UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
AGENCY APPEAL PRE-ARGUMENT STATEMENT (FORM C-A)

☒ APPLICATION FOR ENFORCEMENT ☐ PETITION FOR REVIEW

1. SEE NOTICE ON REVERSE. 2. PLEASE TYPE OR PRINT. 3. PAPERCLIP ANY ADDITIONAL PAGES

CAPTION:	AGENCY NAME:	AGENCY NO.:
NATIONAL LABOR RELATIONS BOARD v. GUY BREWER 43 INC. D/B/A CHECKERS	National Labor Relations Board	29-CA-161438
	DATE THE ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT WAS ENTERED BELOW: April 28, 2016	ALIEN NO : (Immigration Only)
	DATE THE PETITION OR APPLICATION WAS FILED:	Is this a cross-petition for review / cross-application for enforcement? ☐ YES ☒ NO

Contact Information for Petitioner(s) Attorney:	Counsel's Name: Linda Dreeben	Address: Nat'l Labor Relations Board 1015 Half Street, S.E. Washington, D.C. 20570	Telephone No.: (202) 273-2960 E-mail: AppellateCourt@nlrb.gov	Fax No.: (202) 273-0191
Contact Information for Respondent(s) Attorney:	Counsel's Name: THE BOARD IS NOT AWARE OF COUNSEL FOR RESPONDENT	Address:	Telephone No.: E-mail:	Fax No.:

JURISDICTION OF THE COURT OF APPEALS (provide U.S.C. title and section):	APPROX. NUMBER OF PAGES IN THE RECORD:	APPROX. NUMBER OF EXHIBITS IN THE RECORD:	Has this matter been before this Circuit previously? ☐ Yes ☒ No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (*i.e.*, F.3d or Fed. App.)
29 USC § 160(e)			

***ADDENDUM "A"*: COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; AND (3) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT.**

***ADDENDUM "B"*: COUNSEL MUST ATTACH TO THIS FORM: (1) THE RELIEF REQUESTED; (2) A LIST OF THE PROPOSED ISSUES; AND (3) THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

PART A: STANDING AND VENUE

STANDING	VENUE
PETITIONER / APPLICANT IS: ☒ AGENCY ☐ OTHER PARTY ☐ NON-PARTY (SPECIFY STANDING):	COUNSEL MUST PROVIDE IN THE SPACE BELOW THE FACTS OR CIRCUMSTANCES UPON WHICH VENUE IS BASED: Venue is proper because unfair labor practices occurred in New York.

IMPORTANT. COMPLETE AND SIGN ON PAGE 2 OF THIS FORM.

PART B: NATURE OF ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT
(Check as many as apply)

TYPE OF CASE:

_____ ADMINISTRATIVE REGULATION / RULEMAKING

_____ BENEFITS REVIEW

_____X_____ UNFAIR LABOR

_____ HEALTH & SAFETY

_____ COMMERCE

_____ COMMUNICATIONS

_____ ENERGY

_____ IMMIGRATION - **includes denial of an asylum claim**

_____ IMMIGRATION - **does not include denial of an asylum claim**

_____ TARIFFS

_____ OTHER:
(SPECIFY) _____

1. Is any matter relative to this petition or application still pending below? ☐ Yes, specify: _____ ☒ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:
   (A) Arises from substantially the same case or controversy as this petition or application ? ☐ Yes ☒ No
   (B) Involves an issue that is substantially similar or related to an issue in this petition or application ? ☐ Yes ☒ No

If yes, state whether ☐ "A," or ☐ "B," or ☐ both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name:	Docket No.	Citation:	Court or Agency:
Name of Petitioner or Applicant:			

Date: July 14, 2016	Signature of Counsel of Record: /s/ Linda Dreeben

NOTICE TO COUNSEL

Once you have filed your Petition for Review or Application for Enforcement, you have only ten (10) calendar days in which to complete the following important steps:

1. Complete this Agency Appeal Pre-Argument Statement (Form C-A), serve it upon all parties, and file an original and one copy with the Clerk of the Second Circuit.

2. Pay the $250 docketing fee to the Clerk of the Second Circuit, unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) CALENDAR DAYS, YOUR PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT WILL BE DISMISSED. *SEE* THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ADDENDUM "A"

Guy Brewer 43 Inc. d/b/a Checkers
Board Case No. 29-CA-161438

(1) A Brief Description of the Nature of the Action:

This is an application by the NLRB for summary judgment enforcing its order against Respondent, pursuant to Section 10(e) of the National Labor Relations Act (29 U.S.C. §§ 151 and 160 (e)). On January 21, 2016, the Board's Acting General Counsel issued a complaint and notice of hearing in Case No. 29-CA-161438, charging Respondent with certain violations of the Act. Respondent failed to respond to the Board despite a follow-up letter sent to Respondent requesting a response. On February 18, 2016, counsel the General Counsel filed with the Board a Motion for Default Judgment. Respondent again did not respond. On April 28, 2016, the Board granted the Motion for Default Judgment and issued its Decision and Order entering an appropriate order against the Respondent.

(2) The result below:

In light of Respondent's failure to respond to the Board, on April 28, 2016, the Board granted the Motion for Default Judgment, issued its Decision and Order and entered an appropriate order against the Respondent.

(3) Relevant Opinions and Orders:

- Board Decision and Order of April 28, 2016, *Guy Brewer 43 Inc. d/b/a Checkers and Fast Food Workers Committee*, reported at 363 NLRB No. 173

ADDENDUM "B"

Guy Brewer 43 Inc. d/b/a Checkers
Board Case No. 29-CA-161438

(1) Relief requested:

Enforcement of the Board's April 28, 2016 Decision and Order.

(2) List of Proposed Issues:

The Board, due to Respondent's failure to respond to the Board, is entitled to summary entry of a judgment enforcing the Board's Order.

(3) Applicable standard of review:

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that "no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused by extraordinary circumstances." This limitation is jurisdictional and its application is mandatory. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982). See also, *KBI Security Service, Inc. v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996); *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 (2d Cir. 2001).

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Guy Brewer 43 Inc. d/b/a Checkers *and* Fast Food Workers Committee. Case 29–CA–161438

April 28, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon a charge and amended charges filed by Fast Food Workers Committee (the Union) on October 2, November 24, and December 2, 2015, the General Counsel issued a complaint on January 21, 2016, against Guy Brewer 43 Inc. d/b/a Checkers (the Respondent), alleging that the Respondent has violated Section 8(a)(3) and (1) of the National Labor Relations Act. The Respondent failed to file an answer.

On February 18, 2016, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on February 19, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Here, the complaint affirmatively stated that unless an answer was received by February 4, 2016, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that by letter dated February 4, 2016, the Region advised the Respondent that unless an answer was received by February 11, 2016, a motion for default judgment would be filed. The Respondent again failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation with an office and place of business located at 43 Empire Boulevard, Brooklyn, New York (the Brooklyn facility), has been engaged in the retail sale of food.

In conducting its operations annually, the Respondent derived gross revenues in excess of $500,000, and purchased and received at its Brooklyn facility goods and services valued in excess of $5000 directly from business enterprises located within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Karen Baney	Owner
Christina Bartlette/Barnette	Investor/Manager

The following events occurred, giving rise to these proceedings.

1. About August 20 or 21, or September 13, 2015, the Respondent, by Bartlette/Barnette, at the Respondent's facility, threatened employees with unspecified reprisals if they engaged in protected concerted and union activities.

2. (a) About the end of March 2015, the Respondent's employee Shawnette Richardson engaged in protected concerted activities with other employees for the purposes of mutual aid and protection by discussing and complaining about the Respondent's practice of issuing late paychecks to its employees.

(b) About the middle of June until August 29, 2015, Richardson engaged in protected concerted activities with other employees for the purposes of mutual aid and protection by discussing and complaining about the Respondent's practices of not paying employees overtime, incorrectly deducting from employees' paychecks time for breaks, paying employees late, and the Respondent's verbal abuse of employees.

(c) About August 29, 2015, Richardson engaged in protected concerted activity with other employees for the purposes of mutual aid and protection by complaining

about loud noise coming from the speaker system and complaining about Baney's verbal abuse.

3. (a) About June 2, 2015, the Respondent decreased Richardson's hours.

(b) About August 29, 2015, the Respondent discharged Richardson.

(c) Since about August 29, 2015, the Respondent has failed and refused to reinstate or offer to reinstate Richardson to her former position.

(d) The Respondent engaged in the conduct described above in paragraphs 3(a) through (c) because Richardson engaged in the protected conduct described above in paragraph 2, and to discourage employees from engaging in these or other concerted activities.

4. (a) About the dates set forth opposite their names, the Respondent discharged the employees named below:

Shanzealise Lincoln	August 21, 2015
Lawrence Williams	September 20, 2015

(b) On August 29, 2015, the Respondent reinstated Lincoln to her former position.

(c) Since about September 20, 2015, the Respondent has failed and refused to reinstate or offer to reinstate Williams to his former position.

5. The Respondent engaged in the conduct described above in paragraph 3(a) through (c) and paragraph 4(a) and (c) because Richardson, Lincoln, and Williams supported the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1 and 3(a) through (c), the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs 3(a) through (c), and 4(a) and (c), the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams, and by decreasing the work hours of Richardson, we shall order the Respondent to rescind the reduction of Richardson's work hours, and to offer Richardson and Williams full reinstatement to their former jobs[1] or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Richardson, Williams, and Lincoln whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[2]

The Respondent additionally shall be ordered to remove from its files any references to the employees' unlawful discharges and the unlawful decreasing of Richardson's work hours and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. We shall further order the Respondent to compensate Richardson, Lincoln, and Williams for any adverse tax consequences of receiving lump-sum backpay awards and to file with the Regional Director for Region 29 a report allocating the backpay

[1] As noted above, the complaint alleges, and we find, that the Respondent unlawfully discharged Shanzealise Lincoln on about August 21, 2015, and reinstated her to her former position on August 29, 2015.

[2] In the complaint, the General Counsel requests that the Notice be posted in both Spanish and English, and we grant this request.

The General Counsel further requests that Richardson, Lincoln, and Williams be reimbursed for any out-of-pocket expenses incurred while searching for work as a result of the discrimination against them. The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. Because the relief sought would involve a change in Board law, we believe that the appropriateness of these proposed remedies should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2 fn. 1 (2015); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

Finally, the General Counsel requests that the Respondent's owner be required to read the Board's remedial notice to assembled employees in Spanish and English during paid working hours, or alternatively, that a Board agent read the notice to employees during work time in the presence of the Respondent's owner and investor/manager. We deny this request because the General Counsel has not demonstrated that the Board's traditional remedies are insufficient to remedy the effects of the Respondent's unfair labor practices. *Fallbrook Hospital Corp. d/b/a Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 1, fn. 3 (2014), enfd. 785 F.3d 729 (D.C. Cir. 2015); *Bruce Packing Co.*, 357 NLRB 1084, 1084 fn. 4 (2011), enfd. in part 795 F.3d 18 (D.C. Cir. 2015); *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

awards to the appropriate calendar year for each employee.[3] *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Guy Brewer 43 Inc. d/b/a Checkers, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected concerted and union activities.

(b) Decreasing employees' hours because they support the Union and engage in protected concerted activities, and to discourage employees from engaging in these activities.

(c) Discharging employees because they support the Union and engage in protected concerted activities, and to discourage employees from engaging in these activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the reduction in Shawnette Richardson's hours.

(b) Within 14 days from the date of this Order, offer Shawnette Richardson and Lawrence Williams full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharges and the unlawful decreasing of Shawnette Richardson's hours, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams and the unlawful decreasing in Richardson's hours, and within 3 days thereafter, notify them in writing that this has been done and that the discharges and reduction in hours will not be used against them in any way.

(e) Compensate Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix" in both English and Spanish.[4] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 28, 2016

[3] Having also found that the Respondent has independently violated Sec. 8(a)(1) by decreasing Richardson's work hours and discharging her, we find that Richardson is entitled to each of these remedies under that provision of the Act as well.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals if you engage in protected concerted and union activities.

WE WILL NOT decrease your hours because you support the Union and engage in protected concerted activities and to discourage you from engaging in those activities.

WE WILL NOT discharge you because you support the Union and engage in protected concerted activities and to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the reduction in Shawnette Richardson's hours.

WE WILL, within 14 days from the date of the Board's Order, offer Shawnette Richardson and Lawrence Williams full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams whole for any loss of earnings and other benefits resulting from their unlawful discharges and the unlawful decreasing of Shawnette Richardson's hours, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharges of Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams and our unlawful decreasing of Shawnette Richardson's hours and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and reduction in hours will not be used against them in any way.

WE WILL compensate Shawnette Richardson, Shanzealise Lincoln, and Lawrence Williams for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

GUY BREWER 43 INC. D/B/A CHECKERS

The Board's decision can be found at www.nlrb.gov/case/29-CA-161438 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St., S.E., Washington, D.C. 20570, or by calling (202) 273–1940.