

Nos. 14-1305, 15-1061

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

MARQUEZ BROTHERS ENTERPRISES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case Nos. 21-CA-39581, 21-CA-39609). Alfonso Mares and Javier Avila were the charging parties before the Board. Marquez Brothers Enterprises, Inc. (“MBE”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by MBE for review of an order issued by the Board on December 16, 2014, and reported at 361 NLRB No. 150. The Board seeks enforcement of that order against MBE.

(c) *Related Cases*: The ruling under review has not previously been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
AGC	Acting General Counsel
Board or NLRB	National Labor Relations Board
FVRA	Federal Vacancies Reform Act of 1998
MBE	Marquez Brothers Enterprises, Inc.
Union	Teamsters Local 63, International Brotherhood of Teamsters

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Marquez Brothers Enterprises, Inc. (“MBE”) to review, and the cross-application of the National Labor Relations Board (“Board”) to enforce, the Board’s Order against MBE. The

Board's Decision and Order issued on December 16, 2014, and is reported at 361 NLRB No. 150. (A312-14.)¹ It is final with respect to all parties.

The Board had subject-matter jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) ("Act"). The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review and cross-applications for enforcement may be filed in this Court. MBE filed its petition for review on December 30, 2014, and the Board cross-applied for enforcement on March 20, 2015. Both filings were timely; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's findings that MBE violated Section 8(a)(1) of the Act by interrogating employee Javier Avila regarding his union support, threatening him with unspecified reprisals, and encouraging employees to revoke their union-authorization cards.
2. Whether substantial evidence supports the Board's findings that MBE violated Section 8(a) (3) and (1) of the Act by discharging employee Avila and co-worker Alfonso Mares because of their union activities.

¹ "A." references are to the joint appendix. "Br." refers to MBE's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Whether MBE waived its challenge to the Board's remedy requiring that a notice be read aloud to employees.
4. Whether MBE waived its challenge to the President's designation of Lafe Solomon to serve as Acting General Counsel of the NLRB.
5. Whether MBE's request to toll backpay is properly before the Court.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are in the attached Addendum.

STATEMENT OF THE CASE

Upon charges filed by employees Avila and Mares, the Board's Acting General Counsel issued a complaint alleging that MBE violated Section 8(a)(3) and (1) of the Act by unlawfully discharging those employees because of their union activities, encouraging employees to ask Teamsters Local 63, International Brotherhood of Teamsters ("Union"), to return their union-authorization cards, interrogating Avila about his union activities, and threatening Avila with unspecified reprisals for those activities. (A165, 178; A653-55, 662-63, 676-85.)

After a hearing, an administrative law judge found that MBE violated the Act as alleged. MBE filed exceptions, and the General Counsel filed a limited cross-exception requesting a notice reading, which MBE did not oppose. (A164 & n.9.) On June 25, 2012, the Board (Members Hayes, Griffin, and Block) affirmed

the judge's findings and recommended order, and ordered a notice reading.

(A164-66.) MBE then petitioned this Court to review that Order.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2014 WL 2882090 (June 26, 2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Block and Griffin. On December 16, 2014, after this Court had remanded the case in the aftermath of *Noel Canning*, a properly constituted Board panel (Members Hirozawa, Johnson, and Schiffer) issued the Decision and Order before the Court, which incorporates the 2012 decision. (A312-14.)

I. THE BOARD'S FINDINGS OF FACT

A. MBE's Operations

MBE is a wholesale distributor of Mexican foods, employing about 37 drivers who deliver perishable dairy items to assigned stores, and stock those products on the stores' shelves. (A166; A327-38, 574-86.) MBE policy requires drivers to remove items that will expire before their next delivery to those stores. Because drivers must deliver a high volume of products in a short amount of time to several stores, drivers sometimes do not find and remove all soon-to-expire products. (A167; A390-91, 495, 592.) Typically, supervisors check the stores and if they find expired items, they mark them and instruct the driver to pick them up

on his next delivery. (A166-67; A374, 387, 593.) If expired product is found, the driver prepares a written invoice crediting the store for the spoiled items. MBE does not automatically discipline drivers for leaving expired product, but simply notifies them and advises them to be more careful. (A167, 170; A327, 357-58, 548-50.)

Drivers are responsible for estimating how much product to leave at a store, as stores often do not tell drivers how much product to leave. Because drivers cannot always estimate precisely, stores occasionally run out of product. The store then contacts MBE to request additional product, and MBE tells the driver to deliver more. MBE does not automatically discipline drivers in those circumstances. (A167, 174; A422-24, 492-94, 515-18.)

B. Mares Initiates a Union-Organizing Campaign; MBE Discharges Him Shortly Thereafter

In May 2010, driver Alfonso Mares spoke several times with an organizer for Teamsters Local Union 952. (A167; A320-21, 323, 329-32.) Mares asked about 17 drivers if they desired union representation. Sixteen drivers put their contact information on a list of union supporters, which Mares provided to the union. (A167; A332-33, 365-66, 392-93; A706.)

On the morning of June 1, driver Jesse Agosto signed Mares' list. Agosto resided with his mother, Bertha Yontomo, an account-receivables/collections clerk for MBE, who works in an office near that of MBE Controller Arturo Perfecto.

Perfecto oversees MBE's financial reporting and some human resources functions. That evening, Yontomo called Mares and instructed him to remove her son from the union-supporter list. Afraid he might be terminated, Mares replied that he did not know what she was referring to. Yontomo angrily retorted that Mares knew exactly what she was talking about. (A167-68; A334-38, 508; A706, 707.)

That day, Mares' direct supervisor, Andres Veloz, prepared an occurrence report recommending that MBE issue a verbal warning to Mares. (A167-68; A752; A561.) The report stated that, "some days ago," the owner of La Sabrosa Market, Gloria Tinajero, asked for another driver because Mares offered poor service and had a bad attitude. Veloz had not made a contemporaneous record of the alleged complaint or mentioned it to Mares at the time, which Veloz later admitted could have been as much as a year earlier. (A168: A555-58, 562-67, 568-69; A752.) The report also stated that, "some time ago," Superior #110 complained that Mares was unfriendly and offered poor service. (A168; A752; A561.)

The following day, June 2, Veloz called Mares, claiming that Veloz found expired product at Superior #110, Food-4-Less #393, and Big Saver #7. Mares asked Veloz to leave the expired product in a back room and said he would handle it on his next delivery to those stores. Veloz replied that Mares should be a little more careful. (A168; A357, 361, 549.) Later that day, Veloz prepared another

report, stating that he found expired product at those stores, which should have been picked up “without exception.” (A168; A753.) MBE’s practice is to issue credits to a store if expired product is found. However, there were no invoices indicating that MBE credited Superior #110 or Big Saver #7 for the expired product that Veloz reported finding on June 2.² (A168; A327, 349-58, 374, 387, 546-48, 553.) As to Food-4-Less #393, Mares credited the store for expired product he found on June 2. (A170; A714-16.)

When Mares returned to MBE’s warehouse at about 4 p.m., Sales Manager Javier Granados instructed him to turn in his keys and paperwork. Mares asked why, but Granados said he did not know, and brought Mares to an office area, where he was required to wait for 2-3 hours. Finally, he was summoned to meet HR Assistant Zulema Pintado, who informed Mares that MBE was terminating him because he had been aggressive with a customer and expired product had been found at three stores he serviced. Mares replied that he had not been aggressive with anyone, and asked to see credit reports showing that expired products were found. Instead, Pintado handed Mares a final warning and a termination letter. (A168-69; A708-09; A338-44.)

The final warning stated that, on June 1, Mares had been “very aggressive” towards Tinajero, who felt “unsafe” and requested that Veloz assign a different

² Mares last serviced Big Saver #7 on May 27. That day, he found expired product and credited the store. (A170; A717-18.)

driver to her store. It also stated that after Mares completed his delivery to Superior #110 on June 1, Veloz found spoiled items there with May 2010 expiration dates. The warning concluded by explaining how Mares could improve, and warned that future related incidents could result in termination. (A168; A708.) The simultaneously issued termination letter stated that, on June 2, Veloz found “various expired products” at two stores, which was “unacceptable.” It added that Mares “was not following proper procedures” for rotating and issuing credits for expired items. (A170; A709.)

C. The Union Campaign Stalls After Mares’ Discharge; Avila Reignites the Campaign; MBE Interrogates and Threatens Avila, and Solicits Avila and Other Drivers To Revoke Their Union-Authorization Cards

After Mares’ June 2 termination, the employees’ unionization efforts stalled for months. Around September, MBE cut the drivers’ pay. In response, Javier Avila, who had signed the union-supporter list that Mares circulated in May, revived the union campaign. (A172; A329, 389, 393, 395, 449; A706.) Avila spoke to the drivers, and many said they wanted union representation. (A172; A393-95.) Avila then contacted the Union, and became a campaign leader. (A172; A395-97, 465-66.) He spoke to approximately 25 drivers about the Union and arranged a union meeting on September 24. (A172; A395-99, 406, 465-66; A726.)

On October 6, the Union filed a petition to represent the drivers, which Sales Manager Granados and Controller Perfecto received shortly thereafter, and the Board scheduled an election. (A172; A727-34; A509.) Around that time, Avila made a scheduled delivery to Superior #102, while his direct supervisor, Cesar Barajas, was there. Barajas approached Avila and asked if he was “part of the Union.” Fearing for his job, Avila answered no. Barajas replied, “Oh, because you are burnt with the lady,” indicating that Elizabeth Lara, a company owner and the wife of Vice-President Francisco Lara, knew of Avila’s union activities. Barajas added, “And you’re also [on] the black list.” (A173; A409-11, 446-48.)

Shortly after the Union filed its petition, MBE prepared forms for employees to sign requesting that the Union return their union-authorization cards. Controller Perfecto provided these forms to Supervisor Barajas. The cover letter stated that “[m]any employees have asked [MBE] how they can get their signed union authorization cards back” and that “employees are concerned that they were tricked by [the Union]” into signing cards. The second page read: “I REVOKE THE AUTHORIZATION CARD. PLEASE RETURN MY ORIGINAL AUTHORIZATION CARD. THANK YOU.” (A173-74; A596-600; A735.) Barajas and Vasquez handed card-revocation forms to several drivers. (A173-74; A479-89, 587, 597-98, 606-08, 610-11.) No drivers had ever asked MBE about revoking their cards. (A173-74; A509, 587, 597-98, 606; A735- 748-50.)

On October 12, after finishing his shift, Avila returned to MBE's warehouse and walked into the lunchroom where drivers normally complete their paperwork. Supervisors Barajas and Vasquez were seated at a table there, which was unusual, especially at the end of the workday. On the table were piles of the card-revocation forms and envelopes, which Barajas and Vasquez handed to employees to sign and address. Barajas said he needed to speak to Avila after he completed his remaining tasks. When Avila returned to the lunchroom, Barajas handed him the form and told him to "go ahead and read this; sign." Avila signed and dated the form in Barajas' presence. Barajas gave Avila an envelope and instructed him to address it to the Union. Avila complied and asked if he should mail it. Barajas replied, "No, don't worry about it; we'll take care of it." (A173-74; A411-16, 479-88, 509, 587, 597-98, 606, 610-11; A735, 748-50.)

That afternoon, while Supervisor Vasquez was in the lunchroom with Barajas and driver Julio Ponce, Vasquez instructed driver Abel Gastelum: "Come over here. So that you can sign here and no one will see you." Gastelum complied, signed the form in their presence, and addressed the envelope to the Union. Ponce placed the letter in the envelope, and put it on top of other envelopes addressed to the Union. (A174; A479-89, 587, 597-98, 606; A748-50.)

D. After the Union Loses a Close Election, MBE Discharges Avila

On November 19, the Union lost the election, 17 to 20. (A172; A733-34.)

On November 29, around noon, Barajas called Avila as he was making a scheduled delivery and asked if he had delivered certain Rancho Grande products to Northgate #19 for a special sale. Avila asked which sale Barajas meant, but Barajas hung up and appeared in person at the store where Avila was making a delivery, repeating his question. Avila, who had been unaware of the sale because he had been on leave when it was announced to the drivers, explained that he had not delivered the Rancho Grande products because the shelves were fully stocked with those products when he last delivered there on November 26. Avila also stated that he left two additional cases of cheese in the back room, but never claimed that it was a Rancho Grande product. Barajas replied that the store ran out of Rancho Grande cheese and dispatched Avila to deliver more. Avila went to Northgate #19, confirmed that the shelves had no Rancho Grande sale items, and left enough to last several hours because Barajas said another driver would bring more. Previously, when MBE had asked Avila to bring more products to a store, Avila was not disciplined. (A174-75; A418-24, 430-31, 457-59, 463, 582-83; A746-47.)

On December 2, Avila went to pick up his paycheck. Both the person there and MBE Owner Lara, who sometimes distributes checks, said they did not have it. Avila encountered HR Assistant Pintado on the nearby stairway, who told Avila to wait there. An hour later, Sales Manager Granados gave Avila a termination

notice. It stated that, on November 29, Avila misrepresented to Barajas that he had filled the shelves with on-sale Rancho Grande product and left two additional boxes of that product at Northgate #19, during his last delivery. (A175; A425-26, 637-38; A736-37.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Hirozawa, Johnson, and Schiffer) affirmed, with slight modification, the administrative law judge's findings that MBE violated Section 8(a)(1) and (3) of the Act. (A312.)

The Board's Order requires MBE to cease and desist from the violations found. Affirmatively, it requires MBE to reinstate Mares and Avila to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions; to make them whole; and to post a remedial notice. The Board (Member Johnson dissenting) also ordered that MBE's CEO or, at MBE's option, a Board agent in that officer's presence, read the remedial notice to employees in English and Spanish. (A312-14.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that MBE violated Section 8(a)(1) by unlawfully threatening and interrogating Avila regarding his union support, and coercively encouraging him and other employees to revoke their union-authorization cards. Substantial evidence also supports the Board's

findings that MBE discharged Mares and Avila because of their union support and failed to show that it would have done so absent their union activities. The Court should accordingly uphold the Board's findings that those discharges violated Section 8(a)(3) and (1) of the Act. MBE attacks the judge's credibility resolutions, but has not shown that they are patently unsupportable. Furthermore, MBE's challenge to the read-aloud notice remedy is not properly before this Court because MBE failed to raise it to the Board.

MBE argues that AGC Solomon's appointment was invalid and that he lacked authority to initiate this action. That argument, too, is not properly before the Court because it was not raised to the Board. In any event, the President validly designated Solomon as Acting General Counsel under §3345(a)(3) of the FVRA, which authorizes the President to designate senior agency employees as acting officers. Even assuming that Solomon's designation was invalid, this Court should find the complaint valid under the de facto officer doctrine, and because MBE, which obtained full adjudication by a properly constituted Board panel, suffered no prejudice. MBE's related claim that backpay should be tolled from the date the complaint issued is also meritless.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT MBE VIOLATED SECTION 8(a)(1) BY INTERROGATING AND THREATENING EMPLOYEE AVILA, AND BY ENCOURAGING EMPLOYEES TO REVOKE THEIR UNION-AUTHORIZATION CARDS

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right “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 right by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.”

The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct reasonably tends to coerce or interfere with employees’ Section 7 rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). The employer’s statements “must be judged by their likely import to employees.” *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006). The critical inquiry is what employees could reasonably have inferred from the employer’s statements when viewed in context. *Id.*; *see Tasty Baking Co.*, 254 F.3d at 124-25 (statements that appear ambiguous in isolation can be

ominous in context). Proof of actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991).

This Court “recognize[s] the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)). The Board’s factual findings are “conclusive” if supported by substantial evidence on the record as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Those findings may not be disturbed, even if a reviewing court on *de novo* review would reach a different result. *United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004).

B. MBE Unlawfully Threatened and Interrogated Avila

Substantial evidence supports the Board’s finding that MBE unlawfully threatened Avila with unspecified reprisals because of his union activity. After Supervisor Barajas arrived unexpectedly at a store where Avila was stocking shelves and asked if he was “part of the Union,” Barajas told Avila that he was “burnt with the lady” and on “the black list.” (*See* pp.7-8.) As the credited evidence shows, Barajas’ statement referred to how “the lady,” MBE Owner Elizabeth Lara, had learned of Avila’s union activities, and “burnt” is a colloquialism meaning someone “is on to you, or that they know what is going

on.” (A173; A410-11, 446-48.) In these circumstances, the Board reasonably found (A173) that Barajas’ statements that Avila was blacklisted and “burnt” were coercive and, therefore, unlawful. *See Alaska Pulp Corp.*, 296 NLRB 1260, 1262-63 (1989) (threat to blacklist coercive), *enforced*, 944 F.2d 909 (9th Cir. 1991) (table).

Substantial evidence also supports the Board’s finding (A173) that Barajas unlawfully interrogated Avila. It is well settled that an employer violates Section 8(a)(1) by coercively interrogating employees about their union support and activities. *E.g., Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Factors favoring a finding of coercion include the employer’s background hostility to unionization; the interrogator’s position; the time, place, and method of the interrogation; the nature of the information sought; and whether a valid purpose for the questioning and assurances against reprisal were provided. *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Here, Barajas, Avila’s direct supervisor, who monitors his work and has the authority to impose discipline, approached Avila and directly asked him if he was “part of the Union.” Barajas neither provided any reason for the question, nor offered any assurances against reprisal. The coercive nature of the questioning was further demonstrated by Avila’s perceived need to falsely deny his union involvement. *See United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 915-17 (D.C.

Cir. 2004) (employees “responded evasively” because she feared retaliation, demonstrating coerciveness of interrogation); *Camaco Lorain Mfg.*, 356 NLRB No. 143, 2011 WL 1687418, at *2 (2011) (attempts to conceal union support suggest coercion). Finally, the inherent coercion in the questioning was, as the Board emphasized (A173), made explicit by Barajas’s reply that Avila was “burnt with the lady” and “on the black list,” indicating that MBE Owner Lara had learned of Avila’s union activities.

C. MBE Coercively Encouraged Employees to Revoke Their Union-Authorization Cards

Substantial evidence supports the Board’s finding (A174) that MBE coercively encouraged employees to ask the Union to return the authorization cards that they had signed. Although an employer may lawfully inform employees of their right to revoke their cards, it cannot attempt to ascertain whether they will avail themselves of that right or otherwise create a situation where they would tend to feel coerced in exercising their right to choose whether to revoke their cards. *Compare Adair Standish Corp.*, 290 NLRB 317, 318 (1988) (employer unlawfully solicited card revocations, and directed employees to obtain forms from their supervisors), *enforced*, 912 F.2d 854, 860 (6th Cir. 1990) and *Mohawk Indus.*, 334 NLRB 1170, 1171 (2001) (violation where supervisor solicited authorization-card withdrawals) *with Mid-Mountain Foods, Inc.*, 332 NLRB 229, 231 (2000) (no violation where supervisor merely told employees where revocation forms were

available, without attempting to see who took or used forms), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001) and *Mariposa Press*, 273 NLRB 528, 529-30 (1984) (no violation where employer did not attempt to monitor whether employees revoked cards, and there was no evidence of employer assistance).

Here, MBE did far more than create paperwork or inform employees of their rights. As the Board explained (A174), “Barajas and Vasquez participated in the process by soliciting employees to complete the paperwork and observing them as they did so.” As discussed (pp.8-10), the credited testimony showed that they sat at a table in the drivers’ breakroom to distribute the company-created forms, and their presence there was unusual at the end of the workday. They distributed the forms to employees, even though no employee had requested card-revocation information, and instructed employees to sign the forms and to address the envelopes, watching as they did so. Finally, they collected the paperwork and assured employees they would mail it. The Board accordingly reasonably found (A174) that this conduct “ha[d] a natural tendency to coerce employees into revoking their authorization cards, thereby overriding any statement in the revocation forms that the choice was up to the employees.”

D. MBE Fails To Meet Its Heavy Burden To Overturn the Board's Credibility Resolutions

MBE's challenges to the Board's Section 8(a)(1) findings (Br.25-27, 44) rest on discredited testimony and unsubstantiated assertions that the judge improperly discredited MBE's key witnesses. However, "credibility issues . . . are quintessentially the province of the [administrative law judge] and the Board." *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988). This Court will defer to an administrative law judge's credibility determinations, as adopted by the Board, unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005). Here, the judge properly considered witness demeanor, the vagueness or detail of the testimony, and the extent to which the evidence was corroborated or inconsistent. *See, e.g., Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1091-92 (D.C. Cir. 2012) (no basis for overturning credibility determinations, where judge credited one witness "based on a combination of testimonial demeanor and a lack of specificity and internal corroboration"); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 349 & n.2 (D.C. Cir. 2011) (no basis for overturning credibility findings where judge discredited one witness because he did not recall details).

MBE contests the judge's credibility determinations by merely substituting its view of the witnesses' credibility for that of the judge. MBE offers (Br.27,44)

only a conclusory assertion that the judge erred in crediting Avila's "self-serving" testimony over that of Barajas. However, the judge reasonably credited Avila and Gastelum because their testimony was supported by "factual detail" and their demeanors were "convincing." In contrast, Barajas testified in a "summary fashion," his testimony was "evasive and unpersuasive," and his demeanor was "not convincing" because "he seemed anxious to support [MBE] rather than to accurately relate the facts." (A174.) MBE has not purported to show how Barajas' testimony was any less self-serving, much less prove that Avila's testimony was "patently insupportable."

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT MBE VIOLATED SECTION 8(a)(3) AND (1) BY DISCHARGING MARES AND AVILA BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Thus, an employer violates Section 8(a)(3) and (1) of the Act by taking adverse employment actions against employees for engaging in union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

Finding that an adverse action violates Section 8(a)(3) turns on whether the action "was motivated by an antiunion purpose." *Local 702, Int'l Bhd. of Elec.*

Workers v. NLRB, 215 F.3d 11, 15 (D.C. Cir. 2000). In determining motive, the Board applies the test articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *Transportation Management Corp.* Under that test, if substantial evidence supports the Board's finding that the employee's protected activity was "a motivating factor" in the employer's adverse action, that action is unlawful unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 397-403. The employer "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996); *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995).

While the Court's review of the Board's factual findings is "highly deferential," its "review of the Board's determination with respect to motive is even more deferential." *Laro Maint. Corp.*, 56 F.3d at 228. Indeed, "[m]otive is a question of fact, and the [Board] may rely on both direct and circumstantial evidence to establish an employer's motive," taking into account "such factors as the employer's knowledge of the employee's union activities, the employer's

hostility toward the union, and the timing of the employer's action." *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Other facts that support a finding of animus include the employer's contemporaneous Section 8(a)(1) violations,³ departure from established policies and practices to impose discipline,⁴ and shifting or implausible explanations for its actions.⁵

B. MBE Unlawfully Discharged Avila

1. MBE was motivated by union animus in discharging Avila

MBE's commission of contemporaneous Section 8(a)(1) violations against Avila, shortly before discharging him, supports the Board's finding (A177) that MBE learned of Avila's union activities, harbored animus against those activities, and discharged Avila because of his union support. As discussed (pp.14-16), Supervisor Barajas unlawfully interrogated Avila about his union support, indicated that MBE owner Lara had discovered his union activities and threatened that he was "blacklisted" as a result, and unlawfully solicited Avila and other drivers to revoke their authorization cards. As the Board observed (A177), a "virulent" form of animus is shown by MBE's willingness to violate the law to prevent its employees from freely expressing their representational desires. *See*

³ *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996).

⁴ *Id.*

⁵ *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988).

Vincent Indus. Plastics v. NLRB, 209 F.3d 727, 735-36 (D.C. Cir. 2000) (unlawful-motive finding supported by employer's commission of other violations).

The Board also reasonably found (A177) that the timing of Avila's discharge strongly evidenced MBE's unlawful motive. Indeed, it occurred just a few weeks after MBE unlawfully threatened and interrogated him, and solicited him to revoke his authorization card; it was also two weeks after the Union lost the election. *See Vincent Indus. Plastics*, 209 F.3d at 735-36 (fact that employees received discipline close in time to employer's taking unlawful action is strong evidence of unlawful motive).

Additionally, as the Board reasonably found (A175), MBE's reliance on pretext further exposes its unlawful motive. A significant part of MBE's justification for Avila's discharge—Barajas' discredited claim that Avila lied to him about delivering on-sale Rancho Grande products to a store—was simply false. And “this falsification was of no little concern” because it allowed MBE to better align its purported justification with Avila's last written warning, which referenced the need to avoid empty shelves. (A177; A738-45.) However, Avila credibly denied that accusation, and explained that he told Barajas that he had not delivered any Rancho Grande at all because the shelves were already stocked. (A175; A417-22, 426-29.) Avila also credibly denied telling Barajas that he had left two cases of that particular product, as MBE claimed in Avila's falsified

termination notice. (A175; A432.) Given Avila's credited testimony, the Board reasonably inferred (A175) that MBE manufactured a charge of dishonesty to strengthen its case against Avila, further illustrating its unlawful motive. *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (unlawful motive may be inferred from falsity of employer's stated reason for discharge) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). Thus, MBE's "explanations were pretextual and shielded an illicit motive." *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995).

2. MBE did not meet its *Wright Line* burden

The Board reasonably concluded (A177) that MBE failed to prove that it would have discharged Avila absent his union activities. The Board acknowledged (*id.*) that shelves at a store serviced by Avila ran out of product. But, as the Board emphasized, and the record demonstrates, drivers cannot always estimate precisely how much product to leave, stores occasionally run out of product, and MBE does not automatically discipline drivers in those circumstances. (A167; A422-24, 492-94, 514-17.) Indeed, when MBE had previously asked Avila to bring more products to a store, Avila was not disciplined, and Barajas did not indicate that Avila would be disciplined. (A175; A422-24.) Rather, the standard procedure is for the store to contact MBE to request additional product, and for MBE in turn to tell the driver to deliver more. (A167, 175; A492-94, 515-18.) MBE presented no

evidence that it has terminated another employee on this basis, much less that it had done so in circumstances analogous to those here, where Avila was unaware of the sale and could not locate a store manager for guidance. (A174-75; A426-29.) Thus, “empty shelves” was not a terminable offense for MBE, until Avila revived the union campaign.

Moreover, contrary to MBE’s assertions (Br.41-43), the Board fully considered (A177) Avila’s disciplinary history, including a final written warning he received in October, in making its finding. As the Board observed (A175-77), he had received other final warnings in the past, and was not terminated for similar service errors even while on probation. (A738-45.) Yet, after MBE learned of Avila’s union activity, MBE “seized upon the empty shelves issue to construct a reason to discharge Avila,” though it had never terminated or automatically disciplined employees on that basis. (*Id.*) Therefore, the Board reasonably concluded (DA177) that, “on balance,” the credited evidence showed that MBE’s had “construct[ed]” its reasons for the discharge and had failed to establish that it would have discharged Avila absent his union activities. *See Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (where record had evidence of employer’s animus, employee was discharged one week after openly supporting union, and no other employee was discharged for similar violation, substantial evidence supported Board’s finding of unlawful discharge).

MBE maintains (Br.37-38), relying on Barajas' discredited testimony, that there is no evidence that MBE had knowledge of or animus toward Avila's union activities. As shown (pp.14-17), however, the credited testimony establishes that Barajas threatened and interrogated him regarding his union activities, and solicited him to revoke his union-authorization card. MBE also incorrectly suggests (Br.39) that the Board's finding was grounded in "generalized" union animus that Vice-President Lara exhibited in captive-audience meetings before Avila's discharge. In fact, the Board's passing reference to the statements at such meetings were an introduction to the "more virulent form of animus" (A177) illustrated by MBE's 8(a)(1) violations against Avila (and other employees) that provided a significant basis for the Board's finding.

C. MBE Unlawfully Discharged Mares

1. Mares' discharge was unlawfully motivated

Substantial credited evidence supports the Board's finding (A167-68, 171) that Mares engaged in union activity and MBE learned of that activity. As the leader of the first union campaign, Mares spoke to numerous drivers about the Union, procured their names and contact information on a list of union supporters, and provided that list to a union organizer. The Board, taking into account all of the circumstances, reasonably found that MBE management learned of Mares's activity through company clerk Yontomo, who worked near Controller Perfecto, an

official with labor-relations responsibilities who later provided the card-revocation forms for distribution to employees. (A168, 171.) As discussed (p.5), hours after Mares successfully solicited Yontomo's son to sign the list of union supporters, Yontomo called Mares, demanding that he remove her son from the list. The following day MBE discharged Mares in a "hastily contrived" manner, leading the Board to conclude that "there was no event other than the discovery of Mares' union activities on June 1 that credibly explains his abrupt termination" on June 2. (*Id.*) As the Board explained, the 2-3 hour delay between when Mares was told to turn in his keys and paperwork and his actual termination made it "apparent that MBE had not fully prepared the paperwork it felt it needed to justify Mares' discharge, but it nonetheless felt compelled to hastily terminate him that evening." (A171.) That MBE simultaneously gave Mares a final warning and termination letter, "effectively making the warning meaningless," reinforces the Board's finding. (A164.) The highly suspicious timing and "hastily contrived" manner (A164, 171-72) of Mares' discharge support both the Board's inference that MBE became aware through Yontomo of Mares' union activity, and the Board's finding that Mares' union activity motivated MBE's decision to discharge him.⁶ *See*

⁶ Though MBE notes (Br.34) that Sales Manager Granados and Vice-President Lara each denied having knowledge of Mares' union activity when they discharged him, the judge reasonably found MBE had knowledge of Mares' union support, given the strong circumstantial evidence of knowledge, the striking timing and

Power, Inc., 40 F.3d at 418 (timing may evidence union animus); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993) ("knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn") (citation omitted) .

MBE's reliance on shifting reasons for the discharge further supports the Board's finding. *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (shifting explanations for discharge demonstrates unlawful motive) (citing *NLRB v. Indus. Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1983)). As the Board explained (A171), first, MBE claimed that it discharged Mares based on an alleged complaint from La Sabrosa owner Tinajero, and on Sales Supervisor Veloz's discredited and unsubstantiated statement that he found expired product on June 1. At trial, MBE added "an entirely new ground," Mares' allegedly unsatisfactory personal appearance. (A164.) However, because that issue was neither mentioned in the discharge papers, "nor is there any written evidence of warnings or previous discipline on this subject," the Board reasonably concluded that this alleged reason was "made up after the fact." (A170.) On that basis, the judge properly credited (A171) Mares' denial that he met with Vice-President Lara to discuss disciplinary issues or had been warned about his appearance. MBE's presentation of new

hasty manner of the discharge, and the plethora of inconsistent purported reasons for his discharge.

explanations at trial suggests that MBE recognized that its existing reasons for discharging Mares were insufficient. *See Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007). MBE's shifting justifications only serve to demonstrate that MBE sought to conceal its true motivation, Mares' protected behavior.

Moreover, the documentary evidence -- specifically the June 1 occurrence report, the June 1 final warning, and the June 2 termination letter -- reveals numerous inconsistencies in MBE's contemporaneous explanations for the discharge. (A168-69.) While the warning further claims the La Sabrosa Market complaint occurred on June 1, the June 1 report states that it occurred "some days ago." (A708, 752.) Indeed, Veloz admitted that it may have occurred up one year earlier, and refused to answer questions regarding why he prepared the report on June 1, even though supervisors are supposed to "record daily occurrences as they happen." (A168-69; A555-63; A752.) Also, the warning indicates that La Sabrosa owner Tinajero felt "unsafe" talking to Mares, but the occurrence report contains no such statement and Tinajero denied telling Veloz that she felt unsafe. (A168-69; A708, 752.) The warning further claims that Veloz found spoiled product at Superior #110 on June 1, yet Veloz's June 1 report made no mention of it. (A168-70; A708-09, 752.) Thus, the Board reasonably found (A169) that the "written warning both increased the magnitude of the alleged misconduct and heightened

the immediacy of that conduct,” suggesting that MBE recognized that the misconduct described in Veloz’s report alone would not justify Mares’ discharge.

The lack of any credible evidentiary support for MBE’s contemporaneously stated reasons for Mares’ discharge—that Mares was aggressive with Tinajero and that Veloz discovered expired product at Mares’ stores—further illustrates the pretextual nature of his discharge. First, neither Tinajero’s nor Veloz’s testimony established if and when any alleged La Sabrosa incident occurred, or that Mares had been aggressive, and as explained below (pp. 32-33), the judge properly discredited most of their testimony on that matter. (A168-70; A528-32, 538.) Second, as the Board observed (A168, 172), MBE failed, in the face of Mares’ credible denials (A168; A349-56), to provide any documentation substantiating Veloz’s alleged discovery of expired product, either when Mares demanded it at the time of his discharge or at trial. (A166-68; A341-44, 349-56; A711-13.) Though MBE’s practice is to issue credit invoices for expired product, there is no credit invoice for Superior #110 on June 1, and the only available credit invoices indicate that Mares—not Veloz—found expired product at Food-4-Less #393 on June 2, and at Big Saver #7 during his last visit there on May 27, and properly credited those stores. (A170; A327, 373-74; A714-18.) This failure to credibly support its proffered reasons for Mares’ discharge buttresses the Board’s inference that his discharge was motivated by his recently discovered union activity.

2. MBE has not met its *Wright Line* burden

The Board reasonably found (A172) that MBE failed to prove that it would have discharged Mares absent his union activity. Given that the La Sabrosa complaint could have occurred months earlier and was insufficient to justify any discipline at the time, “what remains of MBE’s case against Mares are the pieces of expired product that Veloz reportedly found on June 2.” (A172.) However, as discussed, MBE did not present any documents showing it credited Superior #110 or Big Saver #7, as it would have done pursuant to its practice, and Mares credited Food-4-Less #393 for the expired product he found. Also, the credited testimony, including that of MBE’s witnesses, establishes that accidentally leaving expired product is not uncommon and does not automatically result in discipline or termination. (A166-67, 172; A390-91, 496, 501-04, 592-93.)

While Mares’ disciplinary record (A170-72) included past instances of failing to remove expired product and other customer-service issues, the credited evidence showed that MBE had tolerated similar performance in the past. And while an employer certainly has the right to insist on good performance by its employees, the Board “must measure the level of customer service by the employer’s own standards.” (A172.) *See Parsippany Hotel Mgmt. Co.*, 99 F.3d at 423-24 (departure from policies and past practice to impose discipline support finding unlawful discharge). Here, as the Board explained (A172), whatever

customer-service issues Mares may have had, they were not sufficiently serious in MBE's view to discharge him. Therefore, the Board reasonably found (A164, 172), based on the credited evidence, that MBE would not have discharged Mares for any of his alleged deficiencies absent his recent union activity.

Though MBE claims (Br.43) that the Board "disregarded" that MBE discharged three employees "for similar issues," the evidence shows otherwise: two of those employees, who were on disciplinary probation, committed several service errors within their probationary periods; the third committed five errors in a 15-day period, and his "poor customer service" caused MBE to lose shelf space at three stores. (A813-23.) In contrast, Mares was not on probation and MBE last disciplined him several months before his discharge. (A172.) Although the Board appropriately considered that important evidence, it did not, as MBE claims (Br.36), find Mares' discharge unlawful based on a "single, flawed rationale" that there was no documented discipline for several months before his discharge. Rather, as demonstrated above, the Board reasonably found, on the evidence taken as a whole, that MBE would not have discharged him for any of his purported deficiencies, before he engaged in union activity.

D. MBE Has Not Shown Any Basis for Disturbing the Judge's Credibility Determinations as to Mares' Discharge

MBE further contests (Br.10-15, 30-31, 33-34) Mares' unlawful discharge by challenging the judge's credibility determinations. However, the judge properly examined the vagueness or specificity of witnesses' testimony and inconsistencies in the evidence presented.

The judge reasonably credited (A168-71) Mares' corroborated testimony over that of company officials who claimed they had legitimate reasons for discharging him. For example, Veloz could not explain the reason for preparing the occurrence report on June 1, when the events it mentioned could have occurred between 5 days and one year earlier. As the judge noted, Veloz responded only with "several long pauses, gulps, and sighs" when the question was repeated, which the judge reasonably inferred was "because a truthful answer would be against the interest of his employer." (A168; A555-62.) Moreover, Mares' testimony that he had found no expired products at the pertinent stores on June 1 was corroborated by the absence of any credit reports, which would have been created by Veloz if he had found expired products.

Contrary to MBE's assertions (Br.14), the judge reasonably credited only portions of Tinajero's testimony—that Mares would become impatient waiting for Tinajero to check in MBE products, Mares' failure to plug in the cooler occurred in the "summertime" (of 2009), and Tinajero told Veloz about those matters. (A170.)

Otherwise, the judge reasonably found Tinajero to be an “unreliable witness.” (*Id.*) On June 16, Tinajero signed a written statement affirming that, despite MBE’s stated reasons for discharging Mares, she had not requested another driver and did not complain about feeling unsafe around Mares; however, on December 15, she recanted the June 16 statement. Then, at the hearing about three months later, Tinajero initially confirmed the bulk of her June 16 affirmation, then in response to leading questions, testified that Mares was “always” aggressive, and ultimately, admitted that she never complained to Veloz about it. (A169-70; A522, 538-40; A811.) Given these frequent changing accounts, and considering Tinajero’s “entirely unconvincing” demeanor and “clearly exaggerated” testimony about Mares’ “alleged shortcomings,” the judge reasonably credited only select portions of Tinajero’s testimony, none of which undermine the Board’s findings. (A170.)

III. MBE’S CHALLENGE TO THE REMEDY IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, LACKS MERIT

The Board ordered (A165) that a remedial notice be read aloud to MBE’s employees by MBE’s CEO or, at MBE’s option, a Board agent in that officer’s presence, in accordance with the Board’s standard calling for such a remedy where the violations are “sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion.” *Pacific Beach Hotel*, 356 NLRB No. 182, 2011 WL 2414720, at *1, *10 (June 14, 2011), *enforced sub nom. NLRB v. HTH Corp.*, 693 F.3d 1051 (9th

Cir. 2012). Because both lower-level and senior officials were involved in the violations, and employees would reasonably infer that management would continue “methodically target[ing]” their union activities (A165), the Board found that this remedy will legitimately ensure employees that MBE’s management will respect their statutory rights.

The Board explained (A165) that MBE engaged in a “persistent campaign” of coercive conduct, including discharging two union-campaign leaders, which extended “throughout the life of the employees’ organizing efforts and that touched every employee MBE believed supported the union.” That misconduct conveyed to employees that it was “continuing to methodically target union supporters.” (A165.) In addition to discharging Mares and Avila, and interrogating and threatening Avila prior to discharging him, MBE “engaged in an orchestrated effort to coerce all the employees whom it believed had signed union-authorization cards into sending revocation letters to the Union.” (*Id.*) Thus, the Board concluded that MBE’s “evident lack of inhibition in coercing employees to withdraw their support of the union demonstrates that a reading of the notice is warranted to assure employees that they may freely exercise their [rights under the Act] in the future.” (*Id.*)

In its opening brief to this Court, MBE argues (Br.44-47) that this remedy is inappropriate and inconsistent with Board precedent. However, because MBE

failed to raise that challenge to the Board, the Court may not consider it. Section 10(e) of the Act states: “No objection that has not been urged before the Board . . . 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); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). Here, after the judge declined to grant the General Counsel’s request for a read-aloud notice, the General Counsel filed a cross-exception objecting to that ruling. MBE could have filed an answering brief opposing that request, but failed to do so. (A164 n.9.) Even after the Board reversed the judge and ordered a notice reading, MBE could have filed a motion for reconsideration, but did not do so, thereby waiving review of that argument. *See* 29 C.F.R. § 102.48(d)(1); *Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341, 348-49 (D.C. Cir. 2011) (where motion for reconsideration is party’s first opportunity to raise objection, party’s failure to seek reconsideration precludes judicial review). MBE also cannot rely on Member Johnson’s dissent (A312 n.1) to create a right to challenge the Board’s ordering of a notice-reading remedy. Section 10(e) requires “that the parties themselves actually raise the issue before the Board;” that requirement is not excused simply because “the [Board] members themselves engaged in its discussion.” *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003). Ultimately, MBE had “full opportunity” to present its argument to the Board,

before and after its decision issued, and “the mere inconvenience of severing the issues or delaying a petition for review does not constitute an extraordinary circumstance.” *Id.*

Nevertheless, MBE’s argument fails. Section 10(c) empowers the Board to order the labor-law violator “to take such affirmative action . . . as will effectuate the purposes of the Act.” 29 U.S.C. § 160(c). The Board’s authority in formulating remedies “is a broad discretionary one, subject to limited judicial review.” *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Thus, the Board’s ordering of a notice reading must be enforced, unless MBE shows that it “is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.” *Fibreboard Corp.*, 379 U.S. at 216 (citation omitted).

Contrary to MBE’s assertions (Br.44-47), the Board has granted this remedy in similar circumstances where the employer unlawfully discharged, threatened to blacklist, and interrogated employees because they engaged in union activities,⁷ or pressured employees to sign prepared documents disavowing union support amidst other violations.⁸ The Court should reject MBE’s invitation (Br.46-47) to make apples-to-oranges comparisons to factually distinguishable cases, particularly

⁷ *Carwash on Sunset*, 355 NLRB No. 205, 2010 WL 3835583, at *4-8 (2010).

⁸ *Vincent Metro Trucking*, 355 NLRB 289, 290 n.4 (2010).

where MBE has not given the Board the opportunity to address its claim that the remedy here departs from Board law. In essence, MBE's argument amounts to nothing more than quibbling with the Board's application of its established standard to these particular facts—not an extraordinary circumstance that should excuse MBE's failure to raise the issue to the Board in the first instance.

IV. MBE WAIVED ANY CHALLENGE TO THE PRESIDENT'S DESIGNATION OF LAFE SOLOMON AS THE BOARD'S ACTING GENERAL COUNSEL BUT, ASSUMING MBE DID NOT, THE PRESIDENT VALIDLY DESIGNATED LAFE SOLOMON UNDER §3345 OF THE FEDERAL VACANCIES REFORM ACT

A. MBE's Challenge To AGC Solomon's Authority Is Not Properly Before the Court

MBE argues (Br.58-62) that the Regional Director lacked authority to issue the complaint in this case because, it contends, Lafe Solomon was invalidly designated as the Board's Acting General Counsel ("AGC"). That argument is not properly before the Court.

MBE waived any challenge to the President's designation of AGC Solomon by failing to raise its objection to the Board, "while it [had] opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952); *see* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

Even though MBE's challenge goes to the validity of the complaint itself, MBE did not raise its objection in its answer to the complaint, or at any time thereafter before the Board. Rather, MBE contested Solomon's designation for the first time in this Court, in its July 11, 2014 motion to dismiss its then-pending petition for review of the Board's 2012 Decision and Order and its response opposing the Board's motion to vacate and remand. *Marquez Bros. Enterprises, Inc. v. NLRB*, Case Nos. 12-1278, 12-1357, Entry IDs 1502202 & 1502193. Even after a properly constituted Board issued the Decision and Order now before the Court, MBE failed to file a post-decisional motion with the Board challenging Solomon's designation. *See* 29 C.F.R. § 102.48(d)(1). Under these circumstances, there is no reason to depart from the bedrock rule of appellate procedure that challenges not timely asserted are forfeited. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar . . . than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.") (internal quotation marks omitted). That principle applies to claims that the actions of government officials are ultra vires. *See L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 38 (rejecting belated challenge to hearing examiner's authority, while acknowledging that defective appointment would have invalidated resulting order "if the [Agency] had overruled an

appropriate objection made during the hearings”); *see also NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974) (declining to grant relief on a forfeited challenge to the composition of a Board panel, notwithstanding that the court had previously upheld a similar challenge, because the argument was not timely raised). Moreover, had MBE raised its argument before the Board, “the [Agency] would at least [have been] put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.” *L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 37. Thus, by failing to challenge Solomon’s designation before the Board, MBE waived appellate review of that issue.⁹

Nor was MBE’s failure to raise the issue in any way excusable. All of the facts and legal arguments necessary to challenge AGC Solomon’s designation were available to MBE since January 31, 2011, when the AGC issued the consolidated complaint in this case. At that time, MBE was aware, or should have

⁹ Although this Court may reach issues that have been waived below in “extraordinary circumstances,” *Noel Canning v. NLRB*, 705 F.3d at 497 (“we hold that we *may* exercise jurisdiction under [S]ection 10(e)”) (emphasis supplied), there are no extraordinary circumstances here. Unlike *Noel Canning*, which raised a constitutional issue, here a properly constituted panel of Senate-confirmed Board Members issued the unfair-labor-practice order now before the Court, and could have considered MBE’s statutory argument that the AGC lacked authority to issue the complaint. The circumstances here are more akin to those in *L.A. Tucker Truck Lines*. *See Noel Canning*, 705 F.3d at 497 (“In *L.A. Tucker Truck Lines*, the challenge was not to the Commission’s power to act, but only its examiner’s.”); *see also Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to consider a belatedly raised Appointments Clause claim, while recognizing that “[i]t is certainly within [the Court’s] power to consider”).

been, of Solomon's designation under the FVRA, a statute that has been in effect since November 1998. There was certainly no change in the facts or law between that time and the present that altered the availability of the FVRA-based challenge that MBE now raises. And MBE proffers no reason for its failure to raise the issue before the Board. Accordingly, the Court should reject MBE's challenge to AGC Solomon's authority to issue the unfair-labor-practice complaint.

B. In Any Event, AGC Solomon Properly Held His Office Pursuant to His Valid Designation by the President

1. The President relied on FVRA, not Section §3(d) of the Act, in designating AGC Solomon

MBE's challenge to AGC Solomon's authority starts with a flawed premise in arguing (Br. 58-59) that the designation of AGC Solomon was invalid because it did not comply with §3(d) of the Act.¹⁰ The President did not designate Solomon under §3(d). Rather, the President directed Solomon to perform the duties of General Counsel "[p]ursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998" (*See* Attachment 1.)

¹⁰ Section 3(d) authorizes the President to designate an individual to act as General Counsel during a vacancy, but prohibits an AGC from serving "for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate." 29 U.S.C. § 153(d).

Although §3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently-enacted Federal Vacancies Reform Act of 1998 (“FVRA”) clearly provides another. *Benjamin H. Realty Corp.*, 361 NLRB No. 103, 2014 WL 6068930, at *1 (2014). The express terms of FVRA, with four immaterial exceptions, apply to all federal appointments requiring Senate confirmation. 5 U.S.C. § 3349(c). Accordingly, §3(d) is no longer the sole means of filling the Board’s General Counsel vacancies, even though 5 U.S.C. § 3347(a)(1)(A) preserves the option of using §3(d).¹¹ FVRA’s legislative history confirms congressional intent to provide the President an additional means to fill vacancies. The Senate Report explains that the bill “retains existing statutes,” including §3(d), that designate an official to serve in a temporary acting capacity and also “provide[s] an alternative procedure for temporarily occupying” an office. S. Rep. No. 105-250, 105th Cong. 2d Sess. 16, 17 (1998) .

Therefore, the President had the option of designating an Acting General Counsel under either §3(d) of the Act or FVRA. Because he chose to designate Solomon under FVRA, MBE’s arguments regarding §3(d) should be ignored.

¹¹ Section 3347(a) provides that FVRA is “the exclusive means” for the President to appoint such an official in an acting capacity “unless—(1) a statutory provision expressly—(A) authorizes the President” to make such an appointment. Thus, where, as here, there is independent statutory authority, FVRA is not the “exclusive” means for appointments, but merely provides an option.

2. Section 3345 establishes multiple methods for temporarily filling vacant offices and designating acting officers

Section 3345 provides multiple methods by which an acting officer may temporarily perform the functions and duties of a vacant Executive agency office that requires Presidential appointment and Senate confirmation. First, subsection (a)(1) provides that the “first assistant to the office . . . shall perform the functions and duties of the office temporarily in an acting capacity.” 5 U.S. C. § 3345(a)(1). Because the first assistant automatically is assigned the functions and duties of the office in an acting capacity, the President need not designate a particular individual to serve as acting officer. *See* S. Rep. No. 105-250, 1998 WL 404532, at *12 (1998). As the Senate Report explained, a first assistant’s automatic assignment to the duties of the office is appropriate “because such person is often a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time by that one person.” S. Rep. No. 105-250, 1998 WL 404532, at *12.

Second, notwithstanding the first assistant’s authority to serve as an acting officer under subsection (a)(1), the President is authorized under subsection (a)(2) to designate instead “a person who serves in an office for which appointment is required by the President, by and with the advice and consent of the Senate.” 5 U.S.C. § 3345(a)(2). Subsection (a)(2) thus gives the President the option to

designate as an acting officer someone who is already serving in an office pursuant to Senate confirmation to temporarily fill the vacant position, without requiring prior service at the agency in which he is designated. *See* S. Rep. No. 105-250, 1998 WL 404532, at *12-13. Congress's purpose in providing this option was to allow the President "limited flexibility in appointing temporary officers, restricting the pool to persons who have already received Senate confirmation for their current position." S. Rep. No. 105-250, 1998 WL 404532, at *13.

Third, and relevant here, under subsection (a)(3), the President may designate "an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(3). That senior agency employee, however, must have "served in a position in such agency for not less than 90 days" during the prior year, with a rate of pay at the GS-15 level or higher. 5 U.S.C. § 3345(a)(3)(A)-(B). If a senior agency employee meets those requirements, the President is authorized to override subsection (a)(1)'s automatic grant of authority to the first assistant and designate that senior agency employee to temporarily perform the duties and functions of the vacant office. *See* 144 Cong. Rec. at p. 27496 (1998).

Congress's purpose in adding the "senior agency official" option in FVRA was to enlarge the pool of potential acting officers because, as Senator Thompson, the bill's sponsor, explained, "there will sometimes be vacancies in first assistant

positions, and [] there will not be a large number of Senate-confirmed officers.”

144 Cong. Rec. at p. 27496 (1998).¹² As Senator Levin stated, without that option, the bill would have provided “too restrictive a pool of acting officials,” and “not give[n] the administration . . . the ability to make a long-time senior civil servant within the agency an acting officer,” who “may be the best qualified to serve.” 144 Cong. Rec. at p. 22514 (1998).

In conjunction with those methods of temporarily filling vacancies, §3345(b)(1) addresses the hybrid circumstance where the first assistant to the vacant office also becomes the President’s nominee for appointment to the vacant office:

Notwithstanding subsection (a)(1), a person may not serve as an acting officer under this section, if—(A) during the 365-day period preceding [the vacancy] such person—(i) did not serve in the position of first assistant to the office of the officer; or (ii) served in the position of first assistant to the office of the officer for less than 90 days; and (B) the President submits a nomination of such a person to the Senate for appointment to the office.

5 U.S.C. § 3345(b)(1). Thus, as the Senate Report explained, “a first assistant who has not received Senate confirmation, but who is nominated to fill the office

¹² Senator Lieberman also emphasized how “particularly pleased” he was that the final version of the bill addressed the President’s then-limited options for making acting designations by adding “the option to choose any senior agency staff who has worked at the agency for at least 90 days to serve as the acting official.” 144 Cong. Rec. at p. 27536 (1998); *see also* S. Rep. No. 105-250, 1998 WL 404532, at *31 (“Additional Views”) (concerns that third option should be included to increase pool of potential acting officers).

permanently, can be made the acting officer only if he has been the first assistant for at least [90] days in the year preceding the vacancy.” S. Rep. No. 105-250, 1998 WL 404532, at *1-2 (brackets replace the initial 180 days later amended to 90).¹³ Congress’s purpose in enacting that time-in-service requirement was to address the concern that “the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials.” S. Rep. No. 105-250, 1998 WL 404532, at *13.

3. AGC Solomon was properly designated under the “Senior Agency Employee” provision of §3345(a)(3)

On June 18, 2010, the President issued a memorandum designating Solomon to serve as Acting General Counsel under §3345(a) of FVRA, after then-General Counsel Ronald Meisburg resigned, effective June 20. On June 21, AGC Solomon

¹³ From its inception, the provision that would become subsection (b)(1) was generally referred to by its proponents as “the length of service requirement for first assistants” who are also nominees. *See, e.g.*, S. Rep. No. 105-250, 1998 WL 404532, at *31 (“Additional Views”). The same group of Senators who successfully urged reducing the minimum length of service for first assistant nominees from 180 days to 90 days to give the President greater flexibility were also the proponents of adding the “senior agency official” option with the same 90 day minimum service requirement for the same purpose of giving the President additional flexibility to designate acting officials who would also be nominees. *Id.* at *31-*32.

assumed office in that acting capacity.¹⁴ Solomon was a veteran Board employee of 38 years at the time of the President's designation and was fully eligible to serve as acting officer under the "senior agency employee" provision of §3345(a)(3). For 10 years immediately preceding his designation, Solomon served as the Board's Director of the Office of Representation Appeals, a Senior-Executive-Service position, which is above the GS-15 pay level. *See* Attachment 2. Solomon therefore fully satisfied §3345's eligibility requirements for designation when the President directed him to temporarily assume the functions and duties of the General Counsel's office on June 21, 2010.

MBE asks this Court (Br. 21,60-63) to nullify every action taken in this case from the date the complaint issued, including the Region's prosecution of the case

¹⁴ Six months later, the President nominated Solomon to serve as the Board's General Counsel and submitted his nomination to the Senate on January 5, 2011. 157 Cong. Rec. S68-09 (Jan. 5, 2011). His nomination remained pending until January 3, 2013, when the Senate returned it to the President. On May 24, 2013, the President resubmitted Solomon's nomination. On August 1, the President nominated Richard F. Griffin, Jr. to serve as General Counsel and withdrew Mr. Solomon's nomination. The Senate confirmed Mr. Griffin's nomination on October 29, 2013. The complaint in this case issued on January 31, 2011, during Solomon's tenure. Thus, contrary to MBE's assertion (Br.61), Solomon's designation did not lapse under the terms of Section §3346, which limits the tenure of an acting officer designated under Section 3345 to 210 days when no nomination is pending, because Solomon did not serve for longer than 210 days while no nomination was pending. 5 U.S.C. § 3346(a)(2), (b).

and the judge's deciding the case. However, if this Court agrees that AGC Solomon was validly designated, MBE's argument must fail.¹⁵

4. MBE's argument runs counter to § 3345's text, structure, and legislative history

Citing *Hooks v. Kitsap Tenant Support Servs.*, 2013 WL 4094344 (Aug. 13, 2013 W.D. Wash.), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013), MBE claims (Br. 59-61) that AGC Solomon's designation was invalid because he never served as "first assistant." However, the structure, text, and legislative history of §3345 argue against *Kitsap's* construction of its terms.

The district court's rationale for concluding that AGC Solomon was invalidly designated under §3345 is not entirely clear, particularly given the court's abbreviated treatment of the issue. Citing §3345(b), the court stated that FVRA only permits the designation of a person "who, within the last 365 days, has served as a personal assistant to the departing officer," and noted that Mr. Solomon had never served as first assistant. *Kitsap*, 2013 WL 4094344 at *2. In so reasoning, the court apparently accepted *Kitsap's* interpretation of the minimum-service requirements set forth in subsection (b)(1) of §3345. That provision states that "[n]otwithstanding subsection (a)(1)," the subsection authorizing service by a first

¹⁵ MBE incorrectly states (Br. 62 n.3) that Regional Director Garcia was appointed on January 6, 2012, "during the Noel Canning period." However, Garcia was appointed by a properly constituted Board panel on December 22, 2011. *See* Attachment 3.

assistant, a person may not serve as an acting officer “under this section” if that person had not served as a first assistant for a minimum period of 90 days during the prior year and has been nominated by the President to fill the vacant office. Kitsap argued that §3345(b)(1)’s use of the phrase “under this section” means that subsection (b)(1)’s time-in-service requirement of 90 days as a first assistant applies to *all* categories of acting officers listed in subsection (a), not only to first assistants. The text, structure, and legislative history of §3345 stand against that construction.

The district court’s interpretation fails as a textual matter, because it conflicts with other language in §3345(b)(1). Subsection (b)(1) specifies that its limitations apply “[n]otwithstanding subsection (a)(1).” It thereby expressly directs its limitations toward the class of officials covered by subsection (a)(1) – namely, first assistants. If Congress had meant for the time-in-service requirement in subsection (b)(1) to apply to all three categories of officers identified in subsection (a), rather than just to first assistants, it would have said “notwithstanding subsection (a),” rather than referring more specifically and exclusively to subsection (a)(1). The court’s interpretation would render the explicit textual cross-reference to subsection (a)(1) meaningless.

Even if the district court’s reading of subsection (b)(1) were “textually permissible in a narrow sense,” it is “structurally implausible.” *New Process Steel*,

L.P. v. NLRB, 560 U.S. 674, 681 (2010). All of subsection (b)(1)'s limiting conditions are linked to service as a first assistant. Additionally, subsection (b)(1) constitutes the sole source of any limitations on a first assistant's serving as an acting officer under subsection (a)(1). By contrast, subsection (a)(3), the provision applicable to Solomon who was eligible to serve as acting officer because of his status as senior agency employee, has its own self-contained minimum-service requirements, noted above. The proposition that a person independently qualified to serve as an acting officer under subsection (a)(3) must also satisfy requirements linked to service as a first assistant is structurally implausible.

The district court's reading of subsection (b)(1) also runs counter to the legislative history of § 3345. The bill's chief sponsor, Senator Thompson, stated that subsection (b)(1) applies only to first assistants: "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that *this subsection applies only when the acting officer is the first assistant*, and *not* when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." 144 Cong. Rec. at p. 27496 (1998) (emphasis added). Furthermore, Congress's purpose in adding subsection (a)(3) to the bill after it was reported out of Committee would be frustrated by the district court's construction of § 3345(b)(1). As Senator Thompson explained, the "senior agency employee option" was added because, in part, Congress feared that the pool of available first assistants was too small and

therefore sought to expand categories from which acting officers could be selected. *Id.* It would seriously undermine Congress’s stated goal of expanding the pool of potential acting officers beyond first assistants if subsection (b)(1) were construed, as the district court did, to disqualify Senate-confirmed officers and senior agency employees whom the President designated.

In sum, the structure, text, and legislative history of § 3345 stand against *Kitsap*’s overly restrictive view of the President’s power to temporarily fill vacancies in Executive positions. Indeed, *Kitsap* is not settled precedent and is currently on appeal to Ninth Circuit. The Court should decline to follow its holding.

C. Even Assuming That the Court Finds AGC’s Designation Invalid, It May Enforce the Board’s Order

Even assuming that Solomon’s designation was invalid, the de facto officer doctrine may be applied to uphold Solomon’s actions which, in any event, did not prejudice MBE. To be sure, Section 3348(d) of FVRA renders of “no force or effect” those actions taken by a person performing the functions or duties of a vacant office “who is not acting under section 3345, 3346, or 3347,” and further specifies that such actions “may not be ratified.”¹⁶ 5 U.S.C. § 3348(d)(1)-(2).

¹⁶ The Board did not ratify *nunc pro tunc* AGC Solomon’s issuance of the complaint or the Region’s processing of the case, nor does it take the position that it did, as MBE incorrectly claims (Br.55-58.)

Section 3348(e)(1), however, states that “[t]his section shall not apply” to the Board’s General Counsel. According to FVRA’s legislative history, the Board’s General Counsel was excluded from §3348 because Congress understood that because of the statutory separation of the NLRB’s prosecutorial and adjudication functions, the members of the Board, unlike the heads of other Executive departments, could not themselves perform the essential duties of the General Counsel’s office when that office was vacant. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess. 18-19, 20 (1998).

By the plain terms of §3348(e)(1), therefore, the NLRB General Counsel is exempt from all the provisions of §3348, including the provisions of §3348(d) that render actions taken by officers who were not designated in compliance with the FVRA of no force and effect and incapable of ratification. Those provisions were enacted to enforce the new statutory limits that Congress sought to engraft on the President’s ability to authorize acting officers to temporarily perform the functions and duties of vacant Executive offices. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess. 4-8. To that end, Congress crafted §3348(d) in the expectation that “litigants with standing to challenge purported agency actions taken in violation of [§§ 3345, 3346, and 3347] will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.” S. Rep. No. 105-250 at 19-20. Under the legal principles in effect at the time of FVRA’s enactment in

1998, statutory challenges to Executive appointments were often defeated by the government's argument that, even if the appointments were technically defective, the challenged action was nevertheless valid, either because it had been ratified by a validly appointed officer,¹⁷ or because the person acting was a de facto officer.¹⁸ Section 3348(d) strips both traditional defenses from persons whose actions are covered by §3348.

Because the NLRB's General Counsel is expressly exempted from §3348, the traditional de facto officer doctrine remains available to defend Solomon's issuance of the complaint here. *See Hooks*, 8 F.Supp.3d at 1192. Under the de facto officer doctrine, applicable here, the Court should conclude that Solomon's exercise of the General Counsel's "final authority" to issue unfair-labor-practice

¹⁷ *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212, 214 (D.C. Cir. 1998) (rejecting statutory challenge brought under the prior Federal Vacancies Act (which FVRA superseded), because temporary director of OTS, who was validly seated, ratified earlier decision to initiate enforcement proceeding). *Cf. FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 n.6 (D.C. Cir. 1996) (rejecting constitutional separation-of-powers challenge brought against congressionally appointed FEC members in an enforcement action because, after it was reconstituted, FEC ratified its earlier decision to proceed with litigation).

¹⁸ *EEOC v. Sears*, 650 F.2d 14, 16-18 (2d Cir. 1981) (holding EEOC chairman was de facto officer and rejecting litigant's challenge to his continuance in office under "holdover" provision of Title VII, 42 U.S.C. § 2000e-4(a)); *Levine v. United States*, 221 F.3d 941, 942-44 (7th Cir. 2000) (holding AUSA was de facto officer despite being in office in violation of the statute establishing a residency requirement, 28 U.S.C. § 545(a)); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1516 (10th Cir. 1987) (holding that state medical board examiners, even assuming they did not subscribe an oath of office as required by state law, were de facto officers).

complaints, *see NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118 (1987), is valid because he was performing his duties under a claim of right. *See Ryder v. United States*, 515 U.S. 177, 180 (1995) (de facto officer doctrine “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient”); *EEOC v. Sears*, 650 F.2d 14, 17 (2d Cir. 1981) (“The doctrine has generally been applied to individuals who are in possession of an office, are performing the duties of the office, and who maintain an appearance of right to the office”).

The Court’s so holding would further the purpose of the de facto officer doctrine. That doctrine reflects a pragmatic recognition of the “chaos that might ensue if all of the actions taken by an official improperly in office for years were subject to invalidation,” and protects “the government’s ability to take effective and final action.” *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). *See also Hooks*, 8 F.Supp.3d at 1192 (“nullifying the complaints issued during [AGC] Solomon’s time in office . . . would hinder the policy objectives of the NLRA”). Thus, even if there were a defect in his designation, Solomon’s performance of the vacant office’s functions and duties would be validated by §3348(e)’s exemption and the de facto officer doctrine.

Moreover, even if the de facto officer doctrine does not apply, an infirmity in Solomon's designation would not necessarily preclude enforcement of the Board's order. As this Court has suggested, "irregularities" at an early stage of an agency proceeding do not necessitate invalidating the final result. *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998). Here, MBE received the benefit of a wholly independent adjudication by the Board of the claims made against it. *See Haleston Drug v. NLRB*, 187 F.2d 418, 421 (9th Cir. 1951) (explaining statutory separation of NLRB's prosecuting and adjudicating functions). That process culminated in the Board's finding that the record supported the complaint allegations.

In the context of an appointment issue, this Court recognized that irregularities "may be disregarded 'unless such errors prejudiced the defendants.'" *Doolin*, 139 F.3d at 212 (quoting *Bank of Nova Scotia v. United States*, 484 U.S. 250, 254 (1988)); *see also* Admin. Procedure Act, 5 U.S.C. § 706 (on judicial review of agency action, "due account shall be taken of the rule of prejudicial error"). MBE, as the party challenging the Board's action, has the burden to show that any error caused by the alleged defect in Solomon's designation was harmful. *See Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009); *accord Air Canada v. Dept. of Transp.*, 158 F.3d 1142, 1156 (D.C. Cir. 1998). Because MBE has failed to

show any prejudicial error resulting from Solomon's designation under FVRA, this Court should enforce the Board's order.

V. MBE'S REQUEST TO TOLL BACKPAY IS NOT PROPERLY BEFORE THE COURT AND IS, IN ANY EVENT, WITHOUT MERIT

The Court should reject MBE's request to toll backpay from the date the complaint issued. First, that argument was never presented to the Board, and therefore is barred by Section 10(e) of the Act. Moreover, contrary to MBE's claims (Br.62-64), the Board did not "delay" in processing this case, and MBE would not be "penalized for the Board's failure to act without proper authority."

There is no basis for tolling backpay based on the Board's actions after this Court's January 25, 2013 decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The Board was not, as MBE claims (Br.62), "defiant in refusing to follow this Court's [decision]" after it issued; indeed, the Court immediately placed this case in abeyance, and the Board took no further action against MBE.

MBE erroneously suggests (Br.62-63) that the Board was required to discontinue processing cases after this Court's *Noel Canning* decision. Following that decision, the Supreme Court and this Court denied a spate of motions seeking to stay Board action in light of that decision.¹⁹ Prior to the Supreme Court's

¹⁹ See *HealthBridge Management, LLC v. Kreisberg*, Case No. 12A769 (denial by Justice Ginsburg Feb. 4, 2013; denial by the Court Feb. 6, 2013); *CSC Holdings, LLC v. NLRB*, Case No. 13A20 (July 2, 2013) (Roberts, C.J., in chambers); *Ozburn-Hessey Logistics, Inc. v. NLRB*, Case No. 13-1170 (D.C. Cir. May 14,

decision, the courts of appeals were divided on the constitutional issues resolved in *Noel Canning*. As this Court acknowledged, its conclusions in *Noel Canning* concerning the President’s recess-appointment authority conflicted with those reached by three other circuit courts. *Noel Canning*, 705 F.3d at 505-06, 509-10 (discussing *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc), *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (limited en banc), and *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962)). The remaining issue—whether “‘pro forma session[s]’ with ‘no business . . . transacted’” count as sessions or periods of recess—was a question of first impression. *Noel Canning*, 134 S. Ct. at 2573-77. In those circumstances, the Board appropriately continued to administer the Act in accordance with its legal position that the recess appointments were valid. That conclusion applies more forcefully to AGC Solomon’s prosecution of this case, as no court of appeals has yet issued an opinion concerning the President’s designation of AGC Solomon.

Moreover, tolling backpay would impose unwarranted hardship on the victims of MBE’s misconduct. It is settled as a matter of equity that victims of unfair labor practices must not be the ones to suffer. *See Sw.Merch. Corp. v. NLRB*, 943 F.2d 1354, 1358 (D.C. Cir. 1991) (“a backpay order ‘is a reparation

2013) (denying emergency motion to stay Board action); *In re SFTC, LLC*, Case No. 13-1048 (D.C. Cir. June 28, 2013) (same); *In re CSC Holdings, LLC*, Case No. 13-1191 (D.C. Cir. June 28, 2013) (same).

order designed to vindicate the public policy of the [NLRA] by making the employees whole for the losses suffered on account of an unfair labor practice””) (quoting *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1970)); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990) (equity does not countenance “depriv[ing] innocent persons—the workers—of money to which they were entitled”). Therefore, the Court should reject MBE’s unwarranted request to toll backpay.

CONCLUSION

The Board requests that the Court deny the petition for review and enforce the Board's Order in full.

s/ David Habenstreit
DAVID HABENSTREIT
Assistant General Counsel

s/ Nicole Lancia
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Attorney

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National Labor Relations Board

August 2015

**THE WHITE HOUSE
WASHINGTON**

June 18, 2010

**MEMORANDUM FOR LAFF E. SOLOMON
Director, Office of Representation Appeals,
National Labor Relations Board**

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of, General Counsel of the National Labor Relations Board, effective June 21, 2010.

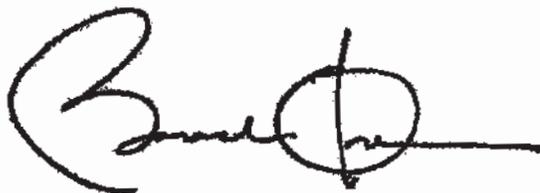
A handwritten signature in black ink, appearing to be "Barack Obama", written over a horizontal line. The signature is stylized with a large initial "B" and a circular flourish.

Exhibit A



Press Release

National Labor Relations Board

Office of the General Counsel

June 20, 2010

Contact:

Office of Public Affairs

202-273-1991

publicinfo@nlrb.gov

www.nlrb.gov

Veteran NLRB attorney Lafe Solomon named Acting General Counsel

President Obama has named veteran NLRB attorney Lafe Solomon to serve as Acting General Counsel, the top investigative and prosecutorial position in the agency. The designation is effective Monday, June 21, 2010.

Mr. Solomon, who began his agency career as a field examiner in Seattle in 1972, directed the NLRB's Office of Representation Appeals for the past decade. Previously he served in various positions on the General Counsel and Board side of the agency, including as staff attorney to 10 Board members. (The Board members were Don Zimmerman, Donald Dotson, Robert Hunter, John Higgins, James Stephens, Mary Cracraft, John Raudabaugh, William Gould, Sarah Fox and Wilma Liebman). He earned a B.A. degree in Economics from Brown University and a J.D. from Tulane University.

Ronald Meisburg, the previous General Counsel, had resigned effective this weekend to join the law firm of Proskauer Rose. His term was due to expire in August, 2010. Mr. Solomon was appointed to the position under the Federal Vacancies Reform Act of 1998.

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Wednesday, December 20, 2000

(R-2418)
202/273-1991
www.nlr.gov

LAFE SOLOMON IS NAMED DIRECTOR, NLRB OFFICE OF REPRESENTATION APPEALS

Lafe Solomon, a career attorney with the National Labor Relations Board, has been appointed Director, Office of Representation Appeals, the Board's unit responsible for handling appeals by parties from decisions issued by NLRB Regional Directors in representation cases. He succeeds Wayne R. Gold, who became Regional Director of the NLRB's office in Baltimore, Maryland (Region 5).

On behalf of the Board, Chairman John C. Truesdale stated in announcing the appointment:

"The R-Unit is very important in our work and we are gratified to keep it in such capable hands. Having worked in many parts of the Agency over the course of two decades, Lafe is a very fine attorney, intimately familiar with the case law in the representation area and with the Board's casehandling processes. He also brings to this position good judgment and proven managerial skills."

A native of Helena, Arkansas, Mr. Solomon received a B.A. degree in Economics from Brown University in 1970. During the first year after graduation, he was a VISTA volunteer in North Dakota. His first NLRB service came in 1972, when he was hired as a Field Examiner in the Agency's Seattle, Washington office (Region 19). In 1973, Mr. Solomon interrupted his NLRB career to enter law school at Tulane University, completing his J.D. degree in 1976. He then returned to the NLRB as an attorney in the Office of Appeals. He transferred to the Appellate Court Branch in 1979.

Two years later, Mr. Solomon left the General Counsel's side of the Agency to join the staff of former Board Member Zimmerman, the first in a succession of 10 Members he would serve until this appointment (Dotson, Hunter, Higgins, Stephens, Cracraft, Raudabaugh, Gould, Fox, and Liebman). He was promoted to Assistant Chief Counsel in July 1989 and Deputy Chief Counsel in May 1995.

Mr. Solomon resides in Bethesda, Maryland with his wife Cam and son Will, a 9th grader. Their daughter Catherine is a freshman at Connecticut College.

###



MINUTE OF BOARD ACTION

December 22, 2011

By individual votes on December 21 and December 22, 2011, respectively, the Board unanimously approved the recommendations of Acting General Counsel Solomon, set forth in the attached separate memoranda to the Board, for the selection of Regional Directors:

Region 10 (Atlanta): Claude Harrell

Region 19 (Seattle): Ron Hooks

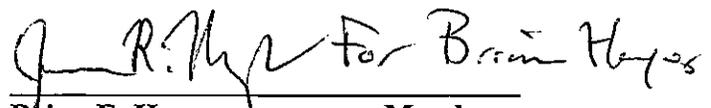
Region 21 (Los Angeles): Olivia Garcia



Mark Gaston Pearce, Chairman



Craig Becker, Member



Brian E. Hayes, Member

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

MARQUEZ BROTHERS ENTERPRISES, INC.)	
)	
Petitioner)	Nos. 14-1305, 15-1061
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	21-CA-039581

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,516 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 17th day of August, 2015

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

MARQUEZ BROTHERS ENTERPRISES, INC.)	
)	
Petitioner)	Nos. 14-1305, 15-1061
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	21-CA-039581
)	

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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s/Linda Dreeben
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Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 17th day of August, 2015