

Nos. 11-1297, 11-1331

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

NOVA SOUTHEASTERN UNIVERSITY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

B. Rulings Under Review

The ruling under review is *Nova Southeastern University*, 357 NLRB No. 74, 2011 WL 3841701 (Aug. 26, 2011).

C. Related Cases

This case has not previously been before this or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel

Dated at Washington, DC
this 31st day of January 2013

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GLOSSARY

The Board	National Labor Relations Board
Nova	Nova Southeastern University
The Act	National Labor Relations Act, 29 U.S.C. §151, et seq.
The Union	Service Employees International Union, Local 32B-32J
A.	Joint Appendix
Br.	Nova's opening brief to the Court

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Nova Southeastern University to review, and on the cross-application of the National Labor Relations Board to enforce, a Decision and Order issued by the Board on August 26, 2011,

and reported at 357 NLRB No. 74. (A. 126-54.)¹ The Board found that Nova maintained an unlawful no-solicitation policy on its Fort Lauderdale campus; enforced that unlawful policy against an employee of its onsite contractor, UNICCO Services Co.; and made coercive statements to a laid-off UNICCO employee who was seeking employment. The Board's Order is final with respect to all parties.

The Board had subject matter jurisdiction over the underlying unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act.² The Court has jurisdiction over this proceeding under Section 10(f) of the Act,³ which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act,⁴ which allows the Board, in that circumstance, to cross-apply for enforcement. Nova filed its petition for review on September 6, 2011. The Board filed its cross-application for enforcement on September 19. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² 29 U.S.C. §§ 151, 160(a).

³ *Id.* § 160(f).

⁴ *Id.* § 160(e).

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portion of its Order.

2. Whether the Board reasonably found that Nova violated Section 8(a)(1) of the Act by prohibiting onsite contractor employees from engaging in organizational handbilling without first obtaining permission from management.

3. Whether substantial evidence supports the Board's finding that Nova violated Section 8(a)(1) of the Act by disciplining an onsite contractor employee for violating Nova's handbilling restrictions. This violation turns on the subsidiary issue of whether substantial evidence supports the Board's finding that a UNICCO supervisor acted as Nova's agent in disciplining a UNICCO employee.

4. Whether substantial evidence supports the Board's finding that Nova violated Section 8(a)(1) of the Act by making coercive statements to a laid-off contractor employee who was requesting assistance in gaining employment.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and the Board's rules and regulations are contained in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by Service Employees International Union, Local 32B-32J, the Board's General Counsel issued a complaint alleging, in relevant part, that Nova violated Section 8(a)(1) of the Act⁵ by maintaining and enforcing an overly broad no-solicitation rule, interfering with the distribution of union literature by an off-duty contractor employee in a non-working area, and issuing a disciplinary warning to the contractor employee. (A. 130-31.) The complaint further alleged, in relevant part, that Nova violated Section 8(a)(1) of the Act by interrogating a laid-off contractor employee about his union activities and implicitly threatening that laid-off employees would not be hired for work on campus because of their union activities. (A. 131.) Following a hearing, an administrative law judge found that Nova violated the Act as alleged. (A. 153.) Nova filed timely exceptions. (A. 126.)

The Board affirmed the judge's unfair labor practice rulings, findings, and conclusions as to the Section 8(a)(1) violations related to the off-duty contractor employee's handbilling and subsequent discipline. (A. 127-28.) The Board modified the judge's proposed order with respect to the interrogation of the laid-off contractor employee, finding only that Nova violated Section 8(a)(1) of the Act by

⁵ 29 U.S.C. § 158(a)(1).

making coercive statements linking the employee's union support to his lack of employment. (A. 129.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Nova Contracted Its Maintenance and Janitorial Work to UNICCO

Nova is a private university with a 300-acre campus in Fort Lauderdale, Florida. (A. 131; 328-29.) In 2000, Nova hired UNICCO Service Company to provide maintenance, landscaping, and janitorial services throughout the campus. (A. 126, 128 n.9, 142 n.16; 390.) UNICCO employees worked out of the physical plant/central services building, where they reported for their shifts and punched a time clock. (A. 127, 131; 218.)

Nova's contract required UNICCO employees to undergo pre-employment drug testing and a background check that included a security report from Nova's public safety department. (A. 128; 307-08, 390.) The contract further required UNICCO to enforce Nova's policies, report policy violations to Nova, and ensure UNICCO's employees "abide by all rules, regulations, and policies of [Nova] during the term of this Contract." (A. 128 n.8, 132; 308, 390.)

In 2006, Tony Todaro was employed by UNICCO and assigned to the Nova campus. (A 131; 263-64.) Todaro's job title was director of physical plant, and he supervised 300 UNICCO employees. (*Id.*) Even though Todaro worked for

UNICCO, Nova listed his contact information on its website alongside Nova management personnel, under the heading “Nova Southeastern University Facilities Management,” without indicating that he was a UNICCO employee. (A. 131-32; 171-73, 355.) Nova also provided Todaro with an @nova email address when he was employed by UNICCO. (A. 137 n.9; 197-98, 410.)

B. UNICCO’s Employees Began Organizing, But Nova Prohibited Them From Distributing Handbills on Campus

In 2006, UNICCO’s employees began a union organizing campaign that continued through the summer. (A. 127; 207.) UNICCO had a no-solicitation policy that prohibited “[s]olicitation and distribution of unauthorized materials at the job location.” (A. 127 n.6; 294-95.) However, UNICCO’s policy was to permit employees to distribute union-related leaflets as long as they were on break. (A 135-36; 295-97.)

On August 22, 2006, UNICCO employee Steve McGonigle arrived on campus before his shift began and distributed handbills to his coworkers in the parking lot adjacent to the physical plant/central services building where they clocked in. (A. 127; 220-23.) The handbills promoted the Union’s “Justice for Janitors” campaign. (A. 127; 221, 412.) A couple of UNICCO supervisors were in the area, but none objected to McGonigle’s leafleting. (A. 223.)

After McGonigle had been distributing handbills for 5 to 10 minutes, a Nova public safety officer drove up and told him to stop. (A. 127, 134; 223-24.) The

Nova employee told McGonigle about Nova's rule prohibiting soliciting on campus. (A 127; 224, 403.) That rule states that "[n]o solicitation is allowed on any [Nova] campus or facility without the permission of [Nova] Executive Administration." (A. 127; 184.) McGonigle asserted that he had the right to handbill during nonworking hours, but he complied with the Nova employee's request and went inside the central services building. (A. 127; 224.)

Once inside, McGonigle spoke with his UNICCO coworkers about his conversation with the Nova employee and Nova's rule against soliciting. (A. 127; 224.) McGonigle then drove to Nova's public safety department building to complain that his right to handbill had been violated. There, several Nova officials informed McGonigle that he was prohibited from soliciting on campus. (A. 127, 134; 224-29.)

C. Nova Reported McGonigle's Actions to UNICCO Management, and UNICCO Disciplined Him

After this incident, Nova brought McGonigle's handbilling to the attention of Todaro and McGonigle's direct supervisor, Jack Sado. (A 127.) Two days after Nova stopped McGonigle from handbilling, Todaro called McGonigle into his office, read both Nova's and UNICCO's solicitation policies to him, and gave him copies of the policies. (A. 127; 229-34.) Todaro issued a disciplinary warning to McGonigle for "handing out (solicitation and distribution) of unauthorized

materials at the job location (without permission from Nova Univ. and UNICCO Co.) This practice must stop immediately.” (A. 127 & n.6; 414.)

D. Nova Ended Its Contract with UNICCO and Directly Hired Todaro and Other UNICCO Employees; Todaro Questioned a Job Seeker About His Union Activity

Nova terminated its contract with UNICCO on February 17, 2007, and replaced UNICCO with several successor contractors. (A. 129; 186-87.) At that time, UNICCO laid off its employees who had been working on the Nova campus. (A. 129; 219-22.) Some of those employees, including Todaro and Thai Nguyen, were hired directly by Nova to perform work similar to what they had previously done when employed by UNICCO. (A. 129; 163, 263-64, 284-85.)

The day after the layoffs, former UNICCO employee Jose Sanchez approached Todaro on campus to seek his help in getting hired by one of Nova’s new contractors. (A. 129; 205-09.) Todaro, now a Nova employee, asked Sanchez whether he had supported the Union and then suggested that Sanchez might be able to get paid by the Union for picketing. (*Id.*)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Liebman and Members Becker and Pearce) found, in agreement with the administrative law judge, that Nova violated Section 8(a)(1) of the Act⁶ by maintaining an overly broad no-solicitation rule without sufficient justification; enforcing that unlawful rule by ordering McGonigle to stop handbilling during nonwork time in a nonwork area and reiterating that prohibition five additional times; and disciplining McGonigle, through its agent Todaro, for his union activity. (A. 126-29.) The Board also found that Nova violated Section 8(a)(1) by making coercive statements to Sanchez, who was seeking assistance in gaining employment. (A. 129.)

The Board's Order requires Nova to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. (A. 129, 153-54.) Affirmatively, the Order requires Nova to rescind the no-solicitation rule from its handbook, remove from its files any reference to the unlawful discipline of employee McGonigle and ask UNICCO to do the same, and notify McGonigle in writing that it has done so and that the discipline will not be used against him in any way. (A. 129, 153-54.) Nova is also required to post a remedial notice. (A. 129, 154.)

⁶ 29 U.S.C. § 158(a)(1).

SUMMARY OF ARGUMENT

No person is permitted to solicit on Nova's campus without permission from Nova administration. The Board found that this no-solicitation rule is unlawful as applied to Nova's own employees, and Nova did not dispute this finding either before the Board or in its opening brief to this Court. Accordingly, the Board is entitled to summary enforcement of this finding.

Nova does challenge the Board's finding that it unlawfully prohibited employees of its onsite maintenance contractor from engaging in handbilling on its campus. Nova argues that such employees are analogous to non-employee union organizers who are not entitled to solicit on its property. But in *New York-New York, LLC v. NLRB*⁷ (referred to as *NYNY*), this Court rejected that argument and approved of the Board's decision to protect handbilling by such employees under certain circumstances. The Board reasonably found that such circumstances existed here, and that Nova failed to demonstrate that its no-solicitation rule was justified by legitimate business reasons.

Nova makes a number of additional arguments regarding the Board's application of *NYNY*. But this Court does not have jurisdiction to consider those

⁷ 676 F.3d 193, 196 (D.C. Cir. 2012), *reh'g en banc denied* July 6, 2012, *petition for cert. filed* Oct. 4, 2012.

arguments, because Nova failed to properly present them to the Board in the first instance.

The Board also found that Nova violated the Act when Todaro disciplined McGonigle for handbilling. Even though Nova did not directly employ Todaro at that time, Todaro was acting as Nova's agent when he issued the discipline.

UNICCO's contract required UNICCO to ensure that its employees complied with Nova's policies. So when Nova informed Todaro that McGonigle had violated its policy, Todaro disciplined him. Under the liberal agency analysis applied in the labor context, the Board's finding that Todaro acted as Nova's agent is supported by substantial evidence.

Finally, the Board found that Nova violated the Act by making coercive statements to Sanchez, a laid-off UNICCO employee who asked Todaro for help in getting a job with Nova's new contractor. In response, Todaro asked Sanchez about his union activity and said that he could not help Sanchez with a job at that time. Todaro was working directly for Nova when this conversation took place, and substantial evidence supports the Board's determination that his comments were coercive.

STANDARD OF REVIEW

This Court’s review of the Board’s unfair labor practice findings “is quite narrow.”⁸ The Board’s legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law.⁹ Furthermore, the Supreme Court has held that the Board bears “primary responsibility for developing and applying national labor policy.”¹⁰ If the Board is to fulfill its statutory role, the Supreme Court recognized, it “necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.”¹¹ Consequently, where the Board engages in the “‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management, the balance struck by the Board is ‘subject to limited judicial review.’”¹²

⁸ *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

⁹ *Int’l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

¹⁰ *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

¹¹ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978).

¹² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers Local 449*, 353 US. 87, 96 (1957)). *Accord Elec. Workers Local 702 v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (the Board has “primary responsibility” for applying the Act, and when its “interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices”) (internal quotation omitted).

The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record as a whole.¹³ Substantial evidence encompasses “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁴ This Court will not reverse the Board’s credibility determinations unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.”¹⁵

Finally, the Supreme Court has instructed that a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.”¹⁶ The Board’s application of the law to the facts is also reviewed under the substantial evidence standard.¹⁷

¹³ 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

¹⁴ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *Accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005).

¹⁵ *Federated Logistics*, 400 F.3d at 924 (quoting *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003)). *See also E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (Board hearing officer is “uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict”).

¹⁶ *Universal Camera*, 340 U.S. at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007).

¹⁷ *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). *Accord United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

ARGUMENT

I. The Board is Entitled to Summary Enforcement of the Uncontested Portion of Its Order

In its filings with the Board, Nova never excepted to the judge's finding that the no-solicitation rule was unlawful as applied to Nova's employees. (*See* A. 71-86.) The Court therefore lacks jurisdiction to review that portion of Board's order, which Nova does not even raise in its opening brief.¹⁸ The Board is entitled to summary enforcement of its finding that Nova's rule is unlawful as applied to Nova's own employees.¹⁹

II. The Board Reasonably Found that Nova Violated Section 8(a)(1) of the Act by Prohibiting Onsite Contractor Employees from Engaging in Organizational Handbilling Without First Obtaining Permission from Management

This case once again brings before this Court the question of the access rights of onsite contractor employees to property where they work but whose owner is not their employer. The case is easily resolved as the Court has already approved of the Board's policy regarding such employees.

¹⁸ *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).

¹⁹ *N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (granting summary enforcement for uncontested violations).

A. This Court Has Already Approved of the Board’s Determination That Onsite Contractor Employees Have Greater Access Rights Than Non-Employee Union Organizers

Section 7 of the Act¹ guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” In turn, Section 8(a)(1) of the Act² implements that guarantee by making it an unfair labor practice for any employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.”

The Supreme Court has held that employees’ rights under Section 7 of the Act to engage in “self-organization lie “at the very core of the purpose for which the [Act] was enacted.”³ As has long been recognized, that core right “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”⁴ It is well-settled that an employer violates Section 8(a)(1) where it prohibits its own employees from engaging in protected union organizing activities at the workplace during nonworking time and in nonworking

¹ 29 U.S.C. § 157.

² *Id.* § 158(a)(1).

³ *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

⁴ *Beth Israel*, 437 U.S. at 491-92.

organizing activities at the workplace during nonworking time and in nonworking areas, unless the employer can show that prohibiting the activity is necessary to maintain production or discipline.²⁴ It is equally well-settled, however, that an employer may restrict nonemployee union organizers' access to the employer's property, unless the employees are beyond the reach of reasonable union efforts to communicate with them.²⁵

In *New York New York, LLC (NYNY)*, the Board considered how to treat onsite contractor employees who want to handbill on the property where they work but whose owner is not their employer.²⁶ The Board concluded that onsite contractor employees have the right to distribute union-related handbills, during nonwork time and in nonwork areas, unless the property owner can demonstrate that the handbilling significantly interferes with its use of the property or justifies its prohibition by other legitimate business reasons.²⁷ This Court approved of that ruling.²⁸

²⁴ *Republic Aviation*, 324 U.S. at 803-04.

²⁵ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992); *Babcock*, 351 U.S. at 112.

²⁶ 356 NLRB No. 119 (2011), 2011 WL 1113038, at *1.

²⁷ *Id.* at *16.

²⁸ *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012), *reh'g en banc denied* July 6, 2012, *petition for cert. filed* Oct. 4, 2012.

Here, the Board applied *NYNY* in finding that Nova violated the Act when it prohibited McGonigle from handbilling on its property. (A. 126-28.) Nova argues (Br. 32, 34) that onsite contractor employees, who it does not directly employ, are analogous to non-employee union organizers, and that it is not required to allow such employees to solicit on its campus under Supreme Court precedent.²⁹ But this Court rejected that exact argument in *NYNY*, holding that “the governing statute and Supreme Court precedent grant the Board discretion over how to treat employees of onsite contractors for these purposes.”³⁰ Accordingly, McGonigle was not equivalent to a non-employee union organizer.

Nova also argues (Br. 40-41) that security concerns justify application of its no-solicitation rule to onsite contractor employees. But the Board reasonably concluded (A. 128) that Nova failed to explain how its campus would be less safe if contractor employees like McGonigle are permitted to distribute handbills to their coworkers. Nova’s opening brief likewise fails to contain any such explanation.

Finally, Nova argues (Br. 40-41) that it did not “prohibit” McGonigle from handbilling but merely required him to get permission before doing so. However,

²⁹ See *Lechmere v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956).

³⁰ *New York-New York*, 676 F.3d at 196.

the Board long ago held an employer may not “predicate the exercise of a Section 7 right upon its own authorization.”³¹ This Court and others have agreed with the Board that employers may not require employees to obtain permission before engaging in protected activity.³² And while Nova argues (Br. 38-40) that such precedents are not applicable because it does not directly employ McGonigle and his coworkers, this is essentially a repetition of its argument that these workers are not “employees” entitled to solicit but rather non-employee union organizers. As explained above, this Court already rejected that argument in *NYNY*. And because Nova’s restriction – requiring contractor employees to ask permission for handbilling – is unlawful, Nova’s argument (Br. 35-38) that it never “excluded” McGonigle from the property is immaterial.

³¹ *J.R. Simplot Co.*, 137 NLRB 1552, 1553 (1962).

³² *E.g.*, *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266, 1270 (D.C. Cir. 2006) (finding unlawful rule that prohibited employees from wearing union insignia without permission); *MLRS Systems Div. v. NLRB*, 788 F.2d 1378, 1381 (8th Cir. 1986) (rule prohibiting distribution without permission “tended to interfere with [employee’s] right to distribute union literature in a nonworking area on nonworking time.”); *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 850 (1st Cir. 1982) (stating rule prohibiting distribution of handbills on company property without permission “is clearly an unfair labor practice”).

B. This Court Does Not Have Jurisdiction to Consider Nova’s Remaining Arguments about the Board’s Application of *NYNY*

As shown, the Board here applied the policy set out in *NYNY* and found that Nova violated the Act by maintaining its no-solicitation rule and enforcing that rule against McGonigle. The Board’s decision was based on its findings that McGonigle was engaged in work integral to Nova’s business and that he was handbilling in a nonwork area open to the public. Nova challenges (Br. 20-42) these factual findings. Nova also challenges (Br. 41-42) evidentiary rulings made by the administrative law judge. However, Nova failed to make any of these arguments to the Board. Accordingly, this Court has no jurisdiction to consider these claims.

1. This Court May Not Consider Claims Never Presented to the Board in the First Instance

Section 10(e) of the Act³³ provides in relevant part that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent extraordinary circumstances. Therefore, as this Court has recognized, a party cannot for the first time raise an objection to a Board order in court.³⁴ This requirement stems not only from the Act but it furthers the need for “orderly

³³ 29 U.S.C. § 160(e)

³⁴ *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) (“[T]he critical question in satisfying section 10(e) is whether the Board received adequate notice of the basis for the objection.”)

procedure and good administration” because ““courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.””³⁵

To preserve their rights on appeal in keeping with Section 10(e), litigants must raise their objections in compliance with the Board’s rules.³⁶ The Board’s Rules and Regulations require exceptions to “set forth specifically the questions” of fact or law objected to, “designate by precise citation of page the portions of the record relied on,” and “concisely state the grounds for the exceptions.”³⁷ If a supporting brief is filed, it must contain “argument, presenting clearly the points of fact and law relied on,” “with specific page references to the record and the legal or other material relied on.”³⁸ Any objection raised in court that fails to comply with these requirements is waived.³⁹

³⁵ *Harvard Indus. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. LA Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

³⁶ *E.g.*, *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (“[T]o preserve objections for appeal a party must raise them in the time and manner that the Board’s regulations require.”).

³⁷ 29 C.F.R. § 102.46(b)(1).

³⁸ *Id.* § 102.46(c)(3).

³⁹ *Id.* § 102.46(b)(2); *Alwin*, 192 F.3d at 144 n.14 (D.C. Cir. 1999) (noting “that the failure to except specifically to [an issue] constitutes waiver of the issue under the Board’s regulations”); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (disregarding exception that “merely recite[d] the findings excepted to and cit[ing] to the judge’s decision without stating, either in its exceptions or its

Cursory treatment of an issue, devoid of argument or citation to testimony or legal authority, falls short of preserving an issue for review under the Board’s regulations.⁴⁰ Furthermore, where “a petitioner objects to a finding on an issue first raised in the decision of the Board rather than of the [administrative law judge], the petitioner must file a petition for reconsideration with the Board to permit it to correct the error (if there was one).”⁴¹

Application of Section 10(e) is “mandatory, not discretionary.”⁴² A “court of appeals has no power, *sua sponte*, to find objectionable a portion of an NLRB order, if no objection was raised before the Board and the failure to object was not excused by any ‘extraordinary circumstances.’”⁴³

supporting brief, on what grounds the purportedly erroneous findings should be overturned”), *enforced*, 456 F.3d 265 (1st Cir. 2006).

⁴⁰ *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996) (refusing to consider argument where employer asserted in exceptions only that “the ALJ erred”); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 198 (4th Cir. 1984) (refusing to consider issue mentioned only generally in exceptions, “a lapse compounded by [party’s] failure to brief or argue” the issue to the Board).

⁴¹ *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 185-86 (D.C. Cir. 2006).

⁴² *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984) (citing *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961)); *see also NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008).

⁴³ *Oldwick*, 732 F.2d at 342 (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982), and *NLRB v. United Mineworkers*, 355 U.S. 453, 463-64 (1958)).

2. Nova Failed To Preserve Its Remaining Objections to the Application of *NYNY*

Nova argues (Br. 20-31) that the facts of *NYNY* are distinguishable and that the Board therefore should not have applied *NYNY* in this case. But Nova never made this argument to the Board. In fact, in papers it filed with the Board, Nova focused on the similarities between the facts of this case and *NYNY*. Indeed, when the administrative law judge in this case concluded that “[t]he facts in *NYNY* and the case at hand differ in significant ways” (A. 143), Nova disagreed, taking specific exception “to the ALJ’s Analysis . . . that the facts of *New York New York Hotel and Casino* . . . are significantly different from the instant case.” (A. 74.)

In its argument to this Court (Br. 22-37), Nova has changed its story. It seeks to challenge the factual findings underlying the Board’s application of *NYNY*. Specifically, Nova now challenges the Board’s factual findings that McGonigle was employed in work integral to Nova’s business and was handbilling in a non-work area that was open to the public. This Court may not consider these arguments because Nova never properly presented them to the Board in the first instance.

The administrative law judge found (A. 146) that McGonigle was handbilling in a non-work area that was not open to the public. Nova filed exceptions to those factual findings:

38. Nova excepts to the ALJ's Analysis, set forth on page 31, lines 34-35, of the decision that this case involves McGonigle soliciting only his co-workers during non-work time in a non-work area . . .

47. Nova excepts to the ALJ's Analysis, set forth on page 35, lines 37-40, of the decision, that Nova's campus is open to the public . . .

(A. 76-77.) However, Nova failed to explain the basis for those exceptions, and it failed to even mention those issues in its brief to the Board. (See A. 87-115.) As explained above, to preserve their rights on appeal, litigants must inform the Board of “the grounds for the exception.”⁴⁴ Nova failed to cite any record evidence or case law suggesting that the unsecured parking lot where McGonigle was handbilling was a work area or closed to the public. Accordingly, Nova's “vague exception[s] w[ere] insufficient to provide notice to the Board” of the grounds for the exception as required by the Board's rules.⁴⁵

After the Board issued its decision and adopted the judge's findings that McGonigle was handbilling in a non-work area open to the public (A. 126-28), Nova failed to file a motion for reconsideration, as required.⁴⁶ Despite two opportunities to do so – in exceptions and in a motion for reconsideration – Nova

⁴⁴ *Parsippany*, 99 F.3d at 417 (quoting 29 C.F.R. § 102.46(b)(1)).

⁴⁵ *Id.* at 418.

⁴⁶ *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1255 (D.C. Cir. 2012); *UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007) (“Because the union failed to file a motion for reconsideration challenging the Board's remedies, section 10(e) precludes us from reviewing the union's claim.”); *Flying Food*, 471 F.3d at 185-86.

did not properly preserve its challenges to these findings. Accordingly, the Court is barred from considering those argument now.

Nova also challenges (Br. 22-26) the Board’s finding (A. 126) that McGonigle was employed in work integral to Nova’s business. This finding was made for the first time by the Board, rather than the administrative law judge. In such circumstances, a litigant must file a motion for reconsideration in order to preserve its argument for appellate review.⁴⁷ As mentioned, Nova failed to do so, and this argument is therefore also jurisdictionally barred.

In sum, the Court lacks jurisdiction to consider the above challenges to the Board’s application of *NYNY*, articulated for the first time in Nova’s appellate brief.⁴⁸ As this Court has recognized, arguments that the Board “committed a factual error in applying [a] new standard [] are precisely the types of claims that [a litigant] [i]s obligated to bring to the Board’s attention by filing a motion for

⁴⁷ *Flying Food*, 471 F.3d at 185-86 (“Where, as here, a petitioner objects to a finding on an issue first raised in the decision of the Board rather than of the ALJ, the petitioner must file a petition for reconsideration with the Board to permit it to correct the error (if there was one).”).

⁴⁸ *See Woelke*, 456 U.S. at 665-66 (party’s failure to present issue to Board “prevents consideration of the question by the courts”).

reconsideration.”⁴⁹ Nova failed to file such a motion, and it has not offered any “extraordinary circumstances” to excuse its failure to do so.⁵⁰

3. Nova Failed to Preserve Its Objection to the ALJ’s Evidentiary Rulings

Nova also argues (Br. 41-43) that the administrative law judge improperly excluded relevant evidence about the safety issues faced by universities. Although in its exceptions to the Board, Nova stated that “the ALJ committed reversible error with respect to the admission or exclusion of evidence” (A. 71), Nova never identified what evidence was wrongly admitted or excluded. (*See* A. 87-115.) Nor did it provide any argument about the admissibility of any evidence. (*Id.*) Accordingly, for the reasons explained above, this Court has no jurisdiction to consider this issue.⁵¹

4. In any event, Nova’s Arguments Have No Merit

In any event, Nova’s arguments have no merit. Substantial evidence supports the Board’s factual findings and its application of *NYNY*, and the judge did not abuse his discretion in excluding evidence.

⁴⁹ *Stephens*, 677 F.3d at 1255.

⁵⁰ 29 U.S.C. § 160(e).

⁵¹ *See supra* note 39.

First, contrary to Nova’s claims, McGonigle and his coworkers were “regularly employed on the property in work integral to the owner’s business.”⁵² Their employer, UNICCO, had a contract to provide maintenance, janitorial, and landscaping services on Nova’s main campus. (A. 127; 169, 390.) At least 300 UNICCO employees worked at Nova, including McGonigle, who worked on campus full time. (A. 217, 264.) Quite plainly, the services that UNICCO provided on Nova’s property – ensuring a clean and well-maintained campus – are a necessary part of how Nova is able to furnish its educational product.⁵³ This part of the *NYNY* test is designed to ensure that contract workers who are given the right to handbill have a regular and ongoing work connection with the property, rather than a “fleeting or occasional” presence on the property.⁵⁴ McGonigle and his coworkers had such a connection with the campus.

In arguing otherwise, Nova cites (Br. 23-24) a number of inapplicable cases in which the Board considered whether certain workers were employees entitled to the protections of the Act or independent contractors; whether two groups of

⁵² *NYNY*, 2011 WL 1113038, at *16.

⁵³ See *Simon DeBartolo Group*, 357 NLRB No. 157, 2011 WL 6936331, at *3, nn.8-9 (2011), (finding employees of a mall’s maintenance contractor to be “regularly employed” “in work integral” to the mall’s business), *petition for review dismissed*, D.C. Cir. Nos. 12-1057 & 12-1098 (Jan. 8, 2013).

⁵⁴ *Id.* at *3, n.8 (finding mall’s maintenance work to be “not so fleeting or occasional as to take this case outside the holding of *NYNY*”).

workers should be in one bargaining unit; or whether a particular location qualified as a work area or not. None of those cases involved the application of *NYNY*.

Nova also argues (Br. 27-32) that the parking lot where McGonigle distributed handbills was a work area. However, Nova fails to identify any work that takes place in the parking lot, and the Board and the courts have repeatedly found parking lots to be non-work areas.⁵⁵ Nova wrongly claims (Br. 27) that the Board found that UNICCO employees performed janitorial services in the parking lot. The Board made no such finding and, as mentioned, Nova has not submitted any evidence that would support such a finding. Although the Board did find (A. 128) that UNICCO employees would be unlikely to litter because they are responsible for keeping the campus clean, this finding is in no way inconsistent with the Board's determination that the parking lot is a non-work area.

Nova next claims (Br. 29-32) that the parking lot was not open to the public. However, Nova's vice president for facilities management testified that the campus has six driving access points, none of which are secured or controlled, and that there are no pedestrian barriers controlling access to the campus. (A. 132; 328-29, Br. 4.) His exact words were, "you can pretty much walk on campus at will." (A.

⁵⁵ *First Healthcare Corp. v. NLRB*, 344 F.3d 523, 527-28 (6th Cir. 2003) (discussing "access to parking lots and other non-work areas"); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1254 (11th Cir. 1986) (stating non-work areas "include[s] break areas [and] parking lots"); *NLRB v. Orleans Mfg. Co.*, 412 F.2d 94, 96 (2d Cir. 1969) (stating non-working areas include lunchroom and parking lot).

217.) Furthermore, the campus contains a research library partially funded by the county that is “open to the general public.” (A. 329.) While Nova’s brief makes clear that a parking permit is required before one can *park a vehicle* on Nova’s campus, substantial evidence in the record shows that the parking lot – just like the rest of Nova’s campus – is open to the public.

Nova also argues (Br. 41-43) that the judge excluded relevant testimony from Nova’s newly hired director of public safety about “events” that “have to do with safety.” (A. 250.) These events all occurred long after Nova adopted its no-solicitation policy and after it enforced that policy as to McGonigle, and the judge concluded that the testimony was not relevant. (A. 251.) Nova has failed to demonstrate that it was prejudiced by the judge’s rulings.

Although Board hearings should, “so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts,”⁵⁶ the Board has considerable discretion on evidentiary rulings.⁵⁷ Such rulings are reviewed for abuse of discretion,⁵⁸ and the party challenging the ruling must prove prejudice.⁵⁹

⁵⁶ 29 U.S.C. § 160(b).

⁵⁷ *Artra Group, Inc. v. NLRB*, 730 F.2d 586, 591 (10th Cir. 1984) (stating the “decision not to consider evidence is within the discretion of the ALJ”).

⁵⁸ *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge’s refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same).

Nova has failed to demonstrate how it was prejudiced by the judge’s ruling. Its brief does not explain what “events” its witness would have testified to, and how those “events” would justify a rule prohibiting onsite contractor employees from distributing handbills in a non-work area. Nova’s vague claims about security are insufficient. Because Nova has failed to demonstrate prejudice, its argument that judge improperly excluded evidence should be rejected.

III. Substantial Evidence Supports the Board’s Finding that Nova Violated Section 8(a)(1) of the Act by Disciplining McGonigle

An employer violates Section 8(a)(1) when it disciplines an employee for violating an unlawful rule.⁶⁰ The Board found (A. 128-29) that Nova violated the Act when Todaro, acting as Nova’s agent, disciplined McGonigle for violating Nova’s unlawful no-solicitation rule. Nova does not dispute that Todaro’s actions, if attributable to Nova, would violate the Act. Rather, Nova contends (Br. 43-49) that Todaro never disciplined McGonigle and that, even if he did, Todaro did not act as Nova’s agent. As shown below, however, the Board’s findings are supported by substantial evidence.

⁵⁹ *Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from ALJ’s exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer “failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing”).

⁶⁰ *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259 (10th Cir. 2005).

A. Todaro Disciplined McGonigle

The record evidence demonstrates that Todaro issued the discipline to McGonigle. Around 4 p.m. on the day in question, McGonigle's direct supervisor called him into his office and told him that "Tony Todaro wanted to see" him and that he "was being written up." (A. 135; 232.) The two then went to Todaro's office, where Todaro explained to McGonigle that he was being written up for passing out handbills on Nova's property. (A. 135; 233.) McGonigle objected, arguing that he had the right to handbill under the Act, but Todaro responded that McGonigle could not "distribute anything on Nova's property because it's private property." (A. 135; 234.) This evidence amply supports the Board's finding that Todaro disciplined McGonigle, despite the absence of Todaro's signature from the disciplinary notice.

Nova cites (Br. 44) Todaro's testimony denying that he issued the discipline to McGonigle. In doing so, Nova is essentially asking this Court to overrule the Board's credibility determinations and credit Todaro's testimony over McGonigle's. But the Board credited McGonigle, noting that Todaro claimed during the hearing that he had no memory of the incident: "Honestly, I don't remember this." (A. 300.) Since Nova has failed to demonstrate that the Board's

credibility determinations are “hopelessly incredible, self-contradictory, or patently unsupportable,”⁶¹ this Court should reject Nova’s request.

B. Todaro Acted as Nova’s Agent

It is settled that an employer may violate the Act through the conduct of its agents.⁶² The Board applies common law principles of agency when assigning liability under the Act,⁶³ but these principles are construed liberally.⁶⁴ The ultimate question is whether employees would reasonably believe the putative agent speaks on behalf of the employer.⁶⁵

A principal will be responsible for the acts of its agents within the scope of the agent’s general authority.⁶⁶ In determining whether an individual has authority to bind the putative principal, the Board is not limited to direct evidence, but may

⁶¹ *Federated Logistics*, 400 F.3d at 924 (quoting *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003)). See also *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (Board hearing officer is “uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict”).

⁶² E.g., *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545-46 (D.C. Cir. 2006).

⁶³ *Id.* at 545.

⁶⁴ *Int’l Ass’n of Machinists v. NLRB*, 311 U.S. 72, 80-81 (1940).

⁶⁵ *Progressive*, 453 F.3d at 545.

⁶⁶ *Local 1814, Int’l Longshoremen’s Ass’n v. NLRB*, 735 F.2d 1384, 1395 (D.C. Cir. 1984).

infer the agent's authority from circumstantial evidence.⁶⁷ This Court has recognized that "the existence of an agency relationship is a factual matter ... which cannot be disturbed if supported by substantial evidence on the record considered as a whole."⁶⁸

When Todaro disciplined McGonigle for violating Nova's unlawful no-solicitation rule, he was acting as Nova's agent. (A. 129.) UNICCO had determined for itself that it would not interfere with its employees' union activity. (A. 135; 295, 297.) As the Board explained (A. 128), the parties' contract required UNICCO to ensure that "its agents and employees will abide by all rules, regulations, and policies of [*Nova*] during the term of this Contract." (A. 129; 395.) Nova informed Todaro that McGonigle was violating its solicitation policy, and Todaro – consistent with the parties' contract – then disciplined McGonigle for violating that policy. (A. 127; 232-34.) He gave McGonigle a copy of Nova's policy and said McGonigle could not "distribute anything on Nova's property because it's private property." (A. 127; 234.) Furthermore, even though Todaro worked for UNICCO, he wore work shirts bearing the logos of both UNICCO and

⁶⁷ See *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 8-9 (1st Cir. 1976); *Schauffler v. Highway Truck Drivers & Helpers Local 107*, 230 F.2d 7, 10 (3d Cir. 1956).

⁶⁸ *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 824 (D.C. Cir. 2001) (quoting *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998)).

Nova; he used an @nova.edu email address; and Nova listed him on its website in a manner suggesting he was a Nova employee. (A. 131-32, 137 n.9; 171-73, 197-98, 351, 355, 410.)

Nova essentially argues (Br. 46-47) that it cannot be held responsible because it did not employ Todaro at the time. But courts have regularly held employers responsible for the acts of agents they do not directly employ.⁶⁹ Nova further claims (Br. 47-48) that it could not delegate to Todaro the authority to discipline McGonigle, because it had no such authority. But Nova misunderstands the liberal agency analysis applied in the labor context.⁷⁰ As the Supreme Court has held, an employer may be held responsible “even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior.”⁷¹ This is because Congress

⁶⁹ See *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 802-03 (1st Cir. 1995) (bankruptcy trustee was agent of employer); *Cagle’s, Inc. v. NLRB*, 588 F.2d 943, 947-948 (5th Cir. 1979) (director of local chamber of commerce was agent of employer). See also *Star Kist Samoa, Inc.*, 237 NLRB 238, 244-46 (1978) (community organization ELM was agent of employer).

⁷⁰ *Uniroyal Tech. Corp. v. NLRB*, 98 F.3d 993, 999 (7th Cir. 1996) (noting “that a number of other circuits have followed, and the NLRA supports, a liberal approach in construing agency”); *3-E Co. v. NLRB*, 26 F.3d 1, 4 (1st Cir. 1994) (“[I]n this labor context, courts utilize a liberal agency analysis.”); *NLRB v. General Metals Prods. Co.*, 410 F.2d 473, 476 (4th Cir. 1969) (“It is clear, therefore, that in determining the company’s responsibility for the acts of others the rules of agency shall be given a liberal construction.”).

⁷¹ *Int’l Ass’n of Machinists v. NLRB*, 311 U.S. 72, 80-81 (1940).

has established “a clear legislative policy” to ensure employees are able to engage in protected activity “free from all taint of an employer’s compulsion.”⁷² Under these circumstances, given that Todaro was enforcing Nova’s rule when it disciplined McGonigle, an employee would reasonably believe Todaro was acting on Nova’s behalf.⁷³

IV. Substantial Evidence Supports the Board Finding That Nova Violated the Act by Making Coercive Statements to a Laid-Off Contractor Employee, Who Was Requesting Assistance In Gaining Employment

As explained above (page 15), Section 7 protects the right of employees to engage in self-organization and other concerted activities, and Section 8(a)(1) implements those rights. This Court has long held that these provisions make it unlawful for an employer to make threats or statements that tend to coerce its employees in the exercise of their rights under the Act.⁷⁴ An employer is also prohibited from coercively interrogating job applicants about their union membership or affiliation.⁷⁵ The test for a Section 8(a)(1) violation is whether an

⁷² *Id.*

⁷³ *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545-46 (D.C. Cir. 2006); *Am. Press, Inc. v. NLRB*, 833 F.2d 621, 625 (6th Cir. 1987); *NLRB v. Solboro Knitting Mills*, 572 F.2d 936, 941 (2d Cir. 1978).

⁷⁴ *See W&M Props. Of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008); *Power, Inc. v. NLRB*, 40 F.3d 409, 415, 418, 423 (D.C. Cir. 1995).

⁷⁵ *See W&M Props.*, 514 F.3d at 1348; *Williams Enterprises, Inc. v. NLRB*, 956 F.2d 1226, 1240 (D.C. Cir. 1992); *M.J. Mechanical Servs., Inc.*, 324 NLRB 812, 812-13 (1997), *enforced mem.* 172 F.3d 920 (D.C. Cir. 1998).

employer's conduct has a reasonable tendency to coerce; actual coercion is unnecessary.⁷⁶

The Board found (A. 129; 205-06) that Nova violated the Act when Todaro – who by this time was employed by Nova – asked Sanchez, a laid-off UNICCO employee seeking work, about his union activity and made a sarcastic comment about the Union. As this Court has repeatedly found, “[q]uestions about union membership have a tendency to coerce.”⁷⁷

Nova disingenuously claims (Br. 51-52) that this incident occurred before it hired Todaro, and that it should therefore not be held responsible for Todaro's actions. But the record evidence overwhelmingly demonstrates that this event happened *after* Nova hired Todaro. Sanchez testified that the conversation took place the day after UNICCO employees were laid off, and that Todaro was working for Nova when they spoke. (A. 205.) While Sanchez was confused about the exact date, it is beyond dispute that Nova's contract with UNICCO ended on February 17 (A. 186), and UNICCO's employees were laid off on that date (A. 163, 201, 288, 337). The following day, February 18, Todaro began working for Nova, and some laid-off UNICCO employees began working for Nova's new

⁷⁶ *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004); *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

⁷⁷ *E.g.*, *W&M Props.*, 514 F.3d at 1348.

contractor. (A. 264, 284-85.) That is when the conversation took place. And Nova admits that Todaro was acting as its agent on February 18. (A. 163.)

Finally, Nova claims (Br. 52-54) that it did not violate the Act because Sanchez wanted help getting a job with one of Nova's contractors rather than with Nova directly, and – it claims – Todaro had no influence over contractor hiring decisions. But other laid-off UNICCO managers who were hired directly by Nova helped their former employees get jobs with the new contractor. For example, when the UNICCO contract ended, Nova hired Thai Nguyen, who had been UNICCO's athletic fields manager, and Nguyen successfully recommended that the new contractor hire the four laid-off UNICCO employees who had previously reported to him. (A. 284, 290.) The argument that Todaro – who was now actually overseeing the contractors that worked on campus (A. 303) – could not have influenced contractor hiring decisions is without merit.

Nor did Todaro believe that he had no influence over contractor-hiring decisions at the time of his conversation with Sanchez. After questioning Sanchez about his union activity, Todaro told Sanchez that he could not help him with a job “at this moment.” (A. 206.) He advised Sanchez to call him in a few months, suggesting to Sanchez that he would help him in the future. (A. 206.) Under these circumstances – where Todaro was acting as Nova's agent and had the power to

help Sanchez get a job with the new contractor – the Board reasonably found
Todaro's questions about Sanchez's union activity to be coercive and unlawful.

CONCLUSION

The Board's interpretation of the Act in this case is reasonable, and its factual findings are supported by substantial evidence. Because Nova's arguments are without merit, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

January 2013

**RELEVANT SECTIONS OF THE
NATIONAL LABOR RELATIONS ACT
AND THE BOARD'S RULES AND REGULATIONS**

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

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

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

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

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

Sec. 10(b) [Sec. 160(b)] [Complaint and notice of hearing; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts

of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

.Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

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

**Relevant provisions of the Board's Rules and Regulations,
29 C.F.R. § 102.46:**

§ 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

...

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

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

...

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

§ 102.48 Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.

...

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.

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

NOVA SOUTHEASTERN UNIVERSITY)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1297, 11-1331
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	12-CA-25114
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,277 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

s/ Linda Dreeben
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Dated at Washington, DC
this 31st day of January ,2013

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

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)	

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2013, 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 a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 31st day of January, 2013