

Nos. 15-1275, 15-1751 15-1753

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

R&S WASTE SERVICES, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of R&S Waste Services, LLC (“R&S”) for review, and the cross-applications of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against R&S and Rogan Brothers Sanitation, Inc. (“Rogan Brothers”) on April 8,

2015, and reported at 362 NLRB No. 61.¹ The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final under Section 10(e) and (f) of the Act, and the Court has jurisdiction over this appeal because the underlying unfair labor practices occurred in New York.

29 U.S.C. § 160(e) and (f). The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of those portions of its Order which are uncontested on appeal, involving unlawful conduct by R&S in violation of Section 8(a)(3), (2), and (1) of the Act.

2. Whether substantial evidence supports the Board’s finding that R&S is jointly and severally liable, as a single employer with Rogan Brothers, for discharges in violation of Section 8(a)(3) and (1) of the Act and coercive statements in violation of Section 8(a)(1); the only contested aspect of those violations is whether the Board properly found that the General Counsel’s

¹ Rogan Brothers did not answer the Board’s application for enforcement and no attorney has filed a notice of appearance on Rogan Brothers’ behalf. On July 17, 2015, this Court set a deadline of August 17 requiring Rogan Brothers to file an appearance by that date or be deemed in default on the appeal. Because Rogan Brothers filed nothing in response, the General Counsel has filed a motion for default judgment against Rogan Brothers.

amendment of the complaint to assert a single-employer theory did not deprive R&S of due process of law.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case stems from a series of unfair-labor-practice charges filed between September and November 2011 by Teamsters Local 813 (“the Union”) following the transfer of certain residential and commercial waste operations from Rogan Brothers to R&S, and the subsequent recognition of, and negotiation of a collective-bargaining agreement with, Journeymen & Allied Trades Local 726 (“Local 726”) by R&S. (A. 808-66.)² The Board’s General Counsel issued a consolidated unfair-labor-practice complaint on May 31, 2012. (A. 833-46.) The caption to the consolidated complaint listed Rogan Brothers and R&S as a single respondent, “as Alter Ego/Single Employer and/or Successor.” (A. 845.)

An administrative law judge convened an unfair-labor-practice hearing on August 14, 2012. Rogan Brothers declined to retain counsel or appear at the hearing; only R&S was represented. (A. 17, 78, 851-52.) On the first day of the hearing, counsel for the General Counsel moved to strike the portion of the caption

² “A.” references are to the appendix. “S.A.” references are to the special appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to R&S’s opening brief to the Court.

indicating that Rogan Brothers and R&S constituted a single employer. (A. 40-41.) The hearing was subsequently postponed at the request of R&S, and did not resume until October 16, 2012. After four days of testimony (A. 97-655), the hearing was once again delayed to allow for subpoena enforcement and as a result of Hurricane Sandy (S.A. 13 n.1).

In early November 2012, while the hearing was in recess, counsel for the General Counsel notified R&S that he intended to submit a motion to amend the unfair-labor-practice complaint to allege that Rogan Brothers and R&S constituted a single employer in addition, or as an alternative, to the existing alter-ego and successor allegations. On November 5, R&S sent an email to the judge outlining its opposition to the proposed motion. (A. 1284-86.) On December 5, the judge issued an order rescheduling the hearing for January 8, 2013, to continue for the remainder of that week “and the entire following week if necessary.” (A. 1309.) The General Counsel formally moved to amend the complaint on December 21. (A. 1282-83).

When the hearing resumed on January 8, 2013, the judge granted the motion to amend, noting that the General Counsel was only introducing an alternative legal theory, that the two theories were substantially “overlapping,” and that R&S still had an opportunity to present any defense it wanted to. (A. 677-78.) Counsel for the General Counsel confirmed that he would not be relying on any new

evidence specific to the single-employer theory. (A. 677.) The hearing continued for five more days, during which counsel for the General Counsel rested his case-in-chief and R&S presented its entire defense. (A. 658-807.) On January 15, R&S stated that it had no further witnesses to call. (A. 805.)

At the end of the hearing, the judge granted R&S a postponement in order for R&S to obtain and review bank records relating to a company named ARJR, which was allegedly owned by James Rogan, the owner of Rogan Brothers. (A. 806.) The dispute over the ARJR bank records and R&S's attempt to subpoena them predated the single-employer amendment. (A. 561-69, 651-55, 681.) On February 11, the deadline set by the judge, R&S requested that the judge reopen the evidentiary record and permit additional witness testimony regarding those bank records. (A. 1323, 1325-26.) On March 8, the judge issued an order finding that R&S had failed, despite a direct request by the judge and multiple responses by R&S, to explain how the records had any bearing on the unfair labor practices at issue or the legal relationship between Rogan Brothers and R&S. (A. 1322-24, 1338.) The judge therefore declined to permit further testimony and ordered the hearing closed. (A. 1322-24.)

II. THE BOARD'S FINDINGS OF FACT

A. Rogan Brothers Enters into Business with Joseph Spiezio

As of early 2011, Rogan Brothers was a corporation owned by James Rogan that provided residential and commercial waste services in New York City and Westchester County, New York. (S.A. 2.) Rogan Brothers was party to a collective-bargaining relationship with the Union for at least a decade. (S.A. 15; A. 893-95.) In practice, only those Rogan Brothers employees who were members of the Union were covered by the terms of the collective-bargaining agreement. (S.A. 2 n.6.) The Union's business agent at the time of the events in question was James Troy. (S.A. 2.)

In January 2011, Rogan Brothers borrowed \$850,000 from Joseph Spiezio, a real estate developer and the owner of numerous businesses. (S.A. 2; A. 731-32, 746, 873-76, 878-80.) The six-month loan was financed through a company owned by Spiezio, and an accompanying agreement specified that Spiezio would form his own waste-services company to take over portions of Rogan Brothers' operations if it defaulted on the loan. (S.A. 2, 18; A. 732, 873-76, 878-80.) The agreement also specified that Spiezio would act as a consultant for Rogan Brothers during the term of the loan and would take control over certain matters, such as labor relations and the oversight of Rogan Brothers' finances. (S.A. 2, 18; A. 734, 869-72.)

B. Spiezio Forms R&S and Performs Managerial Functions for Rogan Brothers; R&S Commences Operations and Assumes Portions of Rogan Brothers' Business

In February 2011, Spiezio filed articles of organization for R&S, his newly formed waste-services company. (S.A. 2; A. 748.) On March 1, R&S filed an operating agreement and applied for a waste-hauling license. The following week, it opened a commercial bank account. (S.A. 2; A. 748.) In the license application to the county waste commission, both Spiezio and James Rogan certified that they were co-owners and co-directors of R&S. (S.A. 4; A. 1105-06, 1111-13, 1126-38.) Spiezio made the same assertion during testimony before the county waste commission. (S.A. 4; A. 1214.) When opening the R&S bank account, both Spiezio and James Rogan signed signature cards, identifying themselves as members of the corporation. (S.A. 2; A. 896-99.)

In March 2011, Michael Vetrano, the Rogan Brothers manager who had traditionally handled labor relations, informed business agent Troy that “going forward [the Union] would have to take up labor relations matters with Spiezio.” (S.A. 2; A. 208, 223.) Also in March 2011, the comptroller for Rogan Brothers, Howard Kassman, relocated his office from the Rogan Brothers facility to Spiezio’s offices. (S.A. 2, 4; A. 686, 706, 747.) Beginning in July, Kassman acted as comptroller for both companies concurrently. (S.A. 4-5; A. 693-94.) Spiezio subsequently acted as Rogan Brothers’ sole representative in a series of collective-

bargaining disputes involving Rogan Brothers and the Union. (S.A. 5-6; A. 223, 236, 468, 737-42, 1018-91.)

On June 30, 2011, R&S received its operating license for waste-hauling services. (S.A. 2; A. 890-92.) The next day, Spiezio declared the loan to Rogan Brothers in default and signed a vendor agreement stating that Rogan Brothers would perform certain waste-removal services for R&S. (S.A. 2; A. 759, 877, 881.) On July 20, Peter Liguori, the owner of a third waste-services company, Industrial Recycling, terminated his business. (S.A. 2 n.7; A. 1238.) R&S immediately hired Liguori, who transferred his customers to R&S, and Rogan Brothers hired Liguori's sole employee, Michael Roeke, as a driver. (S.A. 2 n.7; A. 781, 1148, 1238.) On July 26, Rogan Brothers manager Vetrano wrote to Rogan Brothers' customers using R&S letterhead and informed them that R&S would be servicing their accounts effective immediately. (S.A. 2; A. 884.) To satisfy the loan, a variety of Rogan Brothers assets, including customer lists, trucks, dumpsters, and other equipment, were transferred to R&S on July 31. (S.A. 2; A. 743-44, 882-83, 1212.)

R&S commenced operations on August 1 and began servicing most of Rogan Brothers' former customers. (S.A. 2.) The same day, Spiezio formally hired Vetrano as an employee of R&S to assist in running the business, and Vetrano continued to supervise Rogan Brothers drivers. (S.A. 2, 7; A. 755, 1148.)

The majority of the R&S workforce was composed of former Rogan Brothers drivers who had not been members of the Union and who were hired immediately after separating from Rogan Brothers in late July. (S.A. 2; A. 1143-1211.) Rogan Brothers continued to employ a number of drivers who performed work for R&S, including Union members Roeke, Wayne Revell, and Joseph Smith. (S.A. 2, 4; A. 404-05, 659.)

C. Rogan Brothers Discharges Three Union Members; R&S Refuses to Hire Roeke Unless He Resigns from the Union

On September 29, the Union sent a letter to Rogan Brothers protesting its subcontracting arrangement with R&S and transfer of work to R&S, and demanding that Rogan Brothers cease attempting to “undermine the Union’s collective bargaining rights.” (S.A. 2; A. 1092-94.) Two days later, on October 1, Liguori called Roeke and informed him that he needed to resign from the Union, because Rogan Brothers “wasn’t going to be in the Union no more.” (S.A. 2; A. 509, 518.) When Roeke asked why James Rogan was not the one calling him, Liguori stated that “they told me to call you.” (S.A. 8; A. 509.) Rogan Brothers discharged Roeke after he refused to resign his union membership. (S.A. 8.) Subsequently, Liguori suggested that Roeke apply for employment with R&S, but Roeke understood that, in order to do so, he would have to resign from the Union, and thus Roeke did not apply. (S.A. 8, 35; A. 509.)

On October 4, Rogan Brothers also discharged Smith and Revell. (S.A. 7.) Vetrano informed Smith that there was no more work for him, and told Revell that “things [are] going to be changing, we can no longer employ Union drivers.” (S.A. 2-3; A. 420-21, 661, 666.) Vetrano further informed Revell that “they’re going to bring in another union,” offered him a job with R&S, and provided him with a withdrawal card for the Union and an employment application for R&S, both of which Revell signed. (S.A. 3; A. 661.) James Rogan told Revell that his “hands were tied” and that he “had to lay [off] the rest of the [Union] guys.” (S.A. 7; A. 661.) R&S subsequently hired Revell, but Smith declined to apply. (S.A. 35.) After October 4, and the discharges of Smith and Revell, no Rogan Brothers drivers performed any further work for R&S. (S.A. 3.)

D. R&S Recognizes Local 726 as the Representative of Its Employees

In September 2011, Liguori contacted Local 726 and received a set of union authorization cards to distribute to employees. (S.A. 36; A. 528-30.) Liguori and Vetrano subsequently solicited employees to sign the cards, and obtained signed cards from seventeen employees. (S.A. 36; A. 778-82.) Liguori and Vetrano both identified themselves as unit employees and signed cards. (S.A. 36; A. 1008.) On October 17, an independent arbitrator examined the cards and designated Local 726 as the majority representative. (S.A. 36.) R&S then voluntarily recognized Local 726 as the exclusive representative of its drivers, and they executed a

collective-bargaining agreement containing a union-security clause. (S.A. 36; A. 885-89, 968-1007.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 8, 2015, the Board (Chairman Pearce; Members Hirozawa and Johnson) found that Rogan Brothers and R&S constituted a single employer from early March 2011 until October 4, 2011. (S.A. 3-7.) As such, the Board found the two entities jointly and severally liable for: the discharges of Rogan Brothers drivers Roeke, Smith, and Revell as a result of their union membership, in violation of Section 8(a)(3) and (1) of the Act; and Vetrano's and Liguori's unlawful statements suggesting that employees would have to resign from the Union to avoid discharge, in violation of Section 8(a)(1). (S.A. 7-8.) The Board further found that, after the single-employer relationship ended, R&S violated Section 8(a)(3) and (1) by refusing to hire Roeke, based on its representation that he had to resign from the Union in order to apply (S.A. 8), and violated Section 8(a)(3), (2), and (1) of the Act by recognizing and entering into a collective-bargaining agreement containing a union-security clause with Local 726, despite the fact that Local 726 did not represent an uncoerced majority of R&S's unit employees. (S.A. 1 n.1, 36.)³

³ The Board found that the collective-bargaining agreement between Rogan Brothers and the Union was an unenforceable members-only contract given that its terms were meant to be applied only to members of the Union. As a result, the

The Board's Order requires R&S to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.

Affirmatively, the Order requires R&S to: offer Revell, Smith, and Roeke full reinstatement to the jobs they previously performed for Rogan Brothers or, if those jobs do not exist, to substantially equivalent positions; make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them; compensate them for any adverse tax consequences; withdraw and withhold recognition from Local 726 unless it has been certified by the Board; post a remedial notice; and, jointly and severally with Local 726, reimburse with interest all present and former employees for all initiation fees, dues, and other moneys paid or withheld pursuant to the union-security and dues-checkoff provisions in the 2011 collective-bargaining agreement. (S.A. 9-10.)⁴

Board dismissed an unfair-labor-practice allegation that Rogan Brothers and/or R&S violated Section 8(a)(5) and (1) by failing to apply the contract's terms to all unit employees and by refusing to furnish requested information. (S.A. 1.) The Board found it unnecessary to address the question of whether Rogan Brothers and R&S constituted alter egos. (S.A. 1.)

⁴ The Board's Order also requires Rogan Brothers to cease and desist from the unlawful conduct, and to affirmatively reinstate Revell, Smith, and Roeke, make them whole for any loss of earnings or benefits, compensate them for adverse tax consequences, and post a remedial notice. (S.A. 8-9.)

STANDARD OF REVIEW

The Court's review of Board orders is "quite limited." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). It will enforce the Board's order "where its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole." *Id.*

SUMMARY OF ARGUMENT

This case involves a litany of unlawful conduct undertaken by two closely-related companies, R&S and Rogan Brothers, during the fall of 2011 when R&S was created and commenced operating in order to take over certain waste-hauling services previously performed by Rogan Brothers. R&S does not deny that it violated the law by committing certain unfair labor practices, and the Board is entitled to enforcement of those uncontested violations, which are amply supported in the record. Nor does R&S seriously contest the merits of the Board's finding that Rogan Brothers and R&S constituted a single employer when three drivers directly employed by Rogan Brothers were discriminatorily discharged by R&S managers who concurrently made unlawful threats.

Instead, R&S attempts to evade liability for the unlawful discharges and threats by arguing that the General Counsel's mid-hearing amendment of the complaint to allege the single-employer theory of liability deprived R&S of due process of law. To the contrary, the Board properly allowed that amendment,

which occurred two months after the General Counsel gave R&S notice during an extended break in the hearing and before the close of General Counsel's case-in-chief. R&S subsequently presented its entire defense, and has since failed to identify any specific prejudice from the mid-hearing amendment. Given those facts, the Court should reject the due-process argument and hold R&S responsible for its flagrant violations of the Act, none of which it denies or substantively contests on appeal.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT R&S ENGAGED IN UNLAWFUL CONDUCT IN VIOLATION OF SECTION 8(a)(3), (2), AND (1) OF THE ACT

The Board is entitled to summary enforcement of those portions of its Order that are not contested on appeal. *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009). A party waives its right to contest the Board's findings if a particular argument is not raised in the party's opening brief. *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (arguments unaccompanied by developed argumentation are deemed waived).

In its brief to the Court, R&S solely raises a due-process argument relating to the Board's finding that R&S and Rogan Brothers constituted a single employer. R&S does not contest—or, indeed, even address—the Board's unfair-labor-

practice findings that do not depend on the single-employer determination, specifically: that R&S violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to hire Michael Roeke (S.A. 2, 8), and that R&S violated Section 8(a)(3), (2), and (1) by unlawfully recognizing and entering into a collective-bargaining agreement containing a union-security clause with Local 726 (S.A. 1 n.1) *See Duane Reade, Inc.*, 338 NLRB 943, 943-44 (2003) (finding Section 8(a)(3), (2) and (1) violations where managers coerced employees into signing authorization cards and employer recognized union that did not represent uncoerced majority), *enforced*, 99 F. App'x 240 (D.C. Cir. 2004); *Norman King Elec.*, 334 NLRB 154, 160-61 (2001) (finding Section 8(a)(3) and (1) violation based on unlawful refusal to hire where employer made it clear that filing application would be futile). Those violations are supported by substantial evidence and are based on independent conduct undertaken by R&S alone. Since R&S does not contest them, the Board is entitled to summary enforcement of the relevant portions of its Order.

II. THE BOARD PROPERLY FOUND THAT THE COMPLAINT AMENDMENT DID NOT DENY R&S DUE PROCESS, AND SUBSTANTIAL EVIDENCE SUPPORTS THE OTHERWISE UNCONTESTED VIOLATIONS PREDICATED ON THE SINGLE-EMPLOYER THEORY

R&S does not contest the merits of the Board's findings that employees Revell, Smith, and Roeke were unlawfully discharged as a result of their union membership, or that Vetrano and Ligouri made unlawful statements. Likewise,

R&S does not directly contest the merits of the Board’s finding that Rogan Brothers and R&S constituted a single employer during the relevant time period—a finding that, in any event, is supported by ample record evidence. Instead, R&S disputes the Board’s unfair-labor-practice findings solely on the ground that the Board deprived R&S of due process by permitting a mid-hearing complaint amendment in which the General Counsel alleged a single-employer relationship in the alternative to an alter-ego or successor relationship. Accordingly, the Board is entitled to enforcement of its unfair-labor-practice findings if the Court determines that the Board properly found that the amendment did not violate due process.

A. The Board Did Not Deny R&S Due Process of Law by Affirming the Administrative Law Judge’s Decision to Grant the General Counsel’s Motion to Amend the Complaint

Section 10(b) of the Act grants either the Board or an administrative law judge discretion to amend an unfair-labor-practice complaint “at any time prior to the issuance of an order based thereon.” 29 U.S.C. § 160(b). The Board’s Rules and Regulations allow such amendments upon such terms as may be deemed “just,” which the Board assesses by considering: “(1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated.”

Stagehands Referral Serv., LLC, 347 NLRB 1167, 1171 (2006) (quoting 29 C.F.R. § 102.17), *enforced on other grounds*, 315 F. App’x 318 (2d Cir. 2009).

That analysis is consistent with the constitutional due-process requirements articulated by this Court, i.e., (1) that a respondent before the Board have “fair notice of the acts alleged to constitute the unfair labor practice,” and (2) that “the conduct implicated in the alleged violation has been fully and fairly litigated.” *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990).

To establish a due-process violation, the party asserting the violation must show either “that it was specifically prejudiced” or that the Board failed to follow its established procedures. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1244 (2d Cir. 1990); *see NLRB v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 88 (2d Cir. 1987). R&S has not satisfied that burden, and, as explained below, the Board properly found that R&S had adequate notice of the single-employer theory and that, indeed, it fully litigated the theory at the hearing.⁵

⁵ The Court lacks jurisdiction to consider R&S’s additional Administrative Procedure Act challenge (Br. 37), because R&S failed to raise that claim before the Board. 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.”); *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) (refusing to reach APA challenge not raised before Board absent showing of extraordinary circumstances). In any event, the “[APA claim] requires the same analysis regarding full and fair litigation” as the due-process challenge, and would fail in this case for the same reasons. *Pergament United Sales*, 920 F.2d at 134-35.

1. R&S received ample notice of the single-employer allegation

The purpose of the due-process notice requirement is “to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior.” *Pergament United Sales*, 920 F.2d at 135. As the Board emphasized (S.A. 3 n.8), R&S had ample notice of the alleged single-employer relationship between R&S and Rogan Brothers, despite the General Counsel’s initial assertion, at the outset of the hearing, that he would only be relying on an alter-ego or successor theory.

Specifically, the General Counsel informed R&S of his intent to amend the complaint to allege a single-employer theory in early November 2012, more than two months before the hearing would resume in January 2013. Upon receiving that unequivocal notice, the Company preemptively opposed the putative amendment in a November 5 e-mail to the judge.⁶ When the judge granted the motion to amend on January 8, the General Counsel had not rested his case-in-chief, and R&S had not yet started presenting its defense. R&S thus had sufficient

⁶ The General Counsel formally filed a motion to amend on December 21, over two weeks before the hearing resumed on January 8. Under the circumstances, R&S cannot credibly claim that it was “left in limbo” (Br. 31) with respect to the single-employer theory during the break in the hearing. Any failure to exercise due diligence in preparing for the possibility that the judge would grant the motion does not amount to a due-process violation, and in any event, as noted, R&S still had its entire case-in-chief to prepare and present a defense.

notice to investigate the single-employer issue during the lengthy recess, if necessary, and to defend itself during the hearing.

The Board has previously held that such mid-hearing amendments provide respondents with adequate notice of the charges against them when time still remains to litigate the new allegations. *See Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96, 2014 WL 1715130, at *2 n.7 (Apr. 30, 2014); *CAB Assocs.*, 340 NLRB 1391, 1397-98 (2003). Indeed, the Board has allowed similar mid-hearing amendments involving comparable adjustments to the General Counsel's theory of liability. For example, in *Specialty Envelope Co.*, the Board reversed the administrative law judge's denial of a mid-hearing amendment naming the company's receiver, alleged as an agent of the company in the complaint, as an additional statutory employer. 313 NLRB 94, 94 (1993), *supplemented*, 321 NLRB 828 (1996), *enforced in relevant part sub nom.*, *Peters v. NLRB*, 153 F.3d 289, 295-96 (6th Cir. 1998). In doing so, the Board noted that the receiver was already party to the proceedings and had been "on notice from the inception of the case that certain actions during the receivership were at issue." *Id.*; *see also Fairfax Hosp.*, 310 NLRB 299, 302 & n.3 (1993) (permitting mid-hearing amendment to allege single-employer relationship where respondents had opportunity to subsequently litigate theory), *enforced on other grounds mem.*, 14 F.3d 594 (4th Cir. 1993); *Key Coal Co.*, 240 NLRB 1013, 1015-

16 (1979) (same). In contrast, every case R&S cites in support of its due-process argument is immediately distinguishable on the grounds that each involved a motion to amend the complaint raised only after the close of the hearing or after all of the evidence had been received, or a new theory that was never amended into the complaint.⁷

In sum, given the timing of the amendment, R&S cannot demonstrate that it had inadequate notice of the single-employer theory or that it was unable to defend itself. For essentially the same reason, R&S cannot successfully challenge the Board's further finding that it had ample opportunity to litigate, and did in fact litigate, the single-employer theory after the complaint was amended.

2. The single-employer allegation was fully litigated

The question of whether an issue has been fully and fairly litigated is “so peculiarly fact-bound as to make every case unique,” and must therefore “be made on the record of each case.” *Pergament United Sales*, 920 F.2d at 136. In reviewing the voluminous record in the present case, the Board reasonably

⁷ *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 545-47 (7th Cir. 1987), *remanded*, 289 NLRB 648 (1988); *USC Univ. Hosp.*, 358 NLRB No. 132, 2012 WL 4079439, at *7 (Sept. 17, 2012); *Stagehands Referral Serv.*, 347 NLRB at 1171-72; *Enloe Med. Ctr.*, 346 NLRB 854, 855 (2006); *Lamar Adver. of Hartford*, 343 NLRB 261, 265 (2004); *K-Mart Corp.*, 336 NLRB 455, 459 (2001); *United Mine Workers, Dist. 29*, 308 NLRB 1155, 1158 (1992); *Consol. Printers, Inc.*, 305 NLRB 1061, 1063 (1992); *N.Y. Post Corp.*, 283 NLRB 430, 431 (1987); *Waldon, Inc.*, 282 NLRB 583, 583 (1986); *Eagle Express Co.*, 273 NLRB 501, 503 (1984); *cf. Pierre v. Holder*, 588 F.3d 767, 771 (2d Cir. 2009) (same; non-Board case).

determined that R&S “had the opportunity to fully litigate the [single-employer] matter, and did so, after the amendment was granted.” (S.A. 3 n.8.) Ample evidence supports that finding. As an initial matter, Rogan Brothers refused to comply with subpoenas and was not represented during the hearing. Consequently, R&S’s joint liability for the discharge of three Rogan Brothers employees, and coercive statements made to two of the three, was a central issue throughout the lengthy hearing, even before the single-employer theory was introduced. Moreover, as described above, the complaint was amended before R&S began its case-in-chief, allowing it to present a full defense.

Since then, R&S has had numerous opportunities to articulate how it was “specifically prejudiced,” *Washington Heights*, 897 F.2d at 1244, by the mid-hearing amendment, and yet it has consistently failed to do so.⁸ Indeed, contrary to its claim that it had to “squeeze” in a defense (Br. 28-29), R&S voluntarily rested its case without utilizing all of the available hearing days, declining to call additional witnesses on January 15 (A. 805) despite the administrative law judge’s order scheduling at least three additional days for the hearing (A. 1309). Similarly,

⁸ The question of whether R&S will be found liable for damages in a wholly separate proceeding before the U.S. District Court for the Southern District of New York (Br. 1-2, 30-31) is irrelevant to the issue presently before the Court. In any event, the Board’s single-employer determination was narrowly limited to a finding that Rogan Brothers and R&S constituted a single employer for a seven-month period between March 2011 and October 4, 2011. (S.A. 3.)

R&S misrepresents the facts in implying (Br. 7) that the judge denied it an opportunity to present further witnesses regarding the single-employer issue. In reality, R&S sought to reopen the hearing for the express and sole purpose of examining the ARJR bank records it had subpoenaed. To the extent R&S implies it suffered any prejudice from the judge's ruling, the Court cannot consider that argument, which R&S did not raise before the Board. 29 U.S.C. § 160(e); *see NLRB v. Snell Island SNF LLC*, 451 F. App'x 49, 52 (2d Cir. 2011). Moreover, as the judge noted (A. 1322-24, 1338), ARJR has absolutely no bearing on the legal relationship between R&S and Rogan Brothers.⁹ *See, supra*, p. 5.

Ultimately, R&S's due-process claim rests on its asserted inability to cross-examine witnesses called prior to the complaint amendment and to "interpose" its defense (Br. 3, 23) during the General Counsel's case. However, R&S does not explain why it could not have simply recalled any relevant witnesses. Moreover, as reflected in the Board's analysis of the single-employer factors (S.A. 3-7), the

⁹ Despite R&S's lengthy discussion of ARJR (Br. 25-31), the possible existence of an additional entity in a single-employer or alter-ego relationship with Rogan Brothers is simply irrelevant. The notion of a "true single employer" (Br. 25-26, 29-31) that precludes finding joint liability with other entities has no basis in the law and is not a defense to a single-employer allegation. In its brief (Br. 30), R&S mischaracterizes *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283 (2001), a case in which the Board reversed the administrative law judge's finding that five entities constituted a single employer and, in doing so, merely observed that the complaint had only named two of the five entities. The Board did not suggest that a failure to name all related entities precludes a finding of single-employer status.

principal witnesses who described the companies' relationship were: R&S co-owner Spiezio, the key witness regarding the two companies' relationship; Kassman, comptroller of both companies; and, regarding the centralized control of labor relations, Union business agent Troy. Neither Spiezio nor Kassman testified substantively prior to the amendment of the complaint; both were called as substantive witnesses for the first time more than two months after R&S learned of the General Counsel's intent to allege a single-employer relationship.¹⁰

Although Troy was called as a witness by the General Counsel and was cross-examined by R&S prior to the amendment, R&S could have recalled him to address any remaining issues it considered relevant to the single-employer theory. Instead, after equivocating, R&S stated that it would not do so, as a matter of "trial strategy" (A. 793), and released Troy from his subpoena (A. 794). *Cf. Teamsters Local 812 (Can. Dry Distribs.)*, 302 NLRB 258, 259 (1991) ("The judge provided that the Respondent could recall the only witness who had already testified, if that were necessary to meet the issues raised by the General Counsel's amendment, yet the Respondent did not recall the witness."), *enforced on other grounds*, 947 F.2d 1034 (2d Cir. 1991); *Key Coal*, 240 NLRB at 1016 (citing ability to "examine and

¹⁰ Spiezio was called as a witness on the second day of the trial, but only to serve as the custodian of certain subpoenaed documents. (A. 108-09.) Counsel for the General Counsel agreed to rest his case without calling Spiezio on the assurance that R&S would do so during its case-in-chief. (A. 727-28.)

cross-examine all witnesses (including those who had already appeared and given testimony)” in granting mid-hearing amendment).

There was no additional testimony during the hearing from any other managerial or supervisory individuals employed by R&S or Rogan Brothers.¹¹ R&S references the pre-amendment testimony of the three unlawfully-discharged Rogan Brothers drivers (Br. 26), but fails to specify how its cross-examination of those low-level employees would have been any different if it had been litigating a single-employer theory in addition to the existing alter-ego theory. *See Free-Flow Packaging Corp.*, 219 NLRB 925, 927 (1975) (affirming mid-hearing amendment where it did “not appear that either the cross-examination or the rebuttal testimony would have been any different” if complaint had been amended earlier), *enforced in relevant part*, 566 F.2d 1124, 1131 (9th Cir. 1978); *see also, infra*, pp. 26-27.

Nor does the administrative law judge’s reasoning in *Consolidated Printers*, 305 NLRB at 1064, support R&S’s position (Br. 18, 34). In that case, the judge denied a motion to amend the complaint because the General Counsel waited until the hearing was to be closed before alleging that the defense offered by the

¹¹ The General Counsel subpoenaed James Rogan, Vetrano, and Liguori to testify at the hearing, but all three refused to comply. Contrary to the cursory implications in R&S’s brief (Br. 25, 28), no adverse inference can be drawn against the General Counsel for declining to pursue enforcement of those subpoenas. As the Board noted (S.A. 3 n.9), none of the three was likely to have been favorably disposed toward the General Counsel. *See IBEW Local No. 3 (Teknion, Inc.)*, 329 NLRB 337, 337 n.1 (1999).

employer was itself evidence of a previously-unidentified unfair labor practice. *Id.* As the judge noted, merely giving the employer more time to respond would have been inadequate, because the employer had already been prejudiced by the General Counsel's deliberate decision to wait until the employer had finished incriminating itself. *Id.*; *see also Stagehands Referral Serv.*, 347 NLRB at 1172 (finding opportunity to present additional evidence insufficient where newly identified violation was based on testimony offered as defense to original violation). In contrast, here there is no suggestion that R&S's defense to the alter-ego allegation prejudiced its ability to defend against the single-employer allegation.

Finally, R&S's arguments (Br. 20-23) focusing on purported distinctions between the alter-ego and single-employer theories are inapposite. It is true that, as this Court has recognized, the Board may find an unfair labor practice even when "not specifically alleged in the complaint or advanced by the General Counsel," as long as the violation found is closely connected to the subject matter of the complaint and was fully litigated. *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 447-49 (2d Cir. 2011) (remanding to the Board to determine whether an individual-successor theory of liability was fully litigated where complaint alleged only joint-employer relationship); *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d at 134-37; *accord Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199-1200 (D.C. Cir. 2003). However, the present case is much more

straightforward, because here the General Counsel actually amended the complaint to allege a single-employer theory—in the middle of the hearing and before R&S had even begun presenting its case. Contrary to R&S’s assertion (Br. 35), the Board’s express finding that R&S had notice of, and fully litigated, the single-employer theory of liability does not depend on a determination that the theory was identical, or closely related, to other allegations in the complaint.

In any event, despite R&S’s bare assertions, the enumerated factors for the alter-ego and single-employer theories are substantially equivalent from an evidentiary perspective, and both theories ultimately depend on a holistic factual assessment of the relationship between two entities.¹² Indeed, R&S demonstrates the functional overlap of the two theories in its own brief to the Court, when it argues that it was prejudiced by its alleged inability to respond to the single-employer allegation by demonstrating a “lack of commonality in operations”

¹² The primary difference between an alter-ego finding and a single-employer finding, and the reason that a greater showing is required to demonstrate alter-ego status, is that alter egos are automatically bound by each other’s collective-bargaining agreements. *See Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747-48 (2d Cir. 1996). Contrary to R&S’s claim (Br. 10) that the Board found no alter-ego relationship in the present case, the Board found it “unnecessary to address [the Union’s] exceptions to the judge’s finding that [Rogan Brothers and R&S] were not alter egos.” (S.A. 1.) The Board explained that such a finding was “relevant only to the 8(a)(5) allegations,” which it had disposed of preliminarily by finding the Rogan Brothers collective-bargaining agreement unenforceable. (S.A. 1.) Thus, the Board did not reach the question of whether Rogan Brothers and R&S constituted alter egos.

between the two companies (Br. 28, 32), despite the fact that similarity in operations is also one of the enumerated factors in the test for alter-ego status. *Lihli Fashions*, 80 F.3d at 748. Clearly, an employer's due-process rights are not infringed if it voluntarily fails to rebut an element of a legal theory that was at issue from the inception of the unfair-labor-practice complaint, as the alter-ego theory was in the present case. R&S has not articulated a single concrete example of an evidentiary consideration specific to the single-employer theory, as opposed to the alter-ego theory, that it was prevented from litigating. However, as noted, such an analysis was not central to the Board's conclusion because the mid-hearing amendment to the complaint gave R&S ample actual notice of the single-employer theory and an opportunity to litigate that specific theory directly.

B. R&S and Rogan Brothers Constituted a Single Employer from the Formation of R&S through the Unlawful Discharges

R&S does not directly contest the merits of the Board's reasonable finding that Rogan Brothers and R&S constituted a single employer, which is, in any event, amply supported in the record. In determining single-employer status, the Board considers four enumerated factors: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership." *Bolivar-Tees, Inc.*, 349 NLRB 720, 720 (2007), *enforced*, 551 F.3d 722 (8th Cir. 2008); *Lihli Fashions*, 80 F.3d at 747. However, not every factor need be present, no particular factor is controlling, and single-employer status

ultimately depends on “the totality of the evidence.” *Bolivar-Tees*, 349 NLRB at 720; *see Lihli Fashions*, 80 F.3d at 747. Applying that test and considering the totality of the evidence, the Board reasonably found that all four enumerated factors indicate that Rogan Brothers and R&S constituted a single employer between March 2011 and October 2011. (S.A. 3.)

As the Board found, Spiezio and James Rogan, the owner of Rogan Brothers, identified themselves as co-owners of R&S, and the two companies were functionally integrated, with interrelated management, operations, and personnel during the relevant time period. Spiezio assumed control of labor relations for both companies, and Spiezio, Kassman, and Vetrano performed the managerial functions for both. Moreover, the two companies were functionally integrated, with identical equipment, and with employees driving the same trucks along the same routes to service the same customers.¹³ Accordingly, the two companies constituted a single employer—jointly and severally liable for unfair labor practices—in October 2011, when R&S managers Liguori and Vetrano explicitly discriminated against three Union members by terminating their employment with

¹³ To the extent R&S suggests (Br. 24-25), in its due-process discussion, that the Board’s single-employer finding is “unsupportable” due to Rogan Brothers’ operations in other geographic areas, that argument is without merit. R&S does not dispute the facts detailed above, which amply support the Board’s single-employer finding as to the relevant operations and employees, and R&S does not cite any authority suggesting that having unrelated operations elsewhere precludes such a finding.

Rogan Brothers and unlawfully telling them that the company “wasn’t going to be in the Union no more,” and that it could “no longer employ Union drivers.”¹⁴ R&S does not contest the substantive merits of that finding.

¹⁴ See, e.g., *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998) (finding Section 8(a)(1) violation where spokesmen for employer made coercive statements threatening union supporters); *Godsell Contracting, Inc.*, 320 NLRB 871, 873-74 (1996) (finding Section 8(a)(3) and (1) violations where employer’s agents discharged employees for being union members); *Ave. Meat Ctr.*, 184 NLRB 826, 835 (1970) (finding Section 8(a)(1) violation where employees instructed to abandon union in order to continue working for employer).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Decision and Order in full.

Respectfully submitted,

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National Labor Relations Board
January 2016

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

R&S WASTE SERVICES, LLC	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1275, 15-1751
	* 15-1753
v.	*
	* Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	* 02-CA-065928
	* 02-CA-065930
	* 02-CA-066512
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
This 21st day of January, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,055 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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