s assistance.

Good-Nite is also wrong on the facts. While Good-Nite has highlighted the cases involving the most egregious employer conduct to suggest that its own conduct is qualitatively different (Br. 35-36), the Board has also applied its rule where the employer’s behavior was less severe but nonetheless constituted direct assistance to a decertification effort. For example, in *Manhattan Eye, Ear & Throat Hospital*, the Board held, and the Second Circuit agreed, that the employer was precluded from relying on an employee petition where a supervisor solicited 4 of 100 employees in the bargaining unit to resign from the union.⁷⁶

*House of Good Samaritan*⁷⁷ is another case in which the Board applied the same rule as here. There, two employees initiated the decertification effort, and management did not ask a single employee to sign the petition. But a manager arranged for an employee gathering signatures to meet with other employees; two

(1982) (stating employer “unlawfully aided in the circulation of the petition” and therefore “tainted petition”); *Crafttool Mfg. Co.*, 229 NLRB 634, 637 (1977) (because “petitions were secured through unlawful assistance,” employer “could not properly rely in good faith on those petitions”).

⁷⁶ 280 NLRB 113, 114-15 (1986), *enforced mem.*, 814 F.2d 653 (2d Cir. 1987).

⁷⁷ 319 NLRB 392 (1995).

supervisors participated at that meeting, giving the impression that management supported the decertification effort; and a manager helped an employee contact others who had not been at the meeting to ask them to sign the petition.⁷⁸ Citing *Hearst*, the Board found that the employer violated the Act by withdrawing recognition based on the tainted petition.⁷⁹ The Board did “not require proof of how many employees were exposed to or were aware of the employer’s illegal conduct,” nor did it “inquire whether such conduct actually coerced employees to withdraw their union support.”⁸⁰ Rather, the Board dismissed the idea of a but for analysis when it noted that “any ambiguity as to whether employees would independently have arrived at the same decision would be decided against the employer engaging in the misconduct.”⁸¹

When all of the Board’s cases are considered together, Good-Nite’s argument – that the Board’s precedent requires the application of a “but for” test not used here – unravels. Instead, what controls is whether the employer has “directly instigate[d] or propel[led]” a decertification effort, as the Board here concluded (A. 390, emphasis added). Good-Nite at a minimum propelled the

⁷⁸ *Id.* at 394-95, 397.

⁷⁹ *Id.* at 396.

⁸⁰ *Id.*

⁸¹ *Id.*

antiunion petitions by repeatedly soliciting signatures and threatening an employee for telling coworkers not to sign. And, while employer instigation is not required to find taint, here there is no evidence of any employee decertification movement before August 31 when Good-Nite began soliciting signatures for such a petition.

Contrary to Good-Nite's claim (Br. 37-38), *Mathews Readymix, Inc.*⁸² is consistent with the Board's decision here. The Board in that case applied *Master Slack* to determine that questions about union membership on a job application tainted a decertification petition.⁸³ Because there was "no straight line" (A. 390) between the illegal questions and the petition in that case, the Board used *Master Slack* to draw one.⁸⁴ Although the employer in *Mathews Readymix* had also asked an employee to sign a petition, the Board did not consider this violation in its analysis.⁸⁵ And the Board in *Mathews Readymix* did not "disavow[] that portion of *Hearst* it now cites," as Good-Nite claims (Br. 38 n.12). Nothing in *Mathews Readymix* can remotely be interpreted as rejecting the *Hearst* rule that an employer may not rely on a petition it illegally assisted.

⁸² 324 NLRB 1005 (1997), *enforced in relevant part*, 165 F.3d 74 (D.C. Cir. 1999).

⁸³ *Id.* at 1007 (stating "the questions regarding union membership were coercive and tainted the petitions").

⁸⁴ *Id.* at 1008.

⁸⁵ *Mathews Readymix*, 165 F.3d at n.* (noting that the Board did not treat the solicitation "as an independent source of taint").

3. Good-Nite incorrectly overstates and speculates about the effect of the Board's rule

Good-Nite hypothesizes (Br. 41-43) that the Board's rule will lead to arbitrary results that do not consider whether an employer's conduct actually affects employees' union views and that the Board will take an "expansive view" of what employer actions further a decertification petition. However, all it can point to are allegations made by the General Counsel in a few cases, all of which were ultimately rejected by the Board. Furthermore, those cases involved the *Master Slack* test rather than the per se rule the Board applied here. Good-Nite's claim (Br. 43) that the Board's decision "invites arbitrary decisions" is unfounded and unpersuasive.

Good-Nite also argues (Br. 35, 43-45) that the Board's rule will lead to an infringement of an employer's free speech rights under Section 8(c) of the Act.⁸⁶ However, Good-Nite failed to make this argument to the Board, and the Court is therefore without jurisdiction to consider it. Section 10(e) of the Act⁸⁷ provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances. Therefore, as

⁸⁶ 29 U.S.C. § 158(c) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.").

⁸⁷ 29 U.S.C. § 160(e)

this Court has recognized, a party cannot for the first time raise an objection to a Board order in court.⁸⁸ This is because the need for ““orderly procedure and good administration”” requires that ““courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.””⁸⁹ Accordingly, the Court lacks jurisdiction to consider this untimely challenge, articulated for the first time in Good-Nite’s appellate brief.⁹⁰

In any event, the Board has never suggested that a petition is tainted “if an employer does anything with or says anything about” it. (Br. 35.) Rather, the Board held that a petition is tainted if an employer “*unlawfully* assisted, supported, or otherwise *unlawfully* encouraged” it. (A. 389, emphasis added.) Accordingly, any statement that is lawful under Section 8(c) would not taint a petition.⁹¹

⁸⁸ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) (“[T]he critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection.”)

⁸⁹ *Harvard Indus. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. LA Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

⁹⁰ *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (party’s failure to present issue to Board “prevents consideration of the question by the courts”).

⁹¹ *See Wilshire Foam Prods.*, 282 NLRB 1137, 1148 (1987) (finding comment that was “legally privileged by Section 8(c)” did not taint petition).

Finally, Good-Nite contends (Br. 43-44) that the Board’s rule is overbroad and will lead to the rejection of petitions that represent the true and uncoerced wishes of employees. But as the Supreme Court has recognized, the Board is “entitled to suspicion when faced with” an employer claiming to be a “vindicator of its employees’ organizational freedom.”⁹² As the Board emphasized, its rule applies only in “the narrow circumstance where an employer unlawfully instigates or propels a decertification campaign, and then invokes the results of that campaign to justify its unilateral withdrawal of recognition from its employees’ representative.” (A. 391.)

The Supreme Court has approved the Board’s use of conclusive presumptions in other contexts, despite the fact that such presumptions may temporarily prevent employees from decertifying their union. For example, in *Fall River Dyeing & Finishing Corp. v. NLRB*,⁹³ the Supreme Court discussed with approval the Board’s conclusive presumption that a union has majority support during the first year following certification. As the Court noted, “[t]hese presumptions are based not so much on absolute certainty that the union’s majority status will not erode following certification, as on a particular policy decision” intended to promote “stability in collective-bargaining relationships” while

⁹² *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1986).

⁹³ 482 U.S. 27 (1987).

“remov[ing] any temptation on the part of the employer to avoid good-faith bargaining.”⁹⁴

Here, the Board engaged in similar policy-making after carefully considering the rights of all parties. Notwithstanding Good-Nite’s claim that the Board’s policy may result in rejection of a petition supported by a majority of employees, that policy reflects a careful consideration of employee free choice, which is what is at stake here. Although some employees who signed the petition may have wanted to decertify the Union, other employees may have signed the petition only as a result of Good-Nite’s unfair labor practices. Whether the Board accepts or rejects the petition, it risks burdening the rights of one group or the other. The Board’s policy reflects its considered determination that rejecting an unlawfully assisted petition best protects employees’ rights, while also deterring unlawful conduct in the future. This is exactly the kind of policy determination the Supreme Court has said is entitled to deference.⁹⁵

⁹⁴ *Id.* at 38 (internal citations and quote marks omitted).

⁹⁵ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201-02 (1991) (stating courts must “give the greatest latitude to the Board when its decision reflects its ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management”) (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

IV. Good-Nite Has Not Complied with the Board's Order, Which Imposes Continuing Obligations and Is Therefore Not Moot

In seeking to avoid this Court's enforcement of the Board's Order, Good-Nite argues (Br. 46-49) that its supposed compliance renders the Board's remedy moot. Good-Nite's argument is flawed both factually and legally.

Before the Board decided this case, the Board's General Counsel obtained temporary injunctive relief under Section 10(j) of the Act⁹⁶ from the U.S. District Court for the Northern District of California.⁹⁷ The district court's order was similar but not identical to the Board's Order. Notably, the district court's order did not require Good-Nite to make whole employees Maldonado and Valencia, it did not require Good-Nite to remove from its files material related to its illegal firing of those employees, and it did not require Good-Nite to turn over certain material to the Board for use in determining compliance. In addition, although the district court ordered Good-Nite to bargain with the Union, its bargaining order was explicitly limited to 90 days.

Subsequently, the Board's General Counsel asked the district court to extend the affirmative bargaining order past 90 days, until the Board issued its decision. The district court, exercising its discretion, declined to do so, noting that 10(j)

⁹⁶ 29 U.S.C. § 160(j).

⁹⁷ *Norelli v. SFO Good-Nite Inn*, Order Granting Motion for Temporary Injunction, No. C06-07335, 2007 WL 662477, at *16-17 (N.D. Cal. Mar. 1, 2007).

injunctions are temporary and that it is the Board that ultimately has the authority to adjudicate unfair labor practices.⁹⁸ The injunction therefore expired.

Good-Nite attempts to mislead this Court when it wrongly states (Br. 47) that “the District Court noted that Good-Nite had provided the affirmative relief required by [its] first Order.” The district court made no such finding regarding Good-Nite’s compliance with its own order. Rather, the district court stated that Good-Nite “insists that it has fully complied with the Court’s affirmative bargaining order” but it noted that “[t]he parties currently dispute whether they have reached a[] good faith impasse in their collective bargaining negotiations.”⁹⁹ Order at 6, 4.

Moreover, there is no evidence before this Court that Good-Nite has fully complied with the Board’s Order. Any impasse the parties may have reached (Br. 49) does not eliminate the requirement that Good-Nite maintain a bargaining relationship with the Union. The Supreme Court stated, in the context of an unlawful withdrawal from multiemployer bargaining, that:

As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases

⁹⁸ *Norelli v. SFO Good-Nite Inn*, Order Denying Motion to Extend Affirmative Bargaining Order, No. C06-07335, 2007 WL 2344994, at *4-5 (N.D. Cal. Aug. 16, 2007).

⁹⁹ *SFO Good-Nite Inn*, Order Denying Motion to Extend Affirmative Bargaining Order, No. C06-07335, 2007 WL 2344994, at *6, 4.

is eventually broken, through either a change of mind or the application of economic force. Furthermore, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Hence, there is little warrant for regarding an impasse as a rupture of the bargaining relation¹⁰⁰

Consequently, any impasse in 2007 would not terminate the bargaining relationship. Even if Good-Nite lawfully implemented its bargaining proposals, it continues to be obligated to bargain over any other changes in terms and conditions of employment, and to bargain for a contract if impasse is broken.

In any event, as the Supreme Court has held, even if Good-Nite *had* fully complied with the Order, the Board would nevertheless be entitled to enforcement.¹⁰¹ Compliance does not render a case moot. A Board order imposes a “continuing obligation” and “provides the Board with an effective enforcement procedure should the employer resume the unfair labor practices in the future.”¹⁰² The Board’s Order requires Good-Nite to cease and desist from like or related unfair labor practices restraining or coercing employees in the exercise of their

¹⁰⁰ *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (internal quotations and citations omitted).

¹⁰¹ *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950) (noting that “[a]n employer’s compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court”); *accord NLRB v. Local 1445, Food & Commercial Workers*, 647 F.2d 214, 217-18 (1st Cir. 1981).

¹⁰² *NLRB v. Unoco Apparel, Inc.*, 508 F.2d 1368, 1371 (5th Cir. 1975).

statutory rights. Because “a remedial order issued by the [Board] is not self-executing . . . the respondent can violate it with impunity until a court of appeals issues an order enforcing it.”¹⁰³ As such, enforcement is required to ensure that Good-Nite complies with all aspects of the Board’s Order.

¹⁰³ *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990).

CONCLUSION

Good-Nite's threats, promises, and solicitation of employees' signatures for a union disaffection petition tainted the petition and precluded its withdrawal of recognition. Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying Good-Nite's petition for review.

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January 2012

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

SFO GOOD-NITE INN, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1295 & 11-1325
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	20-CA-32754

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,357 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/Linda Dreeben (by MF)
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Dated at Washington, DC
this 27th day of January 2012

**STATUTORY
ADDENDUM**

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

* * *

(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 159(a) of this title].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . .

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2012, 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 further certify that all parties are registered CM/ECF users and will be served electronically through the CM/ECF system.

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