

Nos. 16-1316 & 16-1367

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

KING SOOPERS, INC.

Petitioner/Cross-Respondent

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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: King Soopers, Inc. (“the Company”), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of a Board Decision and Order issued on August 24, 2016, and reported at 364 NLRB No. 93. The Board seeks enforcement of that order against the Company.

(C) Related Cases: This case was not previously before this Court or any other court. Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

/s/Linda Dreeben
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Dated at Washington, DC
this 2nd day of February, 2017

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of King Soopers, Inc. (“the Company”) to review, and on the cross-application of the National Labor Relations

Board (“the Board”) to enforce, a Board Order issued against the Company on August 24, 2016, and reported at 364 NLRB No. 93. (A 1213-43.)¹

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board, in those circumstances, to cross-apply for enforcement. The Company filed its petition for review on September 9, 2016. The Board filed its cross-application for enforcement on October 25. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Wendy Geaslin for engaging in protected, concerted activity

¹ Citations are to the joint appendix filed on December 27, 2016. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

and also, through the same manager, issuing Geaslin a prior unlawful suspension and, in violation of Section 8(a)(1), interrogating her.

2. Whether the Board acted within its broad remedial discretion in determining the relief due to employee Geaslin to make her whole for the loss of earnings she suffered as a result of the Company's unlawful actions.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's rules and regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on unfair labor practice charges filed by Wendy Geaslin, the Board's General Counsel issued a complaint alleging the Company unlawfully suspended Geaslin twice before unlawfully discharging her. (A 1229.) During a hearing on the complaint before an administrative law judge, the General Counsel amended the complaint to allege that the Company, by the same manager, also unlawfully interrogated Geaslin. (A 1229.) Following the hearing, the judge issued a decision and recommended order finding that the Company violated the Act as alleged. (A 1242-43.)

The Company filed exceptions and the General Counsel filed a limited exception. In addition, the Board invited all interested parties to file briefs

regarding whether the Board should make changes to remedial relief requested by the General Counsel to compensate discriminatees for search-for-work expenses, as well as expenses incurred in connection with interim employment, separately from backpay and regardless of whether a discriminatee received interim earnings. In response to this invitation, the parties filed supplemental and responsive briefs. Four amici filed briefs in support of the General Counsel's requested changes.² No individual or association other than the Company filed a brief in support of retaining the Board's traditional approach to awarding the relevant expenses. (A 1215 n.8.)

Following consideration of all the exceptions and briefs before it, the Board issued a Decision and Order affirming the judge's rulings, findings, and conclusions, modifying the recommended remedy, and adopting the recommended Order, as modified. (A 1213.) The Board thus found that the Company violated Section 8(a)(3) and (1) of the Act by twice suspending and discharging Geaslin for engaging in protected, concerted activity and violated Section 8(a)(1) of the Act by unlawfully interrogating her about her protected, concerted activity. (A 1213.) In addition to the remedies ordered by the judge for these violations, the Board further ordered the Company to compensate Geaslin for her search-for-work and

² The amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations; the Service Employees International Union; the International Brotherhood of Electrical Workers, Local 304; and the law firm Weinberg, Roger & Rosenfeld. (A 1215 n.8.)

interim employment expenses regardless of whether those expenses exceeded her interim earnings. (A 1221.) The facts relevant to the Board's findings are detailed below, followed by a summary of the Board's Decision and Order.

II. THE BOARD'S FINDINGS OF FACT

A. The Company Operates With Collective-Bargaining Agreements that Cover Employee Work Duties

The Company has two contracts with the United Food and Commercial Workers Union, Local 7 ("the Union") at its grocery store #1 in Denver. (A 1213, 1229; 328-562.) Both the meat and retail contracts contain articles describing the work to be performed by employees covered by each agreement. (A 1213; 334-36, 443.) The retail contract specifically covers clerks whose duties involve "bagging...sold merchandise" and states that "[a]ll work and services performed in the bargaining unit connected with the handling or selling of merchandise to the public shall be performed exclusively by bargaining unit members except as provided below." (A 1213, 1215; 443, 448.) The meat contract covers employees working in store coffee shops pursuant to a letter of agreement between the parties. (A 1213; 432.) The Union interprets both contracts to prevent employees from performing work outside their assigned departments. (A 1214, 1230; 163-64.) Assistant deli manager Angelica Eastburn (a bargaining unit member) stated, for example, that it was unusual for employees who were not under the retail contract to bag groceries. (A 1214; 224.)

B. Employee Geaslin Worked as a Barista in the Meat Bargaining Unit; Manager Pelo Questioned Geaslin about a Work-Related Complaint

Wendy Geaslin began working for the Company in 2009 and most recently worked as a barista at the Starbucks kiosk in store #1 under the meat contract.

(A 1213; 163, 432.) In March 2014, Geaslin complained to coworker Latrice Jackson, a produce clerk, about Starbucks' employees not being able to complete their own duties, such as restocking, due in part to helping bakery department employees cut bakery products for distribution as samples. (A 1230; 53, 84.)

Geaslin did not know at the time that Jackson was a union steward. (A 1230; 55, 151.)

After that complaint, store manager Theresa Pelo asked Geaslin if she had really complained to the Union about having to prepare bakery samples. (A 1231; 53, 88.) Geaslin responded that she had not spoken to the Union about that issue (still being unaware that Jackson was a steward). (A 1231; 53, 151.) Pelo then stated that Geaslin was not telling the truth and that Pelo did not like Geaslin complaining to the Union. (A 1231; 53.)

C. Geaslin Approaches Pelo about Taking Her Lunch Break after Pelo Asks for Bagging Help; Pelo Says To Wait Until After Bagging; Geaslin Asks if She Should Bag; Geaslin Follows Pelo's Directive to Come Back and Talk; Geaslin Denies Refusing to Bag; Pelo Suspends Geaslin for Five Days

On May 9, 2014, store manager Pelo called on the intercom for employees, and specifically baristas, to assist with bagging in the front of the store. Geaslin

was surprised because she had never been asked to bag groceries. Geaslin walked to the front of the store and tried to tell Pelo that she needed to take her lunch break. (A 1213, 1231, 1238; 57-58, 119.) Article 24 of the meat contract requires employees to take a lunch break at approximately the middle of their shift and Geaslin had already worked about 6 hours of her 8.5 hour shift. (A 1213 & n.3; 96, 348.) Geaslin had previously been disciplined for failing to take her lunch break. (A 1238; 46, 794-96.)

Pelo told Geaslin not to worry about her lunch, that she would get it after she bagged groceries. Geaslin then asked whether she should be performing bagging duties because she belonged to a different bargaining unit or union. Pelo repeated her directive. (A 1213, 1231; 58, 125, 152.) Geaslin turned to bag, raising her hands in the air and stating that she was just asking about her lunch. Geaslin then turned to walk toward the check stands to bag groceries but Pelo called her back saying they needed to talk. (A 1213, 1231, 1238; 59, 146, 152.)

After moving to Pelo's office, Pelo accused Geaslin of refusing to bag groceries. Geaslin replied that she was not refusing, but had only inquired about her lunch break and whether the Union's contract permitted her to do bagging work. Pelo placed Geaslin on a 5-day suspension for refusing to bag groceries. (A 1213-14, 1238; 59-61, 63-64, 221, 287.)

D. Geaslin and Her Union Representative Meet with Pelo; Pelo Continues To State Geaslin Refused To Bag Groceries; Geaslin Disputes that Claim; Pelo Admits Geaslin's Duties Do Not Include Bagging; Pelo Suspends Geaslin for Another Five Days

On May 14, Geaslin and her union representative Danny Craine met with Pelo and two assistant store managers to discuss Geaslin's suspension. Geaslin and Pelo had a tense exchange disputing whether Geaslin refused to bag groceries or whether, instead, she had simply questioned Pelo's directive without disobeying it. Geaslin made a surprised look, including raising her arms in the air, to express her disbelief that Pelo continued to state she refused to bag groceries. (A 1232; 65-66, 141, 165-67.) During the meeting, Pelo admitted that Geaslin's duties did not include bagging groceries. (A 1214, 1232; 166-67.)

After a break in the meeting during which Craine took Geaslin out of the room for approximately 5 minutes, Geaslin calmly returned to Pelo's office. Pelo placed Geaslin on another 5-day suspension, this time because Pelo asserted that Geaslin was being rude and making faces at her in the meeting. (A 1214, 1232-33; 67-70, 168-69.)

E. Pelo Discharges Geaslin Because of the Meeting About the First Suspension

On May 21, Pelo again met with Geaslin and Craine at the store. Pelo terminated Geaslin for alleged gross misconduct during the May 14 meeting. (A 1214; 71, 171-73, 644.) The Union filed a grievance contesting Geaslin's May 9

suspension and May 21 termination. Craine later informed Pelo that he considered the May 21 meeting to be the first step grievance meeting and the Company accepted this statement. (A 1233; 174, 185, 293-94, 800.)

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Pearce and Members Hirozawa, McFerran, and Miscimarra) found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)). The Board unanimously found that the Company violated Section 8(a)(3) and (1) of the Act by suspending employee Wendy Geaslin on May 14 and discharging her on May 21 for engaging in protected, concerted activity as well as violated Section 8(a)(1) of the Act by interrogating her in March about her protected, concerted activity. The Board further found (Member Miscimarra dissenting) that the Company violated Section 8(a)(3) and (1) of the Act when it first suspended Geaslin on May 9 for engaging in protected, concerted activity. (A 1213.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. §157). (A 1242.) Affirmatively, the Order requires the Company to offer Geaslin full reinstatement and make her whole for any loss of earnings and other benefits due to the Company's discriminatory

action. (A 1221, 1242.) The Board further ordered (Member Miscimarra dissenting) the Company, in an amended remedy, to compensate Geaslin for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. (A 1221.) The Company must also physically and electronically post copies of a remedial notice at its store #1 in Denver. (A 1243.)

SUMMARY OF ARGUMENT

1.a. The Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Geaslin for her protected, concerted activity in a May 14 meeting with her store manager. There is no dispute that the Company discharged Geaslin for her conduct in that meeting, which began with Geaslin insisting that she attempted to bag groceries, per manager Pelo's order, after simply asking whether she should perform such an assignment. Geaslin was engaged in protected, concerted activity by honestly and reasonably invoking a contractual right in a meeting with management to discuss her suspension the week prior. The Board further found that none of Geaslin's behavior in the May 14 meeting was so egregious as to lose the protection of the Act. The Company's arguments rest on the Court overturning the Board's adoption of the judge's thorough findings and well-supported credibility determinations. The Company also insists the Board should be required to analyze

the Company's conduct under an inapplicable test that would still result in a finding of unlawful discharge.

1.b. The Board further found based on substantial evidence that the Company separately violated the Act by suspending Geaslin on May 9 for engaging in protected, concerted activity when Geaslin honestly and reasonably invoked a contractual right by questioning whether she should be bagging groceries because she belonged to a different bargaining unit or union. Again, the Company's challenges to the Board's credibility determinations fail under well-settled law and the Board properly distinguished the Company's citation to inapposite case law. Additionally, as to the unlawful discharge and two suspensions, the Board found nothing in the record to meet the Company's burden of proving deferral to the parties' grievance procedure was appropriate because the Union refused to take Geaslin's grievance to arbitration and the parties did not resolve Geaslin's grievance in any other way.

1.c. The Board also found that the Company violated the Act when Pelo interrogated Geaslin over going to the Union about cutting samples of bakery products. Based on the totality of the circumstances surrounding Pelo's questioning, the Board determined that Pelo had no intention other than to discourage Geaslin from exercising her statutory right to complain to and seek assistance from the Union. The Company relies on the wrong legal standard to

assert there was no interrogation. The Board properly decided to permit a mid-trial complaint amendment alleging the interrogation because the Company had an opportunity to fully litigate the issue.

2. The Board properly exercised its discretion to include search-for-work and interim employment expenses as make-whole relief for Geaslin without limiting reimbursement of such expenses to the amount of a discriminatee's interim earnings. Discriminatees have a duty to mitigate their loss of income from an employer's discharge and carrying out that duty may require reasonable expenditures which, under the Board's traditional approach, they would only be reimbursed for up to the amount of their interim earnings. If such earnings were less than their expenses, they would not be made whole. The Board further found that its change in calculating search-for-work and interim employment expenses separately from backpay comports with the treatment of other non-wage make-whole relief such as employee benefits.

The Company ignores the Board's role in effectuating the policies of the Act utilizing its knowledge, expertise, and broad remedial authority by incorrectly asserting that the Board could not make this change or exceeded its authority. The Company's speculation as to discriminatees' incentives to inflate their expenses fails to take into account the burden of proof on both the General Counsel and discriminatees in the Board's compliance proceedings. Furthermore, the bifurcated

nature of the Board's proceedings supports the Board's granting of both the General Counsel's pre-hearing motion to amend the complaint to include the revised make-whole relief and petition to revoke the Company's subpoena for Geaslin's expenses as the amount of make-whole relief owed is a compliance matter for later determination.

STANDARD OF REVIEW

This Court will uphold a decision of the Board “unless it relied upon findings that are not supported by substantial evidence, failed to apply the proper legal standard, or departed from its precedent without providing a reasoned justification for doing so.” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (citation omitted). The Board's findings of fact are “conclusive” when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally's Park Place, Inc. v. NLRB*,

646 F.3d 929, 935 (D.C. Cir. 2011). Finally, this Court will accept credibility determinations made by the judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted); *accord Inova Health*, 795 F.3d at 80.

The Board’s legal determinations under the Act are entitled to deference, and this Court will uphold them so long as they are neither arbitrary nor contrary to law. *Int’l Transp. Servs. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). Specifically, determining “whether activity is concerted and protected within the meaning of Section 7 [of the Act] is a task that implicates the Board’s expertise in labor relations,” so the “Board’s determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable.” *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)). *Accord DIRECTV Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016). That determination involves “the ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management.” *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (citations omitted). Accordingly, “the balance struck by the Board is subject to limited judicial review.” *Id.* (citations omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING GEASLIN FOR ENGAGING IN PROTECTED, CONCERTED ACTIVITY AND ALSO, THROUGH THE SAME MANAGER, ISSUING HER A PRIOR UNLAWFUL SUSPENSION AND, IN VIOLATION OF SECTION 8(a)(1), INTERROGATING HER

A. An Employer Violates the Act by Discriminating in a Term of Employment Because of an Employee’s Protected, Concerted Activity

Section 7 of the Act guarantees employees “the right to engage in... concerted activities for the purpose of...mutual aid or protection....” 29 U.S.C. § 157. To be protected under Section 7, employee activity must be both “concerted” in nature and pursued either for union-related purposes aimed at collective bargaining or for other “mutual aid or protection.” *Id.* These protections are to be construed broadly. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Citizens Inv.*, 430 F.3d at 1197.

When an employer takes an adverse employment action against an employee in order to discourage union activity, it violates Section 8(a)(3) of the Act, which prohibits discrimination “to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 103 n.1, 104 (D.C. Cir. 2003); *G&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 624 (7th Cir. 1978) (stating “it has long been recognized” that action

motivated “by a desire to discourage protected activity” violates Section 8(a)(3)).

The Supreme Court long ago held that discouraging membership in a labor organization includes discouraging participation in concerted activities. *See Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 39-40 (1954). In addition, such union-motivated retaliation derivatively violates Section 8(a)(1) of the Act, 29 U.S. C. § 158(a)(1), because it interferes with employees’ Section 7 right to engage in union activity. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

When an employee is discharged “for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.” *Kiewit Power Constructors Co. v. NLRB*, 652 F.2d 22, 28 (D.C. Cir. 2011) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). An employee engaged in protected activity can, by “opprobrious conduct,” lose the protection of the Act. *Inova Health*, 795 F.3d at 86 (quoting *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)). In determining which actions are so opprobrious that the employee loses protection, this Court “defers to the [Board]’s distinction between merely intemperate remarks, which the Act protects, and actual threats, which it does not.” *Kiewit*, 652 F.3d at 28. The *Atlantic Steel* test is typically used to analyze whether direct communications,

face-to-face between an employee and employer at the workplace, lose protection of the Act thereby enabling the Board to balance employee rights with the employer's interest in maintaining order at its workplace. *See id.* at 26 (citing *Atlantic Steel Co.*, 245 NLRB at 816).

B. The Board Found Based on Substantial Evidence that the Company Suspended Geaslin on May 14 and Ultimately Discharged Her on May 21 Because of Protected, Concerted Activity in the May 14 Meeting with her Manager

There is no dispute that the Company suspended Geaslin and ultimately discharged her for conduct in the May 14 meeting. The Board reasonably found based on substantial evidence in the record that Geaslin “engaged in protected activity at the grievance meetings” on May 14 and May 21. (A 1215.) The Company therefore violated the Act because Geaslin’s conduct during her protected activity was not so egregious as to lose the protection of the Act. (A 1215 (citing *Atlantic Steel*, 245 NLRB 814)).

1. Geaslin was engaged in protected, concerted activity at the May 14 meeting

Substantial evidence overwhelmingly supports the Board’s conclusion that Geaslin engaged in protected, concerted activity at the May 14 meeting. Geaslin asserted her contractual rights by “insist[ing] that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract.” (A 1237.) An individual employee’s assertion of a right grounded in a

collective-bargaining agreement constitutes protected, concerted activity because the employee is acting in the interest of all employees covered by the contract. *Interboro*, 157 NLRB 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). *Accord City Disposal*, 465 U.S. at 829 (assertion of a collectively bargained right “is an extension of the concerted action that produced the agreement”). Furthermore, as the Supreme Court has explained, “an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.” *City Disposal*, 465 U.S. at 840 (single employee refusing to drive truck he believed was unsafe, pointing to provision in collective-bargaining agreement giving him right of refusal, engaged in protected, concerted activity).³

Additionally, as the Board found, the May 14 meeting was a “grievance” meeting because Geaslin and her representative met with management to discuss

³ *Accord OPW Fueling Components v. NLRB*, 443 F.3d 490, 496 (6th Cir. 2006) (asserting contractual right to file grievance is protected); *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 400 (4th Cir. 1991) (asserting contractual right to reimbursement of travel expenses is protected); *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 514-15 (7th Cir. 1991) (asserting honest and reasonable—but mistaken—contractual right to refuse work assignment is protected); *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1291 (9th Cir. 1989) (asserting contractual requirement that only electricians move electrical wire is protected).

her discipline the week prior.⁴ (A 1237; 65-66, 165-67, 287.) *See, e.g., Stephens Media*, 677 F.3d at 1252 (attempted participation in meeting with management to question employee was protected, concerted activity); *Crown Central Petroleum Corp.*, 177 NLRB 322, 322 (1969) (participation in grievance meeting was protected conduct), *enforced*, 430 F.2d 724 (5th Cir. 1970).

2. Geaslin did not lose the protection of the Act

The Board further found, adopting the judge's analysis on this question, that Geaslin's behavior did not lose the protection of the Act because the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting such protection.⁵ (A 1240.) Under *Atlantic Steel*, 245 NLRB at 816, an employer violates the Act by disciplining an employee engaged in protected activity unless, in the course of that conduct, the employee engages in opprobrious conduct, costing her the Act's protection. The Board considers four factors in making this determination: the place of the discussion; the subject matter of the discussion; the nature of the employee's

⁴ Geaslin was also engaged in protected, concerted activity at her May 21 termination meeting because that meeting was considered a step 1 grievance meeting under the meat contract. (A 1237; 174, 185, 293-94.)

⁵ The Company has waived any challenge to this finding beyond its challenge (Br. 35 n.15) to the judge's credibility determinations. Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party's contention with citations to authorities and record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

outburst; and whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.*

First, as to the place of discussion, the Board found (A 1240; 65,165) that this factor favors protection because the meeting occurred in the manager's office in the presence of Pelo and two other managers. As such, there is no evidence that anyone else heard the discussion. *See, e.g., Inova Health*, 795 F.3d at 86 (place of discussion favored protection when encounter occurred in administrative hallway away from patients and members of public); *Stanford Hotel*, 344 NLRB 558, 558 (2005) (weighing location in favor of protection when outburst occurred away from work area with door closed in effort to maintain privacy).

Second, the Board found (A 1240) that the subject matter of the discussion favors protection. As the Board stated, in the May 14 meeting, "Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her, and Geaslin disagreed with Pelo's characterization of the events of May 9." (A 1240; 65-66, 165-67.) Thus, the subject matter of the discussion encompassed Geaslin's "expression of her opinion on her duties per her interpretation of the collective bargaining agreement [which] is a fundamental Section 7 right." (A 1240.) When an employee's outburst occurs during protected activity, the subject matter of the discussion weighs heavily in favor of protection. *See Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (finding it "very significant" in favor of

protection that employee was engaging in protected activity when he had disputed outburst), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). *Accord Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1322 (2006) (discussion of merits of grievance seeking reinstatement of coworker was protected subject matter); *Consumers Power*, 282 NLRB at 131 (criticizing management for failing to provide coworker with police escort when reading meter at location with known violent homeowner was protected subject matter).

Third, the Board determined that the nature of Geaslin's outburst weighs in favor of protection. During the meeting, the credited evidence shows that after Pelo began by claiming that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder. Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. (A 1233, 1241; 67-70, 168-69.) As the Board found, Geaslin "did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office...she merely questioned the propriety of the [bagging] task, and then sought to defend herself when faced with discipline." (A 1241-42.) The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection. *See Goya Foods*, 356 NLRB 476, 478

(2011) (citing *United States Postal Serv.*, 251 NLRB 252, 259 (1980), *enforced*, 652 F.2d 409 (5th Cir. 1981)). By any account, Geaslin's behavior falls well short of threats or physical intimidation that have nevertheless been found to be protected by the Act. *See, e.g., Kiewit*, 652 F.2d at 28 (employee did not lose protection of Act despite angrily telling supervisor that things could get "ugly" and he "better bring [his] boxing gloves"); *Battle's Transp., Inc.*, 362 NLRB No. 17, slip op. at 9-10 (2015) (employee told supervisor to "shut up," got partly out of his chair and slammed hand on table in front of supervisor, and called supervisor "stupid" and "a liar").

Finally, the Board found that the fourth factor, provocation by the Company, weighs in favor of protection under the Act. At the meeting, Pelo insisted that Geaslin refused to bag groceries and therefore refused to follow her manager's directions. It was at this point that Geaslin "became visibly upset, ma[de] facial expressions...interrupted Pelo and became agitated...insist[ing] that she attempted to bag the groceries but...Pelo called her back to speak to her." (A 1242; 66, 166.) Thus, through the accusation that Geaslin refused her orders despite Geaslin's credible account that she attempted to comply before being given a second command to come talk to Pelo, "[i]t is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights." (A 1242.) In sum, Geaslin's actions at the May 14 meeting were not so opprobrious

as to warrant the loss of the Act's protections and the Company therefore unlawfully discharged her for her conduct at that meeting.

3. The Company's arguments fail to provide a basis to disturb the Board's finding of unlawful discharge

The Company mistakenly contends (Br. 10, 16, 41, 43) that the Board affirmed determinations of the judge, including as to the unlawfulness of the May 14 suspension, without providing supporting analysis or reasoning. However, the Company completely ignores the Board's statements that it affirms the judge's "rulings, findings, and conclusions" and that the Board "agree[s]" with the judge as to the analysis of the May 14 meeting. (A 1213 n.1, 1215.) The Company's assertion (Br. 43) that the Board is owed no deference on its findings or analysis as to Geaslin's discharge is therefore false. *See Inova Health*, 795 F.3d at 80.

The Company's challenges (Br. 19-21) to the Board's credibility determinations fail under well-settled law. As to the events of the May 14 meeting, the judge credited both Geaslin's and union representative Craine's testimony. Specifically, the judge stated that Craine testified in a "deliberate, calm manner" with "measured" tone and "pause[s]" when thinking about his response to the questions." (A 1232 n.17.) Furthermore, Craine's testimony generally supplemented Geaslin's testimony about the May 14 meeting and he testified "without a hint of bias." (A 1232 n.17, 1235.) In the face of the judge's well-supported credibility determinations, the Company offers nothing that comes close

to meeting its heavy burden of proving that the determinations are “patently unsupportable.” *Stephens Media*, 677 F.3d at 1250.

The Company insists (Br. 20) that, because its three managerial witnesses testified that Geaslin was “lunging” toward Pelo in her chair, the judge could not discredit this testimony. However, the judge stated that “[t]heir version of events seemed exaggerated and hyperbolic” while also going on to note that assistant manager Panzarella did not testify to any lunging in prior sworn testimony at a state labor and employment hearing, which was a “significant omission” that “clearly undermined” her testimony. (A 1233 n. 21; 239-40, 248.) Additionally, the judge declined to credit Pelo’s account of the May 14 meeting because “if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting.” (A 1235.) Given the lack of merit to the Company’s credibility attacks, it is clear that substantial evidence supports the Board’s finding that Geaslin was unlawfully discharged for her protected, concerted activities. *See Federated Logistics & Ops. v. NLRB*, 400 F.3d 920, 925 (D.C. Cir. 2005) (accepting Board’s resolution of conflicting testimony). *Accord NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985) (deference to Board’s findings particularly appropriate

where “record is fraught with conflicting testimony and essential credibility determinations have been made”).

Next, the Company seeks application of a different or additional legal standard to the facts of the case when it incorrectly states (Br. 46) that the Board’s decision should be reversed because the Board did not consider whether the Company acted lawfully under *NLRB v. Burnup & Sims*, 379 U.S. 21, 23-24 (1964). Under *Burnup & Sims*, an employer violates Section 8(a)(1) of the Act by disciplining an employee “if it is shown that the employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.” 379 U.S. at 23. In such circumstances, the employer’s good-faith belief that the misconduct occurred is no defense, for “protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.” *Id.*

It is therefore puzzling why the Company insists (Br. 45-50) that *Burnup & Sims* should somehow apply to this case while also vehemently insisting that Geaslin was not discharged for engaging in protected activity and/or that the

Company does not believe she was engaging in protected activity.⁶ In any event, if the Company is conceding that Geaslin was engaged in protected activity at the May 14 grievance meeting, its argument under *Burnup* nevertheless fails. As discussed above, the Board found that Geaslin did *not* engage in unprotected misconduct during the course of her otherwise protected conduct at the meeting.

Furthermore, it is the Board's province, not the Company's, to determine the appropriate analysis of a complaint before it. Here, the Board did so, applying the well-established test set out in *Atlantic Steel*.⁷ In contrast, the *Burnup* framework has consistently been applied by the Board, with court approval, in cases where, unlike here, an employer has arguably acted according to a "good faith mistake of

⁶ Even in its recitation of the facts, the Company states (Br. 9) that the General Counsel alleged Geaslin was suspended on May 14 for "engaging in inappropriate and aggressive behavior." To the contrary, the proven allegation in this case is that Geaslin was suspended for engaging in protected, concerted activity.

⁷ The Company's citation (Br. 47) to *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 436-37 (D.C. Cir. 2012), as requiring the Board to analyze this case under *Burnup & Sims* is misplaced. As this Court recently explained, "we held [in *Sutter*] that '[i]f [a company's] management reasonably believed [the employee's] actions occurred, and the disciplinary actions taken were consistent with the company's policies and practice, then [a company] could meet its burden under *Wright Line* regardless of what actually happened.'" *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (quoting *Sutter*, 687 F.3d at 436-37 and citing *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)). Here, unlike in *Sutter*, the Board did not analyze Geaslin's discharge under *Wright Line* because "Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable." (A 1239 n.28.) The Company has not challenged that Board determination. *Sitka Sound*, 206 F.3d at 1181 (issues not raised in opening brief are waived).

fact” in disciplining an employee. *Allied Industrial Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 880 (D.C. Cir. 1973). *Accord Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29 (D.C. Cir. 1998).

Not only did the Board in its discretion apply the correct test, but the Company has also waived any argument that the judge misapplied the *Atlantic Steel* test in finding that Geaslin engaged in no misconduct that would forfeit her the protection of the Act. The Company failed to challenge the *Atlantic Steel* analysis before this Court other than a comment (Br. 35 n.15) that the judge’s credibility determinations were wrong—absent even any supporting analysis indicating how those determinations rendered the application of *Atlantic Steel* in error. Fed. R. App. P. 28(a)(8)(A); *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.”) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n. 1 (D.C. Cir. 2005)).

C. The Board Also Found Based on Substantial Evidence that, Prior To Pelo Unlawfully Discharging Geaslin, Pelo Unlawfully Suspended Her on May 9 for Engaging in Protected, Concerted Activity

As the Board found, on May 9, “Geaslin engaged in protected, concerted activity when she questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union.” (A 1214.) As such, Geaslin was also unlawfully suspended that day for “asserting her contractual

rights” when Pelo sent her home for five days for an alleged refusal to bag groceries. (A 1239.)

1. Pelo suspended Geaslin for asserting her contractual rights

The Company violated Section 8(a)(3) and (1) of the Act by suspending Geaslin for engaging in protected, concerted activity. *See Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 39-40 (1954). The Board reasonably found that Geaslin’s query as to whether she should bag groceries was protected, concerted activity as an assertion of a right grounded in her collective-bargaining agreement. *See Interboro*, 157 NLRB 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). *Accord NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (assertion of a collectively bargained right “is an extension of the concerted action that produced the agreement”).

As the Board found, Geaslin “honest[ly] and reasonabl[y]” questioned the directive to bag groceries outside her contract. (A 1214.) *City Disposal*, 465 U.S. at 840 (requiring an “honest and reasonable invocation” of a contract right “regardless of whether the employee turns out to have been correct in his belief that his right was violated”). In reaching this conclusion, the Board relied on evidence that Geaslin’s interpretation of the contract was consistent with that of her union representative and with Pelo’s own admission that Geaslin’s job duties did not include bagging groceries, as well as the assistant deli manager’s testimony

that it was unusual for non-retail contract employees to bag groceries. (A 1214, 1237; 166-67, 224.) Thus, based on the contract provisions at issue in both the meat contract covering Geaslin and the retail contract covering clerks, the Board concluded that “even if it turns out that Geaslin’s belief that only retail unit employees should perform retail unit bagging work is incorrect, there is no basis to find on this record that her belief was not honest and reasonable.” (A 1215.)

The Board further noted the strong policy rationale in favor of protecting conduct such as Geaslin’s inquiry to Pelo because to protect only correct, rather than reasonable, contract interpretations would require employees “to be virtual legal experts regarding their contractual rights.” (A 1215.) The Board determined that “[h]olding employees to such a high standard is unreasonable and would certainly chill employees’ exercise of their Section 7 rights.” (A 1215.) *See NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991) (“the exercise of rights protected under the Act would be severely hampered if employees could face retaliation for good faith interpretations of collective bargaining agreements”).

Based on this rationale, the Board’s determination here that Geaslin was engaged in protected, concerted activity based on her honest and reasonable belief comports with its precedent in numerous cases of employees reasonably invoking their contractual rights. *See id.* (employee engaged in protected, concerted activity when refusing assignment based on honest and reasonable understanding of oral

agreement); *NLRB v. H.C. Smith Constr. Co.*, 439 F.2d 1064, 1064 (9th Cir. 1971) (employee engaged in protected, concerted activity although incorrect in belief that contract contained chain of command provision); *Hi-Tech Cable Corp.*, 309 NLRB 3, 12 (1992) (employee engaged in protected activity when honestly and reasonably protesting work assignment as contravening agreement reached in preliminary stages of grievance resolution), *enforced*, 25 F.3d 1044 (5th Cir.1994) (unpublished); *K-Mechanical Servs., Inc.*, 299 NLRB 114, 118 (1990) (employee engaged in protected, concerted activity although not covered by agreement provision under which he asserted right to preferential weekend overtime work). Because Pelo suspended Geaslin for asserting a contract right based on an honest and reasonable interpretation of her collective-bargaining agreement, the Company violated Section 8(a)(3) and (1) of the Act.

2. The Company's arguments fail to provide a basis to disturb the Board's finding that the May 9 suspension was unlawful

The Company aims several attacks at the Board's finding that Geaslin was engaged in protected, concerted activity on May 9 in an unsuccessful attempt to show Pelo lawfully suspended Geaslin. First, as the Board stated, the judge "fully credited Geaslin's testimony that she attempted to bag groceries and discredited Pelo's contrary testimony." (A 1213 n.4.) Geaslin "consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk to her." (A 1231 n.13; 59, 146, 152.) Geaslin

testified “in a calm demeanor” and her testimony was “unwavering” despite rigorous cross-examination “attempt[ing] to confuse her testimony.”⁸ (A 1230 n.6, 1231 n.13.) Additionally, as the judge indicated, Geaslin’s “prior behavior of questioning her duties but ultimately performing those duties supports her version of events.” (A 1236; 233.)

Given the judge’s analysis as well as the Board’s review of the record, the Board found no basis for overruling the judge’s credibility determinations. *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (Board’s findings especially entitled to deference where they rest on credibility resolutions made by judge who “sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records”). Indeed, such “well-reasoned credibility determinations [a]re not hopelessly incredible, self-contradictory, or patently unsupportable” and the Company has failed to provide any justifiable reason for this Court to upset them.⁹ *Enterprise Leasing Co. of Florida v. NLRB*, 831 F.3d 534, 544 (D.C. Cir. 2016) (citation omitted).

⁸ The Company misleadingly states (Br. 19) that the judge based her credibility determination on Geaslin’s affidavit to the Board during the investigation of the unfair labor practices charges. Before noting that her testimony was “corroborated by her Board affidavit,” the judge assessed Geaslin’s demeanor and her overall consistent testimony, including on cross-examination. (A 1230 n.6.)

⁹ Therefore, the Company’s reliance (Br. 13, 39, 42, 47) on statements that Geaslin “refused Pelo’s directive and declined to sack groceries” (Br. 13) do not comport with the credited evidence, and do nothing to advance its arguments that the May 9

In another attempt to support its argument that Geaslin was not engaged in protected, concerted activity, the Company continues to rely (Br. 39) on *ABF Freight Systems*, 271 NLRB 35 (1984). In *ABF Freight*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations four times more than any other driver, which led the employer to send all the driver's assigned trucks to be driven to the auto shop for inspection before he drove them. Even after these inspections and subsequent inspections, the driver refused to drive and the employer discharged him. The driver's opinion was contrary to the opinion of other drivers, mechanics, and his union's business agent. The Board held that the evidence, taken as whole and analyzed under the *Interboro* doctrine, indicated that the driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints" and therefore his refusal was neither concerted nor protected under the Act. *Id.* at 36-37.

The Board agreed (A 1214 n.5) with the judge's conclusion (A 1237) that Geaslin's actions are readily distinguishable from the employee in *ABF Freight*.¹⁰

suspension was lawful or that the additional May 14 suspension and subsequent discharge were lawful.

¹⁰ The Company asserts (Br. 39 n.19) that the Board "rubber stamped" the judge's distinguishing of *ABF Freight*. However, the Board clearly stated that it was agreeing with the judge "[f]or the reasons stated by the judge." (A 1214 n.5.) The Company seems therefore to be incorrectly suggesting that the Board was

Geaslin raised the issue of whether certain duties should be performed by baristas two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer. Rather, Geaslin “raised her questions but ultimately performed or attempted to perform the tasks.” (A 1237; 51-53, 58-59, 84, 152, 233.) Additionally, Geaslin’s belief about her duties was supported by Pelo herself based on Craine’s credited testimony. (A 1237; 166-67.)

The Company then asserts (Br. 41-42) that Geaslin lost the protection of the Act on May 9 because she engaged in a work stoppage in violation of the collective-bargaining agreement. As the judge found (A 1239 n.27), and as discussed previously (pp. 30-31), Geaslin did not refuse to bag groceries. Furthermore, the judge found, in the alternative, that “[e]ven if Geaslin’s action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration [than Geaslin’s approximately one minute of questioning] remain protected.”¹¹ (A 1239 n.27.) *See, e.g., Fortuna*

obligated to fully restate the judge’s analysis rather than endorsing and relying on it.

¹¹ *Mead Corporation*, 331 NLRB 509, 513 (2000), which the Company relies on (Br. 41), is distinguishable. There, the Board upheld a judge’s finding that a union steward’s advice to an employee to engage in insubordination by refusing a management directive (to bid on a permanent job that would accommodate his health needs) was unprotected. Here, Geaslin did not refuse Pelo’s directive but raised a contractual issue before moving to comply.

Enters. v. NLRB, 789 F.3d 154, 156-57, 164 (D.C. Cir. 2015) (two-hour work stoppage retained protection); *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011) (momentary refusal to return to work protected); *Goya Foods*, 356 NLRB 476, 478 (2011) (refusal to follow supervisor's order to leave for few minutes before punching out retained protection).

3. The Company is incorrect that its suspensions and discharge of Geaslin should have been deferred to arbitration

The Company asserts (Br. 26-28) that the Board should have deferred the matter of its suspensions and discharge of Geaslin to the meat contract's grievance and arbitration procedure. However, the Board found that deferral was not appropriate because the Union refused to take Geaslin's grievance to arbitration nor did the parties resolve the grievance. As the Board determined (A 1234), there is nothing on this record that meets the Company's burden of proving deferral to the grievance procedure is appropriate. *See Doctor's Hosp. of MI*, 362 NLRB No. 149, slip op. at 13 (2015); *Rickel Home Ctrs.*, 262 NLRB 731, 731 (1982).

The Union filed a grievance but ultimately refused Geaslin's request to arbitrate her claim. The Union's Executive Committee did not share its reasons for declining to take the grievance to arbitration. (A 1235; 186-87.) Geaslin did not have the power to take her own claim to arbitration and thus she exhausted the grievance procedures available to her. Likewise, the Board cannot "compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance."

(A 1235.) Hence, as the Board determined (A 1235), deferral is inappropriate. *See USPS*, 324 NLRB 794, 794 (1997) (finding deferral inappropriate where union refused to process employee's grievance to arbitration in absence of evidence that union's refusal was unlawful or motivated to avoid deferral).

The Company's reliance (Br. 26-27) on the Board's decision in *Alpha Beta*, 273 NLRB 1546 (1985), is entirely misplaced. Unlike in this case, the employer and the unions in *Alpha Beta* reached a settlement agreement resolving a set of grievances. Therefore, in that case, the Board deferred to a settlement agreement "made under the contract's grievance procedure" and to which "[a]ll parties agreed to be bound, including the employees" who not only were informed of the terms but made the "final decision of acceptance or rejection of the proposed settlement." *Id.* at 1547; *see also Plumbers & Pipefitters Local 520 v. NLRB*, 955 F.2d 744, 749-50 (D.C. Cir. 1992) (approving the Board's settlement-deferral standard). The Company has produced no evidence of any kind of settlement with the Union as to Geaslin's grievance.¹² Furthermore, to the extent that the Company argues (Br. 27 n.8) that the Board erred in considering whether deferral was appropriate under the standard in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Company ignores

¹² The absence of any alleged settlement agreement or even any type of understanding between the Company and Union resolving Geaslin's grievance distinguishes this case from *Titanium Metals Corp. v. NLRB*, 392 F.3d 439 (D.C. Cir. 2004).

the fact that the Board in *Alpha Beta*, 273 NLRB at 1547, stated it was applying the principles of *Collyer* as well as other deferral cases.

Finally, the Board reasonably distinguished (A 1235) its decision in *General Dynamics Corporation*, 271 NLRB 187 (1984), upon which the Company also relies (Br. 27-28). In *General Dynamics*, the charging party employee voluntarily withdrew his grievances, after pursuing them through four of the five grievance steps but prior to an already scheduled arbitration, and filed an unfair labor practice charge. 271 NLRB at 189. In a letter announcing his decision to withdraw, the employee said his decision was “based in essence simply on his conclusion that it would be less expensive and more convenient to pursue his unfair labor practice charge before the Board than to pursue his grievances through arbitration.” *Id.* at 190. In that circumstance, the Board concluded that deferral to the grievance procedure was appropriate in the face of a voluntary withdrawal absent evidence that the grievance procedure was unfair or would produce a result repugnant to the Act. *Id.* Here, Geaslin did everything possible to pursue her grievance including appealing the Union’s decision not to take it to arbitration. The Company’s related point (Br. 28 n.9) that the Union’s withdrawal of the grievance is the same as Geaslin herself withdrawing the grievance ignores action she took to continue pursuing the grievance and does not comport with the Board’s decision in *USPS*, 324 NLRB at 794, upon which the Board relied (A 1235).

D. Prior to Twice Suspending and Discharging Geaslin, the Board Also Found Based on Substantial Evidence that Pelo Unlawfully Interrogated Her Two Months Prior

The Board reasonably found that Pelo unlawfully interrogated Geaslin about speaking to the Union after Geaslin complained about having to sample the Company's bakery items in addition to her barista duties. The Board relied on well-established precedent to find that, under the totality of the circumstances, Pelo's questioning was coercive.

1. Pelo interrogated Geaslin about complaining to the Union

An employer's statements violate Section 8(a)(1) of the Act if, considering the totality of the circumstances, the statements have a "reasonable tendency" to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). When reviewing the Board's evaluation of the coercive effect of employer statements, the Court must "recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship."

Progressive Elec., Inc. v. NLRB, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

Pelo asked Geaslin if she complained to the Union about having to cut bakery samples and then accused Geaslin of not telling the truth when Geaslin denied doing so (Geaslin having been unaware that the coworker to whom she

complained was a union steward). (A 1230-31; 53, 55, 88, 151.) While Pelo denied speaking to Geaslin about the bakery sampling, the judge discredited Pelo's denial, further noting that Geaslin was a generally credible witness and it would be unlikely for her to fabricate an interaction with Pelo. (A 1231 n.9.) The judge credited Geaslin's account in part because her version of events leading up to Pelo's questioning was corroborated by assistant manager Lisa Panzarella's testimony. (A 1235; 235.)

As the Board found, Pelo's question was unlawful because "she told Geaslin she was displeased that she went to the Union" while knowing that Pelo complained to Jackson. (A 1238.) The Board reasonably determined that Pelo had "no other intention but to make Geaslin think twice about complaining to the Union." (A 1238.) Thus, Pelo's interrogation objectively would restrain Geaslin from pursuing her Section 7 rights, which "in this case are to seek union assistance for workplace and contractual questions." (A 1238.) Under the totality of the circumstances, Pelo's conduct was "coercive and sought information from Geaslin about her protected concerted activity" and hence violated Section 8(a)(1) of the Act.¹³ (A 1238.) *See United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C.

¹³ The Company errs (Br. 29) in stating that the Board "failed to analyze" the judge's conclusion. The Board specifically stated that it found the interrogation unlawful "[f]or the reasons stated by the judge." (A 1213.) Again, the Company appears to want the Board to fully restate the judge's reasoning rather than

Cir. 2004) (test for a Section 8(a)(1) violation is whether an employer's conduct has a reasonable tendency to coerce; actual coercion is unnecessary).

2. The Company's arguments fail to provide a basis to disturb the Board's finding of unlawful interrogation

The Company asserts (Br. 29-32) that Pelo's interrogation was not unlawful because Geaslin was not engaged in protected, concerted activity when she complained to Jackson. However, it is well established that an employee complaining about terms and conditions of employment to her union is engaging in activity protected by Section 7 of the Act. As the Board noted, Geaslin "actually complained to the Union." (A 1236.) The Board has explained that "where union activity is involved, the protection of Section 7 is absolute and [is] not contingent on a showing that [the employee] had made or intended to make common cause with other employees."¹⁴ *Elec. Workers, Local Union No. 596*, 274 NLRB 1348, 1351 (1985).

In further challenging the Board's finding, the Company insists that Pelo did not interrogate Geaslin because the "only alleged question" in their March 2014 exchange was whether Geaslin complained to the Union about having to prepare

endorsing and affirming it, as the Board did after reviewing the Company's exceptions and arguments.

¹⁴ In that regard, the Company mistakenly relies on (Br. 29-32) inapplicable cases that do not involve seeking union assistance. *See, e.g., Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987); *Plumbers Local 412*, 328 NLRB 1079, 1082 (1999).

bakery product samples and that question “does not suggest Pelo was seeking information upon which to take action against Geaslin.” (Br. 33.) In making that argument, the Company misstates the standard for an unlawful interrogation, which the judge correctly stated (A 1238) as whether an employee would be restrained from pursuing her Section 7 rights, including in this case seeking union assistance for workplace issues, due to a manager’s questioning. *See United Servs. Auto.*, 387 F.3d at 913. Here, as stated, the Board found that Geaslin’s question had the unlawful intention of “mak[ing] Geaslin think twice about complaining to the Union,” and it is therefore inconsequential whether Pelo sought to take action against Geaslin for doing so. (A 1238.)

The Company next posits (Br. 34) that Pelo’s question was rhetorical and therefore not unlawful. Again, the Company is focused on the wrong inquiry. The issue is not merely whether Pelo wanted Geaslin to answer her question and give particulars about whether or not she complained to the Union. The issue is whether Pelo’s question would reasonably tend to coerce an employee who would therefore feel restrained from exercising her Section 7 rights. *See, e.g., Guardian Indus. Corp.*, 313 NLRB 1275, 1277 (1994) (rhetorical question was not unlawful in “total absence of coercion or intimidation”).

The Company further states that Pelo’s single question unaccompanied by a threat “cannot form the basis for an interrogation finding.” (Br. 35.) Not only is

this statement incorrect because interrogations do not require accompanying “suggestions” that an employer will “take action” against an employee, but the Company relies on (Br. 35) inapposite case law in support of its contention. *See Chauffeurs, Teamsters & Helpers, Local 633 v. NLRB*, 509 F.2d 490, 495 (D.C. Cir. 1974) (finding employer’s “bare assurance” that “employee need not answer” was insufficient to eliminate coercion in context of “isolated and limited set of questions”).

Finally, the Company contends (Br. 24-25) that this Court should set aside the Board’s well-supported decision to allow the General Counsel to amend the complaint during the trial to include the interrogation claim. As the Board noted, the Company “had the opportunity to fully litigate this allegation because the amendment was made mid-trial, giving the [Company] the opportunity to call Geaslin as a witness.” (A 1213 n.1.) *See Amalgamated Transit Local 1498 (Jefferson Partners)*, 360 NLRB No. 96, slip op. at 2 n.7, 2014 WL 1715130, *2 n.7 (2014) (mid-hearing complaint amendment properly granted as issue “was fully litigated from that point forward”). Additionally, as the judge noted, the Company in fact cross-examined Geaslin about the facts of the alleged interrogation and surrounding events. (A 1234; 82-90.) Finally, the judge further relied on the Company’s opportunity to “question[] its witnesses” about the alleged

interrogation because it had yet to put on its case and, in fact, the Company called Pelo as a witness. (A 1234.)

Overall, the Company has failed to provide any basis to disturb the Board's findings, supported by substantial evidence and the judge's fully reasoned credibility determinations, that it violated Section 8(a)(3) and (1) of the Act by discharging, twice suspending, and, in violation of Section 8(a)(1), interrogating employee Geaslin. Therefore, the Board ordered the Company to offer Geaslin reinstatement to her job and make her whole for any losses suffered as a result of the discrimination against her.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE RELIEF DUE TO EMPLOYEE GEASLIN TO MAKE HER WHOLE FOR THE LOSS OF EARNINGS SHE SUFFERED AS A RESULT OF THE COMPANY'S UNLAWFUL DISCHARGE

A. The Board has Broad Discretion to Order Remedial Relief

Section 10 of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator "to cease and desist from such unfair labor practice, and to take such affirmative action...as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Congress vested the Board with the authority to develop appropriate remedies

based on administrative experience because it could not foresee and define such remedies for “an infinite variety of specific situations.” *Id.* Thus, “[f]rom the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board’s remedial approach...[and] [t]he Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme.” *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011).

The Supreme Court has described the Board’s power to order make-whole relief, in particular, as a “broad, discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998). It is a power “for the Board to wield, not for the courts.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). This is because when the Board chooses a remedy, “it draws on a fund of knowledge and expertise all its own, and its choice...must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). *Accord Federated Logistics & Ops. v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005). Thus, a Board order of make-whole relief is entitled to enforcement unless it is “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Seven-Up Bottling*, 344 U.S. at 346 (citation omitted).

B. The Board Properly Exercised Its Discretion To Order Full Reimbursement of a Discriminatee’s Reasonable Search-for-Work and Interim Employment Expenses and Provided a Reasoned Explanation for the Change

As this Court has stated, “the Board is at liberty to change its policies as long as it justifies the change with a reasoned explanation.” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1076 (D.C. Cir. 2002). Here, the Board determined—and fully explained—that making discriminatees whole justifies fully reimbursing an employee for her reasonable search-for-work and interim employment expenses instead of limiting reimbursement to the amount of the discriminatee’s interim earnings. The individual most harmed by an employer’s unlawful discharge is the discriminatee, who is deprived of his or her job, causing a loss of income and employment benefits. Yet, at the same time as the discriminatee suffers this loss, the law imposes on the discriminatee the duty to mitigate their loss. (A 1217.) Under the duty to mitigate, the discriminatee is required to search for and maintain comparable interim employment, potentially causing the discriminatee to endure additional, significant financial hardship—hardship that is traceable to the employer’s unlawful discharge.

Under the previous, traditional approach, the Board ordered reimbursement of a discriminatee’s search-for-work and interim employment expenses only up to the amount of the discriminatee’s interim earnings. (A 1217 & n.11 (citing *Crossett Lumber Co.*, 8 NLRB 440, 497-98, *enforced*, 102 F.2d 1003 (8th Cir.

1938)). In the instant decision, the Board recognized that the “practical result” of this approach, which the Board acknowledged it had never explained with a reasoned policy rationale, has been less than make-whole relief for some discriminatees. (A 1217.) For example, a discharged employee who bore expenses searching for work but was unable to find interim employment or who found a job that paid wages lower than the amount of their expenses, therefore received reduced or zero compensation for their search-for-work and interim employment expenses.¹⁵ (A 1217.) Thus, as the Board noted, its traditional approach “fails to fully reimburse losses incurred by those discriminatees who have already been the most economically injured by unlawful actions.” (A 1217.)

As a result of this inequity, the Board modified its make-whole remedy to require employers to “fully compensate discriminatees for search-for-work expenses and expenses incurred in connection with interim employment” by

¹⁵ The Board provided an example (A 1217 & n.11) that illustrates the shortcomings of its traditional approach. Hypothetical employee Juana Perez worked at a remote location earning \$1,000 per month prior to her unlawful discharge. During the month following her discharge, Perez spent \$500 travelling to different locations looking for work. Perez could only find interim employment in another state that paid \$750 per month. Perez moved to the new state to be closer to her new job and was also required to obtain training for her new position, costing her \$5000 and \$500, respectively. Under the Board’s traditional approach, Perez would receive compensation only up to the amount of her interim earnings for the 2 months, or \$1500 of her \$6000 total expenses, far less than make-whole relief. The Board further noted (A 1217) that a discharged employee has a duty to mitigate by engaging in reasonable efforts to seek and hold interim employment, which in the Board’s example required relocation and retraining expenses.

calculating those expenses “separately from backpay, regardless of whether the discriminatee received interim earnings.” (A 1213.) The Board noted that separately compensating discriminatees for search-for-work expenses and interim employment expenses is consistent with the way the Board orders that employees be made whole for the loss of other types of benefits.¹⁶ (A 1217.) Thus, apart from lost wages, the Board compensates discriminatees “for the separate inequity of additional expenses, such as medical expenses and retirement fund contributions” and does so “regardless of discriminatees’ interim earnings and separately from taxable next backpay.”¹⁷ (A 1218.) *See, e.g., General Motors Corp.*, 59 NLRB 1143, 1146 (1944), *enforced in relevant part*, 150 F.2d 201 (3d Cir. 1945) (making employees whole for loss of insurance benefits); *Scepter Ingot Castings, Inc.*, 331 NLRB 1509, 1510, 1517 (2000) (same), *enforced*, 280 F.3d 1053 (D.C. Cir. 2002). In modifying its method for calculating search-for-work and interim employment expenses to comport with the objective of providing

¹⁶ Furthermore, as the Board stated, in providing make-whole relief, “the Board serves the dual purposes of reimbursing discriminatees for losses suffered as a direct result of the unlawful conduct and furthering the policy interest of deterring illegal actions.” (A 1215 (citing *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965)).

¹⁷ The Board also noted (A 1218) that it compensates discriminatees for a wide variety of additional expenses as part of make-whole relief. *See, e.g., Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits), *enforced*, 227 F.2d 190 (8th Cir. 1955); *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employer-owned housing), *enforced in relevant part*, 300 F.2d 699 (D.C. Cir. 1962).

make-whole relief, the Board, “drawing on [its] fund of knowledge and expertise[,]” acted within its broad remedial authority. *Gissel*, 395 U.S. at 612.

C. The Company’s Challenges to the Board’s Revised Remedial Approach Are Incorrect and Speculative

The Company contends (Br. 50-52) that there has been no change in circumstances warranting a change to the Board’s award of search-for-work and interim employment expenses. However, in arguing that the Board gave no reason for the modification, the Company then recognizes (Br. 51) the reasoned basis of the Board’s remedial determination (A 1217)—that “the current remedial framework fails to make discriminatees truly whole.” (Br. 51.) While the Company notes (Br. 52) that the Board made a policy decision in 1938 as to awarding such expenses only up to the amount of interim earnings, the Company fails to also note that the Board can reevaluate the rationale behind its policy decisions in the absence of a change to the Act.¹⁸ *See, e.g., Chelsea Indus.*, 285 F.3d at 1076 (finding Board did not impermissibly depart from precedent when it overruled, absent a change in the Act, prior case involving withdrawal of recognition standard). The Board has provided such a reasoned explanation here—

¹⁸ Furthermore, as noted above, the 1938 Board failed to give a reasoned policy rationale for its initial treatment of search-for-work and interim employment expenses. (A 1217 (citing *Crossett Lumber*, 8 NLRB at 497-98).)

that discriminatees are not universally made whole under the prior calculation method.

The Company next states (Br. 52-57) that the Board has exceeded its authority by providing a “windfall” (Br. 53) to discriminatees that is punitive to employers.¹⁹ Here, the Board rightfully rejected the Company’s windfall argument because discriminatees “will not receive more than make-whole relief...[as] incurring search-for-work and interim employment expenses represent a different injury than losing wages” and the Board’s remedy insures relief for that injury. (A 1219.) As the Board recognized (A 1216, 1219), the Supreme Court rejected a similar argument that the Board exceeded its remedial authority when the Board modified its computation of make-whole relief to award backpay on a quarterly basis. *Seven-Up Bottling*, 344 U.S. at 346-347. Additionally, the Court found that the Board’s new approach would not result in greater than make-whole relief for

¹⁹ The Company has waived any argument (Br. 52 n.28) that the Board’s method for awarding search-for-work and interim employment expenses amounts to an impermissible award of compensatory damages under Section 10(c) of the Act by failing to make that argument to this Court. *See New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issued raised in heading only without supporting argument waived). In any event, as the Board noted (A 1218), search-for-work and interim employment expenses have been granted under the Act for years and are not a general tort remedy of the type that the Board is not permitted to grant. *See UAW v. Russell*, 365 U.S. 634, 645 (1958) (Board authorized to restore to employees “in some measure what was taken from them” by an employer’s unfair labor practices and thus backpay award “may incident[al]ly provide some compensatory relief”).

discriminatees and declined to debate whether the revised formula was remedial or punitive, explaining that the Court “prefer[red] to deal with these realities and avoid entering into the bog of logomachy.” *Id.* at 348. The same result should adhere in this instance of the Board exercising its broad remedial discretion to provide make-whole relief.²⁰

The Company’s remaining contentions about discriminatees being “incentivized” (Br. 54) to make massive life changes such as moving to a high-priced housing market or traveling the country on the employer’s dime are hyperbolic and ignore limiting factors built in to the Board’s compliance procedures. The Company’s related statement that the Board’s remedy includes search-for-work expenses “without regard to a discriminatee’s search-for-work efforts” (Br. 9) is patently false. Under well-settled Board law, the General Counsel bears the burden of showing the reasonableness of “establishing those expenses incurred by discriminatees, and the Board only awards expenses that are both reasonable and actually incurred.” (A 1220.) *See, e.g., Baker Elec.*, 351 NLRB 515, 537-38 (2007) (finding discriminatee entitled to certain reasonable

²⁰ *See also Mimbres Memorial Hosp. & Nursing Home*, 361 NLRB No. 25, slip op. at 4, 2014 WL 4202633, *4 (2014) (relying on the Board’s “cumulative experience” and that “[i]t is the business of the Board to give coordinated effect to the policies of the Act” to find that discriminatees’ interim earnings should not be deducted from backpay where there was no cessation of employment) (quoting *Seven-Up Bottling*, 344 U.S. at 348), *enforced sub nom. NLRB v. Community Health Servs., Inc.*, 812 F.3d 768 (10th Cir. 2016).

search-for-work and interim employment expenses but directing that other expenses be reduced). Furthermore, discriminatees have an obligation to engage in reasonable mitigation efforts to search for work. *88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enforced*, 55 F.3d 823 (3d Cir. 1995). *See also Phelps Dodge*, 313 U.S. at 197-99 (finding backpay remedy must take into account discriminatees' duty to find "desirable new employment"). As the Board indicated, it is "experienced in making these determinations" and the Company retains its rights to challenge them. (A 1220.)

D. The Company Fails To Show that the Complaint Amendment Seeking Revised Remedial Relief Was Unjustly Granted or that Its Premature Subpoena Should Not Have Been Revoked

The Company asserts (Br. 22-24) that the Board erred in granting the General Counsel's pre-hearing motion to amend the complaint to include search-for-work and interim employment expenses in the make-whole remedy regardless of whether Geaslin received interim earnings. A judge has wide discretion whether to grant or deny motions to amend complaints under the Board's rules and regulations, which allow amendments if they are "just." 29 C.F.R. § 102.17. *Accord Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n.8, 2015 WL 1577199, *3 n.8 (2015); *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1172 (2006), *enforced*, 315 F. Appx. 318 (2d Cir. 2009). As the Board found, the Company "had a full opportunity to litigate" the issue of the General Counsel's

proposed change to awarding search-for-work and interim employment expenses. (A 1220.) Indeed, the Board invited additional briefing on this specific question and the Company presented its arguments in full.²¹

The Company further contends (Br. 23 n.6) that the Board should not have revoked its pre-trial subpoena requesting information from Geaslin about her expenses. The Board rejected (A 1220, 1234) the Company's argument, repeated to this Court (Br. 23), that it could not address the merits of the make-whole remedy "because it does not know *how much* these expenses" are for Geaslin. (A 1234 (emphasis in original).) As the Board indicated, the Board procedure bifurcating unfair labor practice and compliance stages of Board proceedings leaves the "issue of what specific expenses were actually incurred by Geaslin...[to] the compliance stage of these proceedings" (A 1234) and, therefore, the Company "had no need for the subpoenaed documents at the merits stage of the proceedings" (A 1220). *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260 (1969) (the

²¹ The Company's other argument (Br. 24) as to the complaint amendment is that the General Counsel did not offer a valid excuse for the delay. The General Counsel indicated that it was an oversight in the complaint, which notably was corrected pre-trial. The General Counsel also pointed out that this was not the addition of an unfair labor allegation but rather was putting the Company on notice as to the make-whole remedy the General Counsel was seeking only *if* the judge found that the General Counsel met her burden on the discharge being unlawful. (A 1234; 18-19.) *See NLRB v. Blake Constr. Co.*, 663 F.2d 272, 283 (D.C. Cir. 1981) (amendment provision limited by fundamental principles of fairness with due process requiring that "charged party is given adequate notice of all the alleged violations of the Act and that these violations are litigated before sanctions are imposed").

Board's practice is to litigate liability first "but [leave] disputes over the details of reinstatement and back pay to the compliance stage of the proceedings"); *see also NLRB v. Katz's Deli of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (likening compliance proceedings to the damages phase of a civil proceeding). The Supreme Court has made clear that "compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, *if any*, to which the discharged employees are individually entitled." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (emphasis added). *Accord Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1330 (D.C. Cir. 2012) ("compliance proceedings provide the appropriate forum to consider objections to the relief ordered") (citation omitted). Thus, as the Board noted (A 1220), the judge's revocation will not prevent the Company from examining relevant documents in a later compliance proceeding,²² and the Board's determination in any such proceeding is subject to separate judicial review.

²² Furthermore, to the extent that the Company has evidence that it believes will mitigate its liability in this case (Br. 55 n.31), such as evidence about the retail grocery industry in Denver, the Company will have an opportunity to present such evidence in compliance proceedings. *See Sure-Tan*, 467 U.S. at 902.

CONCLUSION

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

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February 2017

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

KING SOOPERS, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1316 & 16-1367
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	27-CA-129598
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,707 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 2nd day of February, 2017

STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. § 157):

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

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(3) (29 U.S.C. § 158(a)(3)):

It shall be an unfair labor practice for an employer –
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

Section 10(c) (29 U.S.C. § 160(c)):

...If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter....

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States...wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order.... 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 because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia....

Relevant provision of the Board's Rules and Regulations:

29 C.F.R. § 102.17:

Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board...upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board...at any time prior to the issuance of an order based thereon, upon motion, by the Board.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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