

decision and in its opening brief to this Court.¹ Indeed, as the Board further noted in its motion (Mot. 3, 5), and the Company does not dispute in its response, it also never cited any decision interpreting or applying Section 8(c), and it never asserted that its communications were statutorily protected or constituted “free speech.”

2. Contrary to the Company’s claims, it never apprised the Board, in its exceptions to the judge’s decision, of an intention to raise the Section 8(c) argument it launched in its reply brief. Therefore, the argument is jurisdictionally barred from review by Section 10(e) of the Act (29 U.S.C. § 160(e)). (*See* Mot. 2-4.) The Company errs in asserting that its belated Section 8(c) argument was “within the scope” (Resp. 4) of its exceptions, or was “reasonably implied” (Resp. 6) by them—although that is not the pertinent standard. (*See* Mot. 2-4.) The contention that the Company raised before the Board that its communications were not unlawful, and were reasonably accurate and consistent with the rights of permanently replaced economic strikers, did not apprise the Board of any claim that the communications were statutorily protected free speech under Section 8(c).

The Company does not help itself by citing (Resp. 2) two inapposite cases. Unlike the instant case, in *May Dep.’t Stores Co. v. NLRB*, 326 U.S. 376 (1945), the Court found that Section 10(e) did not bar the employer’s claim that a blanket

¹ “Mot.” references are to the Board’s motion; “Resp.” references are to the Company’s response. “Reply Br.” references are to the Company’s reply brief; “Br.” references are to its opening brief. “JA” references are to the joint appendix.

cease-and-desist order was impermissibly overbroad, where the employer had excepted to the specific, numbered paragraph of the order as being “not supported or justified by the record,” and the issue was “a frequent subject of dispute in the Circuit Courts.” *Id.* at 386-88, 386 n.5, 387 n.6. Thus, *May Dep.’t Stores* is inapposite. Nor does *NLRB v. Triec, Inc.*, 946 F.2d 895 (6th Cir. 1991) (table), advance the Company’s cause. Contrary to its claim, its exceptions did not “impl[y]” (Resp. 2) its belated Section 8(c) argument so as to put the Board on notice that the issue may be raised on appeal. Moreover, the Court in *Triec* relied on its view that the Board had in fact considered the issues that were brought before the Court, “thus satisfying the purpose of Section 10(e).” *Id.* at *6. In short, the decisions cited in the Board’s motion (Mot. 2-4), and not the inapposite cases relied upon by the Company, control the Section 10(e) analysis here, and show that the Company has not satisfied its statutory exhaustion requirement.

3. The Company wrongly attempts to excuse the launch of its Section 8(c) argument for the first time in its reply brief by repeatedly claiming (Resp. 1-2, 5, 7) that it made the argument in response to a “new” argument advanced by the Board in its brief to the Court. This contention fails, first of all because the Company never contended in its reply brief that the Board’s brief had advanced a “new” argument. Nor did the reply brief so much as mention the settled principle, cited by the Board, that the Company now inaccurately characterizes as a new

argument. *See* NLRB Br. 15 (noting that where the employer creates ambiguity that would reasonably cause employees to question whether they had been discharged, the discharge determination must be resolved against the employer). Accordingly, the Company's claim (Resp. 5) that it offered its Section 8(c) argument in "explicit response" to that point is flatly wrong.

Moreover, the Board did not make a new argument. Rather, it merely identified a settled principle that comes into play in assessing whether employees have been discharged. It was entirely appropriate for the Board to do so. Further, the principle in question falls squarely within the more broadly articulated concept, expressly stated by the Board in its decision, and cited by the Company in its opening brief (Br. 14) that: "The test for determining whether employees have been discharged is whether the employer's statements would reasonably lead the employees to believe that they had been discharged." (JA 43.) The more specific point that an employer's words or actions can reasonably create ambiguity or confusion in employees' minds has frequently been articulated in the line of decisions applying the broader concept. Indeed, the very case cited in the Board's decision (JA 43) does so. *See Grosvenor Resort*, 336 NLRB 613, 617-18 (2001) ("the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees").

WHEREFORE, the Board respectfully requests that the Court grant its motion.

Respectfully submitted,

/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 2nd day of December, 2015

