

No. 15-60848

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

**ALCOA, INCORPORATED;
ALCOA COMMERCIAL WINDOWS, L.L.C.,
doing business as TRACO, a single employer**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the Board's application of its reasonable interpretation of the Act to straightforward facts. Accordingly, the Board believes that the case may be decided on the briefs. However, if the Court believes that oral argument would be of assistance, the Board respectfully requests to participate and submits that 10 minutes per side would be sufficient.

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STATEMENT OF JURISDICTION

This case is before the Court on a petition filed by Alcoa, Inc. (“Alcoa”) and Alcoa Commercial Windows, LLC d/b/a TRACO (“Traco”) (collectively, “the Companies”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Companies. The Board’s Decision and Order issued on November 16, 2015, and is reported at 363

NLRB No. 39. (ROA.1146-62.)¹ In its decision, the Board found that the Companies violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(1)) (“the Act” or “the NLRA”), by refusing to allow a few Alcoa, Inc. employees to distribute union-related literature to fellow employees in the parking lots and exterior areas of the Traco facility, and by engaging in surveillance of employees’ union activities. (ROA.1156-60.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. Although the unfair labor practices here occurred in Cranberry Township, Pennsylvania, this Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and venue is proper because the Companies transact business in this judicial circuit. The Board’s Order is final with respect to all parties.

The Companies filed their petition for review on December 3, 2015. The Board filed its cross-application for enforcement on January 21, 2016. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders. The United Steel, Paper and Forestry, Rubber,

¹ “ROA” refers to the administrative record filed with the Court on January 14, 2016. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Companies’ opening brief.

Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“the Union”) has intervened on the side of the Board in this proceeding.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether substantial evidence supports the Board’s finding that Alcoa and Traco are a single employer under the Act and therefore violated Section 8(a)(1) of the Act by refusing to allow off-site Alcoa employees to distribute union-related literature in the parking lots and exterior nonworking areas of the Traco facility.

(2) Whether the Board is entitled to summary enforcement of the portions of its Order corresponding to the now uncontested finding that the Companies engaged in unlawful surveillance of employees’ union activities.

STATEMENT OF THE CASE

After investigation of a charge filed by the Union, the Board’s Acting General Counsel issued a complaint alleging that Alcoa and Traco are a single employer and therefore violated Section 8(a)(1) of the Act by denying off-site Alcoa employees access to the Traco facility for purposes of distributing union organizational leaflets.² The complaint also alleged, in relevant part, that the

² General Counsel Richard F. Griffin ratified the issuance and continued prosecution of the complaint on October 5, 2015. (ROA.1146 n.1.)

Companies violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities. Following a hearing, an administrative law judge issued a decision and recommended order finding that the Companies constituted a single employer and had violated the Act in the above respects.³ After considering the Companies' exceptions, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a decision affirming the judge's unfair labor practice findings and adopting his recommended order. The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Alcoa Purchases Traco Through a Wholly-Owned Subsidiary and Integrates Traco into Its Business

Alcoa is a large multinational corporation that mines bauxite and manufactures related aluminum products. (ROA.1148; ROA.367, 396.) It is the sole owner of Reynolds Metals Company, which in turn formed Alcoa Commercial Windows, LLC. (ROA.1148; ROA.854.) Around July 30, 2010, Alcoa Commercial Windows, LLC purchased an ongoing, non-unionized window and door manufacturing business, Three Rivers Aluminum Company d/b/a TRACO, located in Cranberry Township, Pennsylvania. (ROA.1148; ROA.854.) Following

³ The judge's dismissal of an additional complaint allegation, that the Companies unlawfully promulgated and maintained an overly broad solicitation and distribution policy, is not before the Court. (ROA.1146 n.2, 1160-61.)

the purchase, the formal name of that business changed from Three Rivers Aluminum Company d/b/a TRACO to Alcoa Commercial Windows, LLC d/b/a TRACO. (ROA.1148; ROA.218-19, 388, 854.)

Alcoa added Traco to its Building and Construction Systems (“BCS”) business unit, a grouping of Alcoa-owned businesses providing products and services for the construction market. (ROA.1152; ROA.225, 305-09, 854.) Traco particularly became a part of the North American segment of BCS, which is managed by Kawneer Company, Inc., a wholly-owned subsidiary of Alumax, Inc., which in turn is a wholly-owned subsidiary of Alcoa. (ROA.1152; ROA.305-09, 854.)

In a press release announcing some of these changes to its organization, Alcoa stated that the president of BCS, Glen Morrison, “will oversee the [newly acquired Traco] business.” (ROA.1152; ROA.831.) The press release further quoted Morrison’s views on the acquisition:

The Traco portfolio of products and commitment to quality customer service dovetails with Alcoa’s focus on customers. Through this combination we see many opportunities to grow our collective business through better service, more comprehensive product offerings and greater efficiency.

(ROA.1152; ROA.831.)

True to the plan of “combination,” Alcoa thereafter transferred its production of windows and window frames at other facilities to the Traco facility

in Cranberry Township, Pennsylvania. (ROA.1152; ROA.876.) Further, as promised in the press release, Alcoa placed Traco under the direction of BCS President Morrison. (ROA.1152; ROA.320-21.) Thus, Traco's first general manager following the purchase—Jeffrey Jost—reported to Morrison and was accountable to him. (ROA.1152; ROA.320-21, 856.)

Meanwhile, Traco made its “combination” with Alcoa clear through publications and official statements to facility visitors and employees. (ROA.1152-53; ROA.406, 780-830.) For example, in a mandatory safety video for visitors, Traco managers referred to the facility as “Alcoa Traco.” (ROA.1153; ROA.406.) Consistent with these references, the video displayed the logos of both Alcoa and Traco. (ROA.1153; ROA.406.) Similarly, the cover of the Traco employee handbook issued after the purchase identified Traco as “a division of Kawneer” and referred throughout to “Alcoa” policies, conduct standards, and resources. (ROA.1153; ROA.780-82, 785-88, 791-94, 796, 803-04, 807, 811, 823, 828, 830.) The handbook, moreover, directed Traco employees to report suspected violations of the stated conduct standards to Alcoa's General Counsel. (ROA.1153; ROA.787.) And in the portion of the Traco handbook addressing the company's “Position on Unions,” the handbook stated only “Alcoa's experience” with unions and its position “that it is in our best interest, and that of our

customers, to maintain our nonunion, competitive workplace.” (ROA.1153; ROA.785-86.)

B. Alcoa Provides Ongoing Services Necessary for Traco’s Operations

Since the purchase of Traco, Alcoa has made several of its administrative departments available to Traco, and Traco has regularly availed itself of their services, eliminating the need for Traco to hire and maintain its own personnel to perform certain basic functions. (ROA.1152-53, 1155; ROA.854, 856.)

Specifically, Alcoa’s accounting department (“Global Shared Services-Financial Accounting Services”) handles financial accounting for Traco. (ROA.1152, 1155; ROA.856.) Alcoa’s human resources department (“Global Shared Services-People Services”) administers payroll and benefits for Traco’s approximately 650 employees, and performs certain other human-resource functions for Traco, such as advertising Traco management vacancies on Alcoa’s public website and on an internal portal known as “the Brass Ring.” (ROA.1152, 1155; ROA.232, 324-26, 856.) Likewise, Alcoa’s business services department (“Global Business Services”) provides information infrastructure support to Traco. (ROA.1152, 1155; ROA.856.)

Along the same lines, Alcoa’s tax department compiles Traco’s tax-related information and ensures Traco’s compliance with federal, state, and local tax laws. (ROA.1152, 1155; ROA.334-37, 854-56.) Consistent with its interpretation of the

law, Alcoa's tax department does not file a separate federal tax return for Traco, but incorporates Traco's profit and loss information into Alcoa's federal tax return. (ROA.1152, 1155; ROA.854-56.) Alcoa's tax department also files separate tax returns for Traco with various state and local governments. (ROA.1152, 1155; ROA.854-56.)

Alcoa's industrial relations department directs Traco's response to unionization efforts and generally ensures that Traco adheres to Alcoa's position on unions as articulated in the Traco employee handbook. (ROA.1153-54; ROA.288-92, 296-97, 857, 879, 890-96.) Thus, Alcoa's industrial relations department has provided a day-long training course for Traco managers on maintaining positive employer-employee relations and keeping the facility union-free; it has instructed Traco officials on how to respond to the discovery of union literature at the plant; and it has provided substantive information about unions for Traco managers to use in town hall meetings with Traco employees. (ROA.1154; ROA.288-92, 857, 879, 890-96.)

Alcoa does not issue a bill or invoice to Traco for any of the above services. (ROA.1152-53, 1155; ROA.854-57.) Nor does Traco actually submit payment to Alcoa for any service provided. (ROA.1152-53, 1155; ROA.854-57.) Rather, Alcoa charges for its services as a matter of internal bookkeeping, through intercompany accounting charges that are applied to Traco's books by Alcoa's

accounting department. (ROA.1152-53, 1155; ROA.292-96, 857.) Moreover, Alcoa does not apply any charge for some services. (ROA.1153; ROA.296.) For example, there is no charge when Traco managers call Alcoa's industrial relations department and elicit advice and support over the phone. (ROA.1153; ROA.296.)

C. Alcoa's Industrial Relations Department Decides, for Traco, that a Few Alcoa Employees Will Not Be Permitted To Distribute Union Literature to Traco Employees in Exterior Nonworking Areas of Traco's Property

In late 2010, the Union, which represents Alcoa employees at a number of facilities, received inquiries from Traco employees about union representation. (ROA.1149; ROA.140.) Following up on these inquiries, Union Organizer Philip Ornot looked into how the Union might be able to disseminate informational literature to employees just outside the Traco facility. (ROA.1149; ROA.140-43.) Ornot and his staff learned from local police that they would be permitted to handbill in a right-of-way on the side of the public roads adjoining the facility, and also at cross-walks leading to the facility from Traco-owned parking lots across the street from the facility. (ROA.1149; ROA.140-43.)

On September 7, 2011, the Union held a conference in Pittsburgh, Pennsylvania for union representatives and members employed by Alcoa and Alcoa-owned companies around the world. (ROA.1149; ROA.141-43.) Ornot used the occasion to solicit volunteers to handbill at nearby Traco. (ROA.1149; ROA.141-42, 170.) Twenty-four attendees of the conference volunteered to

participate in handbilling at Traco the following day. (ROA.1149; ROA.141-42, 144, 170.)

That afternoon, Jim Robinson, a district director for the Union, called Alcoa's director of industrial relations, Kevin O'Brien, with whom he had a working relationship based on their participation in negotiations for a master collective-bargaining agreement between Alcoa and the Union, to inform O'Brien of the planned handbilling activity at Traco. (ROA.1149; ROA.276-79.) Robinson explained to O'Brien that the handbillers would include visiting union representatives from facilities owned by Alcoa around the world. (ROA.1149; ROA.277.) O'Brien responded that he appreciated the information and stated that anyone could handbill in the public right-of-way adjacent to the Traco facility. (ROA.1149; ROA.277-78.) Robinson then asked whether the handbillers would be permitted to enter Traco's parking lots to distribute literature there. (ROA.1149; ROA.277-78.) O'Brien replied that he was unsure and would have to consult with legal counsel about that. (ROA.1149; ROA.278.)

O'Brien then discussed Robinson's request for access to Traco parking lots with two attorneys in Alcoa's legal department. (ROA.1149; ROA.278.) After reaching a decision, he told Robinson that, "under the advice of counsel . . . those individuals who were not employees of Traco could not enter the property," and accordingly "it would not be proper for them to go in the parking lot," and "they

would need to stay on the right-of-way” adjacent to Traco’s property. (ROA.1149; ROA.279.) O’Brien emphasized that members of the union delegation who were not employed at Traco could not enter Traco’s parking lots, because he “wanted to make sure there wasn’t any kind of incident pertaining to that.” (ROA.1149; ROA.279.)

O’Brien did not contact any officials of Traco before announcing this decision regarding access to Traco’s parking lots. (ROA.1149; ROA.279.) However, he conveyed the Union’s plans to Traco officials later in the day, in a conference call that included the two Alcoa attorneys who had contributed to the decision not to allow handbilling in Traco’s parking lots. (ROA.1149; ROA.279-83.) O’Brien’s primary purpose in contacting Traco officials was “to make sure there was no incident, that the matter would be handled appropriately the next day.” (ROA.1149; ROA.281-83.) Accordingly, O’Brien and the Alcoa attorneys on the call advised Traco General Manager Jost as to “the appropriate way” to handle the situation. (ROA.1149; ROA.281.) O’Brien finally told Jost that he could call him on his cell phone if there was any problem. (ROA.1149; ROA.283.)

At around 5:30 a.m. the following morning, a delegation of 24 union officials and representatives from various unionized Alcoa facilities arrived at the Traco facility. (ROA;1149; ROA.30, 144.) As they gathered to begin handbilling, Union Attorney Brad Manzolillo asked if there were any Alcoa employees from

the Midwest present. (ROA.1150; ROA.32-33, 64.) A few individuals came forward, including one employee from an Alcoa facility in Iowa and another from an Alcoa facility in Indiana. (ROA.1150; ROA.32-33, 64, 67, 106.) Manzolillo asked them to accompany him across the street to a Traco entrance. (ROA.1150; ROA.33.)

Once there, Manzolillo spoke with three Traco management officials, explaining that the individuals with him were off-duty Alcoa employees from the Midwest and that the Union believed they had a right to distribute literature in the parking lots and other outside areas of the Traco facility. (ROA.1150; ROA.34-35.) Manzolillo produced a letter that he had drafted, explaining why “both off-duty employees from the Alcoa Cranberry facility and employees from other Alcoa facilities have access rights to the Cranberry facility for the purposes of distributing union literature and soliciting union support.” (ROA.1150; ROA.34, 1042.)

One of the managers noted that they had previously granted Alcoa employees access with proper identification and clearance. (ROA.1150; ROA.35.) Nevertheless, on this occasion, the Traco managers refused to allow the identified Alcoa employees on Traco’s property, taking the position that they did not have a right of access. (ROA.1150; ROA.35.) General Manager Jost repeated this position when he arrived on the scene a short while later. (ROA.150; ROA.35-36,

70.) He added that he had been in touch with O'Brien on this issue and suggested that Manzolillo speak to him. (ROA.1150; ROA.36-37.) Jost then called O'Brien on his cell phone, and spoke to him briefly before handing the phone to Manzolillo. (ROA.1150; ROA.36-37.) O'Brien told Manzolillo that they would not allow Alcoa employees to handbill on Traco's property. (ROA.1150; ROA.36-37.) Thereafter, Manzolillo rejoined his colleagues to handbill in the public right-of-way adjoining the Traco facility. (ROA.1150; ROA.40.)

D. Traco General Manager Jost Openly Monitors Traco Employees Who Accept Union Literature Outside a Traco Entrance; Alcoa BCS President Morrison Removes Jost from His Position

Shortly after the above exchange, at around 6:00 a.m., Jost positioned himself near a group of handbillers outside the Traco facility, effectively creating a situation where Traco employees would have to pass him if they wanted to take a handbill from nearby union representatives. (ROA.1159-60; ROA.44, 89-93, 151-52.) Jost maintained this position for a period of 20 to 30 minutes. (ROA.1159-60; ROA.89, 91.) Less than two months after these incidents, Alcoa BCS President Morrison removed Jost from his position as General Manager of Traco. (ROA.1152; ROA.327.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found (ROA.1146-47 & n.3, 1151-58), in agreement with the

judge, that Alcoa and Traco are a single employer and violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by denying several off-site, off-duty Alcoa employees access to the exterior non-work areas, including parking lots, of the Traco facility for purposes of distributing union organizational materials. The Board further found (ROA.1146, 1160), in agreement with the judge, that Alcoa and Traco violated Section 8(a)(1) by engaging in surveillance of employees' union activities.

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

(ROA.1147, 1161.) Affirmatively, the Board's Order requires the Companies to grant their off-duty and off-site employees access to the exterior non-work areas, including parking lots, of the Traco facility for the purpose of distributing union organizational materials, and to post a remedial notice. (ROA.1161-62.)

SUMMARY OF ARGUMENT

On September 8, 2011, a few unionized Alcoa employees attempted to communicate with their non-unionized counterparts at Traco about the benefits of unionization. They requested access to Traco's parking lots for this organizational purpose. The Companies, under the leadership of Alcoa's industrial relations department, denied the Alcoa employees' request for access to Traco's parking

lots. Examining the Companies' web of interrelationships, the Board reasonably found that they are a single employer, and that together they violated Section 8(a)(1) of the Act by excluding the Alcoa employees from the exterior nonworking areas of Traco's property.

1. Substantial evidence supports the Board's finding that the Companies are a single employer for purposes of the Act. Specifically, as the Companies concede, Alcoa and Traco are linked by common ownership because Alcoa owns Traco through a wholly owned subsidiary. The Companies, further, are interrelated in their operations, as Traco relies on a number of Alcoa's business departments—including its tax, accounting, human resources, and industrial relations departments—to provide basic services necessary for Traco's operations, and the two entities have held themselves out to employees and the public as a combined entity. In addition, the evidence in this case shows that Alcoa's industrial relations department determines critical matters of labor policy for Traco. Indeed, Alcoa's director of industrial relations determined that Alcoa employees would be barred from Traco's property on September 8, 2011. The Board, thus, found numerous facts to support a finding that Alcoa and Traco are a single integrated business enterprise and a single employer under the Act.

2(a). In light of this single-employer finding, the Board reasonably found that the Alcoa employees involved in the September 8 handbilling were off-site

employees in relation to the Traco facility—that is, they were employees of the employer that sought to exclude them from the property. Accordingly, the Board considered the Alcoa employees’ access rights under the test set forth in *Hillhaven Highland House*, 336 NLRB 646 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003), and *ITT Industries, Inc.*, 341 NLRB 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005). Balancing employer and employee rights pursuant to that test, the Board found that the off-site Alcoa employees had a non-derivative right of access to the Traco facility to communicate and make common cause with fellow employees of the single employer. In striking an appropriate balance, the Board considered but reasonably rejected the Companies’ proffered business justifications for denying access. On review, the Companies have waived any challenge to the Board’s finding that they had no legitimate business justification for excluding the Alcoa employees on September 8, 2011.

(b). Contrary to the Companies’ arguments, the Board’s application of the single-employer doctrine to the factual context here was not unreasonable or inconsistent with the Act. The Board, with judicial approval, has applied the doctrine in a wide range of circumstances, as the Companies acknowledge, and the Board is by no means limited to doing so only in previously approved contexts. Indeed, it is the Board’s unique responsibility to interpret and apply the Act’s general terms to new and different circumstances as they arise. In this case, the

Board fulfilled its charge by reasonably applying its single-employer finding to a situation where off-site employees sought access to the exterior of a property controlled by their single employer. Accordingly, the Court should uphold the Board's finding that the Companies unlawfully barred the off-site Alcoa employees from the parking lots and other exterior nonworking areas of Traco's property, without any legitimate justification.

3. The Companies do not contest the Board's finding that they violated Section 8(a)(1) of the Act by surveilling employee interactions with handbillers outside the Traco facility on September 8, 2011. Accordingly, any challenge to that surveillance finding is waived, and the Board is entitled to summary enforcement of the corresponding portions of its Order.

STANDARD OF REVIEW

As the Supreme Court has recognized, "it is to the Board that Congress entrusted the task of applying the Act's general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978) (internal quotation marks and citation omitted); accord *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (noting that "the Board has the special function of applying the general provisions of the Act to the complexities of industrial life" (internal quotation marks and citation omitted)). Accordingly, the Board bears "primary responsibility for

developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). And if the Board is to fulfill its congressional charge, it “necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.” *Beth Israel Hosp.*, 437 U.S. at 500-01.

Consistent with the Supreme Court’s pronouncements above, this Court gives “considerable deference” to the Board’s position on matters of labor policy and will uphold the Board’s position “as long as it is rational and consistent with the Act.” *Trencor, Inc. v. NLRB*, 110 F.3d 268, 279 (5th Cir. 1997) (internal quotation marks and citation omitted); *see also ABF Freight Sys. v. NLRB*, 510 U.S. 317 (1994) (“When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency’s decision controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.” (internal quotation marks and citation omitted)).

In particular, “if the statute is silent or ambiguous” with respect to the precise question at issue, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Applying this standard, the Court “will uphold a Board rule as long as it is rational and consistent with the Act, even if [the Court] would have formulated a different rule

had [it] sat on the Board.” *Curtin Matheson Scientific*, 494 U.S. at 787; accord *Chevron*, 467 U.S. at 842-45 & n.11 (noting that a court “may not substitute its own construction” of the statute for the reasonable interpretation of the agency charged with administering the statute).

“The standard of review of the Board's findings of fact and application of the law is [similarly] deferential.” *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is “such relevant evidence that a reasonable mind would accept to support a conclusion.” *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (internal quotation marks and citation omitted). Thus, the Court will not disturb the Board’s findings “simply because the evidence may also reasonably support other inferences or because [the Court] might well have reached a different result had the matter come before [it] de novo.” *NLRB v. Universal Packing & Gasket Co.*, 379 F.2d 269, 270 (5th Cir. 1967); accord *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 476 (5th Cir. 2001).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ALCOA AND TRACO ARE A SINGLE EMPLOYER AND VIOLATED SECTION 8(a)(1) OF THE ACT BY DENYING ALCOA EMPLOYEES ACCESS TO THE PARKING LOTS AND OTHER EXTERIOR AREAS OF THE TRACO FACILITY FOR UNION ORGANIZATIONAL PURPOSES

The evidence in this case amply supports the Board’s finding (ROA.1156) that Alcoa and Traco are a single employer for purposes of the Act. Moreover, the Board reasonably found that as a result of the single-employer relationship, Alcoa and Traco were not privileged to exclude the few Alcoa employees who sought to handbill in the parking lots and exterior areas of the Traco facility, absent a business justification for doing so. The Court should uphold the Board’s findings, not only because they are supported by substantial evidence, but also because they are consistent with judicially-approved precedent and founded on a reasonably defensible construction of the Act.

A. Alcoa and Traco Are a Single Employer Under the Act

“[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise.” *South Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800, 802 n.3 (1976) (quoting *Radio & Television Broad. Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)); accord *NLRB v. Browning-Ferris Indus. of Pa., Inc.*,

691 F.2d 1117, 1122 (3d Cir. 1982) (explaining that nominally separate entities may be treated as a single employing entity where they “are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ‘single employer’”). With court approval, the Board looks to four factors in considering whether ostensibly separate businesses are a single, integrated business enterprise and therefore a single employer: (1) common ownership, (2) interrelation of operations, (3) common control of labor relations, and (4) common management. *South Prairie Constr. Co.*, 425 U.S. at 802 n.3; *NLRB v. DMR Corp.*, 699 F.2d 788, 790-91 (5th Cir. 1983).

However, “[n]o one of these factors is controlling, nor need all criteria be present.” *DMR Corp.*, 699 F.2d at 791. Rather, the ultimate determination takes into account all the circumstances of the case and turns on “whether [the entities in question] have failed to maintain the kind of arm’s-length relationship that would normally characterize separate and independent companies.” *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1141 (D.C. Cir. 2015).

In this case, strong record evidence “establishes that Alcoa, Inc. owns Traco, that there is a substantial interrelationship of operations between the two, and that Alcoa, Inc. controls the labor relations of Traco at the policy level.” (ROA.1156.) Accordingly, the Board found it unnecessary to pass on whether the entities also share common management. (ROA.1146-47 & n.3, 1156.) *See NLRB v. DMR*

Corp., 699 F.2d 788, 790-91 (5th Cir. 1983) (Board’s single-employer finding need not be supported by all four factors); *Chemical Solvents Inc.*, 362 NLRB No. 164, 2015 WL 5013400, at *12 (2015) (single-employer status found despite absence of common management factor). The Board, therefore, found that Alcoa and Traco are a single employer based on the substantial evidence of common ownership, interrelated operations, and common control of labor relations discussed below.

1. Common ownership

The evidence unquestionably supports the Board’s finding (ROA.1151-52) that Alcoa and Traco are linked by common ownership. As the Board found, “Traco is a wholly-owned subsidiary of Reynolds Metals Co. (Reynolds Metals) which is a wholly owned subsidiary of Alcoa Inc.” (ROA.1148.) Thus, Alcoa owns Traco “through its wholly owned subsidiary Reynolds Metals,” conclusively establishing the factor of common ownership for purposes of single-employer status. (ROA.1151.) *See Masland Indus., Inc.*, 311 NLRB 184, 186 (1993) (finding that “the relationship of privately held corporate parent to wholly owned corporate subsidiary eliminates th[e] issue [of common ownership] from contention).

Recognizing the undisputed evidence above, the Companies fully concede the factor of common ownership in their brief (Br. 18). Accordingly, they have

forfeited any challenge to the Board's finding (ROA.1146 n.3) that this factor favors a finding of single-employer status. *See United States v. Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005) ("Any issue not raised in an appellant's opening brief is deemed waived."); Fed. R. App. P. 28(a)(8)(A) (opening brief of appellant must contain "appellant's contentions and the reasons for them").

2. Interrelation of operations

Substantial evidence also supports the Board's finding (ROA.1154-55) that Alcoa and Traco are interrelated in their operations. As the Board found (ROA.1152, 1155), Traco relies on Alcoa to provide certain basic services necessary for Traco's operations. Specifically, the record shows that Traco receives financial accounting services from Alcoa's Global Shared Services-Financial Accounting Services department; it receives human resources, payroll, and benefits-administration services from Alcoa Inc.'s Global Shared Services-People Services department; it receives labor-relations advice and services from Alcoa's Industrial Relations department; and it receives information services infrastructure support from Alcoa's Global Business Services department. In addition, Traco does not file a federal income tax return independent of Alcoa. Instead, Alcoa's tax department reports Traco's income to the federal government

in Alcoa's tax return. Moreover, Alcoa's tax department handles any state and local income tax filings required of Traco.⁴

Contrary to the Companies' claims (Br. 24-26), there is no evidence of any arm's-length contractual arrangement providing that Traco will pay Alcoa the fair value of these services, as it would if the services came from a disinterested party. Rather, the evidence shows that Traco only "pays" for Alcoa's extensive services as a matter of internal bookkeeping, through intercompany accounting charges that plainly are not at arm's-length. *See Spurlino Materials, LLC*, 357 NLRB 1510, 1517 (2011) (finding lack of arm's-length dealing where entities involved "d[id] not actually invoice each other" but recorded charges on ledger and did not necessarily charge actual cost of services), *enforced*, 805 F.3d 1131 (D.C. Cir. 2015). And Alcoa does not even nominally charge for some services: for example, there is no charge when Traco managers seek and receive advice from Alcoa's industrial relations department by phone. *See Bolivar-Tees, Inc.*, 349 NLRB 720, 721 (2007) ("The presence of non-arm's length transactions at reduced prices or without payment entirely is . . . probative of interrelation of operations.")

⁴ The Companies are mistaken in their claim that the Board relied on the mere fact of the consolidated federal tax filing "as substantial evidence that TRACO and Alcoa, Inc. are a single employer." (Br. 25) As the Board's decision makes clear (ROA.1155), the consolidated tax filing is but one among many facts suggesting interrelated operations. For instance, one salient fact is that Traco has no tax department or tax attorney (ROA.337) and therefore depends entirely on Alcoa's tax department to ensure its compliance with federal and state tax laws.

(internal quotation marks and citations omitted)), *enforced*, 551 F.3d 722 (8th Cir. 2008).⁵

These facts, which illustrate the highly integrated nature of the enterprise, are consistent with the vision of a “combin[ed]” business that Alcoa officials articulated in publicly announcing the purchase of Traco in 2010. As Alcoa stated in its press release, it envisioned that the “combination” of businesses would provide “many opportunities to grow our collective business through better service, more comprehensive product offerings and greater efficiency.”⁶ (ROA.831.)

Following Alcoa’s purchase of Traco, it acted, quite literally, on its plan of “combination” by transferring its existing production of windows and window frames at various other facilities to the Traco facility. Similarly, Traco and Alcoa

⁵ In regard to Alcoa’s tax services, a member of Alcoa’s tax department testified that Alcoa charges Traco a flat fee for each tax return filed, and charges for other services “based on more of an allocation methodology.” (ROA.334-336.) However, the testimony does not establish that, in all events, Traco is charged for and pays the fair value of the tax services that Alcoa provides.

⁶ The Companies suggest (Br. 20-21) that these statements cannot be attributed to Alcoa, because the relevant Alcoa press release relied on statements made by a BCS official. However, as the Companies admit (Br. 21), BCS is not an entity separate from Alcoa; rather, it is a “business group/unit” of and within Alcoa. (ROA.1152; ROA.225, 305-09, 854.) Contrary to the Companies’ further contentions (Br. 20-22), the Board’s single-employer finding does not depend on interactions between Traco and bona fide subsidiaries of Alcoa like Kawneer Company, Inc. However, it is relevant that Alcoa made Traco a “division” of Kawneer and subjected it to Kawneer’s oversight and management in some respects. (ROA.1152-53; ROA.341-42, 780, 854.)

began holding themselves out to employees and the public as a combined business. *See Masland Indus.*, 311 NLRB 184, 187 (1993); *Cardio Data Sys. Corp.*, 264 NLRB 37, 41 (1982), *enforced mem.*, 720 F.2d 660 (3d Cir. 1983), discussed below at p. 27. Indeed, beginning in 2012, a safety video shown to all visitors to the Traco facility referred to the company as “Alcoa Traco” and displayed both the Alcoa and Traco logos. The video further cautioned visitors to Traco that they “must abide by all Alcoa safety rules and regulations.” Along the same lines, the Traco employee handbook published in 2012 referred throughout to “Alcoa” policies and procedures, described “Alcoa’s experience” and position with regard to unions, and directed Traco employees to contact Alcoa’s general counsel to report violations of the Alcoa standards reflected in the handbook. Similarly, from September 2011 to July 2012, applications for employment at Traco bore Alcoa’s name at the top, with no mention of Traco, and inquired, among other things, whether the applicant had ever been employed by Alcoa.

The Companies err in asserting (Br. 22-23) that their interchangeable use of the Alcoa and Traco names and logos does not support the Board’s finding that their operations are interrelated. According to the Companies, the Alcoa name and logo are merely “generic” identifiers that apply to Alcoa’s subsidiaries, but there is no record evidence to support this claim, and the Companies cite none. In any event, it is undeniable that the Alcoa name and logo belong to Alcoa, Inc.—the

entity that constitutes a single employer with Traco—and that the Companies used those Alcoa-owned identifiers here to convey the unique relationship between them. Further, the record shows far more than the sharing of a name and logo; it establishes Traco’s dependence on Alcoa for a variety of basic functions, and Alcoa’s correspondingly deep and ongoing involvement in Traco’s affairs. In these circumstances, the Board fairly considered the use of Alcoa’s name and logo in Traco’s business as yet another fact showing the interrelated nature of the Companies’ operations, as in *Masland Industries* and *Cardio Data Systems*. Accordingly, the Companies miss the mark in observing (Br. 23) that those cases involved different facts. The suggestion of factual distinctions does nothing to undercut the Board’s reasonable reliance on those cases for the settled point that where “two allegedly separate employers hold themselves out to the public and employees as an integrated enterprise, [that] is an important factor in finding an interrelationship of operations.” (ROA.1155.)

Contrary to the Companies’ further claims (Br. 20-21), the fact that the record does not include evidence of daily interactions or sharing of staff, equipment, and accounts, is of no moment. Such facts are not required to establish interrelated operations. *See, e.g., Spurlino Materials*, 357 NLRB at 1516 (finding interrelated operations even though entities were geographically removed and had their own personnel, equipment, accounts, and financial records); *Royal Typewriter*

Co., 209 NLRB 1006, 1010 (1974) (finding interrelated operations despite lack of daily involvement between entities), *enforced*, 533 F.2d 1030 (8th Cir. 1976). In arguing otherwise, the Companies erroneously rely on *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997), but as this Court has recognized, *Lusk* is an employment discrimination case that does not in any way govern the determination of single-employer status under the Act. *See Oaktree Capital Mgmt., L.P. v. NLRB*, 452 F. App'x 433, 442 (5th Cir. 2011).

3. Common control of labor relations

Ample credited record evidence likewise supports the Board's finding (ROA.1153-55) that Traco's labor relations are centrally controlled by Alcoa. As this Court has recognized, "the fundamental inquiry" where single-employer status is concerned "is whether there exists overall control of critical matters at the policy level." *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 F. App'x 433, 438 (5th Cir. 2011) (quoting *Covanta Energy Corp.*, 356 NLRB 706, 726 (2011)); *accord Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983) (operative question is whether controlling company had "the present and apparent means to exercise its clout in labor relations matters" of subsidiary (internal quotation marks and citation omitted)).

Accordingly, the most critical and ultimately determinative fact, as the Board found (ROA.1155), is that Alcoa establishes labor policy for Traco. Thus,

Traco's employee handbook reflects Alcoa policy and, in particular, Alcoa's position "that it is in our best interest, and that of our customers, to maintain our nonunion, competitive workplace." (ROA.785-86.) Alcoa has, further, ensured Traco's compliance with Alcoa's stated position by sending its director of industrial relations, Kevin O'Brien, to the Traco facility to train Traco's managers on how to maintain a union-free work environment. As the facts here show, O'Brien subsequently remained active in directing Traco's response to specific organizing attempts.

In particular, as the record in this case amply shows, O'Brien determined how Traco managers would respond to the Union's handbilling activity on September 8, 2011. Indeed, as the Board found, "the decision to bar Alcoa, Inc. employees from [handbilling in] the parking lots of the Traco facility was made by O'Brien and corporate counsel of Alcoa, Inc," and "Traco managers had no involvement in arriving at that decision." (ROA.1155.) Instead, Traco's management team merely "acquiesced in" and implemented "a decision that had already been made and communicated to the Union without any input from them." (ROA.1156.) Thus, as the Board found, "the evidence clearly establishes that Alcoa, Inc. exerted control over the labor relations of Traco at the policy level." (ROA.1156.)

In a vain effort to overcome these facts establishing Alcoa's control over labor relations policy at Traco, and Alcoa's direct and immediate involvement in the incidents at issue, the Companies claim (Br. 30-34) that Alcoa's industrial relations department merely provided advice and served as a resource for Traco, and Traco managers always had the right to make their own decisions. But the record evidence fails to show that Traco managers ever exercised any such right. In fact, as the Board found, the record overwhelmingly shows just the opposite: that Traco managers yielded to the "advice" and guidance provided by Alcoa's industrial relations department on major issues and fully adopted Alcoa's position on unions. Thus, the absence of a formal requirement for Traco managers to seek the advice of Alcoa's labor relations department is of no moment. *See Pathology Institute*, 320 NLRB 1050, 1059 (1996) (actual interdependence more important than requirement of interdependence), *enforced*, 116 F.3d 482 (9th Cir. 1997).

Likewise, there is no merit to the Companies' claim (Br. 32) that O'Brien's involvement in the events of September 8, 2011 was limited to addressing the conduct of Alcoa's employees. As the Board found (ROA.1155), the record establishes that O'Brien went much further: he decided, together with Alcoa attorneys, and apparently without the involvement of any Traco officials, that Alcoa employees could not enter any part of Traco's property. (ROA.1155; ROA.278-81.) Thus, when Union Official Robinson contacted him about the

planned handbilling and asked if the handbillers could enter Traco property, O'Brien did not say that he needed to confer with Traco officials. (ROA.278.) Instead, he said he needed to "get with my [Alcoa] legal counsel." (ROA.278.) The record shows, moreover, that immediately after conferring with Alcoa counsel, O'Brien called Robinson and announced that "under the advice of counsel," individuals who were not employees of Traco "could not enter the property." (ROA.279.) At no point did O'Brien mention consulting with Traco officials about this decision. Indeed, under O'Brien's testimony, he only contacted Traco officials after the fact, to inform them of his exchange with Robinson. (ROA.278-83.) In light of this evidence—drawn from O'Brien's own testimony—the Companies are simply wrong in their claim that "there is no record evidence that O'Brien, or anyone else at Alcoa, made the decision to bar the handbillers." (Br. 33.)

The Companies nevertheless insist (Br. 33-34) that O'Brien was not involved in "labor relations" at Traco because he only provided guidance about Traco's "legal rights and obligations, in an organizing context." This argument, however, completely ignores the reality that organizing activity lies at the heart of labor relations. It is only through organizing that employees can hope to bargain collectively with their employer over their terms and conditions of employment. O'Brien's involvement in controlling organizing activity at Traco, therefore, was

not trivial as the Companies suggest. As the Board reasonably found, that control reflected O'Brien's (and Alcoa's) fundamental influence over labor relations at Traco.

Given the abundance of evidence demonstrating that Alcoa controls critical matters of labor relations policy at Traco, the Board reasonably found (ROA.1154-55) that Alcoa's lack of direct involvement in handling day-to-day labor matters for Traco is not determinative of whether the two entities are in fact a single employer. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976) (finding that "the fact that day-to-day labor matters are handled at the local level is not controlling"); *accord Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983).

In sum, relying on the ample evidence of not only centralized control of labor relations, but also common ownership and interrelationship of operations, the Board reasonably found (ROA. 1146 n.3, 1156) that Alcoa and Traco are a single employer. As explained below, the Board acted reasonably and well within its authority in applying this single-employer finding to the specific events at issue in this case and determining that Traco, as a single employer with Alcoa, owed a limited right of property access to the Alcoa employees who sought to distribute union literature at Traco on September 8, 2011.

B. The Board Reasonably Found That the Companies, as a Single Employer, Unlawfully Denied Alcoa Employees Access to Exterior Areas of the Traco Facility

The Board reasonably found that because Alcoa and Traco are a single employer for purposes of the Act, Traco managers, acting under instructions from Alcoa, were not privileged to deny employees of the single employer entity—specifically, a few Alcoa employees—access to the parking lots and other exterior nonworking areas of the Traco facility for organizational purposes. In so ruling, the Board applied its long-standing, judicially-approved balancing test fully articulated in *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003), and *ITT Industries, Inc.*, 341 NLRB 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005). Under that test, the Board reasonably found that the Alcoa employees in question had a non-derivative right of access to those exterior areas, absent a valid business justification for the restriction. Before the Board, the Companies failed to establish any such justification, and on review they have abandoned that argument altogether. Moreover, the Companies have failed to show that the Board’s application of the *Hillhaven/ITT* test in the context of a single-employer relationship is irrational or inconsistent with the Act. Accordingly, the Court should uphold the Board’s reasonable finding that the Companies violated Section 8(a)(1) of the Act.

1. Section 7 of the Act directly grants rights to off-site employees, who have a non-derivative right of access to exterior, nonworking areas of property owned by their employer, absent a valid business justification for excluding them

Section 7 of the Act grants employees “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” 29 U.S.C. § 157. Section 8(a)(1) of the Act enforces this guarantee by making it an unfair labor practice for any employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158 (a)(1).

Employees’ rights under Section 7 of the Act to engage in “self-organization” lie “at the very core of the purpose for which the [Act] was enacted.” *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); *see Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991) (observing that the “central purpose of the Act [i]s to protect and facilitate employees’ opportunity to organize unions to represent them in collective-bargaining negotiations”). As has long been recognized, that core right “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S.

483, 491-92 (1978); *accord Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (Section 7 includes “the right of employees to discuss organization among themselves”).

It is well-settled that an employer violates Section 8(a)(1) by prohibiting employees from engaging in protected union organizing activities at the workplace during nonworking time, unless the employer can show that prohibiting the activity is necessary to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 (1945). As the Supreme Court has recognized, “organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Cent. Hardware Co.*, 407 U.S. at 543. Moreover, the jobsite is “uniquely appropriate” for the exchange of employees’ views regarding union representation (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.6 (1945)), as it “‘is the one place where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees,’” *Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (citing *Gale Prods.*, 142 NLRB 1246, 1249 (1963)).

Applying those settled principles, the Board, with court approval, recognized 40 years ago that an employer may not prohibit off-duty employees from engaging in organizing activity at their workplace in outside nonworking areas, absent a

valid business justification for the prohibition. *Tri-County Medical Center, Inc.*, 222 NLRB 1089, 1089 (1976); see *Meijer, Inc. v. NLRB*, 463 F.3d 534, 543 (6th Cir. 2006) (collecting court cases approving the *Tri-County* test). Their right of access follows from the recognition that, by its plain terms, Section 7 of the Act directly confers rights on employees, as distinct from unions and nonemployee organizers, whose rights are merely derivative. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532, 537 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

More than a decade ago, in *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003), and *ITT Industries, Inc.*, 341 NLRB 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005), the Board—which has primary responsibility for developing and applying national labor policy (*NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990))—expanded those principles by applying them in the context of off-site employees. Specifically, the Board, building on its precedent, and with judicial approval, reasonably concluded that the “core concerns of Section 7, which protects the ‘right to self-organization,’ undeniably are implicated” where off-site employees seek to organize fellow employees at a facility controlled by the same employer for whom they are employed. *Hillhaven*, 336 NLRB at 649; *accord ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 71 (D.C. Cir. 2005). As the Board explained, in that situation off-site

employees “are not only ‘employees’ within the broad scope of Section 2(3) of the Act,” which defines the statutory term “employee.” *Hillhaven*, 336 NLRB at 648; *accord ITT*, 413 F.3d at 70. “[T]hey are [also] ‘employees’ in the narrow sense: ‘employees of a particular employer’ (in the Act’s words), that is, employees of the employer who would exclude them from its property.” *Hillhaven*, 336 NLRB at 648; *accord ITT*, 413 F.3d at 70. “Clearly, then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer,” such as nonemployee union organizers. *Hillhaven*, 336 NLRB at 648; *accord ITT*, 413 F.3d at 70.

As the Board further explained, “when offsite employees seek to organize similarly situated employees at another employer facility, th[ey] . . . seek strength in numbers to increase the power of their union and ultimately to improve their own working conditions.” *Hillhaven*, 336 NLRB at 648; *accord ITT*, 413 F.3d at 70-71. Thus, the Section 7 right of access claimed by off-site employees is “personal rather than derivative.” *ITT*, 413 F.3d at 71. Put simply, “employees who seek to make common cause with similarly situated employees of the same employer are seeking to advance their *own* interests—not just those of the employees they target, as is the case for nonemployee organizers.” *Id.*

Nevertheless, the Board recognizes that there is an inherent tension between the employees’ Section 7 rights and the employer’s property rights, and that an

employer may have heightened property concerns when off-site employees seek access. See *Hillhaven*, 336 NLRB at 650; *accord ITT*, 413 F.3d at 72. For example, an off-site employee's request for access to the property may raise "security, traffic control, personnel, and like issues that do not arise when only on-site employee access is involved." *Hillhaven*, 336 NLRB at 649-50; *accord ITT*, 413 F.3d at 73.

However, as the Board has explained, the "critical" factor mitigating the inherent threat to the employer's property interests is the employer's ultimate control over the livelihood of the employees involved. *Hillhaven*, 336 NLRB at 649; *accord ITT*, 413 F.3d at 72. "The existence of an employment relationship means that the employer has a lawful means of exercising control over the offsite employee (even regarded as trespasser), independent of its property rights." *Hillhaven*, 336 NLRB at 649; *accord ITT*, 413 F.3d at 72.

With these considerations in mind, the Board reasonably determined in *Hillhaven* and *ITT* that an appropriate balance between employee and employer rights can be struck where off-site employees are permitted "to access the outside, nonworking areas of the employer's property," except where the employer shows that denial of such access is "justified by business reasons." *Hillhaven*, 336 NLRB at 650; *accord ITT*, 413 F.3d at 73. In considering an employer's proffered business reasons, moreover, the Board specifically takes into account the

employer’s “predictably heightened property concerns . . . when offsite, as opposed to onsite, employees are involved.” *Hillhaven*, 336 NLRB at 650; *accord ITT*, 413 F.3d at 73.

As the Supreme Court has long recognized, the “function of striking [the] balance” between employer and employee interests “to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” *ABC, Inc. v. Writers Guild*, 437 U.S. 411, 431 (1978) (internal quotation marks and citations omitted). Thus, it is “the task of the Board . . . to resolve conflicts between [Section] 7 rights and private property rights, and to seek a proper accommodation between the two.” *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (internal quotation marks and citation omitted).

2. The Board reasonably found that the Companies, as a single employer, unlawfully barred a few off-site Alcoa employees from handbilling in exterior areas of Traco’s property without a business justification

Applying the well-established principles discussed above in the slightly different context of a single-employer relationship, the Board—again exercising its expertise in interpreting ambiguous statutory terms and balancing employee-employer interests—reasonably found, on the facts presented, that the Companies violated Section 8(a)(1) by refusing to let a few Alcoa employees distribute union handbills in the parking lots and other exterior areas of Traco’s property. To

begin, the Board reasonably found that the employees involved were off-site employees of the entity that excluded them from the property, and therefore that their Section 7 rights were non-derivative. *See Hillhaven*, 336 NLRB at 648 (describing off-site employees as “employees of the employer who would exclude them from its property” and finding that they have a non-derivative Section 7 right to communicate at the jobsite). As shown above pp. 29-32, this finding is particularly well-supported here. After all, it was Alcoa officials who made the decision to exclude the employees from Traco’s property without input from Traco managers, and Alcoa, as the entity excluding the employees, retained control over them by virtue of their employment relationship with Alcoa. These factors effectively distinguish them from nonemployee union organizers and other third parties whose Section 7 rights are derivative. *See Hillhaven*, 336 NLRB at 649; *accord ITT*, 413 F.3d at 72.

Especially in these circumstances, the Board reasonably found that “the employees of two entities that constitute a single employer”—like Alcoa and Traco—“are the employees of the single employer.” (ROA. 1157.) After all, as this Court recognizes, a single employer is “one employer” for purposes of the Act. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504 (5th Cir. 1982). Consistent with this principle, the Board reasonably treated the Alcoa employees from the Midwest as employees of the single-employer entity,

and therefore off-site employees in relation to a facility other than their usual jobsites. The Board accordingly applied the access rule governing off-site employees to the facts presented, and found that the Alcoa employees who requested permission to handbill in Traco's parking lots "had a right to access [those areas] . . . to engage in organizational handbilling, unless security needs or related business justifications warranted the restriction of such access."

(ROA.1158.)

Continuing with its multi-step analysis, the Board then found (ROA.1158) that neither Alcoa nor Traco established a legitimate security or business justification for flatly refusing to allow those off-site employees into Traco's parking lots. In their brief to this Court, the Companies do not challenge the Board's finding that they failed to establish a legitimate safety or business reason for excluding those employees. Accordingly, the Companies have waived any argument that they had legitimate safety or business justifications for their action. *See* above p. 23.

In any event, substantial evidence supports the Board's rejection of the Companies' earlier claim that allowing off-site employees to handbill in Traco's parking lots "would have impeded safe employee ingress and egress into the facility." (ROA.1158.) As the Board found, there was "no evidence" to support this speculative concern, particularly given that "the handbilling was peaceful" and

conducted without impeding employees' progress to and from work. (ROA.1158.) As the Board further reasonably found, permitting off-site employees "to give out handbills and speak to employees as they were coming to and leaving their cars in the parking lot" would not have presented a greater obstacle to employees' ingress and egress than the handbilling that Alcoa and Traco actually allowed, "at the entrance to the parking lots, while employees were in their cars and attempting to enter or exit onto [a] public highway." (ROA.1158.)

3. The Companies' remaining arguments lack merit

The Companies object to the Board's application of the well-settled *Hillhaven/ITT* balancing test to determine the access rights of the Alcoa employees here, arguing that the test only applies to off-site employees who "work[] for the same statutory employer." (Br. 39.) Their argument ignores the basic import of the Board's single-employer finding. Where, as here, the Board finds that two entities are a single employer, they meet the definition of "employer" under Section 2(2) of the Act. *Carpenters Local Union No. 1846*, 690 F.2d at 504 (explaining that single employer doctrine allows the Board "to treat two or more related enterprises as one employer within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2)"). Accordingly, as a result of the single-employer finding in this case, the Companies constitute a statutory employer, as did the employers in *Hillhaven* and *ITT*.

Moreover, as the Companies concede (Br. 35-37), over the past 50 years, the Board has applied the single-employer analysis in a multitude of different contexts, to determine the collective rights and obligations of nominally separate entities. For instance, the Board has applied the single-employer doctrine to make nominally separate entities liable for one another's unfair labor practices, and to permit picketing and other concerted activity at one business, in support of a labor dispute involving a nominally separate business. *See, e.g., Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), *enforced*, 872 F.2d 1279 (7th Cir. 1989) (imposing joint and several liability on single employer entities); *Mine Workers (Boich Mining Co.)*, 301 NLRB 872, 873 (1991) (finding that employees of one entity may strike in support of labor dispute between union and another entity, where both entities are a single employer), *enforcement denied on other grounds*, 955 F.2d 431 (6th Cir. 1992). The Board's decision here does nothing more than apply the single-employer doctrine in yet another factual context, to analyze the rights of employees of one entity seeking access to the exterior nonworking areas of a closely related entity's premises, and balance those rights against the entities' property rights.

In asserting (Br. 35) that the Board is precluded from applying single-employer principles in this context, the Companies entirely misunderstand the Board's statutory function. As noted above at pp. 17-18, Congress has entrusted

the Board with primary responsibility for interpreting and applying the Act to the infinite combinations of events that may be deemed violative of its terms. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978). This responsibility requires the Board to “formulate rules to fill the interstices of the broad statutory provisions.” *Beth Israel Hosp.*, 437 U.S. at 500-01. It is accordingly the Board’s task to interpret the general proscription against interference and restraint in Section 8(a)(1), and the ambiguous term “employer” as it is used there and in Section 2(2). *See ITT Indus. v. NLRB*, 413 F.3d 64, 68, 76-77 (D.C. Cir. 2005) (deferring to the Board’s interpretation of Section 8(a)(1)’s ambiguous language as prohibiting unjustified interference with off-site employees’ access to outside, nonworking areas of employer property for organizational purposes); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 147 (3d Cir. 1994) (finding that the term “employer” is ambiguous as used in Section 8(a)(1) and defined in Section 2(2)). And where, as here, the Board’s interpretation of those broad and ambiguous provisions is based on a reasonably defensible construction of the Act, the Court should defer to the Board’s interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

Moreover, as the Supreme Court has held, the Board’s use of an “evolutional approach” in carrying out its statutory responsibility “is particularly fitting.”

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265–66 (1975). Thus, the Companies’ suggestion that “the Board’s earlier decisions froze the development” of the law relating to single employer status—effectively limiting its application to previously recognized situations—“misconceive[s] the nature of administrative decisionmaking.” *Id.*

Finally, the Companies miss the mark in asserting (Br. 41) that the Board relied on “nothing more” than *Mine Workers (Boich Mining Co.)*, 301 NLRB 872 (1991). That case involved a finding that employees of one entity in a single employer relationship could lawfully strike in protest of conduct by another entity in the relationship, because those employees—though nominally employed by only one entity—were not strangers or third parties in relation to the other entity. *See Boich*, 301 NLRB at 872-73, 875. The Board cited that case here merely because it provided an analogy to the instant case, to illustrate the more general principle that employees who are “the employees of the single employer” can lawfully engage in collective action affecting either employer in the relationship.⁷

(ROA.1157.) Applying the same logic here, the Board reasonably found that, because of Alcoa’s single-employer relationship with Traco, Alcoa’s employees

⁷ Accordingly, it is of no moment that the Sixth Circuit granted the employer’s petition for review on the ground that substantial evidence did not support the Board’s finding that Boich and another entity were a single employer. *See Boich Mining Co. v. NLRB*, 955 F.2d 431, 435 (6th Cir. 1992).

are not strangers or third parties in relation to Traco. Rather, they are “the employees of the single employer” entity that includes Traco, and therefore they can engage in lawful concerted activity at Traco, to the same extent as other employees of the single employer entity who work off-site.

In sum, the Board here reasonably found that, in the absence of any legitimate business justification, the Companies could not lawfully bar a few Alcoa employees from distributing union literature in the parking lots and other exterior nonworking areas of Traco’s property. This straightforward finding, which is firmly anchored to the single-employer status of the two entities here, raises no sweeping threat to “corporate separation and property rights” as the Companies suggest (Br. 39). Accordingly, there is no basis for disturbing the Board’s well-supported determination that the Companies interfered with employee rights in violation of Section 8(a)(1) of the Act.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER CORRESPONDING TO THE UNCONTESTED FINDING THAT THE COMPANIES UNLAWFULLY SURVEILLED EMPLOYEES’ UNION ACTIVITIES

The Companies do not contest the Board’s finding (ROA.1160) that they violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), through Traco General Manager Jost, by surveilling employee interactions with union handbillers outside the Traco facility. Accordingly, it is undisputed that Jost positioned himself, for a sustained period, outside the Traco facility and near union handbillers, where he

would see which employees accepted handbills from union representatives. *See NLRB v. Aero Corp.*, 581 F.2d 511, 511-13 (5th Cir. 1978) (sustained employer observation of union activity in public area constituted unlawful surveillance); *Arrow Automotive Indus.*, 258 NLRB 860, 860-61 (1981) (employer observation of handbilling outside employer property was “out of the ordinary” and therefore constituted unlawful surveillance), *enforced*, 679 F.2d 875 (4th Cir. 1982).

This Court’s precedent “establishe[s] that when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement.” *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008). The Board, therefore, is entitled to summary enforcement of the portions of its Order corresponding to its uncontested finding of unlawful surveillance. *See El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 658 (5th Cir. 2012) (explaining that “a party’s failure to challenge the Board’s findings in its initial brief results in waiver of those issues,” making summary enforcement appropriate).

CONCLUSION

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

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May 2016

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

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ALCOA COMMERCIAL WINDOWS, L.L.C.,	*
doing business as TRACO, a single employer	*
	*
Petitioners/Cross-Respondents	* No. 15-60848
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 06-CA-065365
	*
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all 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
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**UNITED STATES COURT OF APPEALS
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	*	
Respondent/Cross-Petitioner	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,529 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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