

Nos. 15-1319 and 15-1369

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

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION**

Intervenor

**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**

ROBERT J. ENGLEHART
Supervisory Attorney

DAVID A. SEID
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2978
(202) 273-2941

RICHARD GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| OZBURN-HESSEY LOGISTICS, LLC |) | |
| |) | |
| Petitioner/Cross-Respondent |) | Nos. 15-1319, 15-1369 |
| |) | |
| v. |) | |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | Board Case No. |
| Respondent/Cross-Petitioner |) | 26-CA-070471 |
| |) | |
| and |) | |
| |) | |
| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION |) | |
| |) | |
| Intervenor |) | |

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. 26-CA-070471). The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“the Union”), Intervenor before the Court, was the charging party before the Board. Ozburn-

Hessey Logistics, LLC (“the Company”), 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 the Company for review of an order issued by the Board on August 26, 2015, and reported at 362 NLRB No. 180. The Board seeks enforcement of that order against the Company.

C. Related Cases: This case has not been before this or any other court.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of March 2016

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GLOSSARY

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|-------|--|
| Act | The National Labor Relations Act |
| ALJ | Administrative Law Judge's decision |
| Board | The National Labor Relations Board |
| Br. | Opening brief of Petitioner Ozburn-HesseyLogistics, LLC |
| NLRB | National Labor Relations Board |

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ozburn-Hessey Logistics, LLC (“the Company”) to review an order issued by the National Labor Relations

Board (“the Board”) against the Company, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on August 26, 2015, and is reported at 362 NLRB No. 180. (A. 304-33.)¹

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended, (29 U.S.C. § 151, 160(a)) (“the Act”), which empowers the Board to remedy unfair labor practices. The Board’s Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction under the same section of the Act. The Company filed its petition for review on September 10, 2015; the Board filed its cross-application for enforcement on October 23, 2015. Both filings were timely because the Act places no time limits on such filings. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union (“the Union”) has intervened on the Board’s behalf.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Deshonte Johnson, and violated Section 8(a)(4), (3), and(1) by suspending employee Renal Dotson.

¹ “A.” refers to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's Acting General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(4), (3), and (1) of the Act (29 U.S.C. § 158(a)(4), (3), and (1)) by committing numerous unfair labor practices during a union campaign. (A. 311-12; 151-59.) Following a hearing, an administrative law judge issued a recommended decision and order finding merit to some of the unfair labor practice allegations. On August 26, 2015, after the Company filed exceptions, the Board (Members Miscimarra, Johnson, and McFerran) issued its Decision and Order affirming, in part, the judge's unfair labor practice rulings, findings, and conclusions. (A. 304-08.) As relevant here, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by terminating employee Deshonte Johnson (Member Miscimarra, dissenting), and Section 8(a)(4), (3), and (1) by suspending employee Renal Dotson.²

² The Board upheld the judge's dismissal of complaint allegations that the Company unlawfully suspended and discharged Darrington Edwards, and discharged Udenise Martin. (A. 304 and n.2, 316-23.) The Board reversed the judge's finding that the Company unlawfully issued employee Keith Hughes a final warning and discharged him and Kimberly Pratcher. (A. 304-07, 323-31.)

I. THE BOARD'S FINDINGS OF FACT

A. **Background: the Company's Operations; the Union Loses an Election in March 2010 and Wins an Election in June 2011; Related Board Orders and Litigation**

The Company provides transportation, warehousing, and logistics services for other companies. It has an office in Brentwood, Tennessee, and warehousing centers throughout the United States, including a hub of four warehouses in Memphis, Tennessee, and services different accounts. (A. 312; 100-02, 152 par. 2, 160 par. 2.) Regional Vice President Karen White, and Director of Operations Phil Smith oversee the Company's Memphis operations. (A.312; 100, 125-26.) Evangelia Young served as the Company's Regional Human Resources Manager from February 2000 to October 7, 2011, followed by Karen Kousbroek from October 7, 2011, to January 1, 2012. (A. 312; 140-41, 147.) Since January 1, 2012, Shannon Miles has served as both the Senior Employee Relations Manager and the Senior Human Resources Manager for the South Region, with direct oversight for human resources matters in the Company's Memphis operations. (A. 312; 145-48.)

In May 2009, the Union began organizing employees at the Memphis warehouses. (A. 312; 164-88, 189-243.) On March 16, 2010, the Union lost a Board conducted election. (A. 312; 164-88, 189-243.)

In 2011, the Board issued two Decisions and Orders finding that the Company had committed numerous unfair labor practices prior to the March 2010

election. In one decision, the Board found that the Company had, among other things, unlawfully threatened and interrogated employees, and discharged a union supporter. Various company officials, including Human Resources Manager Young and Regional Vice President White, interrogated employees unlawfully.

Ozburn-Hessey Logistics, LLC, 357 NLRB No. 125 (2011), (A. 189-243.)

(“*Ozburn I.*”) In the second decision, the Board found that the Company had, among other things, unlawfully disciplined and discharged employee Renal Dotson, discharged a second employee, and threatened and interrogated employees. Director of Operations Smith had a role in in Dotson’s discharge. The Board also found that Smith had unlawfully threatened Dotson, confiscated union materials, threatened employees with the loss of benefits, and warned an employee. *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011) (A. 164-88.). (“*Ozburn II.*”)

On April 5, 2011, while those two cases were pending before the Board, the District Court for the Western District of Tennessee granted the Board’s petition for Temporary Injunctive Relief (“Injunction”), under Section 10(j) of the Act. The Injunction, among other things, ordered the Company to reinstate Dotson. (29 U.S.C. § 160(j)). (A. 312.) *Hooks ex rel. NLRB v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp.2d 1029 (W.D. Tenn. 2011). As ordered, the Company reinstated Dotson later that month. (A. 7.)

On June 14, 2011, the Union filed a new petition for an election. (A. 312; 164-88.) The Union ultimately won an election held on June 27, 2011, by three votes. The Board certified the Union, and required it to bargain with the Union. The Company refused to bargain and challenged the Board's certification of the Union before the Court. *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 118 (2015) (petition for review pending Case Nos. 15-1184 & 15-1242). The Board also found that the Company committed numerous unfair labor practices prior to the second election. Those unfair labor practices included Director of Operations Manager Smith confiscating union material, threatening two employees, and telling employees that they should resign. *Ozburn-Hessey Logistics, LLC*, 361 NLRB No. 100 (2014) (incorporating by reference 359 NLRB No. 109 (2013) (petition for review pending, D.C. Cir. Case Nos. 14-1253 & 14-1289) (fully briefed). (*Ozburn III.*)

In May 2015, the Court enforced the Board's orders and denied the Company's petitions for review in *Ozburn I*, 605 F. App'x 1 (D.C. Cir. Nos. 11-1482 & 12-1063), and *Ozburn II*, 609 F. App'x 656 (per curiam) (D.C. Cir. Nos. 11-1481 & 12-1064.)

B. Deshonte Johnson's Union Activity; in October 2011, the Company Discharges Johnson

1. Johnson's support for the Union

Deshonte Johnson began working for the Company in September 2009. He worked as an operator on the second shift in the Hewlett-Packard department. (A. 320; 65-66.) Operations Supervisor Kila Walker and Operations Manager Darnell Flowers supervised Johnson. First Shift Operations Supervisor David Maxey was also present for the first part of Johnson's shift. (A. 320; 66-67.) During Johnson's employment he wore a prounion shirt twice a week, and prounion stickers on his shirt almost every day. (A. 320; 67-68.) In a September 2011 meeting, Dotson informed Operations Supervisor Walker and Operations Manager Jim Cousino that he disagreed with a warning he had received, that he would take his concerns to Human Resources, and, if not satisfied, would go the "Labor Board," or to his union representative. (A. 320; 68-73.)

2. Johnson crosses over a conveyor belt to retrieve a package

The packages shipped for Hewlett Packard are moved from the storage racks to the packing and shipping area by a motorized conveyor belt. In October 2011, the conveyor belt had a few areas where employees could cross from one side of the conveyor belt to the other side of the belt. In those areas, the belt was either elevated sufficiently for the employees to pass underneath, or had a lift gate. (A. 320; 62-63, 73-75, 136-38, 251.) Johnson regularly crossed directly over the

conveyor line for job-related reasons such as picking up a box or delivering paperwork. (A. 320; 81, 83, 84-86.) Other employees, as well as supervisors Jay Walker, Kila Wilson, and Operations Manager Cousino, also crossed directly over the conveyor line. (A. 320; 56-59, 60-61, 81, 83, 84-86.)

Approximately 30 minutes after Johnson began his shift on October 5, he observed a box fall from the conveyor belt on the opposite side of the belt from where he was working. In order to recover the box and return it to the belt, Johnson sat on the line and swung his legs over the line to get to the other side. He retrieved the box and returned it to the conveyor belt. Before he could return to work, Supervisor Maxey called Johnson over to where he was standing with Supervisor Flowers. Maxey told Johnson that he had committed a serious safety violation. (A. 320; 75-79, 92, 59.) Johnson told Maxey that he did not know that he had committed a safety violation, and that he had engaged in such conduct for two years. Maxey told Johnson to refrain from crossing the conveyor line and Johnson returned to work. (A. 320; 78-79, 91.)

3. The Company discharges Johnson

On October 6, 2011, the Company terminated Johnson during a meeting with Human Resources Generalist Gloria Thompson, Operations Manager Cousino, and Operations Manager Flowers. Thompson told Johnson that he was terminated for committing a safety violation. (A. 80-81, 153 par. 6(b), 161 par. 6(b).) Johnson replied that he had jumped over the conveyor line throughout his

employment, and that others, including supervisors, had also crossed the conveyor line. (A. 81.) Johnson’s termination notice stated that he “committed a very serious safety violation [that] warrant[ed] immediate termination.” (A. 320; 81-82, 252.)

C. Renal Dotson’s Union Activity; the Company Discharges Dotson Prior to the First Election; Dotson Testifies at a Board Hearing After His Reinstatement; the Company Suspends Dotson After the Second Election

1. The Company Discharges Dotson in August 2009

Renal Dotson began working for the Company in March 2009. He worked as a lift truck operator in the Fiskar’s department. (A. 314; 2.) During the organizing campaign he solicited union authorization cards and distributed literature. (A. 2-3.) In an August 2009 email written by Human Resources Manager Young, she described Dotson as a “disruptive individual[]” working with others who was “trying to drive a union” into the Company’s Memphis facility. (A. 314; 3-5; 246-47.) That month, the Company discharged Dotson. (A. 314; 6-7.) After the discharge, Young wrote a memo that referenced the Fiskar’s department as “hot spot” for union activity, and asserted that Dotson had acted inappropriately since the advent of the union activity. (A. 314; 5-6, 248-49.) As noted above, p. 5, the Company reinstated Dotson in April 2011, after the District Court injunction issued, and the Court subsequently enforced the Board’s Order finding that the Company had unlawfully discharged Dotson and ordering his

reinstatement. *Ozburn II*, 609 F. App'x 656 (per curiam) (D.C. Cir. Nos. 11-1481 & 12-1064.) On November 1, after his reinstatement, Dotson testified for the General Counsel at a Board hearing in *Ozburn III*. (A. 314; 7.)

2. The Company suspends Dotson in November 2011

At 8:00 a.m. on November 14, 2011, Supervisor Greg Harvey held his regular start of the shift meeting for the Fiskar department. When Harvey finished he turned the meeting over to Director of Operations Smith. Smith, who rarely attended the morning meeting, announced that Senior Manager Leroy Heath had left the Company, and that he would serve in that position until the Company hired a replacement. (A. 314; 7-11, 13-16, 126.) During the meeting, employees stood in a semicircle facing Harvey and Smith, with employees approximately 3 to 16 feet from them. (A. 314; 11-12, 127.) Dotson usually took notes during meetings. (A. 12-13.) On this particular occasion, he took notes using a box in an aisle as a base for his notebook, which required him to look over his left shoulder to see Harvey and Smith. (A. 314; 13-14, 26, 37-38.) Harvey did not say anything to Dotson during his presentation. (A. 315; 14-15.) Dotson continued to take notes during Smith's presentation. (A. 315; 15-16, 26, 35, 37-38.) While Smith talked, he called out to Dotson three times. Each time Dotson turned his head to look at Smith. After the third time, Dotson also threw up his hands, but did not say anything. Smith directed Dotson to go to Human Resources. (A. 315; 15-19, 38-39.)

On his way to Human Resources, Dotson walked through the breakroom and took a cell phone from his locker. While still in the breakroom, Dotson telephoned union organizer Ben Brandon. (A. 314; 19-20.) Dotson continued talking with Brandon as he entered the area outside Human Resources Director Karen Kousbroek's office and sat down. Kousbroek came out of her office and told Dotson to "get off the phone." (A. 314; 21-23, 40-41, 50.) Dotson stayed on the phone for approximately 10 seconds to inform Brandon that he had to end the phone call. Dotson then sat in the Human Resources area for another 3 or 4 minutes before Smith and Harvey entered the Human Resources area and went into Kousbroek's office. (A. 314; 23-25, 36-37, 50.) A few minutes later Dotson was called into Kousbroek's office. (A. 42.)

When Dotson entered Kousbroek's office, Smith, Harvey, Dotson, and Kousbroek were seated at a round table, with Smith and Kousbroek seated directly across from each other. Dotson explained that, to the extent he turned away from Smith during the morning meeting, it was due to his taking notes. Kousbroek asked Smith to detail the events of the meeting. During the time that Smith spoke, Dotson faced Kousbroek. When the meeting ended, Kousbroek suspended Dotson two days for insubordination. (A. 315; 24-26.)

After Dotson left the meeting, he called organizer Brandon, who told him to get paperwork regarding the suspension. (A. 26-29, 43.) When Dotson returned to Human Resources, Kousbroek told him that she had no paperwork, and that he

should simply return to work in two days. (A. 315; 28, 106.) Dotson, who was still on the phone, informed Brandon, “It’s all good. We’ll just file another charge.” (A. 315; 106.)

When Dotson returned from the suspension he went to Human Resources and received a copy of his suspension notice. (A. 29, 44-45.) The suspension notice stated, that during the November 14 meeting, Dotson “turned his back on [Smith] and refused to pay attention, and disrupted the meeting with his actions. [Smith] had to stop the meeting and sen[d] [Dotson] to H[uman Resources].” (A. 250.) The notice further stated that Dotson ignored Kousbroek’s request “to turn off his cell phone as he is not on break,” “and kept talking on his phone, which was the second incident of insubordination.” (A. 304-09, 250.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On August 26, 2015, the Board (Members Miscimarra, Johnson, and McFerran) issued its Decision and Order. (A. 304-09.) In relevant part, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(4), (3), and (1) of the Act by suspending employee Renal Dotson. The Board also found (Member Miscimarra, dissenting), in agreement with the judge that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Deshonte Johnson. (A. 304-11.)

The Board’s Order requires the Company to cease and desist from the unfair labor practice found and from, in any other manner, interfering with, restraining, or

coercing employees in the exercise of their statutory rights. (A. 308.)

Affirmatively, the Order requires the Company to offer Johnson full reinstatement, to make him and Dotson whole for any loss of earnings, and to compensate them for any adverse tax consequences from receiving a lump-sum backpay award. (A. 308.) The Order also requires the Company to post an appropriate notice and distribute it electronically, if it customarily communicates with employees by such means, and to have the notice read to employees by Regional Vice President of Operations White and Director of Operations Smith in the presence of a Board agent, or by a Board agent in their presence. (A. 308.)

SUMMARY OF ARGUMENT

In two Board Decisions and Orders enforced by the Court, and in a third Board Decision and Order currently pending before the Court, the Board found that the Company committed numerous unfair labor practices during an ongoing union campaign. Here, substantial evidence supports the Board's finding that after the Union narrowly won a second election, the Company unlawfully discharged employee Deshonte Johnson, and suspended employee Renal Dotson. The Company has shown no basis to disturb those findings.

Substantial evidence supports the Board's finding that the Company unlawfully discharged employee Johnson when it claimed it discharged him for crossing a conveyor line. Johnson's expressed support for the Union through the wearing of union insignia, the Company's numerous prior unfair labor practices,

and evidence that Johnson engaged in conduct that regularly occurred, but had never previously resulted in discharge, amply demonstrate that the Company's adverse action was unlawfully motivated. The Court has no jurisdiction to consider the Company's challenges to that finding because the Company never made its current arguments to the Board.

In response, the Company failed to meet its burden of showing that it would have taken the same action even if Johnson had not engaged in protected union activity. Thus, the Board reasonably found that crossing the conveyor line was a regular occurrence, and that the Company had no specific rules against crossing the conveyor line, nor a history of treating such conduct with discharge. In addition, the Board also reasonably found that the Johnson's conduct was not comparable to conduct where the Company had previously discharged employees.

The Board also reasonably found that the Company unlawfully suspended employee Dotson for alleged insubordination during, and after, a company meeting. Dotson's union activity, which had prompted the Company to have previously threatened and unlawfully discharged him, and his testifying against the Company's interests at a Board hearing after his reinstatement, along with the Company's numerous other unfair labor practices, provide ample support for the Board's finding that his suspension was unlawfully motivated. The Board further reasonably found that the Company did not carry its burden that it would have suspended Dotson absent its animus toward his union activity. The Company has

shown no basis to disturb that finding, which was based on the credited testimony, among other factors.

STANDARD OF REVIEW

This Court “accords a very high degree of deference to administrative adjudications by the [Board].” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted). In reviewing the Board’s decision, the Court must uphold the Board’s findings of fact, and the Board’s application of law to particular facts is “conclusive,” if supported by “substantial evidence on the record considered as a whole.” Section 10(e) of the Act (29 U.S.C. § 160(e)); accord *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Bally’s Park Place*, 646 F.3d at 935. A reviewing court should not disturb the Board’s factual findings, even if it would reach a different result on *de novo* review. *United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004). The Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Bally’s Park Place*, 646 F.3d at 939 (quotation marks and citations omitted). Further, the Court gives great deference to an administrative law judge’s credibility determinations, as adopted by the Board, and defers to such credibility determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.”

Stephens Media, LLC v. NLRB, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quotation marks and citations omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE DESHONTE JOHNSON, AND SECTION 8(a)(4), (3), AND (1), BY SUSPENDING EMPLOYEE RENAL DOTSON

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.”

Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse employment actions against employees for engaging in union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).³

Similarly, Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)) makes it an unfair labor practice for an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under th[e] Act.” An employer violates Section 8(a)(4) of the Act by retaliating against an employee for

³ A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

providing testimony at a Board proceeding. *See Ryder Truck Rental v. NLRB*, 401 F.3d 815, 818 (7th Cir. 2005).

In evaluating the lawfulness of an adverse action, the Board applies the well-established test from *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under *Wright Line*, the legality of an employer's adverse action depends on the employer's motivation. If substantial evidence supports the Board's finding that antiunion considerations were "a motivating factor" in an employer's adverse action against an employee, the employer's action violates the Act unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of these activities. An employer fails to prove that it would have taken the adverse action against an employee even absent the employee's union activity when, for example, the record shows that the employer's justification for the discharge did not exist or is pretextual. *Transp. Mgmt. Corp.*, 462 U.S. at 395, 398-403; *Wright Line*, 251 NLRB at 1084, 1089; *accord Laro Maint. Corp v. NLRB*, 56 F.3d 224, 230-32 (D.C. Cir. 1995).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003).

Such evidence includes knowledge of union activities,⁴ hostility toward union activities as revealed by the commission of other unfair labor practices,⁵ the timing of the adverse action,⁶ and the pretextual nature of the employer's justification.⁷

B. The Board Reasonably Determined that the Company Unlawfully Discharged Employee Johnson Because of His Union Activity

1. Substantial evidence supports the Board's finding that Johnson's discharge was unlawfully motivated, and that the Company failed to show that it would have discharged him absent his union activity

As an initial matter, substantial evidence supports the Board's finding (A. 321) that union animus was a substantial or motivating factor in Johnson's discharge for crossing over a conveyor line in November 2011 to retrieve a fallen box. Thus, undisputed evidence establishes that Johnson was an open union supporter who regularly displayed his support for the Union by wearing a pro-union shirt or a pronoun sticker. Moreover, in September 2011, he informed Operations Supervisor Walker and Operations Manager Cousino that, if necessary, he would go the "Labor Board" or to his union representative, after receiving a

⁴ *Tasty Baking Co.*, 254 F.3d at 125.

⁵ *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

⁶ *Tasty Baking Co.*, 254 F.3d at 126 and cases cited.

⁷ *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual "not only dooms [employer's] defense but it buttresses the . . . affirmative evidence of discrimination" and supports an inference of unlawful motive), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

warning that he disagreed with. (A. 320; 68-73.) Johnson's open support for the Union, in context with the litany of unfair labor practices committed by the Company in *Ozburn I, II, and III*, provide strong support for the Board's finding that the discharge was unlawfully motivated. *Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

The fact that the Company had never previously discharged an employee for crossing a conveyor line despite its regular occurrence by employees, and even supervisors, further buttresses the Board's finding. As employee Hughes explained (A. 320; 56-59), employees jumped over the line "periodically" to help unload trucks, and also jumped over the line to go to the bathroom, and to go/come back from break or lunch. (A. 57.) Yet, prior to Johnson's discharge, the Company had never discharged an employee for crossing a conveyor line.

The Board also reasonably found (A. 304 n.1, 321), that the Company failed to demonstrate that it would have discharged Johnson in the absence of his union activity. First, as the Board explained (A. 304 n.4), "at the time of Johnson's discharge [the Company] had no specific rule against crossing conveyor belts." Rather, the evidence establishes that the Company first implemented training for conveyor belt safety in February 2012 (A. 320-21; 63-64, 86-88), over one year after Johnson's discharge. Second, as set forth above, the Company had never discharged an employee for crossing over a conveyor line. Indeed, it had "no history of treating this conduct as a serious safety violation" (A. 304 n.4.)

Rather, to the extent that the Company had ever previously taken action against such conduct, that action was minimal. Thus, Operations Manager Cousino conceded that he merely spoke to employees. (A. 321; 115.) The evidence, at most, reflects a single verbal warning issued to an employee. (A. 321; 111-13.)

The Company's suggestion (Br. 14-15) that it maintained a policy of prohibiting employees from crossing over the conveyor line, and that its employees and supervisors did not engage in such conduct, simply disputes the judge's credibility determinations, as adopted by the Board. (A. 304, 312.) Because the judge's credibility determinations were based "[o]n the entire record, including [her] observation of the demeanor of the witnesses" (A. 312), the Court should not overturn those rulings.⁸

Nor does the Company advance its position (Br. 14-17) by asserting that even in the absence of a specific policy or training, "common sense" dictates that an employee not cross a conveyor line, and that it discharged Johnson as part of a

⁸ See *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996) ("The mere fact that conflicting evidence exists is insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required."); *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1124 (D.C. Cir. 2012) (employer failed to show credibility determinations were "patently unsupportable" where hearing officer discredited testimony that was inconsistent with credited facts or contradicted by credited witness testimony); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1006 (D.C. Cir. 1998) (judge's credibility findings based on demeanor and "apparent truthfulness" not hopelessly incredible) (internal quotation marks omitted).

renewed emphasis on safety. Simply put, the credited evidence establishes that Johnson engaged in conduct commonly practiced and generally tolerated. And the Company cites no evidence that Human Resources Manager Young, who the Company asserts was solely responsible for his discharge, acted based on a renewed emphasis on safety.⁹ Moreover, when the Company discharged an employee for a conveyor-belt infraction over a year after Johnson's discharge, the Company had previously warned the employee. In addition, the Company also relied on the employee's role as "a member of the safety team," whose responsibilities included "help[ing] to increase safety awareness." (A. 321; 253.) Here, the Company had not previously warned Johnson regarding his practice of jumping over the conveyor line. Nor has the Company asserted that Johnson served as a member of the "safety team."

Finally, the Board reasonably found (A. 304 n.4, 321), contrary to the Company's claim (Br. 15, 17-19), "that the other safety violations for which employees had been discharged prior to Johnson's discharge were not comparable." Most of those incidents involved misuse of forklifts, and they

⁹ The testimony of Senior Employee Relations Manager Shannon Miles (Br. 17, A. 148-49) fails to support the Company's discharge of Johnson because it establishes, at most, that she wanted employees who engaged in conduct that raised safety concerns to receive final warnings, as opposed to no discipline. The Company has also offered scant evidence of Human Resource's Manager Young's investigation, which should have turned up evidence that Johnson's conduct was not isolated.

generally involved horseplay,¹⁰ or extremely dangerous situations that placed employees at risk.¹¹ In addition, the Company terminated an employee in 2008 for striking a support column, causing “severe damage,” and “failing to report the incident immediately.” (A. 321; 271.) Here, no credible evidence exists that Dotson engaged in horseplay when he retrieved the package, placed others in danger, or lied to the Company about his actions.

¹⁰ The Company discharged an employee in 2010 for standing on a forklift operated by another employee (A. 321; 265-67), two employees in 2011 for repeatedly slamming on the breaks and turning the steering wheel of their forklifts to make “donuts” in the warehouse area (A. 321; 268-70, 275-77), an employee in 2009 for engaging in horseplay by pulling down a dock door while another employee was trying to exit on a forklift (A. 281-84). In 2012, the Company discharged three employees in connection with a horseplay incident. The Company discharged one employee for photographing another employee as she lay face down, or what is known to the employees as a “planking” position, on the conveyor belt, a second employee for posting the planking photographs on Facebook, and a third employee, a supervisor, for failing to address the conduct with the employees, failing to report it to higher level management, and for withholding information during the internal investigation. (A. 313; 272-74, 278-80, 292.)

¹¹ The Company terminated an employee in 2011 for smoking a cigarette while operating a propane forklift (A. 285-87), and an employee in 2012 for running his forklift into another employee’s forklift after a verbal altercation (A. 293). In addition, the Company terminated an employee in 2011 for sleeping on a running forklift because he was a “lead” employee who was supposed to set an example, had just participated in a lengthy safety meeting, and was already on the verge of termination for other issues. (A. 288-91.)

2. The Court does not have jurisdiction to consider the Company's contention that the Board erred by finding that Johnson's discharge was unlawfully motivated

The Company claims (Br. 11-13) that the Board erred in finding that Johnson's discharge was unlawfully motivated. In other words, it argues that the General Counsel did not satisfy his initial burden under *Wright Line*. Specifically, the Company relies on Board Member Miscimarra's dissenting opinion, in which he found that under the Board's *Wright Line* test, the Board cannot find unlawful motivation, absent the Board's General Counsel proving a "link or nexus between Johnson's union activity and his discharge," such as "evidence that other conveyor belt jumpers were treated more leniently than Johnson *based on union considerations*." (A. 310) (emphasis in the original). The Court has no jurisdiction to consider that argument because the Company failed to make it to the Board. Moreover, aside from jurisdictional grounds, the Company has also waived that argument before the Court, because the Company's brief does not dispute the Board's finding (A. 304 n.4) that the Company did not preserve the arguments raised by Member Miscimarra's dissenting opinion.

To begin, Section 10(e) of the Act (29 U.S.C. § 160(e)) bars the Company's arguments. That Section provides that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances. *Id.*; see *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1992); *Healthbridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir.

2015). The requirements for a valid exception to an administrative law judge's decision, consistent with Section 10(e), are set forth in Section 102.46(b)(1) of the Board's Rules and Regulations. Under that regulation, parties exceptions must "set forth specifically the questions of procedure, fact, law, or policy" objected to, "designate by precise citation of page the portions of the record relied on," and "concisely state the grounds for the exception." 29 C.F.R. § 102.46(b)(1). If an objecting party files a supporting brief, the brief must contain "argument, presenting clearly the points of fact and law relied on," "with specific page reference to the record and the legal or other material relied on." 29 C.F.R. § 102.46(c)(3). *See Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015). Any objection raised in court that fails to comply with these requirements is waived. *Id.* § 102.46(b)(2); *Alwin Mfg. Co.*, 192 F.3d 133, 143, 144 n.14 (D.C. Cir. 1999). And application of Section 10(e) is mandatory. *Nova S.E. Univ.*, 807 F.3d at 313.

Here, the Company's exceptions filed with the Board did not state that it had any issue with the *Wright Line* test as set forth by the judge, or any specific argument as to how the judge erred in its application of that multiple part test in finding unlawful motivation.¹² The Company simply filed a general exception to

¹² The judge (A. 313 n.11, 315 and 321) both referenced and found a link or nexus between employees' protected activity and their adverse employment actions. But the judge also noted that in recent Board cases "the Board has observed that Board

the judge's finding "that the General Counsel had met the initial burden [to establish unlawful motivation] required under *Wright Line*." (A. 304 n.4; 295-303.) As the Board reasonably found (*id.*), the Company made no "specific argument at all in support of this exception." *Parsippany Hotel Mgmt. v. NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996) (Court foreclosed from considering employer's argument because "vague exception was insufficient to provide notice to the Board" of the specific grounds for the exception, as required by the Board's rules.); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 198 (4th Cir. 1984) (Court foreclosed from considering employer's specific argument regarding the Board's remedy where exceptions simply disputed "each and every part of the [judge's] remedy.")

In addition, the Company "compounded" its failure to provide the Board with specific notice in its exceptions by "fail[ing] to brief or argue" to the Board, the issues raised by Member Miscimmaro's dissenting opinion. *Id.* at 198. Rather, the Company's arguments in its brief to the Board in support of its exceptions contested only the judge's finding that the Company "did not meet its rebuttal burden under *Wright Line* of proving that it would have discharged Johnson . . .

cases typically do not include" the need for a link or nexus "as an independent element." (citing *Praxair Distribution, Inc.*, 357 NLRB No. 91 (2011), slip op at 1 n.2, 2011 WL 4406047 * 1 n.2 (the General Counsel's initial burden requires a "showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity," but does not require "that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action" (internal citation and quotation marks omitted).

even in the absence of his union activity.” (A. 304 n.4; Brief in Support of Exceptions.)

Nor can the Company cannot save its otherwise waived claims by relying on the fact that Board Member Miscimarra’s dissenting opinion raised the specific arguments that the Company now relies on. As this Court has held, Section 10(e) bars Court review of any issue not raised to the Board even where raised by a Board member’s dissenting opinion, or by the Board majority. *Healthbridge Mgmt.*, 798 F.3d at 1069 (D.C. Cir. 2015), and cases cited; *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000).¹³

Finally, the Company failed in its opening brief to dispute the Board’s finding that the Company did not preserve the arguments raised by Member Miscimarra’s dissenting opinion. That failure provides a further basis to preclude the Court from considering the arguments raised for the first time by the Company

¹³ In any event, given the Court’s enforcement of two Board orders that the Company committed numerous unfair labor practices, the Company is in no position to dispute its animus toward the Union and its employees’ union activity. Moreover, “an employer’s discriminatory motive is not disproved by evidence showing that ‘it did not weed out all union adherents’” (*Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989) (quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964)), or took action against a minor union supporter rather than a prominent union supporter (*NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 74-75 (1st Cir. 2000)). In addition, it is hardly surprising that the Company may have taken a harder line toward Johnson, an open union supporter, given the Union’s recent narrow victory in an election that was still in dispute, and pending hearing in *Ozburn III*.

in its opening brief. Under settled principles any issue not raised in an opening brief is waived. *See Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 680 n.2 (D.C. Cir. 2001); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (same)

C. The Board Reasonably Determined that the Company Unlawfully Suspended Renal Dotson Because of His Union Activity

The Company asserts it lawfully issued a two-day suspension to Renal Dotson for committing two incidents of insubordination on the same day-- disrupting a meeting, and thereafter ignoring a request to turn off his phone. Notwithstanding the stated reason for Dotson's discipline, the Board reasonably found that the Company disciplined Dotson because of his union activity.

As an initial matter, the Company does not seriously dispute the Board's finding (A. 315) that union animus was a substantial or motivating factor behind the suspension. In August 2009, the Company discharged Dotson shortly after it had identified him as a union leader. And the Court subsequently affirmed the Board's Order that the Company had unlawfully discharged Dotson. (*Ozburn II*.) After the Company reinstated Dotson because of a Federal Court Injunction that issued in April 2011, he testified at a Board hearing held just a few weeks before his suspension. The Company's knowledge of Dotson's union activity, its prior discrimination against him for that activity, his testimony at a Board hearing, along with its commission of numerous other unfair labor practices in *Ozburn I, II*, and

III, provides ample support for the Board finding unlawful motivation. *Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

The Company's claim (Br. 21-22) that Regional Human Resources Manager Kousbroek had no knowledge of Dotson's union activity borders on the frivolous. As noted, the Company had long recognized Dotson as a key union supporter. And, when the Company suspended Dotson, it had previously unlawfully threatened and discharged him, returned him to work under a Federal Court order, and witnessed him testify for the General Counsel in a Board hearing. In these circumstances, it strains credulity that a senior company official like Kousbroek would not have knowledge of Dotson's protected activity and the Company's unlawful actions toward him. Moreover, if the Company wanted to advance that position, it could have presented Kousbroek as a witness. But she did not testify, and the Company provided no basis for failing to call her as a witness.

The Board reasonably found (A. 316), that the Company did not meet "its burden in demonstrating that it would have suspended Dotson in the absence of his union and protected activity." Before the Court, the Company has failed to show a basis to disturb that finding which the Board based on inferences, the absence of testimony from a key company official, and conflicting evidence provided by other company witnesses.

The Company asserts that it suspended Dotson for engaging in two acts of insubordination on the same day. First, the Company claims that Dotson "turn[ed]

his back” on Director of Operations Manager Smith during a staff meeting, “refus[ed] to pay attention,” and disrupt[ed] the meeting with his actions[,]” which led Smith “to stop the meeting and sen[d] [Dotson] to H[uman Resources].” (A. 250.) Second, the Company claims that Dotson ignored Regional Human Resources Manager Kousbroek’s request “to turn off his cell phone . . . and kept talking on his phone” after Smith sent him to H[uman Resources]. (A. 250.)

With respect to Dotson’s conduct during the meeting, the Board assumed, as Operations Manager Smith testified, that Dotson “turned a quarter turn from his earlier position during Harvey’s comments.”¹⁴ (A. 315.) But although the disciplinary notice accuses Dotson of disrupting the meeting, the only disruption, as the Board explained (A. 315), occurred when Smith “repeatedly stopped his presentation to the employees to call out to Dotson,” which led Dotson to throw up his hands. Nor does evidence exist that Dotson refused to pay attention. Rather, the evidence establishes that he simply continued to take notes while Smith spoke.

With respect to Dotson’s cell phone use after Director of Operations Smith sent him to Human Resources, Dotson admittedly obtained a cell phone on the way to the Human Resources office, telephoned union organizer Ben Brandon as he walked into the area outside Regional Human Resources Manager Kousbroek’s

¹⁴ As the Board noted, however, the Company did not present “Harvey or any of the employees who were present . . . as witnesses to corroborate Smith’s testimony.” (A. 315.)

office, and was told by Kousbroek to get off the phone. The Company has shown no extraordinary basis to overturn the Board's crediting of Dotson's testimony that he then got off the phone. (A. 315.) Indeed, the Company did not call Kousbroek as a witness to testify about her conversation with Dotson, and the Company does not claim that she was unavailable. Nor did the Company ask any question to Director of Operations Smith as to whether Dotson was still talking on his phone when he arrived at Human Resources. (A. 130-33.) Instead, the Company presented testimony from Regional Vice President White and Human Resources Coordinator Megan Ferrone, who, as the Board found (A. 315) "gave differing descriptions of what occurred between Dotson and Kousbroek." When the incident occurred, White was working at her computer in her office located four offices from the chair in the hallway where Dotson was sitting. White asserted that she heard Kousbroek ask Dotson twice to turn off his cell phone. (A. 315; 103-05.) Human Resources Coordinator Ferrone, whose cubicle was positioned between Dotson's chair and Kousbroek's office, testified, however, that when Kousbroek told Dotson to turn off his phone, he stopped talking and told

her that the cell phone was off. (A. 315; 107-08.)¹⁵

The fact that Dotson had no prior related discipline (A. 315), as well as evidence that “other employees have not only been disruptive in meetings, but clearly defiant, rude, and noncompliant, and yet were not suspended” (A. 316), further buttresses the Board’s finding that the Company failed to meet its burden. Rather, several employees who acted inappropriately during meetings merely received warnings. One employee received a verbal warning after using profanity and having a negative tone toward management during a team meeting (A. 316; 258), and another employee received a final warning only after “disrupt[ing]” a meeting “several times with loud outburst[s],” and disregarding instructions (A. 261). Likewise, an employee received a final warning, but no suspension, after she acted rudely when receiving work instructions, and refused a supervisor’s request to return to her work area. (A. 316; 259-60.) Similarly, two employees simply received general warnings for improper cell phone use (A. 315; 255, 256), and one employee received a final warning, but no suspension, after failing to follow a company directive regarding cell phone use (A. 315; 257). Here, contrary to those instances, Dotson did not interrupt

¹⁵ The Company’s claim (Br. 8 n.2, 45-53) that Dotson became “evasive” when it requested his cell phone records is puzzling. The cited transcript pages simply reflect that the Company sought his cell phone number, that the Board’s General Counsel objected on relevance grounds, that the administrative law judge overruled the objection, and that Dotson then provided the information off the record.

the meeting or use profanity, and he followed the directive to stop talking on his cell phone.¹⁶

In sum, the Board recognized “the less than amiable” working relationship between Dotson and Director of Operations Smith, and that Dotson may have shown a lack of deference to Smith. (A. 315.) Indeed, Smith’s role in Dotson’s prior unlawful discharge, and his previous unlawful threatening of Dotson, provides ample justification for Dotson and Smith to not have had the best working relationship. The Board reasonably concluded, however, that the Company failed to carry its burden to demonstrate that it would have suspended Dotson absent this union and protected activity. (A. 315.)

¹⁶ The Company’s related claim (Br. 21-22) that earlier examples of discipline short of suspension are not comparable because they occurred prior to an emphasis on accountability fails because the Company offered no evidence that Kousbroek acted based on such a policy directive.

CONCLUSION

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

/s/Robert J. Englehart

ROBERT J. ENGLEHART

Supervisory Attorney

/s/David A. Seid

DAVID A. SEID

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington DC 20570

(202) 273-2978

(202) 273-2941

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

March 2016

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

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|---|-----------------------|
| OZBURN-HESSEY LOGISTICS, LLC | * |
| | * |
| Petitioner/Cross-Respondent | * Nos. 15-1319 |
| | * 15-1369 |
| | * |
| v. | * |
| | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * 26-CA-070471 |
| | * |
| Respondent/Cross-Petitioner | * |
| | * |
| and | * |
| | * |
| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION | * * * * * |
| | * |
| Intervenor | * |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,744 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has

been scanned for viruses using Symantec Endpoint Protection version
12.1.2015.2015 and is virus-free according to that program.

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 10th day of March, 2016

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

....

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

....

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district,

respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is

alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

EXCEPTIONS TO THE RECORD AND PROCEEDINGS

29.C.F.R. Sec. 102.46 *Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.*—(a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the Act and sections 102.111 and 102.112 of these rules) file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of said exceptions. Any party may, within the same period, file a brief in support of the administrative law judge's decision. The filing of such exceptions and briefs is subject to the provisions of paragraph (j) of this section. Requests for extension of time to file exceptions or briefs shall be in writing and copies thereof shall be served promptly on the other parties.

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

- (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.
- (3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

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

| | |
|---|-----------------------|
| OZBURN-HESSEY LOGISTICS, LLC | * |
| | * |
| Petitioner/Cross-Respondent | * Nos. 15-1319 |
| | * 15-1369 |
| | * |
| v. | * |
| | * Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * 26-CA-070471 |
| | * |
| Respondent/Cross-Petitioner | * |
| | * |
| and | * |
| | * |
| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION | * * * * * |
| | * |
| Intervenor | * |

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, 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 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 addresses listed below:

Benjamin H. Bodzy, Esquire
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
211 Commerce Street
Suite 800
Nashville, TN 37201

Stephen Dorr Goodwin
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Firm: 901-526-2000
165 Madison Avenue
First Tennessee Building, Suite 2000
Memphis, TN 38103-0000

Daniel M. Kovalik, Esquire
Nancy Alaba Parker, Assistant General Counsel
United Steelworkers of America, AFL-CIO
60 Boulevard of the Allies
Suite 807
Pittsburgh, PA 15222

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 10th day of March, 2016