

Nos. 15-1349, 15-1419

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

**EF INTERNATIONAL LANGUAGE SCHOOLS, INC.**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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

EF INTERNATIONAL LANGUAGE SCHOOLS, INC.	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1349,
	*	15-1419
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	20-CA-120999
	*	
Respondent/Cross-Petitioner	*	<b>ORAL ARGUMENT</b>
	*	<b>NOT YET</b>
	*	<b>SCHEDULED</b>

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties**

EF International Language Schools, Inc. (“EF”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. Andrea Jesse was the charging party before the Board. The Board’s General Counsel was also a party before the Board. There are no intervenors or amici.

**B. Rulings Under Review**

This case is before the Court on EF’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board

(Chairman Pearce and Members, Hirozawa, and McFerran) in *EF International Language Schools, Inc. and Andrea Jesse*, Case No. 20-CA-120999, issued on October 1, 2015, and reported at 363 NLRB No. 20 (2015).

### C. Related Cases

The case on review before this Court was not previously before this Court or any other court. To date, there are no related cases pending before the Court or any other court.

/s/Linda Dreeben

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Dated at Washington, DC  
this 16th day of May, 2016

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## GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to this Court
“D&O”	The Board’s Decision and Order at issue
“EF”	EF International Language Schools, Inc.
“JA”	Joint Appendix
“SA”	Supplemental Appendix

**UNITED STATES COURT OF APPEALS  
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**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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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of EF International Language Schools, Inc. (“EF”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order finding that EF violated the National Labor Relations Act (29 U.S.C. § 151) (“the Act”) by threatening teacher Andrea Jesse with unspecified reprisals and discharging her for engaging in protected concerted activities.

The Board had subject matter jurisdiction under Section 10(a) of the Act, as amended (29 U.S.C. § 160(a)). The Board's Decision and Order issued on October 1, 2015, and is reported at 363 NLRB No. 20. (JA 245-259.)<sup>1</sup> The Board's Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court. The Company filed its petition for review on October 14, 2015. The Board filed its cross-application for enforcement on November 16, 2015. Both were timely; the Act places no time limitations on such filings.

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<sup>1</sup> "JA" references are to the Joint Appendix filed by the Company. "SA" references are to the Board's Supplemental Appendix, being filed with this Final Brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's finding that EF violated Section 8(a)(1) of the Act by threatening unspecified reprisals against teacher Andrea Jesse for engaging in protected concerted activities.

2. Whether substantial evidence supports the Board's finding that EF violated Section 8(a)(1) of the Act by discharging teacher Andrea Jesse for engaging in protected concerted activities.

3. Whether the Board abused its discretion in ruling that witness Galin Franklin could testify by videoconference.

## RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions.

## STATEMENT OF THE CASE

After investigation of a timely charge filed by teacher Andrea Jesse, the Board's Regional Director issued an amended complaint on behalf of the General Counsel alleging that EF committed unfair labor practices in violation of Section 8(a)(1) of the Act. The complaint alleged that EF unlawfully threatened teacher Jesse with unspecified reprisals, and thereafter discharged her, for engaging in protected concerted activities. (JA 10-14.) Following a hearing, the judge issued a decision and recommended order finding that EF had violated the Act as alleged. On review, the Board affirmed the judge's findings with slight modification.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; EF's Corporate Structure and Its San Francisco School**

EF operates international language schools around the world, including 14 schools in the United States. (JA 249; JA 191-193.) One such school is in San Francisco, California. (JA 249; JA 33.) At its San Francisco school, EF teaches English to students who come to the United States to learn English as a second language. (JA 249; JA 32.)

Meghan Conway is EF's Director of West Coast Operations and is based in Denver, Colorado. (JA 249; JA 31, JA 191.) Conway has responsibility for 14 schools, including the San Francisco school. (JA 249; JA 31) Haviva Parnes is EF's Director of Academic Management in North America and is based in Boston, Massachusetts. (JA 249; JA 172-174, JA 207.) Parnes is responsible for overseeing the academic departments in EF schools across North America, including the San Francisco school. (JA 173-174.)

The Director of the San Francisco school reports directly to Conway. (JA 249; JA 34.) The Academic Director of the San Francisco school reports to both the Director of the San Francisco school and Parnes. Other San Francisco school administrators include Academic Manager Sindy Ramos and Academic Coordinator Stephanie Eto, who report to the Academic Director, as well as

University Preparation Managers Pamela Astarte and Heidi Briones. (JA 249; JA 39, 158, 159.) Astarte and Briones are also teachers. (JA 249; JA 39.)

**B. The San Francisco School Transitions to a New Director and Academic Director**

In the fall of 2013,<sup>2</sup> the San Francisco school was in a period of transition. (JA 249; JA 199.) In September, then-Director Robert Miller left, leaving the school without a Director until November 18, when EF replaced Miller with Director Steven Reilly. (JA 249; JA 199-200.) In mid-November, Academic Director Mike Serangeli left, and EF replaced him with Erin Freeny. Like Reilly, Freeny would start on November 18. (JA 249; JA 165, JA 199.) During this transition period, teachers often communicated by group emails to ensure that everyone was in the loop despite the lack of stable leadership. (JA 253; JA 75-76, JA 404.)

**C. San Francisco School Teacher Andrea Jesse**

Andrea Jesse was one of 20-30 teachers at the San Francisco school. By 2013, Jesse—who had taught at the San Francisco school since 2011— was one of its most senior teachers. (JA 249; JA 34.) Jesse taught a variety of classes, including general education classes “A2-1” and “A2-2,” the latter of which she taught since she began working for EF. (JA 252; JA 53; JA 376.) In early 2013,

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<sup>2</sup> All remaining dates are in 2013 unless otherwise noted.

Jesse taught about 35 hours per week, which made her one of only a few full-time teachers who received health care benefits from EF. (JA 249; JA 34-35.)<sup>3</sup>

In an August 2013 meeting, Parnes publicly announced that Jesse had one of the top three scores for student evaluations of individual teachers (“student evaluations”) in the San Francisco school. (JA 249; JA 48-49, JA 151-153, JA 317.)<sup>4</sup>

**D. During the Transition Period, Jesse Raises Questions on Behalf of Teachers about Terms and Conditions of Employment**

On November 1, EF held a meeting with teachers at the San Francisco school. (JA 249; JA 36.) Academic Manager Ramos and Program Manager Astarte were present along with outgoing Academic Director Serangeli. (JA 249; JA 36.) Serangeli discussed how teachers could receive health care benefits by listing four factors that he asserted were in line with the Affordable Care Act, or “Obamacare.” (JA 249; JA 36-37.) Serangeli stated that to obtain coverage, a teacher must work more than 30 hours a week, must not have more than two consecutive weeks of vacation, must maintain an average of 4.0 or higher on

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<sup>3</sup> In order to be considered “full-time,” a teacher had to work at least 30 hours per week. (JA 249; JA 5.)

<sup>4</sup> EF typically distributed evaluation forms to students at the beginning, middle, and end of each 5- or 6-week course. Completion of the forms was not mandatory, and students did not always complete them. (JA 249; JA 175, JA 215-216.)

student evaluations, and must be a good corporate citizen. (JA 249; JA 35-37; JA 319.)

The next day, November 2, Jesse sent a group email to Serangeli, Ramos, Astarte, Briones, and over 20 other teachers. (JA 249; JA 37-39; JA 319.) In the email, Jesse questioned Serangeli's claim that his four factors were in line with the Affordable Care Act. (JA 249-250; JA 37-39; JA 319.) Jesse specifically asserted that the number of hours required to receive health insurance coverage under the federal program was based on an average number of hours, and would offer more employees coverage than EF's program which required maintaining at least 30 hours each week. Jesse also criticized EF's eligibility requirement of a minimum 4.0 student evaluation score as "precarious" because it was based only on subjective student input. Jesse's email also stated that many of the EF's "corporate citizenship" virtues involved teachers spending free, uncompensated time for school activities. (JA 249-6; JA 319.) In response, Serangeli asked Jesse to come speak with him. (JA 250; JA 321.)

Jesse replied to Serangeli in a group email including the teachers, Ramos, Astarte, and Briones. In the email, Jesse stated that that any follow-up should be handled by a meeting with all the teachers, because "more than half the teachers responded to my email either with an email response or verbally saying, in essence, they were in full support of what I wrote." Jesse concluded her email that "[i]t's

not about me. It's about us." (JA 250; JA 321-323.) On November 6, Jesse sent another group email to the same group, summarizing information she had researched regarding an employer's obligations under the Affordable Care Act. (JA 250; JA 325.)

On November 8, Serangeli held another meeting with the teachers. At that meeting, Jesse continued to express concerns about healthcare. Serangeli told the teachers to save their questions for EF's Director of West Coast Operations Conway, who would be coming from Denver to meet with them about their questions on November 13. Serangeli also told the teachers that Conway was going to introduce incoming Director Reilly at the November 13 meeting. (JA 250; JA 40, JA 85.)

On November 10, Jesse sent an email to 24 teachers and Academic Manager Ramos. In the email, Jesse urged teachers to present a united front at the November 13 meeting with Conway to get what they needed "to be better teachers" and to "better survive the financial difficulties of living in the San Francisco Bay Area." Jesse stated that "sticking up for what's best for ALL teachers" was their best avenue for success. She solicited questions from the teachers in advance of the upcoming November 13 meeting and suggested questions of her own on such topics as how teachers could acquire more classes or hours; how a full time teacher could get EF to pay for health care; whether EF

offered 401(k)s; what being a “good corporate citizen” specifically meant; and how teachers could learn of their student evaluation scores on a regular basis. (JA 250; JA 50; JA 330.) Jesse forwarded her email to Serangeli, stating that she wanted to give her questions to Conway before the November 13 meeting and requesting Conway’s email address. (JA 250; JA 41-42, JA 332.) Serangeli did not respond. (JA 250; JA 42.)

**E. On November 13, Conway Introduces Reilly and Fields Questions from Jesse on Behalf of Teachers Regarding Their Terms and Conditions of Employment; Other Teachers Thank Jesse**

On Wednesday November 13, Conway held a meeting at the San Francisco school attended by approximately 15-20 teachers, including Jesse. (JA 250; JA 44-45, JA 102-103, JA 136, JA 200-205.) Serangeli, Astarte, Ramos, and Academic Coordinator Eto were also present. Conway introduced incoming Director Reilly, who attended the meeting in advance of his official start date the following Monday, November 18. (JA 250; JA 43.)

During the November 13 meeting, Conway announced that there would be a 2-percent raise for teachers who started before a certain date. (JA 250; JA 43-44, JA 88-89, JA 104.) Jesse asked if the raise applied to both the teaching and administrative pay rates, referring to the fact that teachers were paid at one rate for teaching and at a lower rate for engaging in administrative functions, such as attending meetings. Conway stated that the raise applied only to the teacher pay

rate. (JA 250; JA 43-44, JA 88-89, JA 138-39, JA 104.) Jesse responded that it was expensive to live in San Francisco and that the teachers' administrative rate was only just above San Francisco's minimum wage. (JA 250; JA 44, JA 104, JA 142.) Conway asked Jesse: "What do you think [the administrative rate] should be, Andrea?" (JA 250; JA 44, JA 202.) After further discussion, Conway agreed to look into adjusting the administrative pay rate. (JA 250; JA 203.)<sup>5</sup>

Following the wage discussion, Jesse asked Conway why new teachers were constantly being hired when existing teachers wanted more hours so they could qualify for health care insurance. (JA 250; JA 45, JA 138.) Conway told the group that new hires were necessary for succession planning. (JA 250; JA 138.) Jesse also asked Conway about teachers' eligibility for 401(k) plans, and Conway answered that most teachers would not be eligible. (JA 250; JA 45, JA 105, JA 141-142.)

Jesse then asked what exactly was involved with being a good corporate citizen. Conway responded that it involved, "looking sharp, keeping your room tidy, getting to class on time." (JA 250; JA 46, JA 105, JA 205.)

Jesse told Conway that student evaluation scores were "kind of a mystery to us." Jesse explained that teachers did not regularly receive this information. (JA 250-251; JA 47, JA 85.) Other teachers also asked questions about the evaluation

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<sup>5</sup> In February 2014, EF raised the administrative rate \$1 per hour. (JA 250; JA 204.)

system. (JA 251; JA 139.) In response, Conway stated that student evaluations were important and incoming Academic Director Freeny would review student evaluation scores with teachers on a quarterly basis. (JA 251; JA 47, JA 85.) Conway further explained that the scores “were nothing to panic about, that if they were low that they would lead to a conversation . . . to bring them back up.” (JA 251; JA 47.) She stated that to qualify for healthcare coverage, teachers needed a bare minimum student evaluation of 4.0, but management preferred teachers to achieve a 4.2. (JA 251; JA 205.) Conway stated that the evaluation scores would not lead to a teacher’s termination. (JA 251; JA 139.) In any event, Conway noted that the student evaluation system would be revamped by spring 2014 because there were questions about it. (JA 251; JA 138.)

Finally, Jesse asked if more computers could be made available for teachers. Conway agreed to look into this request, and she provided more computers shortly thereafter. (JA 251; JA 94.)

Immediately following the meeting, several teachers thanked Jesse for advocating for them. (JA 251; JA 105-106.) Soon after, Jesse sent a series of three emails to approximately 20 teachers—those who had not been able to attend the November 13 meeting as well as those who had attended. On one of these emails, she included teacher and Program Manager Astarte. She attached her minutes and

observations of the November 13 meeting to these emails. (JA 251; JA 50-51, JA 334-339.)

**F. After EF Announces New Teacher Schedules, Jesse Raises Questions about Her Schedule and Others' Schedules; Reilly Responds that the School Will Adhere To the Schedule as Issued and that Other Teachers Should Contact Management Directly About Their Individual Situations**

On Saturday November 16, Ramos sent an email to all teachers, attaching new teacher schedules. Jesse was assigned to teach two general education classes (“A2-1” and “B1-3”) and one elective course. Jesse was upset that she was assigned to teach the A2-1 class but did not have an assignment to teach the more advanced A2-2 class. She felt that she had mastered the more advanced course and had not received any complaints. Additionally, Jesse noticed that teachers Sandy Teixeira and Galin Franklin had each lost one of their general education courses, which decreased Teixeira’s hours, and reduced Franklin from full-time to part-time status. (JA 251; JA 51, JA 53, JA 55, JA 106-107, JA 109, JA 143, JA 340.) Thus, Franklin’s healthcare benefits were in jeopardy. (JA 249-250; JA 319, JA 145.)

About an hour and one-half later, Jesse emailed Ramos asking that her A2-1 class be reassigned. Jesse noted her seniority and her success with previous A2-2 classes. Jesse predicted that “whoever teaches [the A2-2 class] is likely not to have my high student eval[uation]s. Bad student eval[uation]s are bad for the whole

school.” Jesse further noted the presence of a student in her assigned A2-1 class whom Jesse had attempted to hold back due to her belief that he was cheating. She felt she should not have to teach this student. Ramos did not reply. (JA 251; JA 72-73, JA 376.)

After waiting 30 minutes for Ramos to reply, Jesse forwarded the email to Reilly, asking him to step in and diplomatically resolve the issue of her being assigned A2-1 for the next round of classes. (JA 251; JA 59-62, JA 377.)

Also on November 16, Teixeira reached out to Jesse by email. Teixeira stated that one of her general education classes had been taken away and she asked Jesse if this was “normal.” Jesse and Teixeira discussed options to help Teixeira, including Teixeira teaching Jesse’s elective class, which they ultimately decided against. (JA 251; JA 55-58, JA 93, JA 97, JA 108-109, JA 371.)

On the following day, Sunday November 17, teacher Franklin called Jesse and they discussed the fact that he had lost a general education course. (JA 251-252; SA 1, JA 144-145.) They also discussed Jesse’s assignment to teach A2-1 as well as the fact that a substitute teacher, Andrew Juarez, who had quit some weeks before, had been given a full-time schedule as a substitute teacher. (JA 251-252, SA 1, JA 144-145.)

That same day, Reilly—whose first day of work would be the following day—responded to Jesse. He emailed her that there had been 60 students who

recently departed from the San Francisco school, so they needed to close some classes and move things around. Therefore, he told Jesse that the school would adhere to the schedule as issued.

Jesse responded shortly thereafter by email, stating that it still had not been explained to her why she was not teaching the A2-2 class which she had been teaching since she started at EF. She stated that under the old Director's tenure, teachers were asked what they want before scheduling and then were assigned classes by seniority. In her email, Jesse also offered to give Franklin her A2-1 class to teach since he had lost a class and was "deeply affected" by the "severe cuts in his schedule." (JA 252, JA 380.)

A few minutes later, Jesse sent a follow-up email to Reilly. (JA 252, JA 381.) Jesse stated she would also like to offer a class to Teixeira because Teixeira "took a big hit" on the schedule. (JA 252; JA 382.)

Later on November 17, Reilly replied to Jesse's most recent emails. He stated that they could not maintain Jesse's full-time status if she gave away classes. Reilly also stated: "if other teachers have concerns I do think it's best that they approach [Ramos or Eto] directly to work out their individual situations." (JA 252; JA 382.) Jesse immediately responded to Reilly by email asking what hours were necessary to maintain full-time status. She also requested a link to the employee

handbook and suggested piecemeal substitution of one teacher for another for a few weeks. (JA 252; JA 385.)

**G. Jesse Sends a Group Email to 20 Teachers and Academic Coordinator Eto, Ramos, and Astarte Questioning the Schedule, Expressing Her Concerns for Teachers Franklin and Teixeira, Urging Solidarity Among Teachers, and Requesting a Meeting with Eto The Next Day; Eto Does Not Respond**

In a separate email on November 17, Jesse sent a group email to 20 teachers and Academic Coordinator Eto, Ramos, and Astarte. In her email, Jesse expressed her dissatisfaction with the new teacher schedule, explaining that she was sharing the email with other teachers because she knew others were also upset with how the new schedule affected them. Jesse urged solidarity among teachers, reminding them that they had already had success in getting a pay raise and a new computer.

Jesse's email stated that although Ramos sent out the schedules, Jesse could see Eto's "handy-work" in them. Jesse complained that she was not scheduled to teach A2-2, despite her seniority and success as an A2-2 teacher, and stated her concerns for Teixeira and Franklin each losing a class. In addition, Jesse accused Eto of allowing her personal feelings to influence scheduling by giving full-time hours to substitute teacher Juarez, who was a friend of Eto's. Jesse asked for a meeting with Eto the next day. Eto did not respond to this email. (JA 252, JA 391-392.)

**H. On November 18, Eto Asks To Meet Separately With Jesse and Franklin About Their Scheduling Concerns; Jesse and Franklin Insist on Meeting With Eto Together; Eto Meets With Jesse and Franklin And Then Asks To Continue Meeting in Reilly's Office**

The next day, Monday, November 18, Eto spoke to Reilly about Jesse's email, and then asked to speak to Jesse and Franklin one-on-one. However, Jesse and Franklin told Eto that they wanted to meet with her together. Jesse and Franklin met with Eto together and presented her a list of questions about the issues they had with the teacher schedules. Eto attempted to answer some of the questions. In response to a question about why she hired former employee and substitute teacher Juarez to teach a full-time schedule instead of giving the hours to Teixeira or Franklin, Eto stated that EF gave Juarez full-time hours because he was substituting for a full-time teacher on vacation. (JA 252; JA 63-66, JA 90-93, JA 63-66, JA 146-148, JA 160-161.)

After Jesse and Franklin continued to protest Franklin's loss of full-time status, Eto said, "I didn't want to have to tell you this but it's because of evaluation scores, poor evaluation scores." Eto told them that Juarez had higher evaluation scores than each of them and Teixeira. Jesse and Franklin asked what the specific scores were and how long the practice of awarding classes by evaluation scores had been in place. Eto could not recall the specific scores but stated that evaluation scores had always been used to award class assignments. Eto then told

Jesse and Franklin that she felt bullied by them and asked if they could continue the meeting in Reilly's office. (JA 252; JA 63-67, 146-148, 160-161.)

### **I. The Meeting With Eto Continues In Reilly's Office**

Eto, Jesse, and Franklin then went to Reilly's office. Ashley Weitman, Director of the San Diego school, was also present because she was training Reilly for his first few days as the new Director of the San Francisco school. The conversation continued regarding how Eto and Ramos had assigned teachers to the reduced number of classes. Once again, Jesse asserted that she did not want to teach the A2-1 class. Reilly stated that the schedule would remain as issued. (JA 252; JA 67, JA 116, JA 149, JA 164.)

Jesse further stated that it was outrageous that Franklin's hours were reduced based on poor evaluation scores. She stated that as far as she and Franklin were concerned, "this whole [evaluation score] policy came out of nowhere." Franklin and Jesse then asked additional questions about the evaluation process, but Reilly responded that it was his first day on the job and he did not have the answers. (JA 252; JA 67, JA 116-117, JA 149-150, 164.)

**J. Reilly Discusses Jesse With Conway; Conway tells Reilly to Speak to Jesse About Policies and Procedures; Reilly Cautions Jesse Verbally and In Writing Not to Speak on Behalf of Her Colleagues and Tells Jesse To Instead Redirect Them To Management**

Following the November 18 meeting in his office with Jesse and Franklin, Reilly spoke to Conway about Jesse. Conway advised Reilly to meet with Jesse about policies and procedures. (JA 252; JA 122-123.) On November 20, Reilly told Jesse that he was aware that Jesse wanted to help Franklin “but you really need to focus on your teaching and not get involved.” Reilly told Jesse that full-time teachers were expected to maintain their required hours each week and be available to teach any class at any level. He also told Jesse he was concerned with the list of questions presented to Eto because it made Eto feel attacked. He also told Jesse to “be careful about speaking on behalf of others,” adding that, “all teachers can speak to us directly with any concerns they may have.” (JA 253, JA 69-70, JA 122-123.)

Later that evening, Reilly sent an email to Jesse recapping what he believed they discussed during their meeting that day. In his email, Reilly stated that although he knew that Jesse was “looking out for” her colleagues, he “would caution [Jesse] from speaking on behalf of colleagues and instead redirect them to the academic team or myself. This will help us resolve situations more quickly and efficiently with less confusion all around.” (JA 253; JA 70-71, JA 393.)

**K. Jesse Responds to an Email from Academic Director Freeny With a Group Email Requesting More Computers; Reilly Cautions Jesse Against Sending Group Emails**

On December 6, Freeny sent a group email to all teachers and Reilly, Ramos, and Eto. (JA 253; JA 72-73, JA 397.) On December 7, Jesse replied to all parties on the group email, stating that there was “a serious shortage” of computers for teacher use, and requesting that additional computers and a printer be made available to teachers. (JA 253; JA 398.) By email of December 9, Freeny thanked Jesse for the suggestion and said that EF would look into providing more computers. (JA 253; JA 400.)

On December 16, after returning from vacation, Reilly responded to Jesse’s December 7 email warning her that as they had “discussed before,” she should “please come and speak with [management] . . . in person about any questions or concerns . . . .” Reilly also cautioned Jesse that “sending out a group email like this [Jesse’s December 7 email] is not a professional or effective way to resolve your concerns. Please keep this in mind for the future . . . .” (JA 253; JA 402.) Jesse responded to Reilly, and copied Freeny, explaining that teachers had resorted to email during the San Francisco school’s transition period when they did not have an Academic Director to coordinate communication, and it was still the most efficient way to communicate. (JA 253; JA 74-76, JA 404.)

**L. Freeny Emails Teachers and Administrators a List of the Top Four Scoring Teachers Which Does Not Include Jesse; Jesse Responds to Freeny, Requesting Her Evaluation Scores and Suggesting Reasons Why Her Score May Have Decreased**

On December 17, Freeny emailed all teachers announcing the four teachers who had the highest average student evaluation scores for the year. Jesse—who had been a top scoring teacher in August—was not on the list. (JA 253; JA 48-49, JA 151-153, JA 405.) Freeny stated that if teachers had questions or were curious about their scores, they should “feel free to drop by any time.” (JA 253; JA 405-406.)

Jesse was out on vacation the week of December 17. She nonetheless replied to Freeny in a December 18 email, requesting that Freeny send her evaluation scores to her by email since Jesse could not be at the school to discuss them. In the same email, Jesse noted that apparently her score had fallen and opined that any decrease in her score could be due to three different factors: (1) she taught two terms of a class in which more than 50 percent of the students spoke French, even though they had been promised more of a mixed class to immerse them in English,<sup>6</sup> and “[t]his demographic is very ‘complainsy’ about a lot of

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<sup>6</sup> As the record indicates, the optimal situation for students to learn English is to have the students in each class speaking a variety of languages so that they are forced to speak English as the common language when communicating with each other. A class with 50 percent speaking the same non-English language makes it more probable that the second common language will be utilized rather than

things,” (2) she should not have been given an A1-1 class instead of the A2-2 class she had taught in the past, and (3) she had too many students in her class. (JA 253-10; JA 407-408.)

**M. Freeny Forwards Jesse’s December 18 Email to Reilly and Reilly Forwards It to Conway; Conway Discusses Concerns About Jesse with Reilly and Academic Manager Parnes; Conway Decides That Jesse Should be Discharged and Instructs Reilly To Do So**

Freeny forwarded Jesse’s December 18 email to Reilly. Reilly, in turn, forwarded it to Conway. (JA 254, JA 126, JA 166.) Subsequently, Reilly and Conway discussed their concerns about Jesse. They discussed that Jesse continued to protest teaching the A2-1 class and that Jesse placed responsibility on her classroom demographic which she characterized as “complainy.” (JA 127-129, JA 210-211.)

Freeny also shared concerns about Jesse’s email with Academic Manager Parnes, and Parnes also spoke with Conway. (JA 178, 180-181.) Parnes and Conway discussed that Jesse’s scores had declined. Conway characterized Jesse’s comment that her classroom demographic was “complainy” as a slur against French people. (JA 166, JA 211-212.) After consulting with Parnes, Conway decided to discharge Jesse, and instructed Reilly to do so. (JA 130, JA 211-212.)

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English, thus failing to provide the student with immersion in English. (JA 253, n.12; JA 77-78.)

**N. Freeny Sends Jesse Her Evaluation Score; Reilly Discharges Jesse, Telling Her She Is Not a Good Fit, They Did Not Like Her Group Emails, and She Was Not a Corporate Citizen**

On December 20, Freeny responded by email to Jesse's December 18 email requesting her evaluation score. Freeny's email showed that Jesse had an annual evaluation score of 4.02 for 2013. Freeny also indicated that for weeks 41-50 of 2013—the most recent few months that Jesse had taught— Jesse's score was 4.0. (JA 254; JA 409.) At the hearing, however, Conway testified that Jesse's score for the most recent few months was actually 3.89 because Freeny had incorrectly calculated Jesse's score. (JA 254; JA 217, JA 411.)

Later on December 20, Reilly met with Jesse and discharged her. (JA 254; JA 79-80, JA 130.) Freeny was also present. (JA 254; JA 130.) Reilly told Jesse that “[y]ou're not a good fit, we didn't like the group emails, you're not a corporate citizen.” (JA 254-11; JA 79-80.)

**O. EF's Handbook Provisions Regarding Evaluations and Progressive Discipline**

EF's handbook entitled “Teacher Book” contains a description of the student survey evaluation system, and provides for a performance improvement plan when a teacher's evaluation falls below a 4.0:

For those full-time teachers with a score that has fallen below 4.0, we will provide observation, assistance, and coaching. Our goal is to support the development of our teachers. A performance improvement plan will be developed by the Academic Director for those teachers with continued low evaluation scores and classroom observations.

(JA 251; JA 513.)

Another of EF's handbooks, the "Teacher's Handbook," describes a progressive discipline system with at least one oral warning before a written warning is issued. If a written warning is issued, corrective action is set forth in the warning. The handbook also states that "some types of infractions [not enumerated] may result in immediate termination at this time." In addition, the handbook provides that prior to discharge, an employee is entitled to be informed of incorrect behavior through substandard performance through oral and written warnings unless the infraction is of a severe nature. (JA 257; JA 260, JA 283-284.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts and after considering the parties' exceptions, the Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge, that EF violated Section 8(a)(1) of the Act by threatening Jesse with unspecified reprisals and discharging her for engaging in protected concerted activities. (JA 245-247.) In finding that EF unlawfully threatened Jesse with unspecified reprisals, the Board rejected the claim that EF made in its exceptions that the threat allegations in the complaint should be barred because they were insufficiently related to the sole allegation in Jesse's charge that her discharge was unlawful. The Board found that EF waived that claim by failing to raise it in its answer to the complaint, or at the hearing, and, in

any event, that the threat allegations were closely related to the discharge allegation in the charge and thus were properly included in the amended complaint. (JA 245 n.2.)

In concluding that EF unlawfully discharged Jesse, the Board relied on the judge's analysis under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981). Under *Wright Line*, an employer violates the Act if the General Counsel establishes that protected concerted activity is a motivating factor in the discipline, unless the employer proves it would have taken the same action even in the absence of the protected activity. The Board found "inapplicable" the judge's alternative analysis under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). (JA 245 n.2.)<sup>7</sup> The Board rejected EF's contention that the judge erred by excluding some testimony from Parnes and Conway, finding that they both were able to, and did, testify regarding their motives for Jesse's discharge, and that EF's proffer of evidence was repetitive of other testimony on the issue. (JA 245 n.1.) Finally, the Board also upheld the judge's ruling to allow teacher Franklin to testify via videoconferencing technology, finding that the technology enabled observation of the witness at all

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<sup>7</sup> The Board applies *Burnup & Sims* if the conduct for which the employee is discharged is protected activity, and analyzes whether an employer had a good-faith belief that an employee engaged in unprotected misconduct during that otherwise protected conduct. *NLRB v. Burnup & Sims*, 379 U.S. at 23-24.

material times and therefore was not precluded by Board Rule 102.30. (JA 245 n.1.)

The Board's Order requires EF to cease and desist from engaging in 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 Board Order requires EF to offer Jesse full reinstatement to her former job or substantial equivalent. The Order also requires EF to make Jesse whole for any loss of earnings and benefits, and to post a remedial notice. (JA 245-247.)

### STANDARD OF REVIEW

This Court will uphold a decision of the Board if its findings are supported by substantial evidence. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). "Indeed, the Board is to be reversed

only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). This Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation omitted).

### **SUMMARY OF ARGUMENT**

1. Substantial evidence supports the Board’s finding that EF threatened Jesse with unspecified reprisals for protected concerted activity in violation of Section 8(a)(1) of the Act. Director Reilly warned Jesse not to speak on behalf of her colleagues or to send group emails shortly after she engaged in what was undisputedly protected concerted activity by raising issues to management concerning teachers’ terms and conditions of employment, both in person and in group emails. Well-settled law belies EF’s assertion that Director Reilly’s statements did not constitute threats because he did not intend them to be. Moreover, EF has waived its belated procedural argument that the threat allegations are not sufficiently closely related to the charge filed by Jesse. In any event, the allegations meet the closely related test because they involve the same legal theory as the charge allegation and arise from the same factual circumstances.

2. Substantial evidence also supports the Board's finding that EF followed through on its threats by discharging Jesse because of her protected concerted activity. EF both knew of, and displayed animus toward, her protected concerted activity, as manifested in its threats of unspecified reprisals for engaging in such activity. EF also provided new pretextual reasons for Jesse's discharge at the hearing, citing conduct that EF did not reference in Jesse's discharge meeting. Moreover, notwithstanding her tenure and pristine disciplinary record, EF did not give Jesse any warning or progressive discipline. Instead, EF discharged Jesse, and actually cited Jesse's protected concerted activity of sending group emails as a reason for her discharge. Thus, the Board reasonably found that EF could not establish that it would have discharged Jesse in the absence of her protected activity. In the alternative, the Board reasonably found that even if EF's reasons were not pretextual, they were insufficient to establish that EF would have fired Jesse absent her protected activity.

EF's challenges to the Board's findings are without merit. Its erroneous claim that the Board unlawfully "imputed" animus from Director Reilly to Conway and Parnes, the official decisionmakers for Jesse's discharge, ignores Reilly's significant input into Jesse's discharge. In addition, EF's claim that the Board improperly excluded evidence of Conway's and Parnes' "state of mind" is contrary to the record and the requirement that EF demonstrate prejudice.

3. The Board did not abuse its discretion in adopting the administrative law judge's ruling that permitted former-teacher Franklin to testify by videoconference from Madrid. That mode of obtaining her sworn testimony allowed the judge to assess demeanor, was undertaken with a number of safeguards and is not barred under the Board's rules. EF's assertion that the ruling was contrary to a Board case that disallowed the taking of testimony by telephone, does not mandate a different result. Moreover, EF failed to allege or show any prejudice resulting from the ruling, and its challenge therefore must be rejected.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EF VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING JESSE WITH UNSPECIFIED REPRISALS FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY**

#### **A. Applicable Principles**

Section 7 of the Act guarantees employees the right "to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. Under Section 7, employees may communicate with each other regarding wages and other terms and conditions of employment. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Section 8(a)(1) of the Act implements that right by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce,

employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

The test for whether an employer’s statement violates Section 8(a)(1) is whether, considering the totality of the circumstances, the employer’s statement reasonably tends to coerce or interfere with employees’ Section 7 rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). The employer’s statements “must be judged by their likely import to employees.” *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006). The critical inquiry is what employees could reasonably have inferred from the employer’s statements when viewed in context. *Id.*; *see Tasty Baking Co.*, 254 F.3d at 124-25 (statements that appear ambiguous in isolation can be ominous in context). Proof of actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Moreover, this Court “recognize[s] the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

**B. EF Unlawfully Threatened Jesse For Engaging in Protected Concerted Activity**

In direct response to Jesse’s advocacy regarding teachers’ terms and conditions of employment, Director Reilly warned Jesse not to speak on behalf of her colleagues or to send group emails. As shown below, the record evidence

amply supports the Board's consequent finding that EF unlawfully threatened Jesse on November 20 and December 16 with unspecified reprisals because of her protected concerted activity.

**1. Jesse engaged in protected concerted activity**

Substantial evidence overwhelmingly supports the Board's conclusion that Jesse engaged in extensive protected concerted activity. Jesse repeatedly highlighted collective concerns about terms and conditions of employment and sought to induce group action by her group emails of November 2 (regarding the relationship of full-time hours and evaluation scores to teacher healthcare and the meaning of being a good corporate citizen); November 4 (requesting that EF management meet with all teachers together because "[i]t's not about me. It's about us"); November 10 (stating that regarding healthcare, "sticking up for ALL teachers" was the best avenue for success); and November 17 (urging solidarity among teachers dissatisfied with the new schedules and noting that two teachers had lost a class). (JA 249-256; JA 319, JA 330, JA 325.) Jesse also spoke out on similar issues of concern at the November 13 group meeting with Conway and Reilly, where she additionally raised the issue of an administrative pay raise. Jesse's advocacy in the November 13 meeting even garnered thanks from her co-workers. (JA 252, JA 256, JA 105-106.) Moreover, Jesse insisted on meeting with Eto in the presence of Franklin on November 18 when they discussed why

teachers' hours, including Franklin's, had been reduced.<sup>8</sup> (JA 252; JA 63-66, JA 90-92, JA 146-148.)

As the Board found in analyzing the above evidence, "by sending group emails to her coworkers and speaking at employer meetings about various terms and conditions of employment such as eligibility for health insurance, a wage increase for 'administrative' pay, a 401(k) program, hiring of new teachers when existing teachers were willing to teach more additional hours, utilization of the student survey evaluation method to award classes, and requesting additional computers for teachers, Jesse was involved in protected, concerted activity with 20 or more coworkers." *See Beth Israel Hosp.*, 437 U.S. at 49 (employee discussions about terms and conditions of employment are protected under Section 7 of the Act); *see also Inova Health*, 795 F.3d at 81 (email raising concerns on behalf of a group of nurses constituted protected concerted activity and addressed matter relevant to "mutual aid or protection" by speaking about terms of employment affecting nurses); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195 (D.C. Cir. 2005) (describing protected activity to include bringing group complaint); *Cibao Meat Products*, 338 NLRB 934, 934-935 (2003), *enforced*, 84 Fed. App'x 155 (2d Cir. 2004) (employee speaking in presence of other employees regarding a change

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<sup>8</sup> The Board incorrectly states this happened on December 18. (JA 256.)

in employment terms affecting all employees engaged in protected, concerted activity).

EF admits (Br. 4, 8-11, 34) that prior to November 16, “before classes were consolidated and teachers reassigned, Jesse had engaged in activity protected under the Act.” (Br. 4). Moreover, EF does not contest the Board’s finding that Jesse engaged in protected concerted activity by sending her group email of November 17, which sought “to resolve assignments so that Franklin and Teixeira could increase their hours” and “noted [teachers’] success in getting another computer and an administrative pay raise.” (JA 258.) Nor does EF contest the Board’s finding that Jesse engaged in protected concerted activity on November 18 when she insisted on meeting Eto with Franklin rather than one-on-one. (JA 258.) Thus, EF has waived any challenges to these findings. Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party’s contention with citations to authorities and record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

EF’s sole challenge to the Board’s protected concerted activity finding is that the Board “failed to differentiate between conduct protected by the Act, *e.g.*, inquiries about employee benefits and request for pay raises and computers; and conduct that was indisputably not protected.” (Br. 28.) EF is simply wrong. As shown above, the Board painstakingly delineated Jesse’s protected concerted

activity. And it was this protected activity—consisting of her advocacy on behalf of her colleagues and her group emails—that precipitated EF’s November 20 and December 16 threats. Such evidence amply supports the Board’s finding that Jesse was engaged in protected concerted activity prior to EF’s threats.

## **2. EF Threatened Jesse For Engaging in Protected Concerted Activity**

Substantial evidence supports the Board’s findings that EF unlawfully threatened Jesse with unspecified reprisals for engaging in the protected concerted activity described above. Following Jesse’s series of emails and in-person meetings in which she questioned management about teacher pay, resources, healthcare, and teachers’ lack of knowledge about their evaluation scores, Jesse’s advocacy culminated in meetings with Eto and Reilly, along with teacher Franklin, to raise concerns about her fellow teachers’ hours being reduced under the newly-announced schedules. On November 20, just two days after Jesse and Franklin spoke to Eto and Reilly about this issue, and after Conway advised Reilly to speak to Jesse, Reilly told Jesse to “be careful about speaking on behalf of others.” (JA 252; JA 122-123.) Driving home the message, Reilly followed up that day in writing, emailing Jesse that, “I would caution you from speaking on behalf of colleagues.” (JA 253, JA 255; JA 70-71, JA 393.) Less than one month later, in response to one of Jesse’s many group emails, this time requesting more computer for teachers, Reilly warned Jesse that, as they had “discussed before,” she should

“come and speak with [management]” instead of “sending out a group email,” which he stated was “not a professional or effective way to resolve your concerns,” and warned her to “keep this in mind for the future.” (JA 253; JA 402.)

Given the above circumstances, the Board was eminently reasonable in construing Reilly’s statements cautioning Jesse against speaking on behalf of others and warning her to “keep in mind for the future” that group email was not “professional or effective” as threats that “if she continued to engage in protected, concerted activity of speaking on behalf of others and speaking to groups of employees about their terms and conditions of employment,” she would face unspecified reprisals. (JA 246; JA 402.) *See Santa Fe Tortilla Co.*, 360 NLRB No. 130, 2014 WL 2705194, at \*1 (2014) (unspecified reprisals violate the Act); *see also Ozburn-Hessey Logistics, LLC v. NLRB*, 2015 WL 3369876, at \*2 (D.C. Cir. May 1, 2015) (affirming Board’s finding that threats of unspecified reprisal violate [Section] 8(a)(1)).

EF mistakenly claims that Reilly did not threaten Jesse because his warning not to speak on behalf of colleagues “was prompted by a report that Jesse’s co-worker, Teixeira was upset that Jesse spoke up on her behalf.” (Br. 44.) But the test of interference, restraint, and coercion does not turn on the employer’s motive or on whether the coercion succeeded or failed; rather, the test is an objective one. *Joy Recovery Tech. Corp.*, 320 NLRB 356, 365 (1995), *enforced*, 134 F.3d 1307

(7th Cir. 1998). As shown, the critical inquiry is what employees could reasonably have inferred from the employer's statements when viewed in context.

*Progressive Elec., Inc. v. NLRB*, 453 F.3d at 544 (D.C. Cir. 2006), and cases cited at p. 29. Thus, as the Board found, Reilly's motivation is irrelevant to this finding. (JA 255.)

In addition, EF's analogy (Br. 43-44) to *Hyundai America Shipping Agency, Incorporated v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015) is misplaced. To be sure, in *Hyundai*, this Court found that a stand-alone work rule of general applicability telling employees to voice their complaints to management was, by itself, lawful. However, there was no allegation that the rule at issue in *Hyundai* was promulgated in response to protected activity. *Id.* at 314. Here, in sharp contrast, Reilly's statements were clearly prompted by Jesse's protected activity. Accordingly, EF has failed to overcome the Board's finding that given the context, Reilly's statements were unlawfully coercive.

**3. EF waived its claim that the threat allegations in the complaint were not closely related to the charge and, in any event, its claim is without merit**

EF fares no better in its belated procedural challenge (Br. 40-43) that the threat allegations in the complaint were not sufficiently "closely related" to Jesse's charge. As the Board found, and EF does not contest (Br. 41), it is well-settled that a party asserting such a defense under Section 10(b) of the Act (29 U.S.C. §

160(b)) must do so in its answer to the complaint or at the hearing. (JA 245 n.2, citing *Paul Mueller Co.*, 337 NLRB 764, 764-765 (2002) (requiring party to raise Section 10(b) as an affirmative defense)).<sup>9</sup> Although EF raised this claim to the Board in its exceptions to the judge's decision, it admits (Br. 41) that it failed to raise the issue at the requisite complaint or hearing stage.

EF's only defense (Br. 41-42) against the Board's consequent waiver finding (JA 245, n.2) is that that it "had no occasion to object" to the threat allegations at the hearing because the judge stated that the case would be analyzed as a "standard *Wright Line* discharge." (Br. 41) (*See* JA 30). But the complaint itself put EF on notice that the threat allegations would be at issue, as did the General Counsel's opening statement, which just moments before referenced the threat allegations. (JA 28.) Indeed, counsel for EF was well aware of the threat allegations being at issue, as he alleged in his own opening statement that not only was there no discipline, but also that "there were no threats." (JA 29.)<sup>10</sup>

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<sup>9</sup> The Board, with this Court's approval, has construed Section 10(b) of the Act to allow a complaint to allege matters not explicitly set forth in a charge so long as those matters are "closely related" to the charge. *See Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1021 (D.C. Cir. 1995) (approving Board's "closely related test as "a permissible construction of Section 10(b) [of the Act]").

<sup>10</sup> Thus, EF's citation (Br. 41) to *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23 (D.C. Cir. 2015), is unavailing. In *Bruce Packing*, the complaint did not allege the relevant violation, and the General Counsel did not move to amend the complaint until the close of the hearing. Here, the complaint alleged the violations from the beginning. Moreover, EF has not alleged—let alone demonstrated—that it was

EF's related assertion (Br. 41) that the judge's statement regarding *Wright Line* amounted to "the parties agre[eing] at the hearing that the [only] claim to be tried was whether Jesse's discharge violated the Act under *Wright Line*," is simply untrue. In context, the judge's statement was not an exclusive statement ruling out the litigation of the other complaint allegations of unlawful threats, but instead a comment meant to contrast the discharge analysis (under the *Wright Line* framework) from the analytic paradigm of *Atlantic Steel*, 245 NLRB 814 (1979) (analyzing whether protected activity lost protection of the Act). (See JA 30-31.) Accordingly, EF has provided no grounds to disturb the Board's finding that it waived its "closely related" defense by raising it too late under the Board's procedures. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), quoted in *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

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unable to fully and fairly litigate the threat allegations. See *Pergament United Sales v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990) (no due process violation where uncharged violations were fully and fairly litigated).

In any event, the Board reasonably found that the threat allegations in the complaint were closely related to the discharge allegation in the charge. (JA 245 n.2.) To determine whether a complaint allegation is closely related to a charge allegation, the Board examines whether the complaint allegation (1) involves the same legal theory as the charge allegation and (2) arises from the same factual circumstances or series of events as the charge allegation, and (3) “may look” at whether a respondent would raise similar defenses as to the charge allegation. *Redd-I Inc.*, 290 NLRB 1115, 1118 (1988); *see also Drug Plastics*, 44 F.3d at 1021.

Considering the above factors, the Board concluded that the Section 8(a)(1) threats in the complaint and the Section 8(a)(1) discharge in the charge concern the same general legal issues (indeed, both implicate Section 8(a)(1)), stem from the same sequence of events, and involve the same actors.<sup>11</sup> (JA 245 n.2, citing *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, 2014 WL 7246753 at \*2 (2014)). Although EF protests that its defenses to the allegations would be different (Br. 43), such was also the case in *Alternative Energy*, where the Board

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<sup>11</sup> EF’s claim that the same actors were not involved because Reilly made the threats but Conway and Parnes decided to discharge Jesse is unavailing. As discussed above at p. 33, Reilly consulted with Conway just before he made his threats to Jesse not to speak on behalf of others, and as discussed below at p. 44, Reilly was intimately involved in Jesse’s discharge: forwarding Conway the email that immediately preceded Jesse’s discharge, speaking to Conway just before Conway decided to discharge Jesse, and informing Jesse that she was being discharged for, in part, her “group emails.”

made the statement, equally applicable here, that “this third factor is outweighed by the others.” *Alternative Energy*, 2014 WL 7246753 at \*2. In sum, EF has provided neither substantive nor procedural grounds to disturb the Board’s finding that EF unlawfully threatened Jesse with unspecified reprisals for engaging in protected concerted activity.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT EF VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING JESSE FOR HER PROTECTED CONCERTED ACTIVITY**

EF discharged Jesse, one of its longest-tenured teachers and an indisputably outspoken advocate regarding teachers’ terms and conditions of employment, within days of Director Reilly’s threat that Jesse should not send any more group emails, and only one month after he cautioned her against speaking on behalf of her colleagues. At the hearing, EF purported to rely on Jesse’s student evaluation scores, her complaints about teaching the A2-1 class, and her comment that her classroom demographic was “complainy.” However, the credited evidence establishes that EF cited none of these reasons when it discharged Jesse. Instead, it explicitly referenced its dislike of her group emails. Moreover, it failed to follow its own policies and gave her no warning nor progressive discipline. In the alternative, the Board found that even if EF’s new reasons for discharging Jesse that it provided at hearing were not pretextual, they nonetheless would fail to establish that EF would have discharged Jesse for those reasons absent her

protected concerted activity. As we now show, substantial evidence supports the Board's findings, and EF's challenges are wholly without merit.

### **A. Applicable Principles**

As shown at p. 28, Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of their mutual aid or protection, and Section 8(a)(1) of the Act protects these rights by making it unlawful for an employer to interfere with those rights. In *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), the Supreme Court approved the Board test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, which the Board applied here, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of protected activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 395; *Bally's Park Place Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). If the lawful reasons advanced by the employer for its actions were a pretext—that is, if the reasons either did not exist or were not in fact relied upon—the employer's burden has not been met, and the inquiry is logically at an

end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *see Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230-32 (D.C. Cir. 1995).<sup>12</sup>

Unlawful motivation can be inferred through both circumstantial and direct evidence. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). As this Court recognizes, “[d]rawing such inferences from the evidence to assess an employer’s [] motive invokes the expertise of the Board, and consequently, the court gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive.” *Laro*, 56 F.3d at 229 (internal quotations marks omitted); *see also Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (this Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial”).

Evidence of unlawful motivation includes the employer’s knowledge of protected activity, *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001), hostility toward protected conduct, including by the commission of other unfair labor practices, *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), the timing of the

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<sup>12</sup> As EF acknowledges (Br. 28), the Board applied *Wright Line* after rejecting the judge’s *Burnup & Sims* analysis. (JA 245 n.2). Accordingly, EF’s challenge (Br. 25-29) to the judge’s *Burnup & Sims* analysis is irrelevant.

adverse action, *Tasty Baking Co.*, 254 F.3d at 126; *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), disparate treatment of employees, *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993), and the pretextual nature of the employer's justification. A finding of pretext may support an inference of unlawful motive. *Fort Dearborn Co. v. NLRB*, \_\_ F. 3d \_\_, 2016 WL 1425870 at \*7 (D.C. Cir. April 12, 2016).

**B. Jesse's Protected Concerted Activity Was a Motivating Factor in Her Discharge and EF's Reasons for Discharging Jesse Were Pretextual**

**1. EF knew of Jesse's protected concerted activity and amply demonstrated its animus**

As discussed above at pp. 29-31, Jesse engaged in extensive protected concerted activity throughout November and December of 2013. The Board further found, and EF does not contest, that EF had "full knowledge" of her protected conduct. (JA 255). At least one management official was copied on each of her group emails in November and December, and Conway and Reilly attended the November 13 meeting in which Jesse raised group concerns about terms and condition of employment. Moreover, Jesse and Franklin met with Eto, and then with Reilly, on November 18 to discuss the reduced hours in the teachers' schedules and the relationship between assigned hours and evaluation scores. Following those meetings, Reilly demonstrated his awareness of Jesse's protected concerted activity by stating that he knew she had been "looking out for" her

colleagues. (JA 253; JA 70-71, JA 393). Because EF has not challenged the Board's knowledge finding before this Court, it has waived any such challenge. Fed. R. App. P. 28(a)(8)(A); *Sitka Sound Seafoods*, 206 F.3d at 1181.

Substantial evidence also supports the Board's finding that EF displayed animus toward Jesse's protected concerted activity. (JA 256.) As the Board found, Director Reilly's threats on November 20 "cautioning [Jesse] not to speak in support of her colleagues" and on December 16 "not to send group emails about terms and conditions of employment" clearly demonstrate animus toward her protected concerted activity. (JA 256.) *See Inova Health*, 795 F.3d at 82 (official's anger that employee acted as "spokesperson" for group of employees and had sent a group email rather than having individually discussed issues with a supervisor demonstrated animus); *cf. N. Wire Corp. v. NLRB*, 887 F.2d 1313, 1318-19 (7th Cir. 1989) ("comments made by company officials demonstrating a 'manifest hostility' toward union activity are relevant to determining discriminatory motive"). The Board's finding that Reilly's statements themselves constituted unlawful threats further supports the Board's animus finding. *Vincent Indus. Plastics*, 209 F.3d at 735 (commission of unfair labor practices supports animus finding). EF made good on its threats just four days later when it discharged Jesse. *See Tasty Baking Co.*, 254 F.3d at 126 (suspicious timing can demonstrate animus). Indeed, in the discharge meeting, Reilly told Jesse that EF

“didn’t like the group emails.” Such evidence amply supports the Board’s finding of animus.

EF erroneously claims (Br. 32-34) that the Board improperly “imputed” animus toward Jesse’s protected concerted activity to decisionmaker Conway and Parnes. But the Board did not improperly “impute” animus to them. Instead, as this Court recently held in *Inova Health*, 795 F.3d 68, the Board was “eminently reasonable” in relying on the animus held by “high-level” manager (Director Reilly) who was “directly and intimately involved” in the events leading to the discharge, though the ultimate decision to discharge was made by others (Conway and Parnes). *Id.* at 83.

Indeed, as the Board recognized, Director Reilly was responsible for forwarding Jesse’s December 18 email—which EF claims set Jesse’s discharge in motion—to Conway, and thereafter had a conversation with Conway about Jesse prior to Conway’s decision, along with Parnes, to discharge Jesse. (JA 254.) In addition, Reilly himself was the official tasked by Conway with actually discharging Jesse, and as noted above, told Jesse while discharging her that “we didn’t like the group emails”—the very conduct over which Reilly had unlawfully threatened her. Accordingly, even without a direct evidence of animus held by ultimate decisionmakers, “there is substantial circumstantial evidence that [the

employer]’s antiunion animus motivated the decision to discharge [the employee].”

*See Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 714 (7th Cir. 2015).

EF’s heavy reliance on *Flagstaff Medical Center, Incorporated. v. NLRB*, 715 F.3d 928 (D.C. Cir. 2013), is unavailing. Contrary to EF (Br. 33), this Court in *Inova* rejected an interpretation of *Flagstaff* and related cases as “requir[ing] a finding that the final decisionmaker must independently have knowledge of and animus toward the protected activity.” 795 F.3d at 83. Instead, this Court held in *Inova* that *Flagstaff* stands for the “much narrower proposition that the Board must actually prove that a low-level supervisor had animus, and that the low-level supervisor played some material role in the eventual discharge.” *Id.* at 83-84. Here, of course, Reilly was a high-level supervisor who also played a material role in Jesse’s discharge.

EF also misguidedly cites (Br. 34) *Flagstaff* for the proposition that “circumstantial evidence and legal fictions” may not “trump direct proof” that Conway (and Parnes) lacked animus. *Flagstaff*, 715 F.3d at 935. But unlike in *Flagstaff*, there is no direct proof that Conway and Parnes lacked such animus. Contrary to EF’s claim (Br. 34-35), Conway’s responsiveness to some of Jesse’s concerns during the November 13 meeting, and failure to immediately discipline her for raising those issues, is a far cry from “uncontroverted evidence” that

“defeats any notion that Conway (or Parnes) acted with animus.”<sup>13</sup> EF has thus failed to assail the Board’s reasonable findings (JA 256) that the General Counsel established the requisite showing of motive under *Wright Line*.

## 2. EF’s Reasons for Discharging Jesse Were Pretextual

Substantial evidence supports the Board’s additional finding that EF advanced pretextual reasons for Jesse’s discharge. As an initial matter, as the Board found, and EF does not challenge, such a finding of pretext “not only leaves intact the inference of unlawful motivation established by the General Counsel,” but it also demonstrates that EF “fails by definition” to establish its affirmative defense that it would have discharged Jesse even absent her protected conduct. (JA 257). *See Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced*, 705 F.2d 799 (6th Cir. 1982); *cf. U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “buttresses the . . . affirmative evidence of discrimination” as well as “dooms [employer’s] defense”), *enforced mem.*, 255 F.Appx 527 (D.C. Cir. 2007).

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<sup>13</sup> EF’s assertion (Br. 34-35) that Conway welcomed Jesse’s advocacy with open arms ignores the record evidence that Conway had a markedly negative reaction to Jesse’s questions in the November 13 meeting regarding a raise in teachers’ administrative pay, an unquestionable term and condition of employment. *See* JA 44 (Jesse’s testimony that Conway appeared “angry” after Jesse answered Conway’s question, “[w]hat do you think [the administrative rate] should be, Andrea?” with a remark that teachers should receive the same administrative pay rate as Eto and Ramos); JA 105 (Teixeira’s testimony that Conway “seemed irritated” by Jesse’s remark); JA 202-203 (Conway’s own testimony that she found Jesse’s remark to be “unprofessional”).

The credited evidence simply belies EF's assertion (Br. 39) that it discharged Jesse for her 2013 evaluation score, her reference to her classroom demographic as "complainy," and her reluctance to teach A2-1 instead of A2-2. As the Board found, and EF does not challenge, it did not cite any of these reasons when it discharged Jesse. (JA 257.) Indeed, based on an unchallenged credibility finding, the Board found that the only reasons Director Reilly gave Jesse at the time of her discharge were that she was "not a good fit," EF did not "like the group emails," and she was "not a corporate citizen." (JA 254-255; JA 79-80). This alone supports a finding of pretext. *See Property Resources Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (employer's actions contradicting avowed reason for discharge is evidence of pretext).

Moreover, EF's reasons for discharging Jesse do not comport with its own policies. As the Board found, based on the credited evidence, including EF's own "Teacher Book," low student evaluation scores are not grounds for discharge. (JA 251, JA 257; JA 513). Conway stated as much in the November 13 meeting, telling teachers not to "panic" over their scores, that management would help teachers "bring them back up" if necessary, and that they would not lead to a teacher's discharge. (JA 251; JA 47, JA 139, JA 205, JA 215, JA 513.) The credited evidence also undermines EF's claim that Jesse's December 18 email comment that her classroom demographic was "complainy" caused her discharge.

As the Board explained, contrary to its Teacher Handbook, EF did not follow its progressive discipline policy regarding Jesse's comment. Indeed, EF discharged Jesse—a long-term teacher who had never previously been disciplined—without warning or even explaining that it found her comment troubling much less worthy of discharge. (JA 257; JA 454-472.)<sup>14</sup> Nor did EF warn Jesse that her complaints about teaching the A2-1 class could lead to discharge. (JA 257.) Accordingly, the Board reasonably concluded that EF's reasons for discharging Jesse were pretextual because they "were not articulated at the time of the discharge and because [EF] did not counsel or warn Jesse about these behaviors," and therefore that EF necessarily failed to show that it "would have taken the same action" absent her protected conduct. (JA 257.)

**C. EF Failed To Establish That It Would Have Discharged Jesse Absent Her Protected Conduct**

The Board reasonably found (JA 257-258) that, even if EF's reasons for discharging Jesse were not pretextual, they nonetheless would be insufficient to satisfy EF's burden. *See Wright Line*, 251 NLRB at 1089 (once General Counsel demonstrates protected conduct motivated employer's action, employer can only

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<sup>14</sup> EF's attempt (Br. 36-37) to shoehorn Jesse's comment into grounds for immediate termination under the handbook's proscription against "harassment" is unavailing. To the contrary, Jesse made the isolated comment only in a private email to Freeny and in the context of explaining that the students had expected to have more non-French students in the class so that they could be better immersed in English.

avoid liability by proving that it would have taken the same action even in the absence of the protected activity). As shown below, EF has not demonstrated, as it must, that it would have discharged Jesse for the three reasons that it now asserts, rather than for her protected activity, including the group emails cited at the time of her discharge.

As shown at p. 47, EF does not contest that the record is replete with evidence that Jesse's 2013 student evaluation score, alone, did not warrant discharge. As the Board noted, whether Jesse's score declined during her last few months teaching or not—and the evidence is far from clear—EF's policy was to “counsel” a teacher with a low evaluation. Indeed, the Board correctly noted that Jesse's annual student evaluation score, which according to Freeny was 4.02, “met [EF's] criteria if not their expectation.” (JA 251, JA 31; JA 205, JA 405.)

Even Jesse's evaluation score in combination with her comment about her classroom demographic being “complainsy” and her reluctance to teach A2-1 do not establish that EF would have discharged Jesse absent her extensive protected conduct. As the Board found, while it is “possible to categorize” Jesse's statement as “an ethnic slur,” as EF urges (Br. 35-38), EF did not demonstrate that Jesse's “single, isolated comment” nonetheless warranted her discharge. (JA 257-258). Notwithstanding EF's references (Br. 36-37) to its international mission and state civil rights laws, it remains the case that EF cited neither of these reasons when it

discharged Jesse. Instead, Director Reilly referenced Jesse's group emails, which made up a substantial portion of her protected concerted activity. And as the Board found, "given [EF]'s progressive disciplinary system and Jesse's tenure at the school," her remark does not establish that she would have been discharged had she not engaged in protected concerted activity.<sup>15</sup>

In addition, despite EF's rank speculation (Br. 38-39) that Jesse "let her disgruntlement" over teaching A2-1 affect her job performance, it never warned Jesse that her complaints about teaching A2-1—either by themselves or in conjunction with her allegedly declining evaluation scores—would lead to her discharge. Nor does EF dispute the Board's finding—because it cannot—that Jesse kept the class and ultimately taught it as directed. (JA 258; JA 54).

Finally, the above application of *Wright Line*'s dual motive analysis belies EF's assertion (Br. 28) that the Board "failed to differentiate between" Jesse's protected concerted activity and what EF refers to as "unprotected activity," *i.e.* Jesse's individual complaint about having to teach the A2-1 class and the other

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<sup>15</sup> EF cites (Br. 25) to *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 425 (D.C. Cir. 2012), apparently suggesting that it had a good-faith belief that Jesse engaged in misconduct, and that such a belief could meet its *Wright Line* burden. Setting aside whether the record supports EF's purported "good faith belief," this Court recently held that "good faith belief is of little aid to an employer where the discipline imposed by the company departs from its policy or practice." *Fort Dearborn Co.*, 2016 WL 1425870 at \*7-\*8 (holding that *Sutter East Bay* provides "no safe harbor" under such circumstances). As shown above at pp. 47-50, EF failed to follow its own policies.

statements in her December 18 email. Regarding Jesse's discharge, the Board concluded that EF was unlawfully motivated by Jesse's protected concerted activity (as shown at pp. 42-46), and failed to demonstrate that it would have discharged her for the "unprotected" conduct that it now claims caused her discharge.

**D. EF Failed To Demonstrate That the Board Abused Its Discretion by Excluding "State of Mind" Testimony From Conway and Parnes**

The Board's adoption of an administrative law judge's evidentiary rulings is reviewed for abuse of discretion. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same). The party challenging such rulings must prove prejudice. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67, 70-74 (D.C. Cir. 2015) (alleged procedural missteps did not result in prejudice); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from judge's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer "failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing"). In claiming (Br. 29-32) that its "state of mind" evidence from Conway and Parnes was improperly excluded, EF has shown neither abuse of discretion nor prejudice.

EF's claim (Br. 29-32) apparently rests on a ruling by the judge during Parnes' testimony. Counsel for EF asked Parnes what her reaction was to Jesse's November 18 email containing the comment about her classroom demographic and the statement that Jesse had not wanted to teach the A2-1 class. (JA 178; JA 405.) Counsel for the General Counsel objected, and the judge sustained the objection, stating, "what we want is what was said and what was done." (JA 178-179.) As the Board explained (JA 245 n.1), the judge then allowed EF's counsel to present "an offer of proof" on what the judge deemed "subjective state of mind." (JA 179.) Counsel again asked Parnes for her reaction to the email, and she replied, "I was disappointed to see that there was still so much frustration going on, and I also sort of felt like we had—could have reached an end point with these discussions with Ms. Jesse." (JA 179.) Parnes elaborated that she meant that "these discussions" were "in reference to the classes she was teaching" and "her evaluation scores," and stated that she felt that she could not give Jesse praise or criticism. (JA 179.) The offer of proof then ended. Later, in testimony admitted by the judge, Parnes discussed the reasons that both she and Conway claimed were the reasons for discharging Jesse: her evaluation score, her complaints about teaching the A2-1 class, and her comment about her classroom demographic. (JA 179-190.) As the Board recognized (JA 245 n.1), Parnes' proffer "consisted of

answers that are repetitive” of Parnes’ admitted testimony. (JA 181-185.) Indeed, Conway also testified to the same reasons for discharging Jesse. (JA 210-212.)

On the above record, EF’s hyperbolic assertion that both Parnes and Conway were “precluded from offering testimony regarding the most important issue in the case: the thought processes of the EF decision-makers who decided to terminate Jesse” is demonstrably incorrect. As an initial matter, as the Board pointed out (JA 245 n.1), EF never asked to question Conway about her subjective reaction to the November 18 email. Thus, EF is wrong (Br. 29-32) that the Board ever “excluded” any testimony from Conway.<sup>16</sup> Moreover, as the Board correctly observed, “Conway and Parnes were able to, and did, testify regarding what they said and did in reaction to Jesse’s December 18 email.” (JA 245 n.1.) Thus, EF has not shown that the Board erred in excluding Parnes’ proffered testimony.

In any event, EF has failed to demonstrate that it suffered the requisite prejudice. As the Board reasonably found, after examining the proffer and the evidence extensively set forth above, Parnes’ testimony fails to show that EF would have discharged Jesse regardless of her protected activity. (JA 245 n.1). *Salem Hosp.*, 808 F.3d at 68 (no showing of prejudice where record does not indicate that employer sought to introduce relevant, non-cumulative evidence).

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<sup>16</sup> Nor can EF claim that the judge’s rejection of the proffer caused EF not to question Conway on that issue. Given that the judge allowed EF to preserve the objection by presenting the proffer for Parnes, EF has not demonstrated that it would have been futile for it to make such a proffer for Conway.

Finally, the cases relied on by EF (Br. 29-32) are not to the contrary. Unlike here, those cases either involve the complete exclusion of testimony as to a critical issue of motive, the exclusion of relevant and non-cumulative evidence, or they otherwise unremarkably indicate that decisionmakers should testify as to their rationale, as Conway and Parnes did here. *See e.g., Belle of Sioux City*, 333 NLRB 98 (2001) (complete exclusion as to critical issue of motive); *Pittsburgh & New Eng. Trucking Co. v. NLRB*, 643 F.2d 175, 177-78 (4th Cir. 1981) (same);<sup>17</sup> *Ozark Auto. Distribs., Inc. v. NLRB*, 779 F.3d 576, 584 (D.C. Cir. 2015) (evidence offered was relevant and non-cumulative); *Guarantee Sav. & Loan*, 274 NLRB 676, 679 (1985) (decisionmakers should testify to rationale). Thus, EF's evidentiary challenge provides no grounds to disturb the Board's finding that EF was unlawfully motivated in its discharge of Jesse.

### **III. THE BOARD'S DECISION TO ALLOW GALIN FRANKLIN TO TESTIFY VIA VIDEOCONFERENCE WAS NOT AN ABUSE OF DISCRETION**

The Board upheld the judge's decision to allow Franklin to testify via teleconference from Madrid, Spain, where he lived and worked at the time of the

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<sup>17</sup> EF also asserts (Br. 32) that *Pittsburgh* supports the proposition that EF's proffer "did not cure the prejudice." The Board, however, did not find that the proffer cured the prejudice; rather, it found (JA 245 n.1) that the proffer constituted evidence of what EF would have put on the record from Parnes if allowed to do so, and it did not consist of any non-cumulative evidence that had not already been admitted. In contrast, the proffer in *Pittsburgh* directly rebutted the key issue of motive, an issue for which no other evidence in support of the proffering party had been admitted. *Pittsburgh*, 643 F.2d at 178.

San Francisco hearing, finding that the use of videoconferencing technology for taking his testimony did not deny EF due process. (JA 245 n.1, 3-4, JA 18.) As shown below, in allowing this testimony to proceed with appropriate safeguards, the judge was fully able to observe Franklin's demeanor, and found that Franklin's testimony "was as spontaneous as live testimony." (JA 249.) Such testimony in these circumstances was neither contrary to the Board's rules nor the Board's decision in *Westside Painting*, 328 NLRB 796 (1999), which disallowed telephone testimony that did not allow observation of the witness. In any event, EF has once again failed to demonstrate that it suffered the requisite prejudice from the Board's ruling.

In allowing the testimony to proceed by videoconference, Associate Chief Judge Etchingham set forth extensive safeguards, strictly adhered to by Judge Cracraft at the hearing, that fully enabled Judge Cracraft to observe Franklin's demeanor to determine the veracity of his testimony. (JA 245 n.1, JA 248, JA 20). These safeguards included having a representative for EF present with the witness in Madrid to observe the proceedings, requiring the exchange of exhibits in advance of the video testimony, requiring the reporter and all participants to be able to hear all speakers, having adjustable cameras in both locations to provide a close-up view of counsel and the witness and a panoramic view of the entire room, and having video technicians present in both locations to attend immediately to any

technical difficulties. (JA 248, JA 20.) Indeed, the quality of the video transmission was “flawless,” allowing Judge Cracraft to observe the witness’s demeanor; “any hesitation, discomfort, arrogance, or defiance would have been easily discerned.” (JA 248.)

Relying on *Westside Painting*, 328 NLRB 796 (1999), EF contends (Br. 44, 45-47) that the Board’s decision to allow Franklin’s testimony via videoconference was a “[departure] from established precedent without reasoned justification.” To the contrary, as the Board noted, Board Rule 102.30 (29 C.F.R. § 102.30) does not preclude the taking of oral testimony by videoconference. (JA 245 n.1.) That provision merely provides, in relevant part, that “[w]itnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.” 29 C.F.R. §102.30.

Moreover, in *Westside Painting*, the Board interpreted Rule 102.30 to disallow testimony to be taken via telephone primarily based on the fact that telephonic testimony does not “enable[] the judge to *observe the demeanor of the witness* to determine the witnesses’ veracity.” *Westside Painting*, 328 NLRB at 797 (emphasis added). Additionally, because the witness is not visible to the judge or opposing counsel, the Board stated that “a witness testifying by telephone may be reading from a prepared statement or may have other documents before him of which an opposing party is entirely unaware . . . there could even be another

individual standing by the side of the telephone witness influencing his testimony,” *Id.* (internal quotation marks omitted). As shown above, no such concerns existed here. Accordingly, EF has failed to demonstrate that the Board abused its discretion in adopting the judge’s decision to allow Franklin to testify by videoconference.<sup>18</sup>

In any event, EF’s challenge that the Board denied it due process cannot succeed unless EF can demonstrate that “prejudice resulted from” the Board’s alleged failure. *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996), and cases cited at p. 51. EF’s bald assertion (Br. 47) that the judge relied on Franklin’s testimony does not articulate a single specific example demonstrating how, if at all, Franklin’s testimony being taken by videoconference prejudiced its case. EF was allowed to fully observe and question Franklin. For these reasons, the Court should deny EF’s challenge to the judge’s ruling.

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<sup>18</sup> The non-Board cases cited by EF (Br. 46-47) to claim that there was “no compelling reason” for Franklin not to attend the hearing in person are not controlling and ignore Judge Cracraft’s finding that Franklin, who lived in Spain, had no plans to return to the United States. (JA 247.)

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying EF's petition for review and enforcing the Board's Order in full.

Respectfully submitted

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/s/ Heather S. Beard

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May 2016

# **ADDENDUM**

## STATUTORY ADDENDUM

### Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq.:

#### **Section 7 of the Act (29 U.S.C. § 157):**

Sec. 7. [§ 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 of 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) [section 158(a)(3) of this title].

#### **Section 8(a)(1) of the Act (29 USC § 158(a)(1):**

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] 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 [section 157 of this title];

#### **Section 10(a) of the Act (29 USC § 160(a):**

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) 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: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

#### **Section 10(b) of the Act (29 USC § 160(b):**

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts

of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

**Section 10(e) and (f) of the Act (29 USC § 160(e) & (f)):**

(e) [Petition to court for enforcement of order; proceedings; review of judgment] 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 section 2112 of title 28, United States Code [section 2112 of title 28]. 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] 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 [section 2112 of title 28]. 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.

**Board Rule 102.30 (29 CFR § 102.30)**

WITNESSES, DEPOSITIONS, AND SUBPOENAS § 102.30 Examination of witnesses; deposition. Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition. (a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the

hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to §102.45 or §102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge. (b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. (c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered or certified mail to the regional director or the administrative law judge, care of the chief administrative law judge in Washington, DC, the associate chief judge, in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be. (d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof. (e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained. (f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions. (National Labor Relations Act approved July 5, 1935, 49 Stat. 449; 29 U.S.C. 151–166, as amended by Act of June 23, 1947 (61 Stat. 136; 29 U.S.C. Sup. 151–167), Act of Oct. 22, 1951 (65 Stat. 601; 29 U.S.C. 158, 159, 168), Act of Sept. 14, 1959 (73 Stat. 519; 29 U.S.C. 141–168), and Act of July 26, 1974 (88 Stat. 395–397; 29 U.S.C. 152, 158, 169, 183)) [24 FR 9102, Nov. 7, 1959, as amended at 45 FR 37425, June 3, 1980; 45 FR 51193, Aug. 1, 1980; 62 FR 1668, Jan. 13, 1997]

## **REGULATIONS:**

### **Federal Rule of Appellate Procedure 28(a)(8)(A):**

#### Rule 28. Briefs:

- (a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:
  - (8) the argument, which must contain:
    - (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

**UNITED STATES COURT OF APPEALS  
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	*	15-1419
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	20-CA-120999
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,765 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 16th day of May, 2016

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Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 2016, I electronically filed the foregoing document 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 that the 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:

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Dated at Washington, DC  
this 16th day of May, 2016