Final Brief Oral Argument Not Yet Scheduled

Nos. 11-1320 & 11-1352

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZARK AUTOMOTIVE DISTRIBUTORS, INC.
d/b/a O'REILLY AUTO PARTS

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

FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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OZARK AUTOMOTIVE DISTRIBUTORS, INC. d/b/a O'REILLY AUTO PARTS	)	
Petitioner/Cross-Respondent	)	Nos. 11-1320 & 11-1352
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 21-CA-39846

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Ozark Automotive Distributors, Inc. d/b/a O'Reilly Auto Parts was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board. The Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, CTW was the charging party before the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on September 8, 2011 and reported at 357 NLRB No. 88, which relies on the findings of the Board and a Board hearing officer in an earlier representation proceeding. The findings of the Board in the representation proceeding (Board Case 21-RC-21222) are contained in an unpublished Decision and Certification of Representative, which issued on March 31, 2011; the findings of the hearing officer in the same proceeding are contained in an unpublished Hearing Officer's Report and Recommendations, which issued on October 29, 2010.

C. Related Cases

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

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 21st day of March 2012

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ozark Automotive Distributors, Inc., d/b/a O'Reilly Auto Parts ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Decision and Order issued against the Company on September 8, 2011, and

reported at 357 NLRB No. 88. (A 786-89.)[1] In its Decision and Order, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by: failing and refusing to bargain with the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, CTW ("the Union") as the duly certified collective-bargaining representative of the route drivers employed at the Company's distribution center in Moreno Valley, California; and failing and refusing to comply with the Union's request for information relevant to collective bargaining. (A 787.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

As the Board's unfair labor practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 21-RC-21222) is also before the Court pursuant to Section 9(d) of

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[1] Record references in this final brief are to the Joint Appendix ("A") filed by the Company and the Supplemental Appendix ("SA") filed by the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Company filed its petition for review on September 13, 2011. The Board filed its cross-application for enforcement on September 29, 2011. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its discretion in overruling the Company's election objections and certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide requested, relevant information to the Union.

STATEMENT OF THE CASE

I. THE REPRESENTATION PROCEEDING

A. Factual Background

The Company is an auto-parts retailer that employs 32 "route drivers" to transport goods between its distribution center in Moreno Valley, California, and various retail outlets. (A 787; A 163-65.) In early July 2010, some of the Company's route drivers went to the Union's offices and expressed interest in union representation. (A 422; A 91, 97-98, 107.) A receptionist gave them union authorization cards to complete, and additional blank authorization cards to distribute to their co-workers. (*Id*.) The receptionist later submitted all of the completed authorization cards to Union Business Agent/Organizer Ruben Luna, who was not available to speak to the drivers during their impromptu visit to the Union's offices. (A 422, 427; A 107-08.)

Using the contact information on the authorization cards he received, Luna scheduled a meeting with the drivers to discuss unionization. (A 427; A 104.) Luna subsequently informed the drivers that he had to cancel the meeting due to a conflict in his schedule. (A 427; A 98-99, 101.)

Based on the authorization cards collected as of July 15, 2010, the Union filed a petition with the Board, seeking certification as the route drivers' collective-bargaining representative. (A 418 & n.2; A 558.) The Board scheduled a

representation election to take place among the route drivers on August 13, 2010. (A 525, 418; A 549, 565.)

In the week or two before the election, Luna received a voicemail message from one of the drivers, informing him that the Company had threatened to subcontract the route drivers' work to outside contractors if the Union won the election. (A 105.) The Union followed up on this information by filing an unfair labor practice charge with the Board, and Luna later mailed a letter to all of the route drivers, informing them of the charge. (A 779, 782.) In his letter, Luna assured the drivers that federal law protected them against the "unlawful tactics" threatened by the Company, and that the Union would be there to help them. (A 779.) Luna further urged the drivers not to be swayed by the Company's threats, but to "get informed" and decide for themselves whether it would be in their interest to vote for the Union. (*Id*.)

On the eve of the election, Luna met with the route drivers and again emphasized their rights under federal law, as well as the benefits that the Union could offer. (A 427; A 94-95.) He distributed one document to them—a fact-sheet on employee rights in the election process. (A 427; A 780.) As with the earlier letter to employees, the fact-sheet listed Luna as the representative and contact

person for the Union in the organizing campaign at the Company's Moreno Valley facility.[2] (A 427; A 97-98, 780.)

B. Procedural History

On August 13, 2010, pursuant to a Stipulated Election Agreement, the Board held a secret-ballot election among the employees in the proposed bargaining unit. (A 418; A 562-63, 565.) The tally of ballots showed 17 votes for the Union, 14 votes against the Union, 1 void ballot, and no challenged ballots. (A 565.) Subsequently, the Company filed objections to the election alleging, in relevant part, that agents of the Union engaged in objectionable threats, harassment, coercion, and appeals to racial prejudice that interfered with employee free choice in the election. (A 421-22; A 567-68.) The Company also served subpoenas on the Union and one employee (Oscar Castillo), seeking information about communications between the Union and the Company's drivers, and among the drivers, prior to the election. (A 526 n.2; A 58-62, 65-67.) The Union and Castillo requested that the subpoenas be revoked. (A 526 n.2; A 72-75, 213.)

Pursuant to an order of the Board's Regional Director for Region 21, a hearing was held on the election-objection and subpoena issues over two days in

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[2] Although the fact-sheet named one other union official (Andy Budai), there is no evidence that any union official, other than Luna, had contact with the employees between the filing of the Union's petition to represent the drivers on July 15, 2010, and the August representation election.

September 2010. (A 418; A 549-50.) At the close of testimony, the hearing officer granted the petitions to revoke the Company's subpoenas. (A 526 n.2; A 212-14.) The hearing officer further issued a report recommending that the Board overrule all of the Company's objections and certify the Union. (A 417-58; A 550.)

The Company filed exceptions to portions of the hearing officer's report and recommendations, and to the hearing officer's rulings on the subpoenas. (A 525; A 630-38.) The Board (Chairman Liebman and Member Pearce; Member Hayes dissenting only on the issue of subpoena revocation and not passing on the other issues in the case) issued a Decision and Certification of Representative on March 31, 2011, adopting the hearing officer's rulings, findings, and recommendations, and certifying the Union as the employees' collective-bargaining representative. (A 525-27; A 550.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

By letter dated May 24, 2011, the Union requested that the Company recognize and bargain with the Union as the exclusive collective-bargaining representative of the Company's route drivers, and that the Company furnish certain information relevant to collective bargaining. (A 787, 90-92; A 682-84.) The Company refused. (A 787; A 686.) Acting on an unfair labor practice charge filed by the Union, the Regional Director issued a complaint alleging that the

Company's refusal to bargain and furnish requested information violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 786; A 688, 692-97.)

The General Counsel then filed a motion for summary judgment, and the Board issued a notice to show cause. (A 786; A 548-712.) In response, the Company did not deny that it refused to bargain with the Union and refused to furnish relevant information to the Union, but claimed that it had no duty to take these actions because the Board had erred in overruling the Company's election objections and certifying the Union. (A 786; A 723-24.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 8, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued its Decision and Order, granting the General Counsel's Motion for Summary Judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 786-88.) The Board concluded that all representation issues raised by the Company in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (A 786.)

The Board's Order requires the Company to cease and desist from refusing to bargain with, and refusing to provide information to, the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). (A 788.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, to furnish the information requested by the Union, and to post a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with, and provide requested information to, the Union as the certified collective-bargaining representative of the Company's route drivers. Before this Court, the Company challenges the Union's certification and renews the objections it made in the underlying representation proceeding, that prounion employees engaged in various forms of objectionable conduct that invalidated the Union's election victory. However, the Board did not abuse its discretion in overruling those objections.

Preliminarily, and contrary to the Company, the Board found that the employees who allegedly engaged in objectionable conduct—Robert Castilleja, Oscar Castillo, Adrian Garcia, and Manuel Reyes—were third parties, not agents

of the Union. The Board accordingly considered their conduct under the standard applicable to third parties in an election.

Applying the third-party standard, the Board examined the allegations that the named employees threatened, harassed, and coerced fellow employees (Objections 1 and 2); threatened them with job loss and the prospect of non-representation by the Union if they did not support the Union in the election (Objections 3 and 4); and made appeals to racial prejudice (Objection 5). The Board reasonably found that their actions did not warrant setting aside the election. Although the Company now argues that the Board based its findings on certain erroneous credibility determinations and subpoena rulings, the Company's arguments do not provide a basis for reversing the Board's well-supported findings with regard to the objections.

Accordingly, the Board acted within its discretion in overruling the Company's objections, the Board's certification of the Union must stand, and the Board is entitled to enforcement of its order requiring the Company to bargain with, and provide requested information to, the Union.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS AND CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH, AND PROVIDE RELEVANT, REQUESTED INFORMATION TO, THE UNION

A. Introduction, Applicable Principles, and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." It is well settled that an employer violates this provision not only by refusing to bargain outright, but also by refusing to provide its employees' representative with information relevant and necessary to collective bargaining. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

Here, the Company (Br. 3, 41) has admittedly refused to bargain with, and provide information to, the Union in order to challenge the Board's certification of the Union following its election victory. There is no dispute that if the Board properly certified the Union as the employees' collective-bargaining representative, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by refusing to bargain with, and provide requested information

to, the Union,[3] and the Board is entitled to enforcement of its Order. *See C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988). Accordingly, the issue before the Court is whether the Board acted within its broad discretion in overruling the Company's election objections and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower Co.*, 329 U.S. at 330; *accord C.J. Krehbiel Co.*, 844 F.2d at 882. There is a "strong presumption" that an election conducted in accordance with those safeguards "reflect[s] the true desires of the employees." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); *accord NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1003 (4th Cir. 1997) ("the outcome of a Board-certified election [is] presumptively valid"); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (same); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (same).

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[3] An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Therefore, the results of such an election "'should not be lightly set aside.'" *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 570 (D.C. Cir. 1970) (citations omitted).

In considering claims of election misconduct, the Board and the courts have long recognized a distinction between misconduct by a party to the election—that is, the union or the employer—and misconduct by employees or other third parties. *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 264 (D.C. Cir. 1998); *accord Mastec North Am., Inc.*, 356 NLRB No. 110, 2011 WL 828384, at *4-6 (2011). While the Board will overturn an election based on party misconduct that had a "tendency to interfere with the employees' freedom of choice," a more compelling showing is required where third-party misconduct is concerned because third parties generally do not have the same coercive power over potential voters as do the parties to the election. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). *See Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *4-5. The Board, thus, will only overturn an election based on third-party misconduct if it was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *accord Overnite Transp.*, 140 F.3d at 265.

The objecting party bears the "heavy burden" of proving misconduct sufficient to warrant setting aside the election. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996); *Amalgamated Clothing Workers*, 424 F.2d at 827; *see*

also NLRB v. Mattison Mach. Works, 365 U.S. 123, 123-24 (1961) (per curiam). The determination whether the objecting party has carried its burden is "fact-intensive" and thus "especially suited for Board review." *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1377 (D.C. Cir. 1999).

On appeal, the Board's rulings on election objections are entitled to deference. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562 (D.C. Cir. 1984); *Amalgamated Clothing Workers*, 424 F.2d at 827; *accord Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987). "It is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election." *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1562. Moreover, this Court will accept the credibility determinations of an individual presiding over a Board hearing (that have been adopted by the Board) unless they are "'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)). Accordingly, the scope of appellate review is "extremely limited." *Id.* at 1562, 1564; *accord C.J. Krehbiel Co.*, 844 F.2d at 882.

B. The Board Properly Found that the Prounion Employees Implicated by the Company's Objections Were Not Agents of the Union

The Company argues (Br. 28-36), as a preliminary matter, that the objectionable conduct of the prounion employees in this case must be attributed to the Union, and examined under the legal standard appropriate for misconduct by a party to the election, because the employees at issue were union agents. The Board properly rejected (A 430-32) this argument.

As this Court has recognized, "'not every employee who supports [a] union or speaks in its favor is a union agent.'" *Overnite Transp.*, 140 F.3d at 264 (quoting *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 291 (4th Cir. 1987)). The Board accordingly undertakes a careful examination of the evidence to determine whether a given employee is an agent of a labor organization, applying common-law principles of agency. *Mar-Jam Supply Co.*, 337 NLRB 337, 337 (2001); *accord Overnite Transp. Co.*, 140 F.3d at 265-66. Under those principles, an agency relationship exists where the individual has either actual or apparent authority to act on behalf of the union. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). The employer, as the party asserting the agency relationship, has the burden of showing that the union invested that individual with the requisite authority. *See Associated Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir.

2002); *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 262 (8th Cir. 1993); *Cornell Forge*, 339 NLRB at 733.

Here, the Company failed to adduce any evidence that the four employees who assertedly engaged in objectionable conduct—Castilleja, Castillo, Garcia, and Reyes—had actual authority to act for the Union. Thus, as the Board found (A 422), there is no evidence that the Union designated these employees as its representatives, compensated them in exchange for their organizing activities, or delegated to them any tasks in the organizing campaign (e.g., soliciting signed authorization cards or holding meetings for the Union). Therefore, the Company failed to prove that the four employees here were actual agents of the Union.

The Company also failed to prove that the Union cloaked these employees with apparent authority. "Apparent authority exists where *the principal engages in conduct* that[,] reasonably interpreted, causes [a] third person to believe that the principal consents to have [an] act done on his behalf by the person purporting to act for him." *Overnite Transp.*, 140 F.3d at 266 (emphasis added and internal quotation marks omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 27 (1992)); *accord Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *2. Accordingly, the question is whether Union Business Agent Luna, the only union principal in this case, did anything that would reasonably lead employees to believe that Castilleja, Castillo, Garcia, and Reyes had authority to act on behalf of

the Union. Addressing precisely this question, the Board found (A 432) "no evidence that Luna ever stated or implied to employees that Castilleja, Castillo, Garcia and/or Reyes were authorized to act for the Union in any respect."

To be sure, there was testimony from two employees that the putative union agents either connected themselves with the Union or were believed to be connected with the Union. Specifically, employee Louis "Greg" Morrison testified that on one occasion Castilleja said to him, "[i]f you have any questions about the Union – you know where to find me," and on another occasion, Castillo proclaimed himself a "frontrunner" for the Union. (A 423; A 167, SA 4.) Morrison further testified that he thought Castilleja, Castillo, Garcia, and Reyes were "talking to the [Union]" because he saw them at union meetings. (A 427; A 175.) Similar to Morrison, employee Santiago Albarran testified that Reyes had called him and told him that he needed to support the Union. (A 426; A 118.) Albarran also testified that he had "heard the rumors that Mr. Luna and Adrian [Garcia] and Bobby [Castilleja] and Manuel Castillo" were the union leaders. (A 424; A 122.)[4]

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[4] As the Board found (A 426), one additional employee, Efrain Vasquez, gave conflicting testimony about purported statements that might suggest that Garcia had a greater involvement with the Union. Vasquez initially testified that Garcia was "the one" who told him that employees would get better benefits and pay if the Union represented them. (A 426; A 114, SA 1.) Later in his testimony, however,

But neither Morrison nor Albarran could point to any conduct on the part of the Union or Luna that could have fostered the belief that Castilleja, Castillo, Garcia, and Reyes were connected with and acting for the Union in the organizing campaign. Indeed, Morrison admitted that he merely "assumed" that these individuals were involved with the Union; he never actually saw any of them talking to Luna or any other union official. (A 423; A 174-75, 177.) Likewise, Albarran testified that, apart from the rumors he had heard, he had no knowledge of who the union "leaders" were. (A 424; A 122.) In these circumstances, the Board reasonably found that there was insufficient evidence to establish that the Union vested Castilleja, Castillo, Garcia, and Reyes with apparent authority to act on its behalf.

The Company nevertheless argues (Br. 32-33) that the Union's failure to disassociate itself from the actions of these four employees rendered them union agents under principles of apparent authority. This Court, however, has roundly rejected the theory that an agency relationship may be foisted on a principal simply by virtue of the principal's passivity. *See Overnite Transp.*, 140 F.3d at 267-68 (holding that "mere presence of union officials" at election-day gathering where prounion employees allegedly engaged in objectionable conduct was "insufficient

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Vasquez denied that Garcia ever informed him about anything the Union said. (A 426; A 114.)

to grant [the prounion employees] apparent authority to act on behalf of the union"); *accord Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 114 (7th Cir. 1997) (finding that union supporters were not transformed into agents of the union by virtue of union's passivity in the face of their conduct).

The Board case cited by the Company (Br. 33)—*Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984)—is not to the contrary. In *Bio-Medical Applications*, the Board simply considered a union principal's failure to disassociate itself from the alleged agents' actions as one factor favoring a finding of apparent authority, where the evidence also showed affirmative conduct by the union that created the impression that the alleged agents acted with the union's authorization. *See id.* at 828. Indeed, there, the union held out two prounion employees as "apparent agents" by allowing them to speak for the union at official meetings held for employees, taking them with union officials to make special appearances at election functions, and transporting them to one of the employer's facilities to campaign on election day. As shown above, there was no such affirmative conduct by the Union here that could make the Union's failure to disassociate itself from the actions of Castilleja, Castillo, Garcia, and Reyes even remotely relevant.[5]

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[5] The Company also relies (Br. 33) on *La Famosa Foods, Inc.*, 282 NLRB 316, 328 (1986), to support its claim that "a failure of the principal to disassociate from

Similarly unpersuasive is the Company's effort (Br. 30-32) to liken this case to *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002), and *Local 3, IBEW (Cablevision)*, 312 NLRB 487, 490-91 (1993), in which a few individuals who engaged in extensive organizing activities for the union were found to be union agents. In those cases, the evidence showed that union officials expressly gave over much of their organizing duties to the specific individuals at issue. *See Kentucky Tennessee Clay*, 295 F.3d at 443 (union official directly requested that two employees perform "the lion's share" of the organizing work, placing, for example, the burden of collecting signed authorization cards "squarely and exclusively" on their shoulders); *Local 3*, 312 NLRB at 490-91 (union official gave four named individuals "actual, express authority to engage in organizing

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the actions of the alleged agent may be a controlling factor in determining agency." However, the agency findings in *La Famosa* were made by an administrative law judge, in connection with the finding of certain unfair labor practices that were not subsequently placed before the Board on exceptions. Indeed, the only exceptions filed in the case related to the judge's *failure to find* additional unfair labor practices. *See id.*, 282 NLRB 316, 316 & n.1. Accordingly, any agency findings made in connection with the unfair labor practices found in *La Famosa* were not reviewed by the Board and are not precedential. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (judge's findings, to which no exceptions were filed with the Board, "are not . . . considered precedent for any other case" (internal quotation marks and citation omitted)).

activity"). Here, by contrast, there is no evidence that Union Business Agent Luna expressly delegated *any* organizing duties to Castilleja, Castillo, Garcia, or Reyes.[6]

As the Company, thus, has failed to establish that the four employees at issue had actual or apparent authority to act on behalf of the Union, the alleged misconduct of those employees cannot fairly be attributed to the Union, and the Board properly so found. The Board accordingly considered the employees' alleged misconduct under the standard applicable to third parties in a representation election, as further explained below.

C. The Board Did Not Abuse Its Discretion in Overruling the Company's Election Objections

The Company claims (Br. 41-43) that "the individuals in question," and an additional unidentified individual, "created an atmosphere of fear and coercion which precluded a fair election." However, as the Board properly found (A 433-56), the third-party conduct in evidence does not support the Company's claim.

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[6] Although Luna testified that he or a union receptionist would contact one employee each time a meeting with the employees had to be scheduled, and once when a meeting had to be cancelled—apparently relying on that employee to spread the word to other employees—Luna did not recall who he contacted on these occasions. (A 103-04.) In addition, although Luna testified that Castilleja, given his past membership in a different union, "was well aware of what he needed to do" in an organizing campaign, Luna denied that he ever delegated any specific duties to Castilleja in the organizing campaign. (A 96-97.) There also is no evidence that Luna held Castilleja out as the Union's representative for any purpose.

As the Board has long recognized, "the conduct of third persons tends to have less effect upon [] voters [in a representation election] than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions." *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). In addition, there are equities that militate against taking an election victory away from a party based on conduct that was beyond the control of any party to the election. *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). *See Overnite Transp.*, 140 F.3d at 264. For these reasons, the Board subjects allegations of third-party misconduct to heightened scrutiny. *Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *4-5.

A party that seeks to overturn an election based on third-party misconduct must show not only that the misconduct occurred, but also that it "created a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *accord Overnite Transp.*, 140 F.3d at 265. To determine whether threats, in particular, are objectionable under this standard, the Board considers five factors: (1) the nature of the threat; (2) whether it encompassed the entire bargaining unit; (3) whether reports of the threat were disseminated widely within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time

of the election. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), and cases cited at nn.8-12; *accord Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *3.

1. The Company failed to prove, as alleged in Objections 1 and 2, that prounion employees physically threatened, coerced, and harassed fellow employees

The Company argues (Br. 49-53) that prounion employees Garcia and Castillo threatened and intimidated fellow employees, thereby "creat[ing] an atmosphere of fear and coercion that precluded a fair election." The Company relies on two incidents, detailed below—one involving Garcia, and the other involving Castillo—and certain discredited evidence relating to purported additional incidents involving Castillo. As the Board reasonably found (A 437-43), none of these incidents establishes conduct so egregious as to warrant setting aside the election.

a. Facts relevant to Objections 1 and 2

At a regular safety meeting sometime in the month before the election, the Company's drivers learned that some of their colleagues were trying to "bring[] [the Union] in." (A 434; A 134, 136.) Driver Mario Macchione approached Garcia after the meeting and expressed concern about this development, telling Garcia that he and other unnamed individuals "weren't happy" about the prospect of the Union coming in to represent the drivers. (*Id.*) In response, Garcia

expressed confidence that everything would be alright, and that the Union would "take care of" employees. (A 434; A 136.) Garcia further ventured the opinion that the Union "had the majority vote"—even though the election had not yet taken place—and that the Union would be coming in "no matter what," notwithstanding the concerns of Macchione and his fellow opponents of unionization. (*Id*.)

In a separate incident about two weeks before the election, driver Morrison confronted Castillo at the Company's facility about a rumor that Castillo was calling him a rat.[7] (A 434-35, 441; A 170-71, 173, 180-81, 184-85.) Specifically, Morrison walked to an area where he saw Castillo talking to another employee and said, "Let it be known that whoever started the rumor that I am a rat no longer works here anymore." (A 435; A 171, 178.) On hearing this, Castillo asked whether Morrison was talking to him. (A 435; A 171, 182.) Morrison responded that Castillo was "the only guilty party" he could see. (A 171, 182.) A shouting match ensued, in which Castillo called Morrison an "old man" and told him that his "days [were] numbered" and that he was "not going to be working here much

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[7] Morrison's hearsay testimony serves as the only evidence of the "rat" rumor. Under that testimony, Morrison was told by an unidentified co-worker that "there is a rumor going around that you are a rat." (A 434-35 & n.15; A 170-71.) When Morrison asked the unidentified co-worker to explain what he meant, the co-worker said that Castillo was telling people that Morrison had reported the names of all the employees who had attended an after-work meeting about unionization to a company manager. (A 170-71.)

longer."[8] (A 441; A 171-72.) The two continued to argue, and nearly came to blows, until they were separated by a fellow employee. (A 435; A 183.)

b. The credited evidence fails to show that Garcia and Castillo created a "general atmosphere of fear and reprisal" by their conduct

(i.) Garcia

As the evidence shows and the Board found (A 438), Macchione initiated a conversation with Garcia in which he (Macchione) expressed concern about the Union. Garcia matched Macchione's concern with various expressions of confidence—that the Union would take care of employees, that it already had majority support, and that it would be coming in despite Macchione's opposition. Thus, Garcia's comment to Macchione was simply an expression of opinion, in response to Macchione's expression of his opinion.

Although the Company now claims (Br. 51) that Garcia's confidence in the result of the election "coerced employees who opposed the Union" and "made them feel they had no choice," the evidence fails to show that other employees were even privy to Garcia's remark that the Union already had a majority and was

[8] Morrison testified that, prior to this incident, Castillo made a similar statement—that Morrison was "not going to be here much longer" and that his "days [were] numbered"—in a telephone conversation on June 23, 2010. (A 168-69.) The Board properly refused (A 445 & n.27) to consider this earlier statement, as it fell outside the "critical period" of interest in this case—that is, the period between the Union's filing of the representation petition (July 15, 2010) and the election (August 13, 2010).

coming in "no matter what." Indeed, as the Board found (A 439), "this was a single incident, involving but one employee, with no evidence that the remark was disseminated to any other employee."

In any event, the Board further found (A 440) that, even if Garcia's remark were analyzed as a threat, it still would not qualify as an *objectionable* threat—that is, one that created a "general atmosphere of fear and reprisal"—under the five-factor test set forth in *Westwood Horizons Hotel*. Specifically, assuming that Garcia's comment was a threat (factor #1), there is no evidence that it "encompassed the entire bargaining unit" (factor #2) or was "disseminated" (factor #3) to other employees. *See Westwood Horizons Hotel*, 270 NLRB at 803. The statement, moreover, was not a "threat" that Garcia could have carried out (factor #4), but a projection as to how a majority of employees would vote in the election. *Id*. The evidence further shows that Garcia made the comment only once, at some point in the one-month period before the election, and the Company failed to present evidence that the comment was reiterated thereafter (factor #5). *Id*. In these circumstances, the Board properly rejected (A 438-40, 442) the Company's theory that Garcia's comment constituted an objectionable threat.

The Company nonetheless maintains (Br. 51-52) that the Board erred in failing to find Garcia's comment "clearly coercive," citing *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614 (2002). In that case—which involved numerous,

blatant threats of violence against antiunion employees—the Board observed that threats by prounion employees against antiunion co-workers have a tendency to discourage antiunion employees from speaking out, which in turn could influence employee choice in a later election by creating the appearance that the union "command[s] a degree of support that it does not in fact enjoy." *Id*. at 616. This observation has no application here. Garcia made no threat to do anything to any antiunion employee. Instead, as shown above, he simply expressed the opinion that the Union would be voted in by a majority of employees, notwithstanding the opposition of a few. *Robert Orr-Sysco Food Services* accordingly provides no authority for reversing the Board's finding that Garcia's comments to Macchione did not rise to the level of objectionable conduct.

(ii.) Castillo

Turning to Castillo's alleged threats and physical intimidation of Morrison, the evidence shows and the Board found (A 440-41) that *Morrison* initiated an altercation with Castillo by accusing him of starting a rumor and threatening that he would lose his job. Castillo returned the hostility in kind, telling Morrison that his "days [were] numbered" and that he was "not going to be working here much longer." Under Morrison's credited testimony, both employees engaged in argument and intimidation that nearly led to a physical fight. Because the testimony describes a volley of threats and other intimidating conduct, the Board

properly found (A 440-41) that it would be unreasonable to analyze Castillo's contributions as if they occurred in a vacuum.

The Board accordingly applied (A 440) the *Westwood Horizons* analysis with due consideration of the context in which Castillo acted. With regard to the first factor in the analysis (the nature of the threat), the evidence does not establish that Castillo's job-loss statements were related to the upcoming election or Morrison's stance towards the Union. *See Bell Trans*, 297 NLRB 280, 281 (1989) (finding altercation not objectionable where it would reasonably be viewed as a personal dispute between two employees, unrelated to the election). Rather, the statements—that Morrison's days were "numbered" and that he would not be working for the Company much longer—appear to be related to Castillo's prior observation that Morrison was an "old man." (A 172.) Moreover, to the extent that Castillo engaged in acts of physical intimidation, he was responding to and matching Morrison's conduct, as noted above.

The Board also found that the second and third *Westwood Horizons* factors (whether the threat encompassed the entire bargaining unit and the extent of dissemination) do not favor a finding that Castillo engaged in objectionable conduct. Morrison testified that there were only two other employees present during the altercation: the employee to whom Castillo was speaking when Morrison arrived on the scene, and the employee who intervened to stop the fight.

(A 179, 183.) Thus, the entire 32-person bargaining unit was not present for Castillo's statements and conduct towards Morrison. Moreover, there is no evidence that news of Castillo's role in the altercation was disseminated to employees who were not present.

The Board further found (A 440) that the fourth and fifth *Westwood Horizons* factors do not favor a finding of objectionable conduct. With regard to the fourth factor in the analysis (ability to carry out the threat), the Board properly found (*id*.) that this factor is neutral, as Castillo and Morrison both made threats, and they were equally capable (or incapable) of effectuating those threats. As to the fifth factor in the analysis (whether the threat was made or renewed near the time of the election), the Board found (A 441) that the altercation was an "isolated incident" that occurred two weeks before the election. There is no evidence that Castillo or any of the other prounion employees physically intimidated or threatened Morrison after the incident in question. Indeed, Morrison testified that he never experienced or witnessed anything of the sort. (A 176.) Thus, even if Castillo's part in the altercation were interpreted as particularly threatening to opponents of unionization, it did not amount to conduct that so tainted employee feeling as to warrant a rerun election under the standard set forth in *Westwood Horizons*. *See Bell Trans*, 297 NLRB at 281 (applying *Westwood Horizons* and finding isolated altercation between two employees unobjectionable, where only a

small fraction of the bargaining unit witnessed it and there was little evidence of dissemination).

Contrary to the Company (Br. 50-51), moreover, Castillo's conduct was not comparable to the conduct found objectionable in *Electra Food Machinery, Inc.*, 279 NLRB 279 (1986), and *Buedel Food Prods. Co.*, 300 NLRB 638 (1990). In *Electra Food Machinery*, the Board found that widespread third-party threats "to kill and physically harm those nonsupportive of the Union," and to damage their property, created a "general atmosphere of fear and reprisal" warranting a rerun election. *Electra Food Mach.*, 279 NLRB at 280. In *Buedel Food*, the Board found that a similarly specific third-party threat to burn an employee's car if he did not vote for the union "could have created a sufficient atmosphere of fear and reprisal to warrant setting aside the election." *Buedel Food*, 300 NLRB at 638. *See also Steak House Meat Co.*, 206 NLRB 28, 29 (1973) (finding that specific, voting-related threats of substantial harm, directed at a determinative number of voters, are objectionable). Here, the evidence fails to show that Castillo made any threats of specific violence against employees if they did not support or vote for the Union. Accordingly, the Company's reliance on cases involving specific threats of substantial harm fails. *See Steak House Meat*, 206 NLRB at 29.

Although the Company insists (Br. 49-50, 52) that this altercation was not Castillo's only foray into the area of physical intimidation, there is no credited

evidence to support this position. Two company officials—Regional Director Joseph Cockell and Divisional Human Resources Manager Rafael Alvarez—testified that Castillo sat around the Company's premises on numerous occasions, pointing, glaring, and shouting at employees who were seen talking to management. However, none of the employees who were purportedly subject to this conduct testified at the underlying hearing. In the absence of their critical testimony, the Board discredited (A 439-40) the vague and hearsay testimony of Cockell and Alvarez as to Castillo's alleged acts of intimidation.

The Company also takes issue (Br. 49, 52) with the Board's credibility determinations as to Cockell and Alvarez, but provides no indication as to how those determinations may have been flawed. The Company accordingly has fallen far short of the showing of error required by this Court in order to overrule Board credibility determinations. *See Cadbury Beverages*, 160 F.3d at 28 (party challenging Board credibility determinations must show that they are "hopelessly incredible, self-contradictory, or patently unsupportable" (internal quotation marks and citation omitted)). And in the absence of any showing of error in the credibility determinations at issue, the Company's arguments in disregard of those determinations—that Castillo engaged in additional acts of misconduct—must fail.

2. The Company failed to prove, as alleged in Objections 3 and 4, that prounion employees made objectionable threats of non-representation and job loss

The Company argues (Br. 44-49) that all four of the prounion employees at issue made threats that employees who did not support the Union either would not be represented by the Union if the Union prevailed in the election, or would lose their jobs. However, the credited evidence shows that only two of the employees in question—Castillo and Reyes—made statements related to non-representation and job loss. Moreover, as explained below, the Board properly found (A 448-55) that their statements did not constitute objectionable conduct.

a. Facts relevant to Objections 3 and 4

In the month before the election, Castillo and Reyes suggested to two or three fellow employees that even if the Union became the employees' collective-bargaining representative, it might still refuse to represent individual employees. (A 444, 446; A 111, 118-19, 123-24, 129.) Specifically, employee Javier Soto heard from Reyes, "or someone else" in the context of a group conversation, that if the Union prevailed in the election, those employees who had not voted for the Union "would not be represented in the same manner as those who did support [the Union]." (A 446; A 123-24, 129.) Further, Reyes told employee Santiago Albarran that if he did not vote for the Union, the Union would not help him in the event that he had problems with the Company. (A 446; A 118-19.) And, two days

before the election, Castillo told employee Vasquez that if he did not vote for the Union, he "might" be thrown out of the Union and then he "would not be with the [U]nion." (A 444, 449; A 111.)

In the same conversations above, Soto and Vasquez also heard that their jobs might be in jeopardy if they did not support the Union. (A 444, 447; A 109-10, 124.) Thus, Soto heard from Reyes "or someone else" that if he did not vote for the Union, the Company would not help him to resolve any problems he had, and "it was possible that [he] could be fired sooner." (A 447; A 124.) Castillo told Vasquez that he "might get thrown out from the warehouse for not working with the union," and that if he did not vote for the Union, he "might" lose his job "because they're going to throw us out and get outside carriers." (A 444; A 109-10.)

b. Employees Castillo and Reyes, and other unidentified employees, did not make objectionable threats of non-representation and job loss

(i.) Statements regarding purported non-representation by the Union

The evidence establishes that Castillo and Reyes misinformed two or three co-workers as to how the Union would, or might, treat them after the election if they did not vote in favor of union representation. As the Board found (A 449), however, there is no evidence that these two or three employees were confused by

the misinformation, or believed that Castillo and Reyes spoke from special knowledge of the Union's plans with regard to antiunion employees. Thus, the Board found (A 448-49) that the statements at issue are most aptly characterized as misrepresentations by third-party employees that did not create such an atmosphere of confusion as to taint the results of the election. *See The Humane Society for Seattle*, 356 NLRB No. 13, 2010 WL 4474381, *8 n.6 (2010) (noting that setting aside election based on misinformation spread by third parties "raises serious issues of fairness"); *Phoenix Mech., Inc.*, 303 NLRB 888, 888 (1991) (finding that misleading statements by a non-party to the election generally do not justify setting aside election).

The Board nevertheless considered (A 453) whether the statements were "threats" that created a "general atmosphere of fear and reprisal," as alleged by the Company. (Br. 47.) Applying *Westwood Horizons*, the Board found (A 453) that the nature of the statements at issue (factor #1) merely conveyed "the possibility" that employees who did not support the Union would not be represented by the Union if the Union won the election. *See Westwood Horizons*, 270 NLRB at 803. Moreover, the statements did not encompass the entire bargaining unit of 32 employees (factor #2), nor is there evidence that the statements were disseminated (factor #3) beyond the 3 employees who directly heard them.

The Board further found (A 453) that because Castillo and Reyes, who made most, if not all, of the statements at issue, were bargaining-unit employees, not union agents, they had no ability to carry out the purported threat (factor #4) to withhold union representation. Finally, although Castillo's non-representation statement to Vasquez was made within days of the election, the remaining two statements were made on unspecified dates in the month before the election, and there is no evidence that those statements were revived close to the date of the election (factor #5).

Given these circumstances, the Board reasonably found (A 453-54) that the *Westwood Horizons* factors weigh heavily against a finding that the non-representation statements here amounted to objectionable threats. The Board accordingly overruled the Company's Objection 3.

The Company argues (Br. 47-48) that the Board erred in failing to take into account the testimony of "numerous other witnesses" who purportedly suffered threats of non-representation relevant to Objection 3. In support of this argument, however, the Company only cites (Br. 47-48) more of the testimony of Vasquez and Albarran, whose testimony has already been considered above. And the additional portions of their testimony to which the Company refers (*id.*) do not reveal any threats at all, much less threats of non-representation. Thus, Vasquez's cited testimony merely shows that Garcia told Vasquez "his side of the story," that

he had "got[en] screwed" in previous jobs," and "that's why you've got to vote the union in . . . ." (A 444; A 112.) Similarly, Albarran's cited testimony shows that *Castilleja* (not Reyes, as the Company contends (Br. 48)) told Albarran that the Union could "help [him] out" with work issues if he helped the Union to win the election. (A 446; A 120.) The Board properly did not consider these innocuous prounion statements as evidence of objectionable conduct within the compass of Objection 3.[9]

Nor did the Board err, as the Company suggests (Br. 46, 48), by failing to take into account the closeness of the election result, and the possibility that a determinative number of voters were affected by third-party statements. Under well-settled Board law, a party that seeks to have an election set aside based on third-party conduct must meet the "general atmosphere of fear and reprisal" standard discussed above, and it cannot escape this standard simply because the electoral margin was narrow. *See Mastec North Am.*, 356 NLRB No. 110, 2011 WL 828384, at *7 n.7 (2011) (distinguishing case involving close election result and repeated third-party threats to kill a 16-year-old employee if he voted against the union). *See also Westwood Horizons Hotel*, 270 NLRB at 803 (closeness of

[9] Contrary to the Company (Br. 48), the Board also properly did not consider the vague and self-serving testimony of Human Resource Director Alvarez in connection with Objection 3. Alvarez testified that unspecified employees told him that the Union would not represent employees who did not support or vote for the Union. (A 188.)

election not a factor in addressing third-party threats); *cf. Cambridge Tool & Mfg.*, 316 NLRB at 716 (closeness of election expressly a factor in addressing *party* misconduct). Consistent with this precedent, the Board did not consider (A 454) the Union's margin of victory to be a factor in the analysis of the third-party conduct here. *See, e.g., Corner Furniture Disc. Ctr., Inc.*, 339 NLRB 1122, 1123 (2003) (finding third-party threats insufficient to overturn election decided by one vote).[10]

(ii.) Statements regarding job loss

The evidence shows that Castillo and Reyes (or an unidentified third employee) suggested to employees Vasquez and Soto that they could lose their jobs after the election. As the Board found (A 453), the Company failed to carry

[10] The Company cites (Br. 48) *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 436 (4th Cir. 2002), and *NLRB v. Valley Bakery, Inc.*, 986 F.2d 339, 343-44 (9th Cir. 1983), *rehearing denied and opinion amended*, 1 F.3d 769 (9th Cir. 1993), in support of its argument that a union's margin of victory is relevant to the determination whether alleged threats had a "material effect" on the election. Those cases, however, involved alleged *party* threats, which are not subject to the "general atmosphere of fear and reprisal" standard that governs here. *See Kentucky Tennessee Clay Co.*, 295 F.3d at 436 (finding objectionable threats by two union agents); *Valley Bakery, Inc.*, 986 F.2d at 342, 344 (finding employer entitled to evidentiary hearing over alleged threats, where employer had produced "prima facie evidence that the [u]nion was responsible for the threats").

its burden of proving that these job-loss statements to two employees created a "general atmosphere of fear and reprisal rendering a free election impossible."[11]

Addressing the nature of the statements (*Westwood Horizons* factor #1), the Board reasonably found (A 453) that they indicated only a "possibility" of job loss. Moreover, they were inconsistent in their account of how any job loss might come about. Thus, Castillo said employees "might" get thrown out of the Company "for not working with the Union" or for "not vot[ing] yes for the [U]nion." But Reyes (or someone else) merely suggested that employees "could" be fired "sooner" without the Union on their side, because "the Company would not be helping [them] in resolving any problems . . . ." The evidence, thus, fails to show that employees were subject to "the same threat" (Br. 45), much less any definite threat, that they would be fired if the Union lost the election.

As the Board further found (A 453), there is no evidence that the job-loss statements here were directed to the entire bargaining unit (factor #2) or disseminated widely within the unit (factor #3). Castillo's statement to Vasquez was made in the context of a one-on-one telephone call, and there is no evidence

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[11] Although an additional employee, Morrison, testified to hearing "talk" from "a variety of drivers" that the Company planned to subcontract the drivers' work if the Union did not win the election, Morrison was unable to specify the number and identity of the drivers involved in such talk. (A 444; A 166.) In any event, the Company does not rely on Morrison's testimony as to any subcontracting rumor as evidence of objectionable job-loss threats by the specific prounion employees at issue here—Castilleja, Castillo, Garcia, and Reyes. (See Br. 44-47.)

that Vasquez repeated what he heard to other employees. Although the statement attributed to Reyes "or someone else" was made in the context of a group conversation, there is no evidence as to how many drivers may have been in the group at the time. Accordingly, the Board properly found (A 453) that the evidence was insufficient to establish that Castillo and Reyes captured a large audience of potential voters with their statements regarding possible job loss.

Most importantly, as the Board found (*id*.), Castillo and Reyes were not capable of transforming their statements about job loss into reality, or otherwise carrying out any purported threats of job loss (factor #4). Indeed, they were rank-and-file employees who had no role, so far as the evidence shows, in determining whether fellow employees should be terminated. As a result, their statements about potential job loss if the Union did not win the election were unlikely to have influenced other employees to vote for the Union. *See Duralam, Inc.*, 284 NLRB 1419, 1419 n.2 (1987) (finding that "threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable").

The Company nevertheless insists (Br. 45) that the employees who heard the statements at issue "felt [that Castillo and Reyes] were union agents who could carry out the threats on behalf of the Union." However, the Company cites no evidence to suggest that employees—and specifically Soto and Vasquez—reasonably believed Castillo and Reyes had authority to fire fellow employees for

the Union, or that the Union itself had the power to fire employees.[12] In any event, under settled Board law, job-loss threats by a union are generally no more influential than job-loss threats by rank-and-file employees, because such threats "can be readily evaluated by employees as beyond the control of the union." *Duralam*, 284 NLRB at 1419 n.2. *See also Underwriters Labs., Inc.*, 323 NLRB 300, 301-02 (1997) (finding unobjectionable threat by union representative that employees would lose their jobs if they voted against union representation), *enforced*, 147 F.3d 1048 (9th Cir. 1998); *Janler Plastic Mold Corp.*, 186 NLRB 540, 540 (1970) (finding unobjectionable threat by union that employees would lose their jobs if they did not vote for the union).[13]

In these circumstances, and also in the absence of evidence that the job-loss statements at issue were revived before the election (factor #5), the Board

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[12] This case, thus, is distinguishable from *NLRB v. Kentucky Tennessee Clay Co.*, in which the court found that union agents made threats that employees "reasonably believed" the union agents capable of effectuating—specifically, threats to "remember" those who had not supported the union and to secure "their removal from the workplace . . . either by 'setting them up' to be terminated by management or by making their working conditions so miserable as to force them to leave." 295 F.3d 436, 439-40, 446 (4th Cir. 2002).

[13] *NLRB v. Valley Bakery*, 986 F.2d 339, 341, 344 (9th Cir. 1993), *rehearing denied and opinion amended*, 1 F.3d 769 (9th Cir. 1993), on which the Company relies (Br. 45), is not to the contrary. In that case, the court held only that an employer was entitled to an evidentiary hearing to explore purported statements by union agents that, if the union lost the election, the employer would be disposed to identify, and then discharge, employees who had signed union authorization cards.

reasonably found that the two statements discussed above did not rise to the level of objectionable conduct under *Westwood Horizons*. The Board therefore overruled the Company's Objection 4.

Contrary to the Company (Br. 44), in analyzing this objection, the Board did not improperly fail to take into account certain evidence—including the discredited testimony of employee Macchione—purportedly showing that employees "felt threatened" and were "afraid for their jobs." As the Board explained (A 442), such evidence of employees' subjective reactions is "irrelevant to the question [whether] there was, in fact, objectionable conduct." In any event, as the Board further noted (*id.*), none of the employees who credibly testified in this case "expressed being intimidated or threatened by the remarks made by Castillo, Garcia, or other Union adherants."[14] The Company's argument (Br. 44, 46) based on the employees' purported feelings of fear and intimidation accordingly fails, both as a matter of law and on the credited facts in evidence.

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[14] The Board reasonably discredited the testimony of Macchione, on which the Company relies (Br. 44), that Macchione felt threatened by a statement that Garcia purportedly made, to the effect that Macchione would be fired for not supporting the Union. (A 452; A 137-38.) Based on Macchione's demeanor while testifying, the Board found it (A 452) incredible that Garcia would have made this threat, and further incredible that Macchione would have felt threatened by it. Although the Company implicitly challenges (Br. 44) this credibility finding, it does not demonstrate that the finding must be rejected by this Court as "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages, Inc.*, 160 F.3d at 28 (internal quotation marks and citations omitted).

3. The Company failed to prove, as alleged in its Objection 5, that unidentified union agents made objectionable appeals to racial prejudice

a. Facts relevant to Objection 5

Sometime in the one-month period before the election, a group of around 15 employees gathered at an unidentified employee's home to discuss unionization. (A 455; A 115-16, SA 2.) At the meeting, an unidentified individual observed that the Company "can pay us [Black and Hispanic employees] a lower rate." (A 455-56; A 116.)

b. The isolated reference to race by an unidentified individual does not warrant setting aside the election

The Board reasonably found (A 455-56) that the single race-related comment quoted above was not an objectionable appeal to racial prejudice. Under *Sewell Mfg. Co.*, 138 NLRB 66, 71-72 (1962), a party may not "deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals" to racial prejudice. However, "*Sewell* clearly does not prohibit the mere mention of race." *Mashantucket Pequot Gaming Enter.*, 356 NLRB No. 111, 2011 WL 928081, at *1 (2011). Thus, "a relevant campaign statement is not to be condemned [simply] because it may have racial overtones." *Sewell*, 138 NLRB at 71.

The statement here—that the Company "can pay [Black and Hispanic] employees a lower rate"—had racial overtones, but it was a third-party statement and not part of a sustained campaign to inflame and capitalize on racial hatred in order to secure a particular election result, as in *Sewell*. (A 456.) *See Sewell*, 138 NLRB at 72. Rather, if anything, it was a fleeting effort to inspire racial pride and concerted action by Black and Hispanic employees to better their wages.

Such a third-party comment does not implicate the concerns raised in *Sewell*. *See State Bank of India v. NLRB*, 808 F.2d at 526, 541-42 (7th Cir. 1986) (finding no improper appeal to racial prejudice where union briefly noted to employees that employer was "trying to keep depressed conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups"); *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 927 (5th Cir. 1976) (finding no improper appeal to racial prejudice where union agent equated economic betterment of Black employees with unionism). Indeed, "some degree of 'consciousness-raising' [is] permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged." *Sumter Plywood*, 535 F.2d at 929. The Board, thus, properly overruled the Company's objection that the isolated "consciousness-raising" statement here was an appeal to racial prejudice that warranted a rerun election.

D. The Company's Witness-Credibility and Subpoena Arguments Lack Merit

The Company argues (Br. 15-27) that the Board erred in adopting some of the hearing officer's credibility determinations, and also erred in adopting her rulings on two subpoenas. However, as indicated above p. 14, this Court will not reverse the Board's determinations as to witness credibility unless the party seeking reversal can show that those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages*, 160 F.3d at 28 (internal quotation marks omitted). Similarly, this Court will not reverse a Board decision to revoke a subpoena unless it is shown that the Board abused its discretion, resulting in actual prejudice to the party that filed the subpoena. *See Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000). *See also NLRB v. Cent. Okla. Milk Producers Ass'n*, 285 F.2d 495, 498 (10th Cir. 1960) ("There can be no cause for reversal [based on revocation of a subpoena] in the absence of some proof of resulting prejudice.").

As explained below, the Company has failed to make a sufficient showing of error under either of these standards. There is accordingly no basis to disturb the Board's handling of the witness testimony (Br. 19-27) and subpoenas (Br. 15-19) to which the Company refers.

1. The Company has failed to show that the hearing officer improperly failed to discredit the testimony of the Union's witnesses

The Company argues (Br. 19-27) that Board improperly failed to discredit the testimony of Union Business Agent Luna and the four prounion employees who allegedly engaged in objectionable conduct here—Castilleja, Castillo, Garcia, and Reyes. However, the Board *did* discredit Castillo's testimony in its entirety. (A 450.) And the Board barely relied on the testimony of the remaining named witnesses (Luna, Castilleja, Garcia, and Reyes). Indeed, as shown above, the Board based its agency findings and its decisions to overrule the Company's election objections on the credited testimony of certain bargaining-unit employees, other than Castilleja, Garcia, and Reyes. Accordingly, the Board's failure to discredit the named union witnesses is of no legal significance.

In any event, the Company bases (Br. 19-20) its argument with regard to the credibility determinations on the erroneous view that the Board has not already considered and adopted the hearing officer's credibility determinations. The Company thus cites (*id.*) various Board precedents on the Board's power to depart from a hearing officer's credibility findings where they depend on considerations other than the demeanor of the witnesses. Those precedents, however, are not applicable at this stage in the proceedings.

As the Board has adopted the hearing officer's credibility determinations, the Company must show that those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Cadbury Beverages*, 160 F.3d at 28 (internal quotation marks omitted). It is not enough for the Company to show, as it does here (Br. 19-27), that the Board could have made different credibility determinations, based on "an analysis of the facts and the logical inferences to be drawn therefrom." (Br. 19, quoting *Herbert F. Darling, Inc.*, 267 NLRB 476, 478 (1983), *remanded*, 732 F.2d 1117 (2d Cir. 1984).)

2. The Company has failed to show that it was prejudiced by the Board's rulings with regard to the subpoenas

The Company filed two subpoenas for documents in the underlying representation proceeding. In the first subpoena, served on the Union, the Company requested information about the Union's communications with eight named employees, and further information about the Union's involvement with three of those employees—Castilleja, Castillo, and Reyes. (A 58-62.) The Company also requested information about the Union's communications with bargaining-unit employees as a group. In the second subpoena, served on employee Castillo, the Company sought telephone records and other documents relating to any telephone calls between Castillo and the Union, and between Castillo and other employees. (A 65-67.)

The hearing officer properly found (A 211-14), and a majority of the Board agreed (A 526 n.2), that the Company's subpoenas should be denied because they sought to explore confidential communications—among the employees, and between the employees and the Union—regarding the organizing campaign. The Board jealously protects such communications from examination by an employer, in part, because of the possible chilling effect on employees' exercise of their statutory right "to self-organization [and] to form, join, or assist labor organizations . . . ." 29 U.S.C. § 157. Because "it is entirely plausible that employees would be 'chilled' when asked to sign a union [authorization] card if they knew the employer could see who signed,"[15] it is equally plausible that employees would be chilled from participating in an organizing campaign if they knew that their involvement in the campaign—including the extent of their communications with a union—could later be subject to disclosure to their employer.

The Board also considers the confidentiality interests of employees to be an "overriding concern" because of "the possibility of intimidation by employers who obtain the identity of employees engaged in organizing." *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *Nat'l Tel. Directory Corp.*, 319 NLRB 420, 421 (1995). The Board accordingly found, here,

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[15] *Comm. on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977).

that "[i]n the absence of a showing of a paramount need for the [subpoenaed] information . . . the hearing officer's ruling correctly protected the employees' interests in keeping confidential their communication with a union, an important aspect of the employees' 'engage[ment] in organizing.'" (A 526 n.2 (quoting *Nat'l Tel. Directory Corp.*, 319 NLRB at 421).)

Although the Company now charges (Br. 15-17) that the Board committed "reversible error" by making this finding without balancing the employees' confidentiality interests against the Company's countervailing "right to litigate its case," the Company fails to show how an explicit balancing of rights and interests would have resulted in a finding that the Company's need for the subpoenaed information was "paramount to the employees' confidentiality interests protected by Sec[tion] 7 of the Act [29 U.S.C. § 157]." (A 526 n.2.) The Company rests (Br. 17) on the unsupported assertion that the hearing officer's denial of the subpoenaed information "resulted in a complete barrier to the Company's ability to have a fair hearing." But the Company does not set forth any particularized need for the subpoenaed information, nor does it provide any authority to suggest that it has a need that would have outweighed the confidentiality interests that the Board majority found dispositive.

Thus, the Company has failed to give any content to its claim that it was prejudiced by the Board's handling of its subpoenas. *See Joseph T. Ryerson*, 216

F.3d at 1154. In the absence of any concrete showing of prejudice, there is no ground to disturb the Board's revocation of those subpoenas.[16]

Moreover, because, as shown above, the Board properly overruled all of the Company's election objections, the Board's certification of the Union as the employees' collective-bargaining representative stands. *See Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569 (noting that the cumulative impact of allegedly objectionable conduct "may not be used to turn a number of insubstantial objections to an election into a serious challenge" (internal quotation marks and citation omitted)). The Company is accordingly obligated to bargain with, and provide requested, relevant information to, the Union, and its admitted failure to do so violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), as the Board properly found (A 787).

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[16] Because the revocation of the subpoenas was proper as shown above, the timing of the revocation could not have had any effect on the Company's presentation of its case. Accordingly, the Company's argument (Br. 15, 18) that the hearing officer's delay in ruling on the subpoenas "result[ed] in great prejudice" is meritless. *See Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 811 (6th Cir. 1989) ("An administrative agency's disposition of a case will not be disturbed on the basis of alleged procedural irregularities unless the irregularities resulted in actual prejudice to the objecting parties' interests.").

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enter a judgment enforcing the Board's Order in full.

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March 2012

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STATUTORY ADDENDUM

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

Sec. 7. [§ 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. [§ 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];
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

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(c) [Hearings on questions affecting commerce; rules and regulations]

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the

representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 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 8 [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 predominately 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 Act [subchapter] or has received a construction inconsistent therewith.

***

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the

proceeding, 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 cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZARK AUTOMOTIVE DISTRIBUTORS, INC. d/b/a O'REILLY AUTO PARTS	)	
Petitioner/Cross-Respondent	)	Nos. 11-1320 & 11-1352
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 21-CA-39846

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,645 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 21st day of March 2012

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD	)	
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all 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, D.C.
this 21st day of March 2012