

Final Brief

# Nos. 14-4498, 14-4648

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

AMERICAN MEDICAL RESPONSE  
OF CONNECTICUT, INC.

Respondent/Cross-Petitioner

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

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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ROBERT J. ENGLEHART  
*Supervisory Attorney*

KELLIE ISBELL  
*Attorney*

National Labor Relations Board  
1015 Half Street, SE  
Washington, D.C. 20570  
(202) 273-2978  
(202) 273-2482

RICHARD F. GRIFFIN, JR.

*General Counsel*

JENNIFER ABRUZZO

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

National Labor Relations Board

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**ON APPLICATION FOR ENFORCEMENT AND  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petition of American Medical Response of Connecticut, Inc. (“AMR”) to review, a Board Order issued against AMR. In its Order, the Board found that AMR violated the National Labor Relations Act by failing to give the union representing its employees notice and an opportunity to

bargain before unilaterally changing its start-of-shift procedures. As a result of this change in procedures, AMR unlawfully disciplined more than 160 employees. (JA 87-88.)<sup>1</sup> In addition, AMR discharged employee and union steward Adam Cummings for engaging in protected union and other concerted activity regarding the change in procedures. (JA 87.) The Board’s Decision and Order issued on September 26, 2014, and is reported at 361 NLRB No. 53. That decision incorporates by reference an earlier Board Decision and Order issued on June 28, 2013, and reported at 359 NLRB No. 144. (JA 102-03.)

The Board had subject matter jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a). The Board filed its application on November 20, 2014, and AMR filed its cross-petition on December 18, 2014. These filings are timely; the Act places no limit on the time for filing actions to enforce or review Board orders. The Board’s Order is final, and this Court has jurisdiction under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices were committed in Connecticut.

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<sup>1</sup> “JA” refers to the joint appendix, and “EA” refers to the volume of exhibits filed by AMR. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF THE ISSUES**

1. In its opening brief, AMR failed to contest the Board's findings concerning AMR's change to its start-of-shift procedures. The Board found that AMR violated Section 8(a)(5) and (1) of the Act by unilaterally requiring that employees check their vehicles' oil and coolants and complete a checklist certifying that they had inspected the vehicle. The Board also found that AMR violated Section 8(a)(1) of the Act by disciplining employees as a result of this new procedure. Is the Board entitled to summary enforcement of those portions of its Order remedying these uncontested findings?

2. The Board assumed that AMR had an honest belief that employee Cummings initiated a contractually prohibited work stoppage. Applying the Supreme Court's burden-shifting test, however, the Board found a complete lack of evidence that Cummings initiated a work stoppage. Does substantial evidence support the Board's finding that AMR violated Section 8(a)(1) of the Act by discharging Cummings?

## **STATEMENT OF THE CASE**

Acting on an unfair-labor-practice charge filed by Cummings, the Board's General Counsel issued a complaint alleging that AMR violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1) by making unilateral changes to its procedures, violated Section 8(a)(1) of the Act by disciplining employees as a

result of the unlawful unilateral changes, and violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging Cummings. (JA 93.) After a hearing, an administrative law judge found the violations of the Act as alleged. On review, the Board affirmed the judge's rulings, findings, and conclusions and adopted his recommended order with some modification. (JA 87 & n.6.) Below are summaries of the procedural history, the Board's findings of fact, and the Board's conclusions and order.

## **I. THE PROCEDURAL HISTORY**

On June 28, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against AMR, reported at 359 NLRB No. 144. AMR filed a petition for review in the District of Columbia Circuit. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that the recess appointments of Members Griffin and Block, who were appointed in January 2012, were not valid. On June 27, 2014, the Board set aside the Decision and Order against AMR and retained the case on its docket for further action. The Board subsequently filed a motion to dismiss AMR's petition for review, which the D.C. Circuit granted. (JA 102.)

On September 26, 2014, the Board issued a new Decision and Order in which it "considered de novo the judge's decision and the record in light of the exceptions and briefs." (JA 102.) The Board "also considered the now-vacated

Decision and Order, and . . . agree[d] with the rationale set forth therein.” (JA 102.) Accordingly, the new Decision and Order affirmed the judge’s rulings, findings, and conclusions, and adopted the judge’s recommended Order, as modified by the Board in its June 28, 2013 Decision and Order, which it incorporated by reference. (JA 102.)

## **II. THE BOARD’S FINDINGS OF FACT**

### **A. AMR’s Operations**

AMR provides ambulance and medical transportation services. Its Greater Hartford Division, which provides services in and around West Hartford, Connecticut, is involved in this case. (JA 87, 93; JA 212.) The West Hartford facility employs about 195 paramedics and emergency medical technicians. (JA 93; JA 128, 195.) In 2008, AMR’s paramedics and emergency medical technicians selected the National Emergency Medical Services Association (“the Union”) to be their collective-bargaining representative. (JA 87, 94; EA 1.) In 2009, the Union and AMR signed a collective-bargaining agreement, which by its terms expired on December 31, 2011. (JA 87; EA 3.)

When paramedics and emergency medical technicians report for duty, the shift supervisor gives them their vehicle assignment and keys, vehicle shift log, and equipment. (JA 111.) During the shift, employees complete the vehicle shift log by recording their calls and trips to hospitals. The log, which is an envelope,

also serves as the repository for paperwork received during the shift such as facility transfers, Medicare certificates, and police reports. (JA 112.) When employees return at the end of the shift, they again report to the supervisors' office and return the vehicle keys, equipment, and the vehicle shift log, along with any paperwork acquired during the shift. The vehicle shift log envelope and paperwork are sent to AMR's billing office at another facility. (JA 95; JA 112, 164.)

**B. AMR Implements New Vehicle Checklist Policy; Employees Are Disciplined Even Though They Comply with the New Policy**

For years, AMR had a policy that employees should check their vehicle's oil. (JA 94.) Between 1996 and 2001, AMR required employees to complete a vehicle checklist that included checking oil and other fluids but did not discipline employees who did not complete it. (JA 94; EA 73, JA 116, 183, 202-04, 207-08.) After 2001, employees did not, and were not required to, check oil and coolants on a daily basis or complete a vehicle checklist. (JA 94; JA 117-19, 146-47, 152-54, 160-61, 175-76, 181-82, 185.)

In 2010, AMR began replacing its aging diesel ambulances and bought five new gas ambulances. (JA 95; JA 195, 210.) The new gas ambulances used more oil than the diesel ambulances. As a result, AMR experienced problems with low oil in some vehicles. (JA 95; JA 197, 211.) AMR's nationwide fleet manager notified managers of the problems with the new gas vehicles and instructed them to check the oil each day. (JA 95; EA 85-87, JA 211.) In response, Hartford

operations supervisor Duane Drouin created a vehicle checklist, which included items such as the lights and sirens, body damage, and cleanliness, as well as oil, coolants, and windshield wiper fluid. (JA 95; EA 14, JA 196-97.) In April 2011, AMR began requiring employees to complete the checklist before each shift for all gas and diesel vehicles. (JA 95; EA 88-91.)

AMR did not notify the Union prior to implementing the new checklist procedure. (JA 88, 95; JA 205.) Drouin notified employees by posting a memorandum regarding the new checklist in the crew room. He sent a copy of the memorandum to the Union on April 8. (JA 88; EA 15, 90-91, JA 198.) Drouin did not notify employees or supervisors that, unlike the procedure for the checklist in use more than 10 years earlier, employees would be disciplined if they did not complete the new checklist. (JA 205, 208.) Nor were employees instructed what to do with the completed checklists. (JA 113-14, 158-59.) Many put them in the vehicle shift log envelopes, which were sent to AMR's billing office. (JA 95; JA 108, 136-37, 158-59.) At least some of those checklists were discarded by the billing department. (JA 95; JA 109-10, 170.)

Between May 9 and 11, AMR issued formal disciplinary warnings to 116 unit employees for failing to turn in the checklists on various dates in April and May. (JA 95; JA 206.) On June 10, AMR issued another 50 warnings for not turning in the checklists between May 21 and 29. (JA 95; JA 209.) While some

employees simply forgot to complete the checklists, others complained to supervisors and to the union stewards that they should not have been disciplined. (JA 95; JA 106-08, 177, 188-89.) Some employees noted that they had, in fact, turned in the checklist. (JA 95; EA 46-48, JA 107, 121-23, 163, 169, 189.) Others were on vacation at the time AMR said they failed to turn in a checklist or, even though working, had not been assigned a vehicle. (JA 95; JA 151, 169, 187.) Others reported that one member of a two-person crew was disciplined while the other was not. (JA 95; JA 169.)

**C. Cummings and Other Stewards Express Concerns about the New Checklist Policy**

On April 8, Adam Cummings, an emergency medical technician and union steward, learned about the new policy and sent an email to general manager Sean Piendel, the other stewards, and Toby Sparks, national representative for the Union. (JA 89, 96; EA 16-22.) Cummings expressed concern about the new policy and asked for more information. (JA 89, 96; EA 16-22.) During this email exchange, the stewards noted their concern that, by implementing the new policy without giving the Union notice and posting the new policy for 30 days, AMR had violated the collective-bargaining agreement. (JA 96; EA 16-22, JA 138, 184.)

The stewards also expressed concern about employee safety and requested training for employees who did not know how to check oil and other fluids. (JA 89, 96; EA 16-22.) Specifically, the stewards noted that AMR's vehicle engines

typically run during the entire shift and are usually hot when a new crew arrives for a shift change. (JA 96, EA 16-22, JA 155.) Cummings and the other stewards were concerned that checking oil and other fluids in a hot engine would be dangerous. (EA 16-22, JA 130-31, 155, 184.) They also expressed concern that AMR had not provided training for employees who did not know how to check the oil and fluids in their vehicles. (JA 89; EA 16-22, JA 115, 120, 148, 156, 162, 168, 174, 179.)

In his response, Piendel told the stewards that any employee who was uncomfortable checking fluids should see a supervisor or mechanic for guidance and that employees had already been trained to check vehicle fluids. (JA 96; EA 16-22, JA 132.) Cummings and other stewards disagreed, noting that they had not received any such training. (JA 96-97; EA 16-22.) Cummings added that AMR needed “to provide everyone with the proper training before asking anyone to do these tasks. Until then, I will be advising the employees to have a mechanic check the trucks to protect the equipment and the employees.” (JA 89, 97; EA 19.) Piendel asked whether Cummings was “initiating a concerted job action against AMR.” (JA 89, 97; EA 20.) Cummings replied, “Have at it if you feel that is [what] my response entailed, and you feel that is a more appropriate response than meeting with the union about this situation.” (JA 89, 97; EA 20.) Piendel demanded a yes or no answer. Cummings responded that he felt he had “made

[his] concerns and intentions quite clear,” but that he hoped the Respondent would meet and confer with the Union. (JA 89, 97; EA 22.) On April 19, 2011, Cummings filed a grievance over the new vehicle checklist policy. (EA 32-33.)

**D. Cummings Disagrees with Sparks about the New Checklist Policy; Sparks Tells Cummings He Would Have Him Removed if He Could, and AMR Discharges Cummings for Inciting a Work Stoppage**

On May 12, Sparks sent Piendel a letter about Cummings. In the letter, Sparks stated that the Union received an email from Piendel indicating that Cummings “potentially faces a Bad Faith charge” for violating AMR’s operating procedures. (JA 89; EA 80-84, 187.) Without mentioning any specific conduct by Cummings, Sparks wrote that Cummings’s “actions are not representative of [the Union]. Mr. Cummings actions are his alone, and his actions have in no way been approved or condoned” by the Union. Finally, Sparks noted that the Union “does not agree with Mr. Cummings actions and advises all members to follow company policies.” (JA 89; EA 187.)

Following the email exchange with Piendel, Cummings and other stewards disagreed with Sparks, via email, about whether AMR properly instituted the new vehicle checklist policy. (EA 27-31, 34-36.) Cummings insisted that AMR was required to notify the Union before implementing a change in policy and that AMR should first train employees before requiring them to check oil in hot engines. (EA 37.) Sparks replied that Cummings was wrong. He also told Cummings, “I have a

huge problem with you, and you already know that.” Sparks concluded by stating, “I have no issue telling you how I feel, if I could have you removed, we would not be having this conversation.” (EA 38.)

On June 1, Cummings attended a disciplinary meeting with Piendel, Robert Zagami, AMR’s regional director of human resources, Kelly Gauthier, a human resources employee, and Bree Eichler, chief union steward. (JA 89; JA 141.) Eichler asked Sparks to attend the meeting; he refused. (JA 194.)

In the meeting, Zagami told Cummings that the meeting was about Article 17 of the collective-bargaining agreement.<sup>2</sup> (JA 142.) Zagami gave Cummings a copy of the May 12 letter from Sparks and asked him to explain it. (JA 89; JA 143, 190.) Cummings replied that he had not written the letter and could not explain it but he did not instigate a work stoppage. (JA 97; JA 143, 190-92, 220-23.) Throughout the 10 to 15 minute meeting, Zagami asked Cummings only about the letter from Sparks. (JA 97; JA 219-20.) Zagami did not confront Cummings with any other evidence that he had been responsible for a work stoppage. (JA 97; JA 144-45.)

Following this meeting, Piendel put Cummings on administrative leave. (EA 56.) On June 3, Piendel fired Cummings. (JA 89; EA 68.) In the termination

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<sup>2</sup> Section 17.01 states that employees will not “engage in, incite or participate in any picketing, strike, sit-down, stay-in, slowdown, boycott, work stoppage, [or] paper strike . . . .” (EA 12.)

letter, Piendel wrote that the Union determined that Cummings was “engaging in, inciting, and/or participating in a work action” and that that conduct violated Section 17.01 of the collective-bargaining agreement. (EA 68.) Piendel based his decision to fire Cummings on Cummings’s emailed statement that he would have unskilled employees seek assistance in checking oil from a mechanic or supervisor. (EA 19, JA 214.) Neither Piendel nor the Union conducted any investigation into, or asked any employee, whether Cummings had suggested they not complete the vehicle checklist. (JA 127, 139, 167, 171-73, 179-80, 193, 228-30.)

The Union represented the paramedics and emergency medical technicians until October 24, 2011, when the employees selected Teamsters Local 559 as their representative. (JA 94; EA 2.)

### **III. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and Schiffer) found, in agreement with the administrative law judge, that AMR violated Section 8(a)(5) and (1) of the Act by unilaterally changing its procedures to require that employees check their vehicles’ fluids and complete a checklist certifying that they had inspected the vehicle. The Board also found, in agreement with the administrative law judge, that AMR violated Section 8(a)(1) of the Act by disciplining employees as a result of the new checklist procedure and by

discharging employee Adam Cummings for engaging in union and other protected, concerted activity. (JA 87.)

The Board's Order requires AMR 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 the rights guaranteed them by Section 7 of the Act. Affirmatively, the Order directs AMR to rescind the unilateral changes it made to the terms and conditions of employment of unit employees concerning start-of-shift procedures; remove any unlawful warnings issued to employees pursuant to the unlawful unilateral changes; and notify the collective-bargaining representative before implementing any changes in the terms and conditions of employment. (JA 91.) With regard to the unlawful discharge of employee Cummings, the Order requires AMR to offer reinstatement to Cummings, make Cummings whole for any loss of earnings and benefits suffered as a result of the discrimination against him, remove from its files any reference to the unlawful discharge, and post a remedial notice. (JA 91.)

## **SUMMARY OF ARGUMENT**

In its opening brief, AMR fails to contest the Board's findings that it violated the Act by unilaterally changing its procedures to require that employees check their vehicles' oil and coolants and complete a vehicle checklist at the start of every shift and by disciplining employees as a result of that change. The Board is therefore entitled to summary enforcement of those portions of its Order remedying these violations.

Substantial evidence supports the Board's finding that AMR violated the Act by discharging union steward Adam Cummings for engaging in protected activity as a union steward. It is not disputed that, when Cummings told Piendel he would advise employees to have a mechanic check fluid levels in the vehicles, he was engaged in the protected activity of a union steward. The Board assumed that AMR had an honest belief that Cummings had initiated a contractually prohibited work stoppage, but went on to find that the General Counsel met his burden of showing Cummings had not done so. No witness, including those who testified for AMR, stated that Cummings ever told employees not to fill out the vehicle checklist, and the judge credited Cummings's testimony to that effect as well. Further, the Board found a number of reasons, which AMR no longer disputes, why the low completion rate of the vehicle checklists simply did not support a finding that Cummings orchestrated a work action.

Before the Court, however, AMR claims that, even if no work stoppage occurred, the Board erred by finding that Cummings could not be discharged for simply attempting to incite a work stoppage. Because AMR never presented this new argument to the Board, the Court has no jurisdiction to hear it. In any event, AMR's interpretation of the collective-bargaining agreement, as proscribing incitement alone, is not the compelled reading that AMR now says it is. Moreover, there was no evidence that Cummings ever urged an employee not to perform any work function. AMR's retreat from the explanation that a work stoppage had occurred—and away from what AMR told Cummings and the Board—seriously undermines AMR's attempt to portray the discharge as based upon anything other than Cummings's protected behavior.

Finally, the Board did not abuse its discretion by declining to defer the case to arbitration. The Board's deferral policy has long included an exception for cases in which the union's interests are in conflict with the employee's interests. Here, there was unrebutted testimony and documentary evidence that established the "strong hostility" of labor representative Toby Sparks to Cummings, including a statement by Sparks that he would remove Cummings if he could. In these circumstances, the Board properly declined to defer to arbitration.

## STANDARD OF REVIEW

The Board's findings of fact are "conclusive" under Section 10(e) of the Act (29 U.S.C. § 160(e)) if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Katz's Delicatessen of Houston St.*, 80 F.3d 755, 763 (2d Cir. 1996). As the Supreme Court has said, 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*." *Universal Camera*, 340 U.S. at 488; *NLRB v. G&T Terminal Packing Co.*, 246 F.3d 103, 114 (2d Cir. 2001). This Court will not overturn the Board's factual findings "unless no rational trier of fact could have arrived at the Board's conclusion." *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994).

As repeatedly recognized by this Court, credibility determinations made by the administrative law judge and accepted by the Board may not be disturbed on review "unless they are 'hopelessly incredible' or they 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.'" *NLRB v. S.E. Nichols*, 862 F.2d 952, 956 (2d Cir. 1988) (citations omitted). *See also G&T Terminal*, 246 F.3d at 114.

Finally, the Court reviews the Board's decision whether to defer to arbitration for abuse of discretion. *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 680-81 (2d Cir. 1971).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING ITS UNCONTESTED FINDINGS

Before this Court, AMR has abandoned any challenge to the Board's finding (JA 89) that it violated Section 8(a)(5) and (1) of the Act by unilaterally changing its procedures to require that employees check their vehicles' oil and coolants and complete a checklist certifying that they had inspected the vehicle. Nor does AMR challenge the Board's finding that it violated Section 8(a)(1) of the Act by disciplining employees as a result of the new checklist procedure. (JA 89, 96.) Under well-settled law, AMR's failure to contest these findings constitutes a waiver of any defense and warrants summary enforcement of those portions of the Board's Order remedying the violations. *See NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009); *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994). Further, by not raising these issues in its opening brief, AMR may not raise them in the reply brief. *See Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999). Accordingly, the Court should grant summary enforcement of those portions of the Board's Order.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT AMR VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE ADAM CUMMINGS BECAUSE OF HIS PROTECTED ACTIVITY AS A UNION STEWARD**

**A. Well-Settled Precedent Prohibits an Employer from Discharging an Employee Because of His Protected Activity as a Union Steward**

Section 7 of the Act (29 U.S.C. § 157) grants employees the “right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that grant by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].” Discharging an employee for engaging in protected activity as a union steward violates Section 8(a)(1) of the Act. *See, e.g., NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143 (2d Cir. 1990); *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 98 (2d Cir. 1985).

The Board found (JA 89) that it is undisputed that Cummings was engaged in protected activity when he told Piendel that he would be advising employees to have a mechanic check fluid levels in the ambulances. Cummings, as union steward, expressed his disagreement with AMR’s start-of-shift procedures, conveyed his concerns about employee safety, and requested that AMR meet with the Union about the matter. Nonetheless, AMR discharged Cummings for

violating Section 17.01 of the collective-bargaining agreement, which states that employees will not “engage in, incite or participate in any picketing, strike, sit-down, stay-in, slowdown, boycott, work stoppage, [or] paper strike . . . .”

In evaluating the lawfulness of Cummings’s discharge, the Board applied the analytical framework set forth by the Supreme Court in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964). Under that framework, an employer risks violating the Act when it discharges an employee for alleged misconduct occurring while the employee is engaged in activity protected by Section 7 of the Act. The discharge will be found to have violated Section 8(a)(1) of the Act under the following burden-shifting test: First, the employer must demonstrate that it decided to discharge the employee because it held a good-faith belief that the employee had engaged in serious misconduct. Then, if the employer meets that burden, it becomes the General Counsel’s burden to establish that no serious misconduct in fact occurred. If the Board finds either that the employer did not show that it based its discharge on a good-faith belief that the employee had engaged in serious misconduct or that, in fact, no serious misconduct occurred, the discharge will be found to have violated Section 8(a)(1) of the Act. *See Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003).

Applying the *Burnup & Sims* analysis to Cummings’s discharge, the Board found that Cummings was engaged in protected activity as a union steward when

AMR discharged him for misconduct that he allegedly exhibited in an email he sent to management. Acting as a union steward “embodies the essence of protected concerted activities.” *Gen. Motors Corp.*, 218 NLRB 472, 477 (1975), *enf’d mem.* 535 F.2d 1246 (3rd Cir. 1976). *Cf. United Aircraft Corp. v. NLRB*, 440 F.2d 85, 92 (2d Cir. 1971) (upholding Board’s determination that stewards did not engage in misconduct while soliciting union authorization cards). In exercising his responsibility as a union steward, Cummings told Piendel that, by implementing the new policy without giving the Union notice and posting the new policy for 30 days, AMR had violated the collective-bargaining agreement. Cummings also expressed his concern that the new policy was potentially dangerous since AMR’s vehicle engines are typically hot at the beginning of each shift, and many employees had never received training on how to check oil and fluids. When Piendel responded that any employee uncomfortable checking fluids should see a supervisor or mechanic for guidance, Cummings agreed and stated that until AMR provided employees with training, he would be “advising the employees to have a mechanic check the trucks to protect the equipment and the employees.” (JA 89, 97; EA 19.) When asked whether he was initiating a concerted job action against AMR, Cummings replied, “Have at it if you feel that is [what] my response entailed, and you feel that is a more appropriate response than meeting with the union about this situation.” (JA 89, 97; EA 20.) The Board reasonably concluded

(JA 89), and AMR does not dispute, that when Cummings told Piendel he would advise employees to have a mechanic check fluid levels in the vehicles, he was engaged in the protected activity of a union steward.

The Board then assumed (JA 90), without deciding, that AMR had an honest belief that Cummings had initiated a contractually prohibited work stoppage. Because the Board made this assumption and “imposed the burden of proof on the General Counsel from the outset,” no inquiry into AMR’s belief is necessary. *Shamrock Foods*, 346 F.3d at 1134-35. The Board accordingly shifted the burden to the Acting General Counsel to establish that Cummings did not actually initiate a work stoppage.

**B. Substantial Evidence Supports the Board’s Finding that Cummings Did Not Initiate a Work Stoppage**

The Board found (JA 89-90) that the Acting General Counsel met the burden of showing that Cummings did not initiate a work stoppage. The Acting General Counsel presented six witnesses at the hearing who testified that Cummings never told them, or any other employee to their knowledge, not to fill out the vehicle checklist or otherwise not to comply with the start of shift procedures. AMR produced no evidence that Cummings ever told employees to boycott the vehicle checklist, refuse to check their vehicle fluids, or ignore any other procedure. (JA 90; JA 124-26, 157, 164, 166, 178, 186.) Further, Cummings himself testified that he never told employees not to complete the vehicle checklist. Rather, Cummings

told them that the Union planned to grieve the new procedure and they should comply in the meantime. (JA 133-35.)

Moreover, the uncontroverted testimony shows that neither Sparks nor any manager at AMR investigated to determine whether Cummings encouraged any employee not to complete the new vehicle checklist. (JA 127, 139, 141, 167, 171, 173, 179-80, 193, 228-230.) Rather, as Piendel testified, AMR relied simply on the email Cummings sent Piendel and the fact that AMR gave more than 100 disciplinary warnings to employees for not completing the checklist. (JA 90, 98; JA 214, 225.)

But the email Cummings sent to Piendel is indisputably the protected activity for which Cummings cannot be discharged. And, as the Board found (JA 90), the more than 100 warnings do not support a finding that Cummings orchestrated a work action. Rather, the evidence showed that AMR mistakenly disciplined some employees who turned in the checklists or did not work on the date in question. Other employees simply forgot to turn the checklist in. In addition, the procedure for collecting the checklists was “chaotic,” and one of AMR’s clerical employees discarded a number of the checklists. (JA 95, 97; JA 108-10, 165, 170.) AMR having provided no evidence that Cummings initiated a work stoppage, the Board reasonably found that AMR violated the Act by discharging him.

AMR repeatedly claims (Br. 11-12, 15, 17, 36-38) that Cummings never denied instigating a work action and argues that his failure to deny his misconduct should be “admissible as an adoptive admission” (Br. 37). Contrary to AMR’s claim, the administrative law judge found that Cummings did deny instigating a work stoppage. During the disciplinary meeting with Piendel, “Cummings replied . . . that he did not instigate a work stoppage,” which the administrative law judge credited. (JA 97; JA 143, 192, 219, 222.) As AMR has failed to contest the judge’s credibility determinations, much less show that they are “hopelessly incredible,” *NLRB v. S.E. Nichols*, 862 F.2d 952, 956 (2d Cir. 1988), the Court should affirm the Board’s finding that Cummings denied instigating a work stoppage.

AMR no longer argues (Br. 38-39) that a work stoppage actually occurred. Thus, AMR has abandoned an essential part of the reasoning it used to discharge Cummings. AMR’s manager Piendel told Cummings he fired him “because I believed that he through those e-mails incited a job action,” and because Cummings “said that he was going to tell the people not to do [the checklist] and people did not do it.” (JA 225-26.) In the termination letter, Piendel stated that he was firing Cummings because “the Union has determined you are engaging in, inciting and/or participating in a work action” in violation of Section 17.01 of the collective-bargaining agreement. And to the Board, AMR argued “Cummings was

fired because he incited a work stoppage in violation of the [collective-bargaining agreement]. Subsequent to Cummings' threatened work stoppage and repeated refusal to deny doing the same, [AMR] discovered that nearly fifty percent of its employees completed and turned in "Vehicle Inspection" sheets. This finding confirmed for [AMR] that Cummings made good on his threat. The documents and testimony clearly portray this chain of events and the reasonable, logical conclusion reached by [AMR] that Cummings had incited a work action in violation of the [collective-bargaining agreement]." *See* AMR's brief to the Board in Support of its Exceptions, at 23.

Thus, to both Cummings directly, and in the litigation before the Board, AMR contended that Cummings's misconduct consisted of successfully inciting a work stoppage that violated the collective-bargaining agreement. AMR's retreat from the explanation that a work stoppage had occurred—and away from what AMR told Cummings and the Board—seriously undermines AMR's attempt to portray the discharge as based upon anything other than Cummings's protected behavior. *See NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990). *See also Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988).

Now, for the first time, AMR argues to the Court that the Board got it all wrong—that Cummings was fired only for inciting a work stoppage even though none occurred. It argues the plain meaning of the collective-bargaining agreement

“is that Cummings did not have to cause a work stoppage for AMR to fire him—he only had to intentionally attempt to do so.” (Br. 34.)

Three things must be said about this new argument. First, it cannot be considered by the Court. AMR “filed no motions for reconsideration, rehearing, or reopening of the record with the Board as a result of th[e Board’s] alleged mistake of law.” *NLRB v. Ferguson Elec. Co., Inc.*, 242 F.3d 426, 435 (2d Cir. 2001). Accordingly, “[n]o 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.” 29 U.S.C. 160(e); *accord id.* As a result, the Court is “prevented from considering the issue by the operation of the statute.” *Ferguson Elec.*, 242 F.3d at 435. *See also* *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Second, even if it could be considered by the Court, AMR’s argument is not supported by the more logical reading of the language of the collective-bargaining agreement. The collective-bargaining agreement states that employees will not “engage in, incite or participate in any . . . work stoppage[.]” This proscription contains three verbs: engage in; incite; participate in. Clearly, the first and the third verbs, “engage in” and “participate in,” require that a work stoppage have occurred. But AMR argues (Br. 38-39) that there should be an exception for the middle verb, “incite,” and that it should not require that a work stoppage have

occurred. Not only does AMR offer no support for selecting out the middle verb and arguing that it, alone, does not require that a work stoppage have occurred, but it is hardly the compelled reading that AMR now says it is. Indeed, the more logical reading is that each verb requires that a work stoppage have occurred, and “incite” supplements the proscription of the other two verbs by condemning the conduct of someone who did not engage in the work stoppage, or participate in it, but who did incite it.

Third, as shown above at pp. 21-23, substantial evidence supported the Board’s initial finding that, even apart from the fact that no orchestrated work action occurred, there was “no evidence that Cummings ever urged an employee not to perform any work function.” (JA 90.)

In these circumstances, where AMR has abandoned its contention before that Board that Cummings was discharged for initiating an actual work stoppage, and AMR’s new argument is not properly before the Court, the Court should enforce the Board’s Order that AMR violated the Act by firing Cummings for engaging in protected activity as a union steward.

### **C. The Board Did Not Abuse Its Discretion by Declining to Defer to Arbitration**

In its brief, AMR primarily argues (Br. 21-32) that an arbitrator, not the Board, should decide whether Cummings's discharge was improper. AMR further argues (Br. 27) that the Board improperly failed to apply the factors set out in *Collyer Insulated Wire*, 192 NLRB 837 (1971), to determine whether this case should have been deferred to arbitration.<sup>3</sup>

AMR misunderstands the Board's deferral standard. In the first place, deferral is left to the Board's discretion. *Lodges 700, 743, 1746, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 525 F.2d 237, 239 (2d Cir. 1975) (the Board did not abuse its discretion by deferring to arbitration); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 680-81 (2d Cir. 1971) (the Board did not abuse its discretion by declining to defer to arbitration). Further, the Board evaluates each case to determine whether deferral is appropriate. As the Board explained in *United Technologies Corp.*, 268 NLRB 557, 560 (1984), cited with approval throughout AMR's brief, it will not defer to arbitration "where the

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<sup>3</sup> In *Collyer*, the Board described the following factors as favoring deferral to arbitration: the dispute arose in the context of a long and productive collective-bargaining relationship; there was no claim of employer animosity to employees' protected activity; the collective-bargaining agreement provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer asserted its willingness to arbitrate the dispute; and the dispute was well suited to resolution by arbitration. *Collyer*, 192 NLRB at 842. See also *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee . . . .”

The Board’s refusal to defer in cases in which the union’s interests are adverse to employees’ interests is longstanding and has met with court approval. *See, e.g., Amsted Indus.*, 309 NLRB 860, 860 n.3 & 861 (1992), *enf’d mem. sub nom. Nails v. NLRB*, 999 F.2d 1583 (11th Cir. 1993) (declining to defer to arbitration where employee was fired for threatening life of union steward); *Regional Import Trucking Co.*, 292 NLRB 206, 231 (1988), *enf’d mem. sub nom. NLRB v. Truck Drivers Local Union No. 807*, 914 F.2d 244 (3d Cir. 1990) (declining to defer to arbitration where union represented employees at company and its alter ego and employees were competing for jobs); *NLRB v. Int’l Bhd. of Elec. Workers, Local 11, AFL-CIO*, 772 F.2d 571, 575 (9th Cir. 1985) (affirming Board’s decision not to defer to arbitration where union’s interest in limiting eligibility for hiring hall referrals was adverse to that of applicants for the referrals); *General Motors Corp.*, 218 NLRB 472, 476 (1975), *enf’d mem.* 535 F.2d 1246 (3d Cir. 1976) (declining to defer to arbitration where record established “strong hostility” of union local chairman to employee); *NLRB v. Int’l Longshoremen’s & Warehousemen’s Union & Local 27*, 514 F.2d 481, 483 (9th Cir. 1975) (affirming Board’s decision not to defer to arbitration because of “personal hostility” between union committeeman and employee); *T.I.M.E.--DC*,

*Inc. v. NLRB*, 504 F.2d 294, 302-03 (5th Cir. 1974) (affirming Board’s decision not to defer to arbitration where both employer and union committed unfair labor practices against employee); *NLRB v. Auburn Rubber Co.*, 384 F.2d 1, 4 (10th Cir. 1967) (affirming Board’s decision not to defer to arbitration where employees “were represented at the arbitration by a union to which they were antagonistic”); *Kansas Meat Packers*, 198 NLRB 543, 543-44 (1972) (declining to defer to arbitration where employees and union were in conflict and union sought employees’ discharge).

In this case, the Board found (JA 87 n.2, JA 93 n.2) that “unrebutted testimony and documentary evidence establish the strong hostility of [Union] Representative Toby Sparks towards Cummings.” That evidence included:

- Sparks’s May 12 letter to Piendel in which he disavowed Cummings’s actions but conducted no investigation to determine whether Cummings actually engaged in any misconduct. (EA 187, JA 127, 167, 171, 179-80, 193.)<sup>4</sup>
- Sparks’s email to Cummings stating, “I have a huge problem with you, and you already know that” and “I have no issue telling you how I feel, if I could have you removed, we would not be having this conversation.” (EA 38.)
- Cummings’s involvement in the Union’s internal affairs, including supporting and conferring with the prior union labor representative. (JA 93 n.2; EA 37-40, 51-52, JA 140, 149-50.)

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<sup>4</sup> In fact, after Sparks emailed the May 12 letter to all unit employees, several employees responded to Sparks that they either did not know what he was talking about or that Cummings did not incite a work action. (EA 42-48, 57-62.)

- Cummings’s June 2, 2011, letter to the Union’s Board of Directors seeking Sparks’s removal as labor representative. (EA 63-67.)
- Cummings’s unfair labor practice charge filed against the Union. (JA 87 n.2.)<sup>5</sup>

Based on this evidence, the Board concluded that ““considerations of elemental fairness’ bar application of the Board’s *Collyer* deferral policy to the present case.”<sup>6</sup> (JA 87 n.2.) Thus, this case is unlike *Titanium Metals Corp. v. NLRB*, 392 F.3d 439 (D.C. Cir. 2004) and *NLRB v. Roswil, Inc.*, 55 F.3d 382 (8th Cir. 1995), cited by AMR. Neither case involved deferral in situations with evidence of union animosity toward the employee’s interests. In fact, both decisions acknowledged that the outcome might have been different if there had been evidence that the union’s interests were adverse to those of the employee. In *Titanium Metals*, 392 F.3d at 448, the court explicitly noted that there was no claim that the union breached its duty of representation. In *Roswil*, 55 F.3d at 387, the

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<sup>5</sup> Cummings and the Union settled this charge before the start of the hearing in this case. (JA 87 n.2.)

<sup>6</sup> In a footnote (Br. 31 n.18), AMR suggests that the Board should have ordered the Union to pay for outside counsel to represent Cummings. The cases cited by AMR are ones in which the employees sought arbitration but the unions failed to file or pursue grievances. In this case, Cummings did not want to pursue arbitration. (JA 104.) In any event, the Board applied its court-approved precedent in deciding that the animosity between the Union and Cummings made deferral to arbitration inimical to considerations of elemental fairness.

court acknowledged that “a showing that the interests of the union and the grieving employee are adverse” might have changed the outcome.<sup>7</sup>

In these circumstances, where the Board relied on documentary evidence and unrebutted testimony that established “the strong hostility” of Sparks to Cummings (JA 87 n.2), the Board did not abuse its discretion by declining to defer to arbitration.

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<sup>7</sup> The court in *Roswil* also expressly agreed with the D.C. Circuit’s *Hammontree* decision. In *Hammontree*, the D.C. Circuit recognized that under *United Technologies*, “Board deferment may be impermissible if charges are filed by an individual employee and the interests of the charging party are so inimical to those of the union as to render arbitration an empty exercise.” *Hammontree v. NLRB*, 925 F.2d 1486, 1498 (D.C. Cir. 1991).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny AMR's petition for review.

/s/ Robert J. Englehart  
ROBERT J. ENGLEHART  
*Supervisory Attorney*

/s/ Kellie Isbell  
KELLIE ISBELL  
*Attorney*

*National Labor Relations Board*  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2978  
(202) 273-2482

RICHARD F. GRIFFIN, JR.  
*General Counsel*

JENNIFER ABRUZZO  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

July 2015

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

AMERICAN MEDICAL RESPONSE OF  
CONNECTICUT, INC.

Respondent

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\* Nos. 14-4498,

\* 14-4668

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\* Board Case No.

\* 34-CA-13051

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,234 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC  
this 21st day of July 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Daniel J. Krisch  
Halloran & Sage, LLP  
225 Asylum Street  
1 Goodwin Square  
Hartford, CT 06103

s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC  
this 21st day of July 2015