

**Nos. 11-1284, 11-1348**

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

**AMPERSAND PUBLISHING, LLC, d/b/a SANTA BARBARA NEWS-PRESS**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	31-CA-27950
	)	
and	)	
	)	
GRAPHICS COMMUNICATIONS	)	
CONFERENCE OF THE INTERNATIONAL	)	
BROTHERHOOD OF TEMASTERS	)	
	)	
Intervenor	)	

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

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

A. Parties and Amici

1. Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press (“the Company”) 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. Graphics Communications Conference of the International Brotherhood of Teamsters (“the Union”) was a Charging Party before the Board and is an Intervenor before the Court.

B. Rulings under Review

The Company is seeking review of a Decision and Order issued by the Board in case number 31-CA-27837 on August 11, 2011, and reported at 357 NLRB No. 51.

C. Related Cases

None.

/s/Linda Dreeben

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Dated at Washington, DC  
this 11<sup>th</sup> day of May, 2012

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

---

**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press (“the Company”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board

Order against the Company. The Graphics Communications Conference of the International Brotherhood of Teamsters (“the Union”) intervened.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)). The Decision and Order, 357 NLRB No. 51 (August 11, 2011) (A 2815-69), is “final” under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), so the Court has jurisdiction over the appeals, both of which were timely.

### **STATEMENT OF THE ISSUES**

1. Whether the Board’s Order, which neither requires nor bars publication of any content, nor affects the Company’s editorial discretion, violates the First Amendment.

2. Whether substantial evidence supports the Board’s finding that the Company committed multiple retaliatory and coercive unfair labor practices.

3. Whether the Court has jurisdiction to consider the Company’s challenges to the Board’s remedial Order.

### **STATEMENT OF THE CASE**

This case came before the Board on consolidated complaints. (A 2827.) Following a hearing, an administrative law judge issued a decision finding that the Company had committed multiple violations of Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)), including threats of discipline, coercive

interrogations, and retaliatory evaluations and terminations. (A 2867.) He then considered several arguments bearing on the remedy, and denied various sanction motions relating to subpoena compliance. (A 2863-68.)

After considering the parties' exceptions, the Board (Chairman Liebman and Member Becker; Member Hayes, concurring) issued a Decision and Order, agreeing (A 2821) with the judge's multiple unfair-labor-practice findings, but declining to pass (A 2821n.19) on one that it found cumulative. In doing so, the Board altered (A 2821nn.21-22,2822) portions of the judge's analysis, and made certain modifications (A 2823-24) to his proposed remedy.

## **STATEMENT OF THE FACTS**

### **A. News-Press Policies Raise Employee Concerns**

The Company publishes the Santa Barbara News-Press. Wendy McCaw, who owns the Company and purchased News-Press in 2000, and Arthur von Wiesenberger serve as copublishers, responsible for all facets of the newspaper. (A 2815,2827-28; 1129,1131.)<sup>1</sup> Travis Armstrong is the editorial-page editor and Scott Steepleton serves as associate editor, overseeing the newsroom. The editors of the business, life, city-desk/news, and sports sections report to Steepleton, who

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<sup>1</sup> Where applicable, references preceding a semicolon are to the Board's findings; those following to the supporting evidence.

is involved in assignments, editing, and personnel decisions. (A 2828,2835,2847; 3-4,990,7-8,76.)

The process of preparing an article for publication at News-Press is, generally, as follows. First, an editor assigns a story, which the reporter writes and submits to that editor, who reviews it for qualities from correct grammar to lack of bias; a longer piece may shuttle between them several times. Another editor then reads the story, also checking for bias, among other things. When complete, it goes to the copy-desk editor, who creates the headline, then to layout and publication. (A 2847; 7-8,138,500-10.)

McCaw and von Wiesenberger took over as copublishers in April 2006, and resolved to address issues – particularly perceived bias – that McCaw had identified and discussed with her prior publisher, but which she believed persisted. (A 2815,2828-29; 1131,1142-43,1184-86,1189,2037-39.) From the beginning, News-Press employees viewed some of the copublishers' decisions as inappropriately interfering with news-gathering functions, undermining reporters' journalistic integrity. (A 2815-16,2828-29,2832; 454,490,740-42,807-08.) For instance, after the paper published a prominent article about Armstrong's arrest and sentencing for drunk driving, von Wiesenberger sent then-editor Jerry Roberts a list of concerns, stating that "the ownership" was unhappy with the paper's direction, and citing the article as an example. (A 2816,2830; 492,741,1223,2348-

49.) Later, when Armstrong objected that the newsroom was targeting him unfairly by preparing a follow-up story concerning his sentencing, the copublishers ordered Roberts not to run it. (A 2830; 733-35,1051.)

Another incident that concerned employees involved the paper's address-publication policy. On June 21, a News-Press reporter attended public Montecito Planning Commission hearings regarding actor Rob Lowe's planned house, which some neighbors opposed. After the hearing, Lowe – a friend of McCaw – called Armstrong and requested that his property's address not be published. Armstrong conveyed the message to the newsroom editors, but the story specified Lowe's address, consistent with News-Press' practice of publishing locations of controversial projects before the Commission. (A 2816,2830;453,489,491-92,534,743,760-61,1000-01,1005,1221.) On June 23, McCaw personally issued reprimands to three editors and the reporter who wrote the article. In the letters, she announced it was "now company policy" that addresses not be published without specific authorization. (A 2831; 1441-43 (emphasis in original; similar wording in A 1440).) It was the first time McCaw directly disciplined News-Press staff. (A 2831; 315,545,1042-43,1222.)

A third event that worried employees was News-Press' issuance of a revised business-conduct policy on June 22. The new policy restricted employees' ability

to discuss News-Press with other media outlets. They considered it a “gag order.” (A 2816,2832; 460,2042.)

On July 3, the copublishers appointed Armstrong acting publisher during their vacation. (A 2832; 1045-46.) On July 5, two newsroom editors resigned. The following day, editor Roberts gave his notice. Characterizing the copublishers’ recent actions as “unwarranted, hostile to loyal employees and violative of fundamental principles of public interest journalism,” Roberts’ resignation letter cited incidents he considered “troubling” examples of that phenomenon. (A 2816,2932-33; 364,1055-56,2052-54.) After reading it, Armstrong decided Roberts should leave immediately. Roberts’ departure upset many employees, who gathered around as Armstrong and Human Resources Director Yolanda Apodaca escorted him out – some cried, some hugged, and both editor Jane Hulse and reporter Starshine Roshell shouted “fuck you” at Armstrong. (A 2833; 679-81,736-37,792-95,936,1058.) That week, another 10 or so editors and writers resigned. (A 2816,2833; 77,87-88,365,449.)

In July, Steepleton became city editor and held a news-department meeting. When employees questioned McCaw’s involvement in the department, he asserted that, as owner, she could participate in any aspect of the paper. (A 2835;65,66.) On August 10, Steepleton became associate editor, and announced new work

assignments, conferring additional duties on a number of reporters. (A 2835-36; 76,78-79,2063.)

**B. The Company Opposes Its Employees' Union Campaign**

Reporter Melinda Burns contacted the Union early in July, and led the organizing drive with Dawn Hobbs. Burns, Hobbs, and several other prominent union supporters, including Barney McManigal, Melissa Evans, and Tom Shultz, worked at the city-desk/news department of the newsroom. Along with other union adherents, including Roshell, Karna Hughes, and Davison, they publicized their support by wearing union t-shirts to work and to rallies, and displaying union paraphernalia. (A 2816,2833,2852,2856; 43-44,366,384,625-26,682-83,691-98,796-98,840,842,SA 4,9-11.)

The day Roberts resigned, Burns arranged a union meeting at her home. Approximately 30 employees attended, as did union representatives. At that meeting and later ones, the employees signed union-authorization cards and discussed their concerns with News-Press policies and their collective-bargaining goals. (A 2833; 366-71,762-65,798-99.) As part of their discussions, the employees reviewed two documents. The first was a union contract with Newsday magazine; the employees focused on its grievance and arbitration procedure – specifically, the effect such a procedure might have had on the Lowe-incident reprimands – and on a provision empowering reporters to veto use of their bylines.

(A 2833; 799-808,815-18,853-54,869-70.) The second was a Philadelphia newspaper's pledge not to disrupt its employees' news-reporting and editing functions. (A 2833; 764-65,871-73,1853.)

During one meeting, the employees wrote News-Press a letter announcing that they could "no longer remain silent about the intolerable conditions at the newspaper [they] love," and making four demands: (1) "Restore journalism ethics to...News-Press: implement and maintain a clear separation between the opinion/business side of the paper and the news-gathering side"; (2) Invite back the editors who had resigned in July; (3) "Negotiate a contract with newsroom employees governing our hours, wages, benefits and working conditions"; and (4) "Recognize the [Union] as our exclusive bargaining representative." The letter concluded "We look forward to discussing these issues further with you." A group of employees, including Burns and McManigal, delivered the letter to Armstrong on July 13. (A 2816,2833-34; 370-74,1078,1595.)

The next day, the employees staged the first in a series of events to raise awareness of their campaign and garner public support, a midday rally outside News-Press, protesting the "gag order." Approximately 20 employees, including Burns, Hobbs, and Roshell, lined up in front of the crowd. Burns introduced herself and announced that, while they wanted to discuss events at News-Press, the employees had been barred from talking to the media, under penalty of

termination. She rejoined her colleagues and they placed duct tape over their mouths. (A 2834; 12,375-78,673,770.) Another reporter then took the stage, stated that a majority of the employees supported the Union, and read the July 13 demands. Local media, including News-Press, covered the event, as did the Los Angeles Times. Photos of Burns and Roshell accompanied some of the reports. (A 2834; 376-81,771-76.)

News-Press responded to the formal demands on July 17. It stated its opposition to union representation, declined to recognize the Union, refused to reinstate the former editors, asserted that ethics was not an appropriate subject for a contract, and solicited comments and concerns. (A 2834; 381-82,1600.)

On July 18, employees attended a rally organized by community members protesting the perceived collapse of ethics at the paper. Burns, Roshell, and two others held up signs with the July 13 demands while speakers, including three local mayors, spoke to a crowd of approximately 600. Both the local media and The Washington Post covered the rally. (A 2834; 382-86,776-77.)

On July 20, 12-15 employees, including Burns, attended a union press conference announcing their intention to persuade readers to cancel News-Press subscriptions if the paper did not meet their demands by September 5, and introducing associated subscription-cancellation cards. (A 2835; 387-89,746-47,778-80,856-58.) At the conference, on the cards, and throughout the remainder

of their campaign, the employees limited their demands to restoring journalistic integrity, negotiating a contract, and union recognition – they dropped their reinstatement request. (A 2816 & n.5,2835; 390,457-58,585,878,1601.) Again, local media covered the event, and a photo of Roshell accompanied News-Press’ article. (A 2835; 391-92,747-48,780,1847.) McCaw responded with a July 25 opinion piece denying that the labor dispute involved freedom of the press and asserting her support for “the need for separation between the editorial, news and advertising pages.” (A 2835; 270,1844-46.)

After the cancellation-drive announcement, employees – including Burns, Hobbs, Evans, and Roshell – began distributing cards around town and at various events, including a community forum where Burns spoke about events at News-Press. The employees also set up a website where the card was available. The Union actively promoted the drive, even after the initial September 5 deadline, advertising in another local newspaper and on local radio. It also purchased two 8-by-4-foot “Cancel Your Newspaper Today” banners, which it displayed at several rallies. (A 2835-36; 393-98,584-86,607,683-84,797-98,859,861-66,685-91.)

On August 10, the Union petitioned the Board for an election to represent a unit of news-department employees. (A 2816,2835; 1444.) In its article reporting the petition, News-Press quoted its own spokesman and McCaw describing the campaign as comprising “ugly tactics” intended to force News-Press to recognize

the Union, and characterizing “charges about a breach of journalistic integrity and meddling on the part of management” as “Teamster extortion,” which the paper would not tolerate. (A 2835-36; SA 3,24-25.)

On September 5, the Union held a press conference: because News-Press had refused the employees’ demands, the Union asked readers to cancel their subscriptions. News-Press and other local media reported on the event and Burns was featured in that coverage. (A 2816,2836; 399-403,586,748,860-61.) At a rally on September 24, the Union highlighted its confidence going into the election; the employees restated their demands. The rally was well-attended and covered by the local media. Media coverage of the September 27 election included pictures of Burns and Hobbs. A majority of the unit voted for representation, and the Board certified the Union as the employees’ exclusive representative in August 2007, overruling the Company’s objections. (A 2816 & n.6,2836; 404-05,407-09,434-35,608,688,1848-50.)

In November and December, News-Press published several editorials criticizing the union campaign. They raised questions about the role of union money in local elections, discussed a 1989 lawsuit against the Teamsters and other purported evidence of Teamster corruption, and deplored the potential for pro-union bias in employees’ reporting. (A 2836-37; 1438-39,SA 1-2,28-31.)

### **C. News-Press Cancels Roshell's Column**

Roshell wrote a Sunday column for News-Press, covering topics from pop culture to family. She also wrote other articles, from human-interest stories to theater reviews. Roshell's column was popular, and News-Press featured her, among others, in its advertisements; in 2003, her columns won a prominent award; and her 2004 and 2005 evaluations were glowing, lauding her work, and citing her column's "loyal readership" and popularity. (A 2841; 63,130,662-65,767-70,789-91,1715-33.)

In her July 30 column, "It's a sticky subject: Creative uses for duct tape," Roshell described the rally protesting News-Press' gag order. Her August 6 column, "What I know about reporters: It's not about the money," discussed the multiple July resignations, describing the former journalists favorably, explaining that they had quit because they believed "basic journalistic tenets were being compromised by the paper's management," and highlighting the importance of reporters' integrity. (A 2842; 780-82,1696-1700.)

On August 16, Steepleton cancelled Roshell's column, citing a new policy of cancelling all staff-written – as opposed to freelance – columns. He explained the policy was intended to remove any appearance of bias, and to free space for more reporting. He asserted there would be no more staff-written personality columns, but acknowledged neither freelance nor sports columns were being cancelled:

Roshell's was the only column eliminated under the stated policy. (A 2842; 234, 670-72,678,785-88.) Her supervisor suggested that the cancellation might appear to be retaliation for Roshell's union activities and asked Steepleton to consult his superiors on the matter, but he declined to do so. (A 2842; 672,675.)

Meanwhile, News-Press began publishing a regular column by radio personality Laura Schlessinger at the end of July, and continued to run a staff-written sports column. (A 2835,2842; 62,235,678,SA 32-34.) In September, the paper published a staff-written opinion piece. (A 2943; 538-39,2067-68.) Roshell left News-Press on October 3. (A 2943; 100,2075.)

**D. News-Press Disciplines and Threatens Employees for Attempting To Deliver a Letter to McCaw**

On August 24, approximately 15 employees gathered in the newsroom to deliver a letter addressed to McCaw and signed by about 25 employees, including Burns, Evans, Hobbs, Hughes, and Tom Schultz. The letter requested that McCaw respect the employees' "wish to be represented by a union without fear of threats or harassment," citing examples of perceived retaliation, and complaining about the "gag order." (A 2844; 568-69,600-02,695,809,1590.)

As they left the newsroom, Steepleton told them to return to work, but only some employees heard him. The group walked to McCaw's office, but she was not there, so they proceeded to HR Director Apodaca's office. Apodaca said she would attempt to arrange a meeting with McCaw. They then returned to work,

within 10 minutes of their initial gathering, without engaging in any loud or disruptive conduct. Later, after consulting with Apodaca and Steepleton, Schultz delivered the letter to Apodaca. (A 2844-45; 569-75,587-89,594-95,602-03,700-03,729-30,810,945-46,948,1082-84.) The next day, Schultz sent e-mails to coworkers, describing the event as a success that unnerved management. (A 2845-46; 590,725-26,1852,2267.)

On August 31, Steepleton sent 11 employees – including Hobbs and Hughes – suspension notices for participating in the attempted letter delivery. None were actually suspended; Apodaca later characterized the notices as reprimands. (A 2845; 5,304-05,596-97,941-42,1377-87.) Apodaca issued a memorandum, discussing the march, and threatening discipline for “this or similar behavior in the future.” (A 2845; 575,1591.)

On September 5, News-Press printed an opinion piece criticizing the Union’s “tactics,” referring to union supporters’ conduct as “intimidation” and “disruptive behavior,” and discussing charges against the Teamsters nationwide. (A 2846; SA 3,26-27.) That same day, Schultz sent a group e-mail claiming that the attempted letter delivery – “our blitzkrieg” – had rattled News-Press. (A 2846; 814,2329.) On September 7, the copublishers sent a memorandum to all employees criticizing union supporters, and the August 24 letter incident in particular. They announced that participants had been disciplined and warned of

further discipline for similar conduct. The memorandum described campaign strategies, including the cancellation drive, as “pressure tactics [used] in an effort to force the company to give in to their demands.” (A 2846; 13-14,1388.)

**E. News-Press Fires Burns**

Burns worked for News-Press for 21 years, was one of only three exceptional, “senior” writers, and received many accolades. (A 2847; 128,361-63,524.) On October 1, News-Press published her article, “Danger Zones,” discussing traffic-safety issues outside schools. The article stated that Measure D, a tax initiative on the ballot, would fund safety improvements near schools. Steepleton approved Burns’ plan for, and edited, the article. (A 2847; 21,59,120, 413-15,429-33,467,1625-27.) Subsequently, a pamphlet supporting Measure D quoted the article, a common interest-group tactic. News-Press – which had repeatedly opposed Measure D in editorials – responded by clarifying that it still opposed the initiative. (A 2847; 57,60,123-24,131-32,416-17,467-68,1842-43.)

On October 10, News-Press published a Burns article about an activist forum. The publisher of another paper complained that the article was biased, and McCaw agreed. (A 2847; 410-12,1167,1623-24,2076.) The following week, Burns wrote, News-Press editors approved, and the paper published two more articles related to Measure D. (A 2847; 22,416-17.)

On October 27, Steepleton fired Burns, detailing his reasons in a letter asserting that Burns had “consistently produced biased and one-sided reporting which promote[d her] own personal views,” and citing the above-described articles as examples. Quoting from Burns’ evaluations, Steepleton stated that she had received “repeated warnings, and every opportunity to improve,” and concluded that she had “cho[sen] to remain biased.” (A 2847-48; 5,18-19,1485-86.) Before Steepleton’s letter, no one at News-Press told Burns the articles were biased, nor had she been counseled or disciplined for any reason. (A 2847,2850; 19-20,23,409,412,415-19,SA 5-8.)

**F. News-Press Questions Employees, Under Penalty of Perjury, About Sharing Information with Third Parties**

On December 5, McCaw sent a memo to News-Press employees, asserting her ownership rights, discussing the union campaign, and warning employees: “disloyalty is clearly cause for discharge.” The memo stated that publicly disparaging management is disloyal, and forfeits the protection of the Act. (A 2850-51; 1201-02,1856.) Someone provided the memo to Craig Smith, a blogger covering the campaign, which News-Press considered a violation of its confidentiality policy. (A 2851; 184-86.)

On December 15, Steepleton summoned each newsroom employee, individually, to a conference room. There, he explained he was investigating the leak, and required each employee to acknowledge receipt of the memo and to sign

a statement affirming – under penalty of perjury – that the employee had not provided it to anyone, including Smith. Over thirty employees and managers signed, others refused, and some said they would give a copy of the statement to the Union. (A 2851; 186,189-90,193,288,576-77,580,1592.) At least two employees – Hobbs and Schultz – told Steepleton that they had provided the memorandum, or similar documents, to union representatives. (A 2851; 581-82,706-07.)

#### **G. News-Press Penalizes Four Union Supporters**

Typically, sub-department editors completed annual evaluations. But, in December 2006, Steepleton decided to evaluate most news-department employees, including Davison, Evans, Hobbs, and Hughes. (A 2852; 47-49,79,937.) Each of the four received a lower overall rating than she had the year before; none of the four met the 3.0 score required for a bonus, though all had in 2005. Steepleton had not warned any of them about deteriorating performance during 2006. (A 2852; 5-6,43-44,50-51,316,937,1409-37,1694,1775-76,2005-17,1863,1866.)

#### **H. News-Press Fires Davison, then Supervisor Guiliano**

Davison started at News-Press in 2002. Her 2005 evaluation was glowing, characterizing her writing as some of the newspaper's best. It praised Davison for "always go[ing] the extra mile to make a story better," always acting

professionally, possessing “solid” ethics, and “striv[ing] to be fair to all sides in her writing.” (A 2856; 613,1694-95.)

In 2006, Davison joined the union campaign. She showed her support by signing an authorization card, attending rallies, wearing a union T-shirt and buttons at work, signing the August 24 letter to McCaw, and signing a January 2 letter to the copublishers as one of “The Organized Newsroom Staff.” (A 2856; 288-89,625-26,632-33,1690-91.) News coverage of the campaign included photos of Davison at rallies. (A 2856; 626-31,1606-09,1692-93.)

In January 2007, Davison began preparing “Walk This Way,” an article about replacement of slippery tiles downtown. (A 2856; 634-36.) An earlier phase of the project had entailed tree removal. Historically, such removals had been a source of local controversy and News-Press had run two editorials criticizing the project, but also noting it had not generated the same outcry as earlier tree removals. (A 2856; 112-15,118,1402,2341-42.) None of the people Davison interviewed expressed concern for the trees. (A 2856; 636-40,660.) Guiliano edited and approved the article; News-Press published it on January 15. The story focused on the reasons for, and logistics of, the project, mentioning that it had required tree removal, “to the chagrin of some locals.” (A 2856; 31,331-32,354,635,641-42,661,1405-06.)

That day, Guiliano, covering for Steepleton, met with the copublishers. McCaw criticized Davison's article: she said it was biased because it described favorably a project that cost 51 trees without detailing the opposing viewpoint which, she noted, News-Press' editorials had taken. McCaw further complained that the article contained too many quotes from Santa Barbara's mayor, whom the editorial pages had criticized extensively. (A 2856; 333-34,657.)

McCaw directed Guiliano to reprimand Davison, but he did not for he thought Davison was being targeted due to her union activities. He believed that because: he considered her 2006 evaluation unfairly low, Steepleton prevented him from implementing a performance-improvement plan for her, and he did not agree that "Walk This Way" was biased. (A 2857,2859; 334,337-38,354-55,1196-97.) The following day, Steepleton returned from vacation, and McCaw told him she had reprimanded Guiliano for refusing to discipline Davison. (A 2859; 223-25.)

Meanwhile, Guiliano told Davison about the meeting and suggested she research a story from the perspective of tree-removal opponents. In response to one of Davison's inquiries, a tree preservationist e-mailed explaining why he did not oppose the project. Davison forwarded the e-mail to Guiliano, and he gave it to the copublishers to help explain the lack of public outrage. (A 2857; 339-41,645-49,658-59,1586-87.) In his message, Guiliano conceded that Davison's

story “was weak...in telling both sides.” He later explained to Davison that he characterized it that way in an effort to influence McCaw, following advice he had read in a book. (A 2858; 354,357-58,650-62,661,1586.)

Steepleton fired Davison on January 25, explaining that her overall evaluation score was one of the paper’s lowest, and that she had not committed to improving. He described “Walk This Way” as “totally biased in that it reported on an issue that *always* is surrounded by controversy...without *any* reporting of the other side.” He further dismissed any suggestion that Davison could not find other perspectives as “ridiculous and not credible,” citing the “flood of letters to the editor” against the project. (A 2857-58; 6,27,652-53,1404 (emphasis in original).) Before Steepleton’s letter, nobody at News-Press had suggested to Davison that her writing was biased. Nor had she received a warning, discipline, or a negative comment in any evaluation – including Steepleton’s 2006 evaluation – on that subject. News-Press did not publish a correction relating to her article. (A 2858; 31,236-37,240,264,1086-87.)

The day after Davison’s discharge, Steepleton fired Guiliano, stating only that the termination was “performance related.” Guiliano protested that he had just run the newspaper for three weeks while Steepleton was away, and that Steepleton had praised his work during that time, but Steepleton had no response. (A 2859; 7,341-43.)

## **I. News-Press Fires Employees for a Concerted Protest**

The morning of February 2, employees Evans, Hobbs, Kuznia, McManigal, Schultz, and Zant – accompanied by union representatives and Burns – displayed two large banners reading “Cancel Your Newspaper Today” on either side of a footbridge over Highway 101 in the Santa Barbara area for about an hour. (A 2816,2861,2864; 425,582-83,708-09,867-68.) They also carried smaller signs stating: “Stop Illegal Firings,” “Bring Back Melinda [Burns],” “Bring Back Ann [Davison],” and “Protect Free Speech.” (A 2816,2861; 429,604,709-10,813,1707-10,1831.) A local paper’s article on the protest included a photograph showing one of the cancellation banners and a free-speech sign. (A 2861; 425-28,1393-95.)

Before the protest, Hobbs contacted the police department, and a sergeant told her the planned protest would be legal if the employees held the banners rather than affixing them to the footbridge. (A 2823,2864; 610,754-56.) In fact, displaying signs at all on a freeway overpass is usually a misdemeanor. But the footbridge protesters were not cited for any violations in connection with the protest. (A 2864; 819,1114-15.)

On February 5 and 6, each of the employees who participated in the footbridge protest was individually summoned to an interview with a News-Press attorney and questioned, in the presence of Steepleton, about the demonstration. When each employee admitted to participating, he or she received a letter of

termination for the “serious disloyal conduct” of displaying the cancellation banner. (A 2816,2861; 6-7,15-18,54,605-06,710-15,1396-1401.)

**J. A News-Press Agent Appears To Film Union Rallies**

On February 7 and 21, News-Press agent Jim Diaz appeared to film participants at two rallies. Media representatives also attended the second rally, but Diaz stood apart from them. (A 2862; 559-64,716-20,1689.)

**THE BOARD’S CONCLUSIONS AND ORDER**

Based on the foregoing, the Board found (A 2821-22, 2867), in agreement with the judge, that the Company violated Section 8(a)(1) of the Act by: threatening discipline if employees engaged in union/protected activity; coercively interrogating employees about union activities; instructing employees not to display “McCaw Obey the Law” slogan; terminating supervisor Guiliano for refusing to violate the Act; and surveilling employees’ union activities. Also like the judge, the Board further found that the Company had violated Section 8(a)(3) of the Act by: reprimanding employees for engaging in union/protected activity; canceling a column because the author supported the Union; downgrading employees’ evaluations, denying them bonuses, because of their union activities; and discharging them because of their union activities.

To remedy those violations, the Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any other

manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. With respect to the column cancellation in particular, the Order bars the Company from cancelling the publication of union supporters' columns because of the authors' protected concerted activity. (A 2824.)

Affirmatively, the Order mandates that the Company: offer employees Burns, Davison, Evans, Hobbs, Kuznia, McManigal, Schultz, and Zant reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; rescind the discriminatory evaluations given to Davison Evans, Hobbs, and Hughes; prepare new evaluations for those employees, without regard to their support for the Union; rescind the notices of suspension issued to employees who participated in the August 24 attempted letter delivery; remove from its files any reference to the unlawful discharges, notices of suspension, and discriminatory evaluations, and notify the affected employees in writing that this has been done and that the discharges, the notices, and the evaluations will not be used against them in any way; make Burns, Davison, Evans, Guiliano, Hobbs, Hughes, Kuznia, McManigal, Schultz, and Zant whole for any loss of earnings and other benefits suffered as a result of the discrimination against them; post a remedial notice and distribute it electronically, if the Company customarily communicates with its employees by such means; and have a responsible company

management office, or a Board agent in the presence of such an official, publicly read the remedial notice.<sup>2</sup> (A 2823-25.)

### **SUMMARY OF ARGUMENT**

This case presents a familiar scenario: an employer, facing a union-representation campaign, expressed its opposition not only through lawful persuasion but also through a series of unlawful retaliatory and coercive actions towards employees supporting unionization. The Company insists that – unlike employers in every other industry – it did not have to respect its employees’ mutual-aid-and-protection rights because it is a newspaper, and because one of its employees’ goals was to influence its constitutionally protected editorial discretion.

The Supreme Court has flatly rejected the notion that the First Amendment licenses newspapers to ignore their employees’ Section 7 rights, or spares them the burden of justifying retaliatory or coercive conduct towards their employees. And, of course, the First Amendment limits what the government may regulate, not what private citizens may advocate. The Board’s Order in no way constrains News-Press’ editorial discretion; the Company’s effort to avoid binding precedent – and its employees’ statutory rights – by equating employees’ criticism of its policies

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<sup>2</sup> Member Hayes would not have required notice reading or electronic distribution. (A 2825n.1.)

with government regulation of the same is unavailing. Minus that constitutional red herring, its brief presents only the most cursory defense to each of the unfair labor practices found, all of which are, as demonstrated below, amply supported by the record evidence.

### STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference; this Court will uphold them if they are "reasonable and consistent with applicable precedent."<sup>3</sup> The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.<sup>4</sup> More specifically, this Court affords "considerable deference" to the Board's conclusion that activity is protected under the Act, because such a determination "implicates [the Board's] expertise in labor relations," and gives "even greater" deference to the Board's resolution of questions of motive.<sup>5</sup> The Court does not defer to the Board's resolution of a constitutional question.<sup>6</sup>

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<sup>3</sup> *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007) (quotation omitted).

<sup>4</sup> 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Venetian, supra*.

<sup>5</sup> *Citizens Inv. Svcs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quotation omitted).

<sup>6</sup> *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009).

## ARGUMENT

The employees' concerted activities – in support of union representation, advocating changes to working conditions, and protesting unlawful terminations – fall comfortably within the bounds of Section 7 protection (Part I.A) and, contrary to the Company, the First Amendment does not give News-Press license to disregard that protection to avoid inconvenient discussions or unpleasant publicity (Part I.B). Consequently, the Company violated the Act by opposing representation through retaliatory adverse employment actions, including terminations (Part II.A) and coercive conduct, including threats, interrogations, and surveillance (Part II.B). Finally, the Company has forfeited any challenges to the Board's remedial Order by failing either to raise them before the Board or to argue them in its opening brief (Part III).

### **I. SECTION 7 OF THE ACT PROTECTS COLLECTIVE ACTION TO AFFECT CONDITIONS OF EMPLOYMENT, OR FOR MUTUAL PROTECTION**

Section 7 confers on employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>7</sup> It thus explicitly protects participation in campaigns to obtain union representation for collective

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<sup>7</sup> 29 U.S.C. § 157.

bargaining. The mutual-protection clause also encompasses other concerted activities relating to terms and conditions of employment, or to employees' interests as employees, such as: protesting coworkers' discipline; publicizing, and seeking support concerning, a labor dispute; and protesting actual – or perceived – unfair labor practices.<sup>8</sup>

**A. The Employees' Campaign Epitomizes Section 7 Activity**

It is undisputed that most of the contested activities involved multiple employees acting together and the remainder arose out of the union campaign. The Company's arguments that those concerted activities were not protected are unavailing.

Employees' participation in the campaign – which explicitly sought recognition of the Union as their representative, to bargain over “hours, wages, benefits and working conditions” (A 2834;1595) – was, as the Board held (A 2816-17), quintessential protected activity. The campaign also, as the Board explained (A 2817), targeted employer policies that were themselves sufficiently linked to the employees' working conditions or interests as employees to fall within Section

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<sup>8</sup> See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567, 569-70 (1978) (advocating against right-to-work provision, for minimum-wage law); *Venetian*, 484 F.3d at 606-08 (publicizing labor dispute to public and prospective employees; seeking support); *PHT, Inc. v. NLRB*, 920 F.2d 71, 73-74 (D.C. Cir. 1990) (per curiam) (protesting working conditions and perceived violations); *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006) (protesting unlawful discharge).

7 protection. For example, the modified address-publication policy – one of the catalysts for the representation campaign – resulted in immediate reprimands. (A 2817,2831.) Other disputed policies, like the “gag order,” also had explicit disciplinary consequences “up to and including termination.” (A 2042).<sup>9</sup> And, in a further example of unquestionably protected activity during the campaign, employees protested coworkers’ discharges.

Moreover, the Board reasonably found (A 2817) that the campaign’s broad goal of restoring journalistic integrity – exemplified by the first demand in the employees’ July 13 letter, for newsroom autonomy – was protected for two reasons.<sup>10</sup> First, it noted that the quest for journalistic integrity comprised protected protests of policies such as the address-publication rule. Second, it explained that the broader integrity goal was also independently protected because the controversial editorial decisions affected reporters’ ability to perform their jobs with their accustomed independence, and according to their understanding of

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<sup>9</sup> See *Edgar P. Benjamin Healthcare Ctr.*, 322 NLRB 750, 751 (1996) (policy that “has the potential to affect continued employment of [affected] employees” is a condition of employment); *Peerless Publ’ns*, 283 NLRB 334, 335 (1987) (“[R]ules...governing employee behavior with constituent penalty provisions...fall well within the definitional boundaries of ‘terms and conditions’ of employment.”).

<sup>10</sup> In so finding, the Board found it unnecessary to determine (A 2815n.2) which understanding of the underlying circumstances was correct – the employees’ belief that News-Press was compromising their integrity or the Company’s belief that it was combating persistent bias.

professional norms.<sup>11</sup> News-Press reporters testified, for example, that those decisions undermined their journalistic integrity, interfering with cultivation of sources and effective reporting. (A 488,766,804-07.)

Further, as the Board clarified (A 2817n.3,2820n.17), even if the employees' goal of restoring journalistic integrity did not qualify as a mandatory subject of bargaining (Part I.B), discussion of that goal would remain within the scope of Section 7. That provision encompasses subjects both outside of employers' control, and as to which they have no duty to bargain.<sup>12</sup>

Moreover, even assuming the broader integrity demand is unprotected, the Board's unfair-labor-practice determinations stand. Ample evidence supports the Board's finding (A 2817,2819) that the Company took the disputed actions because of the employees' union activities, *not* in response to employees' advocacy of newsroom autonomy. As detailed below, News-Press provided pretextual reasons – which did not include defense of editorial discretion – for its actions, and never warned employees that advocating autonomy would subject them to discipline. In fact, News-Press' contemporaneous statements dismissed

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<sup>11</sup> See *Mitchell Manuals, Inc.*, 280 NLRB 230, 230-31, 235 (1986) (finding letter advocating reorganization to improve publication and preserve credibility protected because “thrust” was “proposal for increasing the professionalism of their jobs” and because it was “part of and related to [an] ongoing labor dispute”).

<sup>12</sup> See *Eastex, supra*.

the employees' talk of integrity as a pressure tactic designed to force voluntary union recognition. (A 1844-46, SA 24-25.) Those same considerations disprove the Company's assertion (Br.47) that its union animus is factually inseparable from its protected motive of guarding its editorial discretion.

**B. The Board's Order Does Not Impair First Amendment Rights**

News-Press' attempts to cloak itself in the First Amendment are unavailing. As the Board held (A 2819), the Company's constitutional claims fall under the weight of the established principle, articulated by the Supreme Court in *Associated Press v. NLRB*, that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."<sup>13</sup> More specifically, the Court held that newspapers are subject to the Act, which "does not preclude a discharge on the ostensible [First Amendment protected] grounds for [the newspaper's] action; it forbids discharge for what has been found to be the real motive" of the Company.<sup>14</sup> In other words, the Act applies to News-Press, which cannot shield itself merely by claiming constitutionally protected motivations; the Board is entitled to adjudicate those

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<sup>13</sup> 301 U.S. 103, 132-33 (1937). *Accord Passaic Daily News v. NLRB*, 736 F.2d 1543, 1555-56 (D.C. Cir. 1984) (citing *Associated Press* and upholding application of Act to newspaper); *Newspaper Guild of Greater Phila. v. NLRB*, 636 F.2d 550, 558 (D.C. Cir. 1980) (same).

<sup>14</sup> 301 U.S. at 132.

claims. That is precisely what the Board did here, and it determined that, factually, union animus motivated News-Press.

Indisputably, the government may not “exact[] a penalty on the basis of the content of a newspaper,” or interfere with a newspaper’s editorial independence.<sup>15</sup> Consistent with those limitations, and contrary to the Company’s cases invalidating government actions for interfering with First Amendment rights,<sup>16</sup> the Board’s Order does not dictate News-Press’ editorial stance, compel the paper to publish or omit any material, constrain News-Press from enforcing its editorial policies, or otherwise interfere with its First Amendment freedoms. The Order requires only (A 2824-25) that News-Press refrain from intimidating its employees, or retaliating

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<sup>15</sup> *The Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (surveying freedom-of-the-press jurisprudence; holding statute unconstitutional because of “intrusion into the function of editors”). *See Passaic*, 736 F.2d at 1557-58 (discussing Supreme Court’s focus on newspapers’ “absolute discretion to determine” what they publish); *Newspaper Guild*, 636 F.2d at 558, 560 (explaining valid law’s application may violate free-press guarantee if it constitutes “interference by government with editorial content or other matters lying at the heart of a newspaper’s independence”).

<sup>16</sup> *See Tornillo*, 418 U.S. at 258 (invalidating, as contrary to free-press guarantee, statute mandating equal space for political candidates to reply to newspapers’ criticism); *Overstreet v. Carpenters*, 409 F.3d 1199, 1211-12 (9th Cir. 2005) (barring union from peacefully displaying secondary-boycott banners posed significant risk of infringing First Amendment rights). *Cf. BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531-37 (2002) (invalidating rule sanctioning unsuccessful, retaliatory – but *not* objectively baseless – lawsuits; declining to decide whether Board could sanction “reasonably based suits that would not have been filed but for a [retaliatory] motive....”).

against them, because of their protected activities and, affirmatively, that the paper reinstate unlawfully terminated employees and revisit unlawfully downgraded evaluations. It also proscribes (A 2823n.29,2824) News-Press from omitting content specifically in retaliation for authors' protected activities but, again, imposes no restrictions on editorial decisionmaking not based on union animus.

In other words, the Order prevents News-Press from violating its employees' Section 7 rights and compels it to remedy its violations. The Order is therefore analogous, as the Board noted (A 2819), to the *Associated Press* order, which imposed similar remedies on a news organization that had fired an editorial employee because of his union activities.<sup>17</sup> In this case, of course, the fired employees are reporters, not editors; everything they write is vetted by at least one editor before publication (A 500-10), making the likelihood that reinstating the unlawfully discharged employees will affect published content even more remote than in *Associated Press*. Moreover, under *Associated Press*, it is immaterial – given the Board's animus findings, and in light of the Order's explicit recognition of News-Press' right to enforce its editorial policies – whether the Order reinstates one employee or a substantial percentage (Br.52) of the newsroom staff.

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<sup>17</sup> 301 U.S. at 124 (ordering AP to refrain from discouraging union membership through threats or discipline, to reinstate unlawfully terminated editorial employee, and to make him whole). *See also Passaic*, 736 F.2d at 1558-59 (remanding for Board to reshape column-cancellation remedy to avoid compelling publication of content and suggesting “nondiscrimination directive” would be acceptable).

The Company highlights the fact that the campaign's advocacy of a strict editorial-news separation effectively sought changes to News-Press' editorial policies. But the employees sought to guard their integrity, not "control the newspaper's content" (Br.44). As the Board observed (A 2817), they never protested, much less tried to influence, News-Press' substantive positions, as opposed to policies they perceived as undermining their professionalism. And, crucially, the issue emanated from the employees, not the Board.

The relevant constitutional inquiry relates not to whether the employees' demand is statutorily protected, but to whether the Board's Order effectuating that protection interferes with News-Press' constitutional rights. The Company cites no case supporting its contention (Br.44-45) that the First Amendment obviates employees' Section 7 protected right to *express* their position. And while the Board's Decision and Order recognize and protect that statutory right, the Order does not, contrary to the Company's suggestion (Br.48), impose the employees' position on News-Press.

The Board explicitly noted (A 2819-20 & n.14) that News-Press retains its right to maintain its editorial policies – which the Board did not find wrongful, much less unlawful – and to discipline employees for refusing to follow them, or any instructions within its editorial discretion. As demonstrated below (Part II.A), the Company's multiple retaliatory acts were not "for failing to 'conform to

[News-Press'] editorial decisions and standards.'" (Br.52.) None of the unlawful conduct imposed consequences because employees had disregarded editorial policies or instructions. But even assuming, counterfactually, that News-Press disciplined employees for *advocating* policy changes, advocacy alone would not intrude upon freedom of the press. The Company cites no authority for its apparent belief – which runs through its argument – that the First Amendment insulates its editorial decisions from employee criticism, rather than simply shielding them from governmental interference.

The Company nonetheless insists (Br.44,46-48) that the Board's Order unconstitutionally precludes News-Press, faced with economic pressure in the form of a boycott, from responding in kind by disciplining or terminating the responsible employees. That argument rests on faulty logic, and lacks legal foundation.

As an initial matter, the employees participating in the cancellation drive did not directly apply economic pressure on News-Press. Rather, they endeavored, through Section 7 protected, expressive activity, to *persuade* the newspaper's readership of the merits of their position in the labor dispute, and to convince readers to boycott in support of that position. The First Amendment undeniably protects the News-Press' right to enter that same marketplace of ideas, without

government interference, and make its contrary case to readers.<sup>18</sup> The Order in no way precludes such a rebuttal and, in fact, News-Press did advocate for itself and against the union campaign to its readership in opinion pieces (*See, e.g.*, A 1844-46, SA 24-25, 28-31).

The Company's subsequent analytical leap – its assertion that freedom of the press shields not only its countervailing speech, but also its non-expressive, retaliatory discipline of employees for exercising their Section 7 right to solicit third-party support – is unfounded. As *Associated Press* instructs, the First Amendment does not “privilege [the press] to invade the rights and liberties of others.”<sup>19</sup> News-Press is asking this Court to stretch substantially the scope of press conduct that is constitutionally immunized from government regulation. But, as this Court recognized in a right-to-petition case, expanding the contours of an employer's First Amendment protection in the labor-law context “may result in constricting the scope of employees' expressive activity protected by section 7.”<sup>20</sup>

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<sup>18</sup> *Cf. Tornillo*, 418 U.S. at 255 (listing “the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success” as one of two factors limiting a newspaper's power to advance its views) (quotation omitted). *Accord Passaic*, 736 F.2d at 192 (same).

<sup>19</sup> 301 U.S. at 132-33.

<sup>20</sup> *Venetian*, 484 F.3d at 613 (declining to expand constitutional petitioning immunity to conduct purportedly incident to petitioning, but clearly violating Act, finding it “would effectively eviscerate the fundamental protection section 7 seeks to provide for expressive activities by labor unions”).

Because the government action here leaves News-Press free to defend itself in the court of public opinion, and leaves the paper's exercise of its editorial discretion untouched, any such expansion is unwarranted, particularly at the cost of the employees' statutory rights.

Any suggestion (Br.46-47,51-52) that the Union might force editorial concessions during Board-mandated bargaining is speculative. As the Board noted (A 2820), the issue of whether News-Press has an obligation to bargain over the autonomy demand is not presented. Accordingly, the Board's Order does not classify autonomy as a mandatory subject of bargaining, much less require bargaining on that topic. In fact, the Board's decision suggests (A 2820) that autonomy is most likely a permissive subject. In that case, the Company would not be required to discuss it at all and would have legal recourse should the Union try to compel negotiations.<sup>21</sup> But, as the Board explained (A 2820-21), even if autonomy were considered a mandatory subject, the Act would not require the Company to accede to the Union's demands, or change its editorial policies in any respect.<sup>22</sup> Consequently, any potential for the Union to engage in coercive conduct

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<sup>21</sup> See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding non-mandatory subjects, "each party is free to bargain or not to bargain, and to agree or not agree). Accord *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

<sup>22</sup> See 29 U.S.C. § 158(d); *Newspaper Guild*, 636 F.2d at 561 n.35 (Bargaining requirement does not compel agreement but allows use of economic weapons.).

in the future is, as the Board held (A 2821), speculative and insufficient to justify present constraints on employees' protected activities.<sup>23</sup>

Finally, despite the Company's insistence (Br.7,37,45-47), the district court and Ninth Circuit decisions in *McDermott v. Ampersand Publishing, LLC*,<sup>24</sup> which rejected the Regional Director's petition for an injunction based on the judge's decision in this case, do not require a contrary determination regarding Section 7 protection, the First Amendment, or any other aspect of the Board's decision. As this Court has made clear, such injunction rulings – which address the facts and issues in a case before the Board has reviewed them, and apply different legal standards – are not binding on either the Board or this Court.<sup>25</sup> While the Board appropriately considered and addressed *McDermott's* discussion of the scope of News-Press' constitutional rights (A 2818-20 & n.12), it properly adjudicated the unfair-labor-practice allegations before it and considered the constitutional ramifications of its final Order.

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<sup>23</sup> *Cf. Associated Press*, 301 U.S. at 131-32 (rejecting effort “to bar all regulation by contending that regulation in a situation not presented would be invalid”).

<sup>24</sup> 593 F.3d 950 (9th Cir. 2010); No. CV 08-1551, 2008 WL 8628728 (C.D. Cal. May 22, 2008).

<sup>25</sup> *See Coronet Foods, Inc. v NLRB*, 981 F.2d 1284, 1287-88 (D.C. Cir. 1993). *Accord NLRB v. Kentucky May Coal Co.*, 89 F.3d 1235, 1239-40 (6th Cir. 1996), and cases cited therein.

In sum, despite repeated assertions (Br.3-6,44-45,48-49,51) that the Board is regulating “the content of the newspaper,” the Company fails to identify any aspect of the Order that impairs its First Amendment rights. News-Press’ only duty under the Act, as applied in the Board’s Order, is to refrain from coercing or retaliating against its employees because of their Section 7 activity. As that duty is entirely consistent with the paper’s constitutional right to retain total editorial discretion, the Order raises no “serious constitutional questions,”<sup>26</sup> and the Board thus had no obligation (A 2819,2821) to reinterpret the Act to avoid possible conflict with the Constitution. Under those circumstances, the Board reasonably rejected the Company’s conjecture and its efforts to expand the established scope of constitutional protection.

## **II. THE COMPANY COMMITTED MULTIPLE RETALIATORY AND COERCIVE UNFAIR LABOR PRACTICES**

### **A. The Company Retaliated Against Reporters for Union and Protected Activities, Violating Section 8(a)(3) and (1)**

Section 8(a)(3) bars “discrimination in regard to...any term or condition of employment to encourage or discourage membership in any labor organization....” An employer thus violates Section 8(a)(3), and derivatively Section 8(a)(1),<sup>27</sup> when

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<sup>26</sup> *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-02 (1979).

<sup>27</sup> *See Passaic*, 736 F.2d at 1551.

it takes adverse action against an employee because of, or to discourage, the employee's union activities.<sup>28</sup> The framework the Board applies to evaluate such allegations depends on whether the employer's motive for the challenged employment action is disputed.

When an employer asserts that its motive was lawful and unrelated to the employee's union activity, the Board applies the analysis articulated in *Wright Line, a Division of Wright Line, Inc.*<sup>29</sup> Under that framework, the Board first determines whether the General Counsel has met his initial burden of demonstrating that the employee's union activity was a "motivating factor" underlying the employer's decision to take adverse action. Then, if such improper motivation has been shown, the Board considers whether the employer, as an affirmative defense, has proven that it would have taken the same action in the absence of the employee's union activity.<sup>30</sup>

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<sup>28</sup> See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

<sup>29</sup> 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *Accord Transp. Mgmt.*, 462 U.S. at 397, 401-03 (approving *Wright Line* test); *Passaic*, 736 F.2d at 1552.

<sup>30</sup> *Wright Line*, 251 NLRB at 1089; *Tasty Baking*, 254 F.3d at 125.

In evaluating an employer's motive for taking adverse actions under *Wright Line*, the Board may infer unlawful motive from indirect evidence.<sup>31</sup> Disparate treatment of employees or departure from prior practice, for example, may indicate discrimination.<sup>32</sup> And an employer's knowledge of the employee's union activities, hostility towards the union, and pretextual or shifting explanations for adverse action, as well as the temporal proximity of an adverse employment action to the affected employee's protected activity, all indicate that the actual motive is unlawful.<sup>33</sup>

There is no merit to the Company's suggestion (Br.50-51) that the *Wright Line* framework improperly chills freedom of the press by placing the burden on News-Press to demonstrate that it had protected motivations for its challenged conduct. Its sole authority for that suggestion, *Philadelphia Newspapers, Inc. v.*

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<sup>31</sup> See *Waterbury Hotel Mgmt, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003); *Passaic*, 736 F.2d at 1552.

<sup>32</sup> See *Waterbury*, 314 F.3d at 652-53 (finding departure from past hiring practices, and disparate treatment of applicants, indicated animus); *Tasty Baking*, 254 F.3d at 126 (considering fact no other employee had been disciplined for similar conduct in finding sanction unlawful); *Passaic*, 736 F.2d at 1554-55 (holding disparate application of purported column-cancellation policy indicated discrimination).

<sup>33</sup> See *Tasty Baking*, 254 F.3d at 126 (knowledge, hostility, timing); *Passaic*, 736 F.2d at 1553-55 (pretextual justification; proximity to election; knowledge of union activity); *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (Pretextual reason "not only dooms [employer's] defense but it buttresses the...affirmative evidence of discrimination" and supports inference of unlawful motive; also knowledge, animus, timing), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

*Hepps*,<sup>34</sup> is inapposite. Under *Wright Line*, the Board will find a violation only after the General Counsel demonstrates that the action of the employer (newspaper) was unlawfully motivated. As this Court explained a few years before *Hepps*, in *Passaic Daily News v. NLRB*, the *Wright Line* framework does not require a newspaper “to explain its decision unless and until the General Counsel has established a *prima facie* case” of an unfair labor practice.<sup>35</sup> A newspaper, therefore, does not bear the burden of proving that it took the contested action based on a constitutionally protected motive, but only that it would have taken the same action in the absence of the statutorily protected conduct. And a newspaper has no burden of proof at all until the General Counsel has already established the newspaper’s unlawful motivation. That allocation of burdens contrasts with the defamation law the Supreme Court invalidated in *Hepps*, which required newspapers to prove the truth of contested published statements, rather than making plaintiffs prove the statements’ falsity, potentially chilling core First Amendment speech in cases where truth or falsity could not be firmly established.<sup>36</sup>

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<sup>34</sup> 475 U.S. 767 (1986).

<sup>35</sup> *Passaic*, 736 F.2d at 1556 (*Wright Line* “strikes a sensible balance that we are unwilling to disturb.”).

<sup>36</sup> *Id.* at 770, 776-77.

As demonstrated below, ample evidence supports the Board's findings that the Company's repeated retaliation against prominent union advocates – from column cancellation and downgraded evaluations to multiple terminations – violated Section 8(a)(3) and (1). The evidence further supports the Board's holding that the Company's defenses of its retaliatory conduct, including the First Amendment argument discussed above, are pretextual. Notably, the Company essentially forfeits a number of its fact-based defenses by failing to challenge the judge's considered determination (A 2838,2843,2852,2855,2858), that Steepleton was not a credible witness, and consequent determination that his proffered reasons for taking the adverse actions at issue here were pretextual.

**1. The Company cancelled Roshell's column because of her union activities**

Substantial evidence supports the Board's determination (A 2821 & n.21, 2844) that Roshell's union activities were a motivating factor in News-Press' decision to cancel her column, effectively a demotion. Roshell was an active and visible union adherent. She participated prominently in rallies and was pictured doing so in media coverage, wore union t-shirts to work, distributed subscription-cancellation cards, and devoted two of her columns to subjects touching on the Union's campaign. And the Company does not dispute that it knew of Roshell's protected activity. The suspicious timing of the cancellation, just 6 days after the union petitioned for an election and 10 days after the second campaign-related

column, supports the Board's finding of impermissible motive. News-Press' subsequent unlawful retaliation against other prominent union adherents further reinforces it.

The Company's halfhearted challenge to the substance of this violation (Br.61-62) is unavailing. The judge specifically discredited (A 2843-44) Steepleton's testimony that Roshell's column was eliminated as part of a broader business model. As the judge described at length (A 2842-44), the record does not evince any such coherent policy mandating cancellation of Roshell's column. Despite the Company's suggestion that cancellation would free space for reporting, for example, it had added the Schlessinger column a few weeks earlier and continued a sports column. News-Press also published a staff-written opinion piece the following month, which is relevant because it belies the Company's purported rule against publishing staff opinions to avoid perceived bias, or demonstrates discriminatory application of any such rule against union supporter Roshell.

The Company cites (Br.61) Roshell's letter requesting permission to publish her column elsewhere as an "admission" that its motive was to appear unbiased. But Roshell was in no position to "admit" to News-Press' motivations. Nor can that one letter, however interpreted, overcome the weight of evidence disproving the Company's current – and Steepleton's contemporaneous – explanation.

Finally, there can be no question that, contrary to the Company's unsupported contention (Br. 62), the cancellation adversely affected Roshell's employment conditions. The column was a defining aspect of her job – she spent up to 40 percent of her time writing it (SA 14), and she enjoyed great stylistic and substantive discretion in shaping the column, which contained her opinion and which she wrote in a different style than her other articles (SA 16-18). Moreover, while the adverse-impact inquiry is fact-specific, this Court has recognized a similar cancellation adequate to trigger Section 8(a)(3).<sup>37</sup>

**2. The Company reprimanded employees for participating in a protected work stoppage**

Because Steepleton explicitly reprimanded employees for their participation in the August 24 attempt to deliver a letter to McCaw regarding her treatment of union supporters, the *Wright Line* analysis is inapplicable.<sup>38</sup> The only question is whether the concerted action was protected. Consistent with applicable precedent, the Board reasonably found (A 2815,2846) the employees' conduct protected. As the Board explained, the employees' purpose was to notify McCaw of their complaints about both the "gag order" and management's harassment of union supporters. In addition, the incident was short and peaceful – neither loud nor

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<sup>37</sup> See *Passaic*, 736 F.2d at 1554 & n.16.

<sup>38</sup> See *Felix Indus.*, 331 NLRB 144, 146 (2000), *remanded on other grounds*, 251 F.3d 1051 (D.C. Cir. 2001).

otherwise disruptive, according to both employee and company witnesses. And, finally, the employees did not have another avenue of redress, such as a formal grievance procedure.<sup>39</sup> The Company, in its cursory challenge to this violation (Br.60-61), cites no evidence that the employees' action disrupted its business, much less caused any loss of production. As to Steepleton's order to return to work, there is little evidence most participating employees heard it, nor would their failure to comply, alone, destroy their Section 7 protection.<sup>40</sup> In sum, ample evidence supports the Board's conclusion (A 2815,2846) that the attempted letter delivery was protected and, therefore, that the reprimands violated Section 8(a)(3) and (1).

### **3. The Company fired Burns for leading the union campaign**

Substantial evidence supports the Board's finding (A 2821-22 & n.22,2849-50), under *Wright Line*, that News-Press fired Burns because of her union activities and not, as the Company claims (Br.62-63), because of bias in her reporting. As described above, Burns was an initiator, and a visible leader, of the representation campaign, and News-Press was well aware of her union advocacy. Moreover, the Company's general animus is clear, given its multiple retaliatory and coercive

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<sup>39</sup> See *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056-57 (2005) (surveying caselaw; listing relevant factors for evaluating on-site work stoppages).

<sup>40</sup> See *id.* (cautioning all factors must be weighed in context to evaluate whether stoppage retained protection).

violations. With respect to Burns' discharge in particular, suspicious timing also indicates unlawful motive. News-Press fired her just one month after the campaign she helped lead culminated in the Union's election victory. And it purportedly did so to remedy an issue it had tolerated for years before she instigated that campaign.

As the Board detailed (A 2821n.22,2849-50), the Company failed to prove that it would have discharged Burns in the absence of her union activity. Her termination letter and other record evidence indicate that McCaw and various editors harbored concerns about Burns' bias for years. (A 1086,1148,1226,1485, 2348). Nonetheless, while it was noted in some annual evaluations – which have no disciplinary role – News-Press never disciplined or counseled her about bias before her union activities, much less before her sudden termination. (A 19-20,523,1086.) Moreover, the thrust of her evaluations was quite positive, suggesting the evaluators considered any bias to be an issue to monitor, not a serious concern; the last, in 2005, states: "...now that we've addressed my concerns of bias I believe she's a more balanced reporter...." (A 2848;1487-90,1494-95,1836-41).

Finally, News-Press' shifting explanations (A 2822n.22) for Burns' discharge and disparate treatment of her bias compared to incidents involving other reporters are classic signs that its actual motive was unlawful. The Company failed to show it had ever disciplined a reporter, much less discharged one, for bias.

To the contrary, the record contains evidence of biased articles, one of which News-Press formally corrected in a later edition, for which the reporters were not disciplined. (A 2858; 34-35,57-58.) And Steepleton personally approved for publication one of the articles he later cited in Burns' termination letter as a key example of her biased writing and a catalyst for her discharge. News-Press thus cannot explain its sudden decision to sanction Burns' perceived bias by arguing Steepleton had a tougher stance on bias than past managers. Nor has the Company shown that it has ever disciplined another reporter because her article was, like one of Burns' offending articles, excerpted in a political pamphlet.

In other words, contrary to the Company's assertions (Br. 63-64), the Board did not base its unfair-labor-practice determination on any subjective assessment of Burns' work, or even make a finding as to whether her articles were biased. Rather, it relied on the circumstances of her discharge – including timing, disparate treatment of other biased articles, and a changed approach to Burns herself after she commenced her union activity – to determine that the Company's reliance on perceived bias was pretextual. Ample evidence supports both that rejection of the Company's affirmative defense as well as the initial finding of unlawful motive and, consequently, the Board's determination that Burns' discharge violated Section 8(a)(3) and (1).

**4. The Company lowered reporters' 2006 evaluation scores, denying them bonuses, due to union support**

The record amply supports the Board's finding (A 2821-22,2854-55) that the Company violated Section 8(a)(3) and (1) by lowering the 2006 evaluation scores of reporters Davison, Evans, Hobbs, and Hughes, depriving them of bonuses. All four were prominent union adherents – among the most active in the newsroom – and three of them worked at the city desk, the locus of the campaign. Each of them wore union t-shirts to work; Davison, Evans, and Hobbs – a leader of the union campaign – also wore buttons. All four attended multiple union rallies outside News-Press. Hobbs and Evans spoke at, and Hobbs and Davison were pictured in news coverage of, rallies. All four signed the August 24 letter to McCaw, and Hobbs and Hughes were unlawfully reprimanded for participating in the related march.

In addition, News-Press' 2006 evaluation process further demonstrates unlawful motive. Steepleton's decision to review most newsroom – and all city-desk – employees broke with longstanding practice, and he did so despite having been a manager for only a few months. Purportedly, he wanted to remedy past discrepancies between narratives and scores, but he failed to explain how he determined which evaluations were inaccurate, and HR Director Apodaca – who was responsible for ensuring consistency – did not participate in his decision or corroborate testimony that it was warranted. As with most of Steepleton's

testimony, the judge did not credit (A 2852-55 & n.9) either his rationale for the new process or most of his critiques of the four employees.

The results of Steepleton's evaluations serve as further evidence of unlawful motive. He downgraded the most prominent union advocates, some to the point that – for the first time – they did not receive bonuses. The Company's argument (Br.68 & n.2) that many – and particularly “higher profile” (Br.68) – union adherents received improved evaluations and/or bonuses is unpersuasive (A 2854-55). As the judge explained (A 2854-55), the record shows that Steepleton downgraded every stand-out union supporter he reviewed. While the Company suggests (Br.68) that those employees' performance had deteriorated, none was warned of declining performance, and no evidence outside the evaluations suggests it. More specifically, Steepleton did not evaluate many of the Company's comparator employees, including Zant, Patton, and Milton. And, aside from McManigal and Schultz, both of whom were downgraded and just barely qualified for bonuses, none of the “high-profile” employees stand out in the record as union supporters. There is, in particular, no evidence News-Press knew that McMahan had hosted a union meeting.

For all of those reasons, the Board reasonably found (A 2854) that the General Counsel had established that News-Press was unlawfully motivated when it downgraded the four employees. For those, and for the additional reasons

discussed below, the Company has not shown that it would have scored the four employees as harshly in the absence of their union activities.

**a. Davison**

As the Board described (A 2854-55), Steepleton's rationales for downgrading Davison were unsupported and inadequate to prove News-Press would have downgraded her in the absence of her union activity. Briefly, Steepleton penalized Davison's reluctance to volunteer for editing work requiring her to change shifts, but she never gave a final answer to his request that she do so, and he never asked for one. The Company (Br. 66) neither explains why her reluctance warranted downgraded evaluation scores nor suggests it has ever penalized another employee for like conduct. Steepleton also admitted that he downgraded Davison due to his belief (because she stopped conversations with coworkers when he approached) that she was conducting union business during work. And he did not even proffer a reason for downgrading her quality-of-work score, from a 5 to a 3, but barred her supervisor from implementing a performance-improvement plan to help resolve any quality issues.

**b. Evans**

The ostensible rationales for Evans' downgrade are similarly flawed (A 2853,2855). At the hearing, Steepleton cited two specific incidents, one involving Evans' misunderstanding of Steepleton's reassignment memo and the

other involving the timing of a particular article, as the basis for Evans' lower evaluation. But the Company provided no evidence that such incidents would typically affect a reporter's evaluation. Steepleton also stated that a substance-abuse problem interfered with her job performance. But Evans credibly testified that the problem did not detract from her work, that nobody at News-Press had ever suggested that it had, and that Steepleton was unable to provide her with any examples of distraction when she inquired. Astonishingly, the Company now defends (Br.67,A 822-23) Evans' downgrade by relying exclusively on the fact that she was focused on recovery and did not produce stories *while on medical leave*.

**c. Hobbs**

Steepleton's primary rationale for downgrading Hobbs, which the Company still emphasizes (Br.67), was that she yelled "fuck you" at Armstrong the day Roberts left. Substantial evidence supports the finding (A 2853,2855) that she did not. Hobbs, another reporter, and a supervisor present during the incident all testified (A 679-81,792-93) that she did not utter the offending words. Steepleton relied solely on Armstrong's complaint, a month later: he did not investigate by speaking to Hobbs, Apodaca (who did not corroborate Armstrong at the hearing),

or any other witness.<sup>41</sup> Finally, the judge discredited (A 2853-55) Steepleton's other purported rationales for the downgrade, which the Company barely mentions.

**d. Hughes**

Steepleton's principal explanation for downgrading Hughes was tardy work. But, as the judge described (A 2852,2855), Hughes followed the same guidelines for years. In 2004, she received a favorable evaluation in the relevant category, and her 2005 evaluation did not mention timeliness. (A 1977,2005-12.) Moreover, her superiors' 2006 decision to offer her a promotion indicates their satisfaction. The Company's brief shifts focus (Br.66-67) from timeliness to productivity – which Steepleton mentioned in passing – but provides no evidence, much less adequate proof to counter Hughes' explanation that the referenced productivity goals depended on a future, unrealized reduction of her other responsibilities. (SA 19-23.)

**5. The Company fired Davison because of her union support**

Less than two months after unlawfully downgrading her, News-Press fired Davison, ostensibly for biased writing. Substantial evidence supports the Board's finding (A 2821,2858-59) that her discharge was actually unlawful retaliation for her union activity, in violation of Section 8(a)(3) and (1). Davison's extensive

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<sup>41</sup> See, e.g., *Rogers Elec., Inc.*, 346 NLRB 508, 520 (2006) (citing failure to question employee about incident before adverse action in rejecting employer's explanation as pretextual).

union activity is detailed above, as is News-Press' knowledge of and animus towards it. Steepleton's termination letter (A 1404) both confirms News-Press' unlawful motive and reveals the bias explanation to be pretextual, particularly when viewed in conjunction with his earlier evaluation of Davison. In the letter, Steepleton cites that retaliatory evaluation, which specifically mentions Davison's union activity. But, in explaining her discharge, Steepleton's letter emphasizes her purportedly biased writing, an allegation he failed to mention in the evaluation.

The Company has not shown it would have discharged Davison in the absence of her union activities. McCaw had complained of bias in Davison's writing long before the union campaign (A 2828-29; 1086-87,1172-73,1178-81), but no one at News-Press mentioned the issue to Davison, much less disciplined her for it. And the judge discredited (A 2858) Steepleton's convenient assertion that McCaw had reprimanded him on the subject. News-Press' attempts to explain the bias it perceived in the article that ostensibly triggered Davison's discharge are, as the judge detailed (A 2859), counterfactual or inconsistent with News-Press policies. And the Company offered no explanation of how McCaw's initial reprimand order ended in Davison's termination.

In any event, as described above, News-Press' treatment of other incidents of perceived bias disproves any suggestion that the issue, in isolation, would have resulted in termination. The fact (Br.65) that one union supporter who wrote a

biased article was not disciplined does not undermine the Board's analysis. That reporter was not a prominent union advocate like Davison; two witnesses were unsure whether she supported the Union (SA 13,15). Contrary to the Company's assertion (Br.64-65), this violation does not depend on whether Davison's articles were biased, but on the Company's failure to show it actually fired her for bias, and would have done so even if she were not a prominent union supporter.

**6. The Company fired employees for a protected concerted protest**

The Company does not dispute that it fired six employees because of their participation in the footbridge protest. During that protest, in addition to large banners urging drivers "Cancel Your Newspaper Today," consistent with the Union's well-publicized cancellation drive, the reporters carried smaller signs protesting News-Press' illegal firing of Davison and Burns. As the Board held (A 2822,2861), the footbridge protest continued the participating employees' ongoing labor dispute with News-Press, and was precipitated by the paper's unlawful termination of Davison. Because the Board reasonably rejected the Company's arguments that the protest lost protection, due to disloyalty or illegality, the terminations violate Section 8(a)(3) and (1).

**a. No disloyalty**

The Company does not directly contest the Board's holding (A 2818,2823,2841) that Section 7 protects consumer-boycott communications

when the protesters are engaged in a labor dispute with their employer and do not disparage its product.<sup>42</sup> Nor does the Company argue that the footbridge protesters disparaged the quality of News-Press' product as did the employees in its supporting cases.<sup>43</sup> Instead, its disloyalty argument (Br.69-71) focuses on whether observers would have understood the link to a labor dispute. The Company insists that link would be indecipherable because the protesters did not manifest their union affiliation at all, or specify their complaints on the banners. As the Board explained (A 2822), however, the protesters' smaller signs explicitly advertised the dispute: one decried "illegal firings," two others advocated reinstatement for Burns and Davison.

In asserting that the conduct was disloyal, the Company effectively demonstrates the protest's link to a labor dispute. Its argument (Br.69-72)

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<sup>42</sup> See *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064-66 (D.C. Cir. 1992) (finding employee's support for boycott protected during labor dispute, unprotected after); *Arlington Elec., Inc.*, 332 NLRB 845, 846 (2000) (finding flyer protected when urged hospital boycott because employer, a hospital subcontractor, did not provide healthcare).

<sup>43</sup> Compare, e.g., *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (disparaging remarks accused management of ruining company through layoffs "leaving voids in the critical knowledge base for the highly technical business"); *Five Star Transp., Inc.*, 349 NLRB 42, 45-46 (2007) (disparaging letters appeared intended to damage company's reputation; used "inflammatory language," describing company as "substandard" and "careless," with issues of "incompetence and negligence," and raised years-old incidents unrelated to labor dispute), *enforced*, 522 F.3d 46 (1st Cir. 2008).

implicitly assumes observers would know that “Cancel Your Newspaper” refers to News-Press, as opposed to one of the several other newspapers in the immediate local area and in nearby Los Angeles. The Board stated the obvious: the only way an observer could be sure the boycott was directed at News-Press would be if he was aware of the cancellation drive and associated, well-publicized campaign. In other words, as the Board also explained (A 2823), no motorist without knowledge of the dispute had any means of identifying News-Press as the target of the banner, rendering any purported attack unintelligible.

**b. Alleged illegality**

As the Board described (A 2923,2864), the employees consulted the police before the footbridge protest and acted according to the advice they received. There is no evidence they were cited for any criminal offense, and the Board reasonably declined to interpret the relevant state law in the first instance.<sup>44</sup> Even if the otherwise peaceful protest were illegal, that alone would not necessarily destroy its protection. The Company’s cases (Br.71-72) do not require a contrary holding, as they involve illegal acts with aggravating factors such as violence or deprivation of property.<sup>45</sup> Finally, as the Board found (A 2823n.27,2861,2864),

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<sup>44</sup> See *McKee Elec. Co.*, 349 NLRB 463, 465 n.13 (2007) (declining to decide whether videotaping violated state law).

<sup>45</sup> *St. Joseph Hosp. Corp.*, 260 NLRB 691 (1982), is inapposite; it involved picketing that was unlawful for failure to satisfy the Act’s notice requirements.

the Company failed to demonstrate that it either actually fired the protesters because they violated the law, or that it would, in the absence of protected activity, fire an employee for the type of misdemeanor alleged.<sup>46</sup>

**B. The Company Coercively Discouraged Union Support in Violation of Section 8(a)(1)**

Section 8(a)(1) makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. As demonstrated below, the Company violated that provision in several ways, including threats, interrogations, and a discharge – over many months, during approximately the same period it was committing the above-described retaliatory violations.

**1. The Board is entitled to summary enforcement of several of its findings**

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), “the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board,” either upon exceptions or in a motion for reconsideration.<sup>47</sup> The Company has, moreover, waived any challenges not substantively argued in its opening brief to

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<sup>46</sup> See *Molon Motor & Coil Corp.*, 302 NLRB 138, 138-39 (1991) (finding employer fired employees for refusing to work, not because onsite work stoppage constituted trespassing).

<sup>47</sup> *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord Spectrum Health—Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 348-49 (D.C. Cir. 2011).

the Court.<sup>48</sup> Accordingly, the Board is entitled to summary enforcement of the portions of its Order finding and remedying such uncontested violations.

The judge found (A 2846) that, in addition to reprimanding employees for participating in the August 24 march, News-Press threatened them (Steepleton informally, Apodaca formally) with discipline should they engage in similar conduct in the future, in violation of Section 8(a)(1). Similarly, the judge found (A 2861 & n.12) that, before firing employees for participation in the footbridge protest, News-Press coercively interrogated them about it, in violation of Section 8(a)(1). The Board held (A 2821n.18) that the Company forfeited any challenge to those violations by failing to except to the judge's findings. Although the Company now appears to claim (Br.4) that it filed a relevant exception with the Board regarding the interrogation violation, it failed to bring any error to the Board's attention in a motion for reconsideration. Moreover, any contention (Br.4) that the Company has satisfied Section 10(e) by filing a relevant exception is waived for failure substantively to argue it in the opening brief. The Board is thus entitled to summary enforcement of these violations.

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<sup>48</sup> See *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (arguments referenced but not argued in opening brief are waived). See also *S.E.C. v. Banner Fund Int'l*, 211 F.3d 602, 613-14 (D.C. Cir. 2000) (citing FRAP 28(a)(9)(A) and cases for proposition that Court will not entertain cursory, "asserted but unanalyzed" argument that fails to identify and explain alleged errors or provide appropriate factual and legal citations).

The Board is likewise entitled to summary enforcement of the portions of its order finding unlawful and remedying Guiliano's termination as the Company failed to include any substantive discussion of the discharge in its opening brief. Its passing suggestion (Br.72) of Board error with respect to certain subpoenas is also inadequate to preserve any such challenge.

## **2. The Company's coercive interrogations**

An employer violates Section 8(a)(1) when it coercively interrogates an employee about union activities.<sup>49</sup> The Board evaluates questioning using a totality-of-the-circumstances test, and the following factors, among others, may support a finding of coercion: a history of employer animus; the appearance of seeking information to use against the employee; a questioner holding a relatively high position in the employer's hierarchy; summoning an employee for questioning in "an atmosphere of unnatural formality."<sup>50</sup>

The Board reasonably found (A 2821,2851-52) that Steepleton coercively interrogated employees in mid-December when he questioned them about disseminating McCaw's December 5 memorandum discussing the Union's campaign and warning employees against disloyalty. First, his broad questioning

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<sup>49</sup> See *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000).

<sup>50</sup> See *Vincent*, 209 F.3d at 737 (describing factors); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998) (same).

reasonably tended to cover protected conduct, particularly because the memorandum focused on the union campaign. And, even after that tendency was confirmed by some employee's responses, that they had provided documents to the Union, Steepleton neither ceased nor narrowed his questioning. Second, the circumstances of the interviews were coercive. Steepleton – who topped the newsroom hierarchy and was sometimes accompanied by HR Director Apodaca – formally summoned each employee to a conference room for questioning. Once there, he ordered each one to respond in writing, under penalty of perjury, belying the Company's argument (Br.55-56) that the interrogations lacked any threat. Finally, Steepleton questioned only bargaining-unit employees, even though McCaw's memo addressed all News-Press employees.

**3. The Company required removal of protected buttons and signs**

An employee's Section 7 rights include the right to display union-related insignia while at work, and an employer's prohibition of such displays violates Section 8(a)(1) in the absence of special circumstances.<sup>51</sup> News-Press admittedly (A 2855; 1334¶11,1342¶11) ordered the removal of buttons and car-window signs stating "McCaw Obey the Law." The Board (A 2818,2821,2841,2856) reasonably

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<sup>51</sup> See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-03 & n.7 (1945); *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61-62 (D.C. Cir. 2009) (enforcing unfair-labor-practice finding where employer ordered employee to remove armband and sign indicating union support).

found that message – a reference to employees’ belief that McCaw and her company had committed unfair labor practices – protected and, consequently, the removal orders to be unlawful.

Specifically, McCaw had affirmatively and publicly opposed the union campaign, inserting herself personally into the labor dispute. At the time the employees displayed the slogan, the company she owned – and ran – was the subject of multiple unfair-labor-practice allegations, and the Board subsequently found a number of violations. The slogan criticized her official acts in her owner/copublisher role, responding to the Union’s campaign – it was not a character assassination unrelated to the ongoing dispute. It was, moreover, nonspecific; it did not specify which law McCaw had allegedly violated, or even whether she had purportedly done so already, but rather expressed employees’ wish for a “clean” union campaign going forward. The Company does not provide any explanation of its interpretation of the slogan, the assumptions underlying it, or the effects it feared the slogan might have on its business. In other words, the Company’s effort (Br.58-60) to paint McCaw as a bystander, and the union slogan as gratuitous abuse and unambiguous character assassination is disingenuous. The

obey-the-law slogan bears little resemblance to the sort of attack the Board has found unprotected due to disloyalty.<sup>52</sup>

#### **4. A company agent appeared to film two union rallies**

An employer violates Section 8(a)(1) by taking pictures or videos of employees engaged in Section 7 activity, even if they are on or near employer property, because such actions go beyond “mere observation” in that “pictorial recordkeeping tends to create fear among employees of future reprisals.”<sup>53</sup> The Company does not dispute that its agent appeared to film the rallies in question – whether or not he actually did (Br.56), which the employees could not know, is immaterial. While a “reasonable, objective justification” may mitigate the tendency of (apparent) video surveillance to coerce employees, the Company has

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<sup>52</sup> Compare *Five Star Transp., Inc.*, 349 NLRB at 46 (unprotected letters directly disparaged company as “substandard,” “reckless,” and incompetent; focused on incidents unrelated to labor dispute); *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1241 (2000) (unprotected handbill questioned employer’s business plan, criticized product, and urged city to give contract to competitor, ostensibly for public interest; did not reference labor dispute); *Lutheran Soc. Serv. of Minn.*, 250 NLRB 35 (1980) (unprotected statements were derogatory, uttered repeatedly for months, included personal accusations of incompetence and vulgar insults, and upset fellow employees; not connected to labor dispute).

<sup>53</sup> *F. W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993) (taking photographs and video of employees handbilling outside store entrances was unlawful surveillance). See also *Alle-Kiski Med. Ctr.*, 339 NLRB 361, 363-65 (2003) (appearing to photograph or film union organizers soliciting on or near employer’s property was unlawful surveillance). *Accord Nat’l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (surveillance violations based on videotaping, and having video camera while observing, union rallies on company property).

not shown it had any “reasonable basis for anticipating” misconduct, security threats, or similar risks.<sup>54</sup> Nor does it cite any authority for the proposition (Br.57) that the potential for noise at an outdoor rally on public property would qualify. In sum, the Company provides no basis for this Court to reject the Board’s reasonable determination that the apparent filming of employees at rallies violated Section 8(a)(1).

### **III. THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER CHALLENGES TO THE BOARD’S REMEDIAL ORDER**

In 2010, after the judge’s decision issued in this case, the Board issued two decisions modifying its standard remedies. The first provided for daily compounding of interest on monetary awards,<sup>55</sup> and the second, for electronic distribution of remedial notices when an employer customarily distributes information electronically to its employees.<sup>56</sup> Accordingly, the Board ordered (A 2824) that interest on the backpay award in this case be compounded daily, and that the remedial notice be distributed electronically, if appropriate. The Company did not challenge those *sua sponte* decisions in a motion for reconsideration before the Board. This Court thus has no jurisdiction to consider the Company’s

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<sup>54</sup> *Nat’l Steel*, 156 F.3d at 1271 (quotation omitted). *See also Woolworth and Alle-Kiski, supra.*

<sup>55</sup> *Kentucky River Med. Ctr.*, 356 NLRB No.8, 2010 WL 4318371 (2010).

<sup>56</sup> *J. Picini Flooring*, 356 NLRB No.9, 2010 WL 4318372 (2010).

arguments (Br.72-74) regarding either one.<sup>57</sup> Nor does the Court have jurisdiction over the Company's objections to public reading of the notice, which it also failed to raise to the Board.

The Company has, moreover, waived any objections to both public reading and electronic distribution by failing substantively to raise them in its opening brief. Its vague contention (Br.73) that public reading is "inappropriate" and cursory argument (Br.73-74) – devoid of supporting authority – regarding electronic distribution are inadequate to preserve those objections.<sup>58</sup>

In any event, this Court has long recognized that the Board enjoys broad discretion in fashioning remedies to unfair labor practices, and "will decline to enforce the Board's remedial order only if the order represents 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"<sup>59</sup> Here, as the Board explained (A 2823-24), the multiple violations detailed above – committed over several months as part of an aggressive anti-union campaign implicating all levels of the Company's hierarchy – necessitate public

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<sup>57</sup> 29 U.S.C. § 10(e). *See also* *Woelke and Spectrum*, supra note 47.

<sup>58</sup> *See* note 48, supra.

<sup>59</sup> *O'Dovero v. NLRB*, 193 F.3d 532, 537-38 (D.C. Cir. 1999) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) and *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 957 (D.C. Cir. 1988)). *Accord Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 212 (D.C. Cir. 2003) (quoting *O'Dovero*).

notice reading to assure employees that News-Press and its managers “are bound by the requirements of the Act.”<sup>60</sup> Indeed, the Company does not even challenge the propriety of the Board’s concomitant broad cease-and-desist order, imposed (A 2823) for similar reasons.

In sum, the Company has waived all challenges to the Board’s remedial Order and has, in any event, failed to demonstrate any abuse of the Board’s remedial discretion.

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<sup>60</sup> *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929-30 (D.C. Cir. 2005). *See also Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401-03 (D.C. Cir. 1981) (notice reading may be appropriate remedy to reassure employees that employer will comply with Act where multiple violations created chilling environment).

## CONCLUSION

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

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

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	)	
Petitioner/Cross-Respondent	)	Nos. 11-1284, 11-1348
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	31-CA-27950
	)	
and	)	
	)	
GRAPHICS COMMUNICATIONS	)	
CONFERENCE OF THE INTERNATIONAL	)	
BROTHERHOOD OF TEMASTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,998 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 11th day of May, 2012

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CONFERENCE OF THE INTERNATIONAL	)	
BROTHERHOOD OF TEMASTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 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 certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, DC  
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