

Nos. 16-2954, 16-3187

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

XEROX CORPORATION

Intervenor

v.

ROCHESTER REGIONAL JOINT BOARD, LOCAL 14A

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Rochester Regional Joint Board Local 14A (“the Union”) to review, a final Board Decision and Order issued against the Union on April 29, 2016, and reported at 363 NLRB No. 179. (A. 26-39.)¹ The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151 et seq., 160(a)), which empowers the Board to prevent unfair labor practices. The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)), and venue is proper because the unfair labor practices occurred in Webster, New York. The Board’s application and the Union’s cross-petition are timely because the Act places no time limit on such filings. Xerox Corporation (“the Company”) has intervened on the Board’s behalf.

STATEMENT OF THE ISSUE

Whether the Board is entitled to summary enforcement of its Order finding that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act because, in the absence of timely exceptions, the Court is jurisdictionally barred under Section 10(e) of the Act from reviewing the Union’s challenge to the Board’s Order.

¹ “A” references are to the Joint Appendix. “SA” references are to the Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

The underlying issue in this case involved a challenge to a provision in a collective-bargaining agreement and whether the Union violated Section 8(e) (29 U.S.C. § 158(e)) and Section 8(b)(4)(ii)(A) and (B) and of the Act (29 U.S.C. § 158(b)(4)(ii)(A) and (B)) by entering into and seeking to enforce the contractual provision. Section 8(e) proscribes contract clauses that require certain business transactions, such as subcontracting, be limited to employers who are signatories to union contracts, or contract clauses that require the employer to cease doing business with those employers.² Section 8(b)(4)(ii)(A) and (B) proscribe efforts to enforce an unlawful contract provision or to interpret a valid contract provision in an unlawful manner.³ These Sections are designed to limit union pressure in a

² Section 8(e) reads in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

³ The relevant portions of Section 8(b)(4)(ii) of the Act make it unlawful for a union to “threaten, coerce, or restrain” an employer in furtherance of certain unlawful objectives, which include (A) “forcing or requiring any employer . . . to enter into any agreement which is prohibited by [S]ection 8(e)[,]” and (B) “forcing or requiring any person to cease . . . doing business with any other person” 29 U.S.C. § 158(b)(4)(ii).

labor dispute to the “primary” employer involved, while shielding from pressure a “secondary” or “neutral” employer, with whom the union has no direct labor dispute. *See NLRB v. Pipefitters*, 429 U.S. 507, 519-20, 528 & n.16 (1977); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

Accordingly, a union may lawfully enter into a contractual agreement that precludes an employer from doing business with another employer, but only if it has a primary objective, such as preserving work performed by the employees of the employer bound by the agreement. *See National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 644-45 (1967). When a union enters into an agreement that has a secondary purpose, such as furthering general union objectives and attempting to regulate the labor policies of other employers, it violates Section 8(e) of the Act. *Id.*

Here, acting on unfair labor practice charges filed by the Company, the Board’s General Counsel issued a complaint, later amended, alleging that the Union violated Section 8(e) of the Act by entering into and maintaining a provision in its collective-bargaining agreement in which the Company agreed not to do business with any other employer or person. (A. 31; SA 10-16.) The complaint further alleged, as relevant here, that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing a grievance and a lawsuit seeking to enjoin the Company from subcontracting to JLL and to compel arbitration of its grievance. (A. 31; SA

14.) After a hearing, the administrative law judge issued a decision and recommended order finding that the Union violated Section 8(e) and 8(b)(4)(ii)(A) and (B) the Act. (A. 30-39.)⁴ On review, the Board issued a Decision and Order, finding, in disagreement with the judge, that the contractual provision at issue did not violate Section 8(e). (A. 26-30.) The Board further found that the Union failed to file exceptions to the judge's finding that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act and therefore had waived its right to challenge the finding. (A. 26 n.1, 28 n.14.) Accordingly, the Board expressed no view on that finding and adopted it. (A. 28 n.14.)

I. THE BOARD'S FINDINGS OF FACT

A. **Background; the Union Files a Grievance and a Lawsuit in Response to the Company Contracting Work to Another Employer**

The Company manufactures and sells office equipment worldwide. (A. 26, 31.) For many years, the Company and the Union have been parties to a collective-bargaining agreement ("Agreement") covering the Company's Monroe County production and maintenance employees. (A. 26, 31.) The most recent agreement is effective from June 2, 2014, through June 1, 2018.

⁴ The judge dismissed a complaint allegation that the Union had violated Section 8(b)(4)(ii)(A) and (B) by repeatedly taking the position that subcontracting was prohibited by the agreement violating Section 8(e). (A. 37.)

Article XXII of the Agreement, entitled “Successorship,” has been in the parties’ collective-bargaining agreements in its current form since 1989. (A. 26, 31, 32; SA 3, 7, 27-28.) Article XXII prohibits the “transfer by sale, lease or otherwise of ownership of or operational control” of the Company’s business unless the transferee assumes the obligations of the Agreement. (A. 26, 31-32; SA 28.) Article XXII also requires the Company to provide a written commitment by the transferee to assume all of the Company’s obligations under the Agreement. (A. 26, 31-32; SA 28.)⁵

⁵ In relevant part, Article XXII states:

A. DEFINITIONS

1. Transfer of Business shall mean the transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of the Company's current production functions or facilities in Monroe County, New York to any other individual, partnership or corporation provided, however such term shall not include any such transfer, sale or lease, in whole or in part, which forms part of one or more financing transactions by the Company where the Company retains operational control of the assets transferred, sold or leased.

[...]

B. NOTICE AND REGULATIONS

1. There shall be no Transfer of Business unless at least sixty (60) days prior to the effective date of such Transfer of Business the Company has delivered to the Manager of the Rochester Joint Board a binding written commitment by the Transferee to assume all of the Company’s obligations under this Agreement. In addition, the Company agrees that during said sixty (60) day period immediately preceding such a transfer, it shall meet at reasonable times, for the

Jones Lang LaSalle Americas, Inc. (“JLL”), a national commercial real estate services provider, entered into a contract with the Company effective November 1, 2012, under which JLL manages and administers the Company’s real estate in the United States and Canada. (A. 27, 31; SA 1, 3.) In 2014, the Company contracted with JLL to provide additional services, including HVAC maintenance, cleaning, moving, docks, and ancillary services, at the Company’s Webster, New York facility. (A 27, 32, 49.) Pursuant to the contract between JLL and the Company, the scope of work to be performed would remain under the Company’s control. (A. 32; SA 5, 24-26.)

On August 21, the Union filed a grievance alleging that the Company violated Article XXII by transferring “operational control over the maintenance functions” at the Webster facility without complying with Article XXII. (A. 27, 32.) On October 27, the Union initiated a civil action and filed a petition for a preliminary injunction in Case No. 6:14-CV-6607 in the United States District Court for the Western District of New York, seeking to enjoin the Company’s 2014 subcontracting to JLL until its grievance was arbitrated. (A. 27, 33; SA 29.)

purpose of negotiating with the Union all issues concerning the effects of the Company’s decision to transfer its operations.

(A. 26, 31-32; SA 28.)

B. The Administrative Law Judge's Decision; the Union Excepts to the Section 8(e) Violation Found by the Judge, But Does Not Except to Judge's Finding of the Section 8(b)(4)(ii)(A) and (B) Violations

The administrative law judge issued a decision finding that the Union violated Section 8(e) of the Act by entering into Article XXII of the Agreement with the Company. (A. 33-36, 38.) The judge interpreted Article XXII to mean that any lease is a transfer of business subject to the requirements of the Article, including adopting the Agreement, and that it therefore unlawfully restricted the Company's right to enter into any lease with a secondary employer. (A. 27, 34-36.) The judge further found that the Union violated Section 8(b)(4)(ii)(A) of the Act by filing a grievance to enforce Article XXII on August 21, 2014, and by filing a civil action and a motion for a preliminary injunction in the United States District Court for the Western District of New York on October 27, 2014, seeking to enjoin the Company from subcontracting until the August 21, 2014 grievance was arbitrated. (A. 37-38.) Finally, the judge found that the Union violated Section 8(b)(4)(ii)(B) of the Act by filing the aforementioned grievance and lawsuit to enforce its interpretation of Article XXII, and by taking those actions with the objective of precluding the Company from doing business with JLL until after the August 21, 2014 grievance was arbitrated. (A. 37-38.)

Seeking Board review, the Union filed 12 exceptions, all of which disputed the judge's Section 8(e) finding. (A. 43-46.) Exceptions 1 to 6 asserted that the

judge erred by failing to apply the Board's work-preservation doctrine prior to analyzing Article XXII under Section 8(e). (A. 43-44.) Exceptions 7 to 12 then asserted that the judge erred by finding that Article XXII was unambiguous and violated Section 8(e) on its face. (A. 44-46.) The exceptions did not cite to Section 8(b)(4)(ii)(A) and (B), nor did the Union's brief in support of exceptions include any argument referencing that statutory provision or the judge's finding of a violation of that Section. However, after the Company filed its brief in opposition to the Union's exceptions in which it alleged that the Union had waived any exceptions to the Section 8(b)(4)(ii)(A) and (B) finding, the Union filed a reply brief in which it responded to that point by stating only that "the absence of an exception" indicated that the Union would not challenge "the Board's oft-stated position that seeking arbitration to enforce a clause facially violative of Section 8(e) is primary activity and would serve to renew the statute of limitations for 'entering into' a Section 8(e) clause." (SA 43-44.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 29, 2016 the Board (then-Chairman Pearce and Members Hirozowa and McFerran) affirmed the judge's rulings, to the extent consistent with its Decision and Order. (A. 26.) The Board, in disagreement with the judge, found that Article XXII did not violate Section 8(e) of the Act. (A. 27-29). The Board found, contrary to the judge, that Article XXII did not restrict the Company from

entering into any lease with a secondary employer, but that by “its express terms is limited to ‘transfers of ownership . . . or operational control.’” (A. 27.) Therefore, the Board found the Article was not unlawful because “Section 8(e) does not include the sale or transfer of a business.” (A. 27.)

Further, the Board noted that there were “no exceptions to the judge’s finding that the [Union] violated Sec[ti]on 8(b)(4)(ii)(A) and (B) of the Act by attempting to restrict and enjoin [the Company’s] subcontracting to [JLL] by seeking to enforce Article XXII of the parties’ collective-bargaining agreement through the grievance procedure and through Federal litigation.” (A. 26 n.1.) The Board rejected the Union’s contention, which the Board noted was made for the first time in the Union’s reply brief, that it had not waived its right to challenge the Section 8(b)(4)(ii)(A) and (B) finding. In the absence of exceptions, the Board adopted the judge’s conclusion and “express[ed] no view on that finding.” (A. 26 n.1, 28 n.14.)

The Board’s Order requires the Union to cease and desist from pursuing its September 21, 2014 grievance alleging that the Company violated Article XXII of the Agreement in connection with its subcontracting to JLL, and from pursuing civil action 6:14-CV-6607 filed on October 27, 2014, in the United States District Court for the Western District of New York seeking a preliminary injunction enjoining the Company from subcontracting to JLL until after arbitration of the

September 21, 2014 grievance. (A. 29, 38.) Affirmatively the Board's Order requires the Union to withdraw the grievance, and to seek dismissal of the lawsuit. (A. 38.) The Order also requires the Union to post a remedial notice. (A. 29-30.)

The Union filed a motion for reconsideration with the Board in which it claimed that its exceptions had preserved a challenge to the judge's Section 8(b)(4)(ii)(A) and (B) finding. In the alternative, the Union claimed that no exceptions were needed because the judge's Section 8(b)(4)(ii)(A) and (B) finding did not contain an independent finding with respect to Article XXII. (SA 47, Memo in Support of Reconsideration.) Subsequently, the Board denied the motion because the Union had "not identified any material error or demonstrated exceptional circumstances warranting reconsideration." (SA 40.)

STANDARD OF REVIEW

The Board is authorized by statute "to make . . . such rules and regulations as may be necessary to carry out the provisions of" the Act (29 U.S.C. § 156), and thus it is "vested with broad discretion in interpreting and applying its own rules." *KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294-95 (1996) (citing *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991)). Accordingly, "[a] reviewing court will set aside the Board's construction of its own rules only where the Board has acted in a fashion 'so arbitrary as to defeat justice.'" *KBI Sec.*, 91 F.3d at 295 (citation

omitted); accord *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1319 (7th Cir. 1986).

Section 10(e) of the Act precludes a reviewing court from considering any objection “that has not been urged before the Board” unless such failure is excused by extraordinary circumstances. 29 U.S.C. § 160(e). Accordingly, as the Supreme Court has explained, courts of appeals “lack[] jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); accord *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001); *KBI Sec.*, 91 F.3d at 294. As the Court has stated, absent such extraordinary circumstances, “[t]he Board is entitled to summary affirmance of portions of its order identifying or remedying . . . uncontested violations of the Act.” *EDRO Corp. v. NLRB*, 650 F. App’x 789, 792 (2d Cir. 2016) (quoting *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009)).

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of its Order. Before the Board, the Union filed exceptions challenging only the judge’s finding that the Union violated Section 8(e) of the Act. The exceptions did not address the judge’s finding that the Union also violated Section 8(b)(4)(ii)(A) and (B) of the Act, nor did its brief in support of the exceptions even mention those violations or that Section of the Act. In the absence of exceptions, and consistent with the Board’s

Rules and Regulations, the Board adopted those portions of the judge's recommended order. In these circumstances, Section 10(e) of the Act precludes the Court from considering any challenge to the Board's finding because it was not timely raised before the Board.

The Union's arguments that its exceptions preserved a challenge to the judge's Section 8(b)(4)(ii)(A) and (B) finding are unavailing, and it does not assert, let alone show, any extraordinary circumstances that would excuse its failure to timely file exceptions to the judge's 8(b)(4)(ii)(A) and (B) finding. Instead, the Union's relies on inapplicable cases related to the Board's accepting, rather than striking, exceptions that contained some deficiencies under its rules, and the unrelated principle that the Board can find a violation not expressly plead in the complaint if the issue has been fully and fairly litigated. Neither situation applies here, where the Union filed exceptions that met the requirements of the Board's rules after fully litigating the case, but simply failed to except, in any way, to the judge's Section 8(b)(4)(ii)(A) and (B) finding. Last, the Union's argument that a violation of Section 8(b)(4)(ii)(A) and (B) cannot stand in the absence of a finding that the related contractual provision violates Section 8(e), cannot be considered because that argument was never timely raised to the Board. 29 U.S.C. § 160(e). Nonetheless, in finding that the Union violated Section 8(b)(4)(ii)(A) and (B), the judge dispelled that view by citing cases where a union unlawfully interpreted a

valid contractual provision, thereby violating Section 8(b)(4)(ii)(A) and (B) in the absence of a Section 8(e) violation. The Board is therefore entitled to summary enforcement of its Order.

ARGUMENT

THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER FINDING THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(A) AND (B) OF THE ACT BECAUSE, IN THE ABSENCE OF TIMELY EXCEPTIONS, THE COURT IS JURISDICTIONALLY BARRED FROM REVIEWING THE UNION'S CHALLENGES

In its Decision and Order, the Board addressed violations of two separate provisions of the Act. First, the Board overturned the judge's finding that a contractual provision violated Section 8(e) of the Act and deleted the corresponding paragraph from the judge's recommended order. Second, the Board noted that the Union did not file exceptions to the judge's finding that the Union violated Section 8(b)(4)(ii)(A) and (B) by attempting to restrict and enjoin the Company's subcontracting to JLL by seeking to enforce its interpretation of Article XXII through the dual avenues of the grievance procedure and federal litigation. In the absence of exceptions to that finding, and consistent with Section 102.46 of the Board's Rules and Regulations, the Board adopted the judge's Section 8(b)(4)(ii)(A) and (B) conclusion and the corresponding portions of the judge's recommended order. Thus, any claims that the Union now seeks to present to the Court are jurisdictionally barred from consideration.

A. Section 10(e) of the Act Precludes Judicial Review of An Issue Not Raised Before the Board

Section 10(e) of the Act provides in relevant part: “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.” 29 U.S.C. § 160(e). Extraordinary circumstances “excusing a failure to raise an objection ‘exist only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time.’” *NLRB v. Snell Island SNF, LLC*, 451 F. App’x 49, 51 (2d Cir. 2011) (quoting *NLRB v. Allied Prods., Corp.*, 548 F.2d 644, 654 (6th Cir.1977)).

Section 10(e) of the Act is intended to further the policy of “‘affording the Board [the] opportunity to consider on the merits questions to be urged upon review of its order.’” *Elastic Stop Nut Div. of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (citation omitted). As the Court has recognized, Section 10(e) is designed “to insure against piecemeal appeals to the court by requiring the parties first to give the Board an opportunity to rule upon all material issues in a case.” *NLRB v. GAIU Local 13 B Graphic Arts Int’l Union*, 682 F.2d 304, 311 (2d Cir. 1982). *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“courts should not topple over administrative decisions

unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.”)

The Board has implemented the statutory policy underlying Section 10(e) “by adopting regulations requiring the parties to raise by exceptions or cross-exceptions all issues they desire the Board to consider in reviewing a [judge’s] decision.” *GAIU Local 13 B*, 682 F.2d at 311. Those regulations, set out in Section 102.46 of the Board’s Rules and Regulations (29 C.F.R. § 102.46), require “parties to set forth their exceptions in detail” by identifying “precisely the specific finding contested and requires the supporting brief to articulate grounds for the exception in the form of supporting argument and authority.” *NLRB v. St. Barnabas Hosp.*, 46 F. App’x 32, 33 (2d Cir. 2002) (citing 29 C.F.R. § 102.46(b)). Generalized exceptions to the judge’s findings are insufficient to meet this standard. *Id.*; *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 270 n.3 (2d Cir. 2000). Moreover, “[u]nder the Board’s regulations, ‘[n]o matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.’” *KBI Sec. Serv.*, 91 F.3d at 294 (quoting 29 C.F.R. § 102.46); accord *National Maritime Union of America, AFL-CIO v. NLRB*, 867 F.2d 767, 775 (2d Cir. 1989). Rather, any exception “not specifically urged shall be deemed to have been waived.” *GAIU Local 13 B*, 682 F.2d at 311 (quoting 29 C.F.R. § 102.46); accord *National Maritime Union*, 867 F.2d at 775.

B. The Court Lacks Jurisdiction to Consider the Union's Challenge to the Board's Finding that the Union Violated Section 8(b)(4)(ii)(A) and (B) of the Act

The record amply demonstrates that the Court lacks jurisdiction to consider the Union's challenge to the Board's finding that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act because the Union failed to file exceptions to the judge's finding regarding those violations, and the Union has failed to demonstrate any extraordinary circumstances that would justify its failure to file such exceptions. Indeed, before the Court, the Union does not claim that it complied with Section 102.46 of the Board's Rules and Regulations (29 C.F.R. § 102.46), which required it to set forth exceptions to the judge's finding in detail and to "articulate grounds" for the exceptions. *See St. Barnabas Hosp.*, 46 F. App'x at 33 (citing 29 C.F.R. § 102.46(b)).

The Union's exceptions, on their face, make clear that the Union failed to challenge the Section 8(b)(4)(ii)(A) and (B) finding in any way. Thus, the Union filed 12 exceptions to the judge's decision that cited specific pages and lines of the judge's decision, all of which reference the portion of the judge's decision that found the Union violated Section 8(e) of the Act. (A. 41-46.) The Union's first 6 exceptions assert that the Board failed to apply the proper analysis in determining that Article XXII of the Agreement violated Section 8(e). (A. 43-44.) The remaining 6 exceptions dispute the judge's finding that Article XXII was facially

unlawful, which again is a Section 8(e) inquiry. (A. 44-46.) Tellingly, none of the Union's 12 exceptions even cite Section 8(b)(4)(ii)(A) and (B). Likewise, its brief in support of exceptions included no mention of Section 8(b)(4)(ii)(A) and (B) beyond an introductory reference to the judge's finding.

Indeed, even in its reply brief filed in response to the Company's brief in opposition to its exceptions, the Union essentially admitted that it only excepted to the judge's finding that Article XXII violated Section 8(e), stating that "the absence of an exception" to the judge's Section 8(b)(4)(ii)(A) and (B) finding reflected its view that the Board considered seeking enforcement of a facially unlawful Section 8(e) clause to be unlawful. (SA 43-44.)

In these circumstances, the Board reasonably found that "there were no exceptions to the judge's finding that the [Union] violated Section 8(b)(4)(ii)(A) and (B)," and thus adopted without review the judge's finding that the Union violated Section 8(b)(4)(ii)(A) and (B). (A. 26 n.1, 29.) As the Court has recognized, where a party fails to file exceptions that specifically reference the portion of the judge's decision finding liability for particular conduct, the Board is correct in finding no exceptions were filed to the judge's disposition and the Court lacks jurisdiction to consider the Board's finding. *KBI Sec. Serv.*, 91 F. 3d at 294 (employer failed to file any exceptions referencing the employer's liability for unlawfully interrogating its employees).

Before this Court, the Union does not claim, as it must, that extraordinary circumstances excuse its failure to timely take exception to that portion of the judge's decision that addressed the Section 8(b)(4)(ii)(A) and (B) determination, and therefore, Section 10(e) bars judicial review of the finding. *See KBI Sec. Serv.*, 91 F.3d at 294 (absent extraordinary circumstances to excuse the failure to raise exceptions, the Court lacks jurisdiction to review the Board's finding); *National Maritime Union*, 867 F.2d at 775 (absent exceptions, "the union may not be heard to argue on appeal that the [judge's] ruling was erroneous"). As a result, the Board is entitled to summary enforcement of its Order. *See EDRO Corp.*, 650 F. App'x at 792 (absent extraordinary circumstances, the Board is entitled to summary enforcement because the employer did not except to the judge's finding that the discharge was unlawful).

C. The Union's Contentions Are Without Merit

The Union asserts (Br. 9-10) that the Board applied a "narrow reading" of Section 102.46(b) of the Board's Rules and Regulations that is at odds with Board precedent. Contrary to the Union's view, and as discussed above (p. 16), it is simply not true that exceptions "need only inform all parties as to areas of disagreement." (Br. 9.) Instead, the Board's Rules and Regulations require specificity and detail, including, for example, specifying "the questions of procedure, fact, law or policy to which exception is taken," and requiring that

parties “identify that part of the administrative law judge’s decision to which the exception is made.” 29 C.F.R. § 102.46(b)(1). And the Rules and Regulations require that any exception “which is not specifically urged shall be deemed to have been waived.” 29 C.F.R. § 102.46(b)(2).

The cases relied on by the Union (Br. 9-10) are inapposite because they address situations where the Board, unlike here, rejected a motion by the General Counsel to strike a party’s exceptions or supporting brief in their entirety. In those cases, the Board found that a party set forth its specific areas of disagreement even if there was a failure to fully comply with literal requirements of the Board’s rules.⁶ Here, in contrast, the Board does not dispute that the Union filed exceptions and a supporting brief that satisfied the Board’s rules with regard to challenging the Section 8(e) finding. The Board accepted the exceptions and the parties proceeded on the basis that those exceptions addressed the specific disputes that the Union had with the judge’s decision. In the absence of any mention of Section 8(b)(4)(ii)(A) and (B), much less the attendant violations, in the Union’s exceptions and supporting brief, the Union is in no position now to suggest (Br. 9)

⁶ See *General Laborers Local Union No. 190*, 306 NLRB 93, 93 n.1 (1992) (deficiencies insufficient to strike exceptions); *Cincinnati Bronze, Inc.*, 286 NLRB 39, 39 n.1 (1987) (rejecting motion to strike exceptions because the exceptions and supporting brief taken together sufficiently set forth the party’s disagreements with the judge’s decision even if not in full compliance with the Board’s rules); *BT Mancini Co.*, 269 NLRB 869, 869 n.1 (1984) (deficiencies insufficient to strike party’s brief in support of exceptions).

that it set forth its disagreement with this portion of the judge's findings or that any failure to comply with the Board's rules constitutes a mere technicality.

The Union incorrectly attempts to blend doctrines by claiming (Br. 10-15) that its exceptions preserved a challenge to the judge's Section 8(b)(4)(ii)(A) and (B) finding because its exceptions to the judge's Section 8(e) finding are "closely related" to the judge's Section 8(b)(4)(ii)(A) and (B) finding. The Union's reliance (Br. 10-15) on the very different principle that the Board can find a violation not expressly alleged in an unfair-labor-practice complaint if the issue is "closely related" to a complaint allegation and was fairly and fully litigated, has no application here.⁷ The complaint here alleged violations of both Section 8(e) and Section 8(b)(4)(ii)(A) and (B), the parties fully litigated the issues. This case involves an entirely different issue. Indeed, if a party could preserve a challenge to a judge's finding simply by showing an issue was fully litigated, it would defeat the purpose of Section 10(e) of the Act and the Board's Rules and Regulations that require a party to place the Board on notice of the specific exceptions and articulate clear grounds for those exceptions.

Next, the Union suggests (Br. 16-18) that no such exceptions were necessary because the Board's determination that the Union did not violate Section 8(e) of

⁷ See, e.g., *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 133-37 (2d Cir. 1990) (Board's finding that employer violated different Section of the Act than alleged in complaint did not violate the employer's due process because the issue was fully litigated).

the Act by entering into Article XXII precluded a finding that its later attempts to enforce that contractual provision through arbitration or federal litigation violated Section 8(b)(4)(ii)(A) and (B) of the Act. As an initial matter, the Union could have made this argument (or any argument about its attempts to enforce the provision) to the Board in its exceptions, but it failed to do so. Nor has the Union offered any argument to support its claim (Br. 15) that its exceptions made the Board “aware” of its position that the Section 8(b)(4)(ii)(A) and (B) finding was dependent on finding that Article XXII violated Section 8(e).

Additionally, as a practical matter, the Union was fully alerted from the judge’s decision that separate exceptions to the judge’s Section 8(b)(4)(ii)(A) and (B) finding would be required. To begin, the Board’s General Counsel asserted before the judge that even if Article XXII of the Agreement did not facially violate Section 8(e), the Union’s interpretation here, which would require the Company to cease doing business with JLL unless JLL assumed the Agreement, violated Section 8(b)(4)(ii)(A) and (B) of the Act. (General Counsel Brief to the Administrative Law Judge, p. 18). And importantly, the judge, in finding that the Union violated Section 8(b)(4)(ii)(A) and (B) cited cases where the Board found a violation of Section 8(b)(4)(ii)(A) and (B) in the absence of a Section 8(e) violation. *See*, A.37 citing, *Newspaper & Mail Deliverers Union (New York Post)*, 337 NLRB 608, 609 (2002) (“a union violates Section 8(b)(4) by filing a grievance

based on a reading of a portion of the collective-bargaining agreement that would effectively convert it into an unlawful Section 8(e) provision”); *Elevator Constructors Local 3 (Long Elevator)*, 289 NLRB 1095, 1095-96 (1988) (union violated Section 8(b)(4)(ii)(A) by interpreting a bargaining agreement in a manner that would violate Section 8(e) of the Act), *enforced*, 902 F.2d 1297, 1300, 1307 (8th Cir. 1990); and *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB 540, 540 n.2, 548 (1996) (union violated Section 8(b)(4)(ii)(B) by prosecuting a grievance based on its unlawful interpretation of a facially valid subcontracting clause in a bargaining agreement).

Finally, to the extent that the Union challenges the Board’s remedy (Br. 1, 11, 15), that argument was never raised to the Board. Neither the Union’s exceptions, its supporting brief, nor its motion for reconsideration, even mention the Board’s remedy. Accordingly, any such challenge is jurisdictionally barred by Section 10(e) of the Act. In any event, the Board’s remedy does not, as the Union suggests, require it to cease and desist from enforcing Article XXII of the Agreement despite the lawfulness of the provision. Rather, the Board’s remedy (A. 29, 38) simply addresses the Union’s attempt to unlawfully enforce a misinterpretation of that contractual provision and apply it to the Company’s subcontracting with JLL, a remedy fully consistent with a finding that the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act.

CONCLUSION

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

Respectfully submitted,

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February 2017

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NATIONAL LABOR RELATIONS BOARD)	
)	
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)	Nos. 16-2954, 16-3187
and)	
)	Board Case Nos.
XEROX CORPORATION)	05-CA-121221
)	05-CA-132227
Intervenor)	05-CA-138025
)	
v.)	
)	
ROCHESTER REGIONAL JOINT BOARD)	
LOCAL 14A)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,595 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 15th day of February, 2017

**UNITED STATES COURT OF APPEALS
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)	03-CE-137252
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)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further 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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