

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

<b>COOPER TIRE &amp; RUBBER COMPANY</b>	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	
	)	
<b>v.</b>	)	<b>Nos. 16-2721</b>
	)	<b>16-2944</b>
<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	
<b>and</b>	)	
	)	
<b>UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL &amp; SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC</b>	)	
	)	
<b>Intervenor</b>	)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS  
BOARD TO THE COMPANY’S MOTION TO STRIKE**

To the Honorable, the Judges of the United States  
Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, opposes the motion of Cooper Tire & Rubber Company (“the Company”) to strike a paragraph in the Board’s brief where the Board answers a company contention by noting an undisputed record fact. The Company erroneously claims that Section 10(e) of the National Labor Relations Act (29 U.S.C. § 160(e)) bars the Board—the adjudicatory agency whose decision is under review before the

Court—from noting any point that the General Counsel, acting in his prosecutorial capacity below, did not mention in exceptions before the Board. Mistakenly conflating the distinct roles of the Board and the General Counsel, the Company in effect makes the absurd claim that Section 10(e) required the Board to provide notice to itself of any argument made by the Board in defending its Order. The Court should deny the Company’s motion for the following reasons:

1. The Company objects to one paragraph of the Board’s answering brief, where the Board responded to the Company’s suggestion in its opening brief that even if Title VII of the Civil Rights Act of 1964 did not require it to discharge employee Runion, it was obligated or entitled to do so under its policy against workplace harassment. (Board Br. at 27.) The Board answered this contention by noting that it “rings hollow,” given the undisputed fact that the Company merely suspended another employee for directing racial epithets against his supervisor and others on the job, but discharged Runion for his off-the-job remarks made when he was on the picket line. (*Id.*) In his decision, the administrative law judge noted this record evidence. (A. 462.)

2. The Company is seriously mistaken in contending that Section 10(e) imposes limits on the Board—the adjudicatory agency that issued the Decision and Order under review. To be sure, Section 10(e) serves as an administrative exhaustion requirement requiring *parties* to raise their challenges in exceptions

filed with the Board. 29 U.S.C. § 160(e); *see also* 29 C.F.R. 102.46(h). And under Section 10(e), a party's failure to file an exception on a particular issue bars it from raising its contention on review. *See, e.g., NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 825 (8th Cir. 2000) ("In order for this Court to consider a party's objection, the party must have apprised the Board 'that it intended to press the question now presented' to us.") (quoting *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943)). Section 10(e) does not, however, require the adjudicatory agency such to file exceptions with itself.

3. At bottom, the problem with the Company's Section 10(e) argument is that it fails to recognize the distinction between the Board and the General Counsel, who prosecuted the unfair-labor-practice complaint before the Board. *See* Section 3(d) of the Act (29 U.S.C. § 153(d)) (setting forth the General Counsel's prosecutorial role). The Company seems not to realize that after the Board issues its Decision and Order, the General Counsel's prosecutorial role ends. At that point, as Section 3(d) further provides, the General Counsel acts in a different capacity—namely, as the Board's attorney seeking enforcement of its Order. *See Osthus v. Whitesell Corp.*, 639 F.3d 841, 847 (8th Cir. 2011) (noting that since 1955, the Board has delegated to the General Counsel "the power to petition any court of appeals") (citing *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1098 (9th Cir. 2009) (same)). Moreover, in seeking enforcement, the

Board is not bound by “the view he [the General Counsel] expressed as a party before it.” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002). In other words, the General Counsel’s litigation strategy before the Board is “of no moment,” and “the court will take no note of it.” *Id.* See also *NLRB v. Food Workers Union, Local 23*, 484 U.S. 112, 117-122 (1987) (explaining the General Counsel’s prosecutorial function is separate from Board’s adjudicatory function); *Sutter Roseville Med. Ctr.*, 348 NLRB No. 29, 2006 WL 2826427, \*14 (2006) (“The views of the General Counsel are those of the prosecutor and do not bind the Board.”). For these reasons, the General Counsel’s litigating strategy below does not affect the Court’s jurisdiction under Section 10(e) of the Act to consider points made by the Board in its appellate brief.

4. In any event, the Company mischaracterizes the Board’s brief by asserting (Mot. 2) that it “contend[s] that this Court should enforce [the Board’s Order] on the grounds that Cooper disparately enforced its Harassment Policy.” As noted above at p. 2, in the paragraph that the Company seeks to strike, the Board’s brief merely responds to a suggestion made by the Company in its opening brief that its policy against workplace harassment privileged it to discharge Runion. (Board Br. at 27; Co. Br. 27-30.) The Board was fully warranted in answering that suggestion by pointing out that it “rings hollow,” given the undisputed record evidence that the Company applied its policy inconsistently.

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion to strike.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

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Dated at Washington, D.C.  
this 16th day of December, 2016

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FOR THE EIGHTH CIRCUIT**

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	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-2721 & 16-2944
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	08-CA-087155
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY,	)	
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
AFL-CIO/CLC	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its opposition contains 969 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.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board

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

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Washington, DC 20570  
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	)	

**CERTIFICATE OF SERVICE**

I certify that on December 16, 2016, I electronically filed the foregoing motion for extension of time with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I also certify that the foregoing motion was served on all parties or their counsel of record through the CM/ECF system as all counsel are registered users.

/s/ Linda Dreeben  
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Dated at Washington, D.C.  
This 16th day of December 2016