

Nos. 16-1320, 16-1369

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

CAPITAL MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 21

Intervenor

**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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**UNITED STATES COURT OF APPEALS
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)	
and)	
)	
UFCW, LOCAL 21)	
)	
Intervenor)	
_____)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties

Capital Medical Center (“the Hospital”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. UFCW, Local 21 (“the Union”) was the charging party before the Board and is the Intervenor in the instant case. The Board’s General Counsel was also a party before the Board.

There are no amici.

B. Rulings Under Review

This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board (then-Chairman Pearce and Members Miscimarra and Hirozawa) in *Capital Medical Center and UFCW Local 21*, Case No. 19-CA-105724, issued on August 12, 2016, and reported at 364 NLRB No. 69.

C. Related Cases

The case on review before this Court was not previously before this Court or any other court. To date, there are no related cases pending before the Court or any other court.

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Dated at Washington, DC
this 4th day of April, 2017

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GLOSSARY

“The Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s brief to this Court
“JA”	Joint Appendix
“The Hospital”	Capital Medical Center
“The Union”	United Food & Commercial Workers Local 21
“UFCW”	United Food & Commercial Workers

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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Capital Medical Center (“the Hospital”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order issued by the Board on

August 12, 2016, and reported at 364 NLRB No. 69. (JA 374-93.)¹ United Food and Commercial Workers Local 21 (“the Union”), which was the charging party before the Board, has intervened on the Board’s behalf. The Board’s Order is final with respect to all parties.

The Board had subject matter jurisdiction over the underlying unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this proceeding under 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) of the Act (29 U.S.C. § 160(e)), which allows the Board, in that circumstance, to cross-apply for enforcement. The Hospital filed its petition for review on September 12, 2016. The Board filed its cross-application for enforcement on October 27, 2016. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

¹ Citations are to the Joint Appendix. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

STATEMENT OF THE ISSUE

Whether the Board reasonably found that the Hospital violated Section 8(a)(1) of the Act by attempting to prevent off-duty Hospital employees from peaceful and stationary informational picketing at the Hospital's nonemergency entrances, threatening employees with discipline and arrest for such picketing, and summoning the police to the scene.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and the Board's rules and regulations are contained in the Statutory Addendum.

STATEMENT OF THE CASE

Based upon an unfair labor practice charge filed against the Hospital by the Union, the Board's General Counsel issued a complaint on December 20, 2013. (JA 385; JA 314, 326.) The complaint alleged that the Hospital violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by denying off-duty employees access to outside nonworking areas of the Hospital for the purpose of publicizing a labor dispute by engaging in picketing and handbilling. (JA 385; JA 314.) The complaint also alleged the Hospital violated the Act by threatening employees with discipline and arrest and summoning the police in response to such activity. (JA 391; JA 314.) After a hearing, an administrative law judge issued her decision, finding that the Hospital violated Section 8(a)(1) of the Act by attempting to

prevent the employees from picketing near the main entrances of the Hospital, threatening the employees with discipline and arrest for doing so, and summoning the police. (JA 385-93.)²

On August 12, 2016, after timely exceptions were filed, the Board issued its decision, affirming the judge's findings. (JA 374.) The Board's findings of fact and conclusions and Order are discussed below.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Hospital is an acute care hospital in Olympia, Washington. The Union was the certified collective bargaining representative for the Hospital's technical employees for about 14 years before the parties' relevant collective bargaining agreement expired on September 30, 2012. (JA 374, 386; JA 8-9, 283.)

By May 2013, the parties had not yet reached a new agreement for a successor contract. In an effort to educate the public and encourage the Hospital to settle on a contract, the Union and some of the employees planned to engage in informational picketing and handbilling on May 20, the day before a scheduled bargaining session. (JA 374, 386; JA 10-12, 104.)

² The judge dismissed the handbilling allegations because the Hospital did not prevent employees from handbilling. (JA 388.)

On May 9, the Union provided the Company with notice of its intent to engage in picketing and handbilling on May 20, as required by Section 8(g) of the Act.³ The activity was scheduled to last from 6 a.m. to 6 p.m. (JA 374, 386; JA 283, 291.)

B. On May 20, the Union and Employees Handbill and Picket at the Hospital

The main hospital entrance and the physician's pavilion entrance—about 50-70 feet apart—are non-emergency entrances. The main hospital entrance is primarily used for patient family members visiting, as well as employees and staff. The physicians' pavilion entrance is primarily used for people attending outpatient appointments within those physicians' offices, generally within the 9:00 a.m. to 5:00 p.m. time frame, as well as employees working in those offices. (JA 374; JA 109, 113-15, 153.)

Beginning at 6:00 a.m. on the morning of May 20, two off-duty employees began to distribute handbills at the main lobby entrance of the hospital and the physicians' pavilion entrance. The handbills stated that "our patients matter," informed the public that the employees and the Hospital were in contract negotiations but having difficulty reaching a contract, and stated that supporting

³ As discussed further below at pp. 41-42, Section 8(g) of the Act (29 U.S.C. § 158(g)) provides that a union must give a hospital 10-day advance notice of any picketing or strike.

hospital workers means “fair wages, fair benefits, and dependable hours.” (JA 374, 374 n.5, 386; JA 18, 109-10, 294.)

At the same time, 20-25 employee picketers organized on the public sidewalk adjacent to the hospital driveway. They carried picket signs that were two feet by three feet, and contained such phrases as “Fair Wages,” “Fair Contract Now,” and “Respect Our Care.” (JA 374 n.6, 386; JA 18, 25, 327-29.) By 3:30 p.m., approximately 50-60 employees were handbilling and picketing on the public sidewalk without Hospital interference. (JA 374-75, 386-87; JA 26.)

At around 4:00 p.m., unit employees Gina Arland and Derek Durfey went to the main lobby entrance with handbills and picket signs. Their picket signs stated “Respect Our Care” and “Fair Contract Now.” (JA 375; JA 111, 153, 172, 329.) Arland stood between the main doors and the pavilion entrance, about six feet in front of the doors and four feet to the right. (JA 387; JA 112-13.) Durfey stood at least 10-12 feet from the main entrance and held two picket signs. He did not speak with any patients or visitors. (JA 375; JA 171-72, 176.) Arland initially tried to handbill while holding a picket sign, but ultimately gave up on handbilling because it was too cumbersome. Neither Durfey nor Arland patrolled, chanted, or blocked any entrance. (JA 375, 387, 391; JA 115, 176.)

C. The Hospital Repeatedly Asks Arland and Durfey To Stop Picketing and Threatens Discipline

At about 4:00 p.m., Heather Morotti, the Hospital's director of human resources, received a report that Arland and Durfey were picketing adjacent to the front lobby entrance. In response, security manager Bruce Hillard, along with several other security guards, approached Arland and told her that she could handbill, but could not stand on hospital property with her picket sign. Over the course of the next hour, Hillard politely asked Arland to leave several times and Arland respectfully declined. (JA 375, 387; JA 116-17, 172-73.)

Around the third or fourth time Hillard approached Arland, the Hospital's lead negotiator, attorney Glenn Bunting, followed along to reaffirm to her that she could not be on the Hospital's property with her sign. (JA 375, 387; JA 119, 173, 175.) Durfey then went to the sidewalk to consult Jenny Reed, the Union official in charge of the activity. Along with fellow Union representative Cathy MacPhail, Reed went to the main entrance and expressed to Bunting that the employees had the right to picket outside the entrance. Bunting asked Reed and MacPhail to come inside to discuss the matter further. (JA 375, 387; JA 30-32.)

Reed and MacPhail accompanied Bunting into Morotti's office. Bunting told them that the employees with picket signs near the Hospital entrance needed to leave. If the employees refused, he said that they could face discipline. Reed informed Bunting and Morotti that the Union's attorney, James McGuinness, had

told her that the employees had the right to picket outside the hospital entrance. Reed and MacPhail then left the office. Shortly thereafter, Reed informed Arland that Bunting had said that the Hospital could hold Arland accountable for her actions. (JA 375, 375 n.7, 387, 391; JA 33-37, 139.)

Bunting called McGuinness. He told McGuinness that if they could not resolve the situation, the Hospital could either discipline the employees or call the police. After the call, Morotti spoke with the Company's CEO and decided not to issue discipline. Instead, they decided that they would call the police at 5:00 p.m. if Arland and Durfey were still present near the entrances. (JA 375, 387; JA 94-98, 221-23.)

D. The Hospital Threatens To Call, and Then Calls, the Police

Bunting and Morotti returned to the entrance. Durfey and union steward Allison Zassenhaus overheard Bunting mention calling the police. Durfey decided to return to the sidewalk, and Zassenhaus took his picket sign. (JA 375, 388; JA 126, 155-56, 175.)

At 4:59 p.m., a hospital security guard called the Olympia Police Department and, by 5:11 p.m., Patrol Sergeant Dan Smith arrived. Bunting and Morotti told him that they wanted the picketers removed from their premises. Smith told Bunting and Morotti that he could not force the picketers to leave because they were not preventing people from entering the hospital, blocking

doors, or otherwise being disruptive. Instead, he advised the parties to resolve their differences. The picketers decided to leave because they were scheduled to end at 6:00 p.m. and that time was drawing near. Smith left the hospital at 5:49 p.m. (JA 375, 388; JA 50, 182-95, 198.)

During the time Zassenhaus carried her picket sign at the main entrance, fewer than five people entered or exited the hospital, and Arland also recalled there not being much traffic. There were no confrontational interactions between the picketers and anyone entering or exiting the hospital entrances. (JA 375, 388; JA 115, 152-53, 162-63, 176.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra, dissenting) affirmed the findings of the administrative law judge, with slight modification, and held that the Hospital violated Section 8(a)(1) of the Act by attempting to prevent the off-duty employees from picketing near the Hospital entrance, threatening them with discipline and arrest for engaging in such picketing, and summoning the police to the scene. (JA 374-79.) In so finding, the Board balanced the off-duty employees' right to engage in protected activity against the Hospital's property and business rights as set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and its progeny. Specifically, the Board applied a modified version of *Republic Aviation* given the hospital setting, as

called for by *NLRB v. Baptist Hospital*, 442 U.S. 773, 781-87 (1979), and *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978). Applying that framework, pursuant to which the Hospital could only prohibit its off-duty employees' protected activity by demonstrating that the prohibition was necessary to prevent patient disturbance or disruption of health care operations, the Board concluded that the Hospital had not made the requisite showing. (JA 375-78.)

The Board adopted the recommended order of the administrative law judge and directed the Hospital 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 the rights guaranteed them by Section 7 of the Act. The Order also required the Hospital to post a remedial notice. (D&O 379, 392.)

SUMMARY OF ARGUMENT

The Board reasonably determined that the Hospital violated the Act by attempting to prevent its off-duty employees from engaging in a quiet, stationary two-person picket outside the Hospital's entrance. In making its determination, the Board reasonably chose to apply its longstanding *Republic Aviation* framework, modified in the hospital context, to balance the employees' right to picket against the Hospital's property and business interests. Substantial evidence also supports the Board's application of that standard, given that the Hospital failed to

demonstrate that restricting its employee's picketing rights was necessary to avoid disruption of health care operations or disturbance of patients.

The Hospital's assertion that *Republic Aviation* applies only to employees' solicitation and distribution activities, and not picketing, is belied by Board precedent. The Board's application of *Republic Aviation* and its progeny to the off-duty employees in the instant case who were picketing on their own employer's property comports with the three primary distinctions made by the Board and Supreme Court when considering an employee's right to engage in Section 7 activity on private property: (1) who engaged in the activity (employees or non-employees); (2) the ownership of the property; and (3) the nature of the activity being prohibited. The Board's decision properly considers each of those factors, and appropriately recognizes that the rights of employees are at their strongest where, as here, employees exercise them at their own workplace. In contrast, the Hospital's preferred "alternative means" test conflates the relevant considerations and ignores the strength of the employees' interests here, improperly treating them as either non-employees, trespassers, or off-duty employees engaged in disruptive strikes.

The Hospital has failed to challenge the Board's additional finding that the Hospital's threat to discipline employees picketing near its entrance also violated the Act. In any event, substantial evidence supports that finding. Finally, the

Court lacks jurisdiction to consider the Hospital's belated and undeveloped First Amendment challenge to the Board's finding that the Hospital violated the Act by threatening employees with arrest and summoning the police. Accordingly, the Board is entitled to enforcement of its Order in full.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY ATTEMPTING TO PREVENT OFF-DUTY HOSPITAL EMPLOYEES FROM INFORMATIONAL PICKETING AT THE HOSPITAL'S NONEMERGENCY ENTRANCES, THREATENING EMPLOYEES WITH DISCIPLINE AND ARREST FOR SUCH PICKETING, AND SUMMONING THE POLICE TO THE SCENE

A. Standard of Review

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). If the Board is to fulfill its statutory role, it “necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978). *Accord Auciello Iron Works, Inc. v. NLRB*, 571 U.S. 781, 788 (1996). “The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board’s application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.” *Beth Israel*, 437 U.S. at 501; *see also Curtin Matheson*, 494 U.S. at 787 (Board’s legal rules are accorded “considerable deference,” and reviewing Court must “uphold a Board rule as long as it is rational and consistent with the Act, even if [the Court] would have formulated a different rule”) (internal citation omitted).

The Board’s interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

See NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board's reasonable interpretation of the Act. Indeed, the Court must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)). *Accord ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 68 (D.C. Cir. 2005) ("*ITT Indus. II*") (ambiguity of Section 7 counsels *Chevron* deference unless courts have settled clear meaning of statute); *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). The Court will consider "both whether the [Board's] interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the [Board] considered the matter in a detailed and reasonable fashion." *ITT Indus. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001) (internal quotation omitted).

As discussed below, Section 7 of the Act (29 U.S.C. § 157) grants employees, among other rights, "the right to self-organization, to form, join, or assist labor organizations" At the same time, however, it is equally well settled that employees' exercise of Section 7 rights at their workplace may conflict with their employer's legitimate interest in controlling its property and operating

its business (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 802 n.8 (1945)), particularly with respect to the managerial interest in maintaining production and discipline. *Eastex*, 437 U.S. at 571-572.

It is for the Board, and not the courts, to reconcile those competing interests “with as little destruction of one as is consistent with the maintenance of the other” (*NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)), and the balance struck by the Board is “subject to limited judicial review.” *Beth Israel*, 437 U.S. at 501. *Accord Healthbridge Mgmt. LLC v. NLRB*, 798 F.3d 1059, 1070 (D.C. Cir. 2015) (review of Board decision “is necessarily limited, as th[e] function of striking the[] balance [between employer and employee rights] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review”) (citations omitted); *Elec. Workers Local 702 v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (Board has “primary responsibility” for applying the Act, and when its “interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices”) (internal quotation omitted). The deferential standard of review is fully applicable to the Board’s statutory task of delineating the scope of Section 7, which “is for the Board to perform in the first instance.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978). *Prill v. NLRB*, 755

F.2d 941, 950 (D.C. Cir. 1985) (noting that “Court has upheld the Board’s broad construction of [S]ection 7 in a variety of contexts”).

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that the Board’s factual findings are “conclusive” if supported by substantial evidence on the record as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence encompasses “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *Accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005). The Board’s application of the law to the facts is also reviewed under the substantial evidence standard. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). *Accord United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

B. Principles Governing the Exercise of Off-Duty Employees’ Protected Activity on Employer’s Private Property

As noted, Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” In turn, Section 8(a)(1) of the Act (29 U.S.C. § 158 (a)(1)) implements that guarantee by making it an unfair labor practice for any employer “to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in [S]ection 7.” Employees’ rights under Section 7 of the Act to engage in self-organization lie “at the very core of the purpose for which the [Act] was enacted.” *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). As has long been recognized, that core right “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel*, 437 U.S. at 491-92. Moreover, that core Section 7 right encompasses the related rights of employees to improve their lot through third-party channels outside the immediate employee-employer relationship. *Eastex*, 437 U.S. at 566. *Accord Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 443 (D.C. Cir. 2003) (“both we and the Board have made clear that . . . [S]ections 7 and 8(a)(1) protect employee rights to seek support from nonemployees” during ongoing labor disputes).

As the Supreme Court recognized, the jobsite is “uniquely appropriate” for the exchange of employees’ views regarding union representation. *Republic Aviation*, 324 U.S. at 803 n.6. Indeed, it ““is the one place where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.”” *Eastex*, 437 U.S. at 574 (citing *Gale Prods.*, 142 NLRB 1246, 1249 (1963)). The workplace is also “a uniquely effective location” for employees “to communicate with the relevant members of the public.” *New York New York, LLC*, 356 NLRB

907, 915 (2011), *enforced*, *New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012).

Based on its experience in enforcing the Act, the Board has made particular restrictions on employee Section 7 rights “presumptively lawful or unlawful under § 8(a)(1) subject to the introduction of evidence sufficient to overcome the presumption.” *Beth Israel*, 437 U.S. at 492. In *Republic Aviation*, 324 U.S. at 796-97, 801-03, the Supreme Court upheld the Board’s general rule that restrictions on an employer’s own employees engaging in Section 7 activities violate Section 8(a)(1) “unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline.” *See generally Beth Israel*, 437 U.S. at 492-93. Absent special circumstances, “time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property.” *Republic Aviation*, 324 U.S. at 803 n.10.

In the hospital context, the Board has modified its rule because of “the need to avoid disruption of patient care and disturbance of patients.” *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778 & n.8 (1979) (citing *St John’s Hosp. & School of Nursing, Inc.*, 222 NLRB 1150 (1976), *enforced in part and denied in part*, 557 F.2d 1368 (10th Cir. 1977)). In *Beth Israel*, the Supreme Court upheld the Board’s

rule that, although a hospital may prohibit its employees from engaging in Section 7 protected activity on their own time in strictly patient care areas, such as patient rooms, operating rooms, and places where patients receive treatment, a hospital may not prohibit it in non-immediate patient-care areas unless it shows that a ban in those areas is “necessary to avoid disruption of health-care operations or disturbance of patients.” *Beth Israel*, 437 U.S. at 495, 507. *Accord NLRB v. Baptist Hosp., Inc.*, 442 U.S. at 778-79; *Brockton Hosp.*, 294 F.3d at 103.

C. The Board Reasonably Found That The Hospital Violated Section 8(a)(1) of the Act By Attempting to Prohibit Its Off-Duty Employees From Informational Picketing Near the Hospital’s Front Entrance

The Hospital does not contest that it repeatedly asked its off-duty employees to stop picketing in front of the Hospital entrance. The Board reasonably determined that because this case involves off-duty employees engaged in informational picketing on their hospital-employer’s premises, *Republic Aviation* and its progeny in the hospital context, discussed above, is the applicable standard to determine whether the Hospital violated Section 8(a)(1) of the Act by attempting to prohibit them from doing so. Moreover, substantial evidence supports the Board’s application of *Republic Aviation* and its progeny to the facts, because the Hospital failed to demonstrate that prohibiting its off-duty employees from engaging in their small, quiet, and stationery picket in front of its entrance was

necessary to prevent patient disturbance or the disruption of its health care operations. (JA 374-79.)

1. The Board reasonably assessed this case under the *Republic Aviation* framework modified in the hospital context

The Board reasonably found that *Republic Aviation* and its progeny provide the applicable analytical framework. (JA 376.) Under *Republic Aviation*, employers may not bar employees who are not on working time from engaging in protected activity in nonworking areas of its property unless such a bar is necessary to maintain discipline and production. 324 U.S. at 798. In discussing why *Republic Aviation* provided the framework best suited to this case, the Board explained that when addressing the intersection of Section 7 rights with an employer's property and management interests, the Board, with "guidance from the Supreme Court," has considered three primary factors: (1) who is engaging in the activity (employees vs. nonemployees); (2) who owns the property; and (3) what activity is being prohibited? (JA 390.) In applying those factors to the employees at issue here, the Board recognized the undisputed facts that "the individuals who engaged in the Section 7 activities at the hospital were employees, the disputed Section 7 activities took place on property the hospital owned and controlled, and the prohibition targeted the specific Section 7 activity of carrying picket signs at the hospital's nonemergency entranceways." (JA 376, 390.)

The Board acknowledged that *Republic Aviation* involved handbilling and solicitation, not picketing, but, citing to *Town & Country Supermarkets*, 340 NLRB at 1413-1414 (2004), it concluded that *Republic Aviation* was “also applicable when employees engaged in picketing.” (JA 376.) In *Town & Country*, the Board applied *Republic Aviation* and found that the employer violated the Act by calling the police, threatening arrest, and causing the arrest of the off-duty employees, who were handbilling and picketing at the front entrances of its stores. 340 NLRB at 1414. In reaching that result, the Board did not distinguish between handbilling and picketing, finding the employer’s prohibition of both activities on its property unlawful in the absence of a justification based on its need to maintain order or discipline. (JA 376.) Accordingly, the Board here properly found that applying *Republic Aviation* to cases involving picketing by off-duty employees comports with Board precedent. (JA 376.)

After establishing that *Town & Country* supports applying *Republic Aviation* to picketing, the Board then explained that given the “special considerations involved in an acute care hospital setting,” it would modify its *Republic Aviation* presumption as set forth in *Baptist Hospital* and *Beth Israel*. (JA 377.) As discussed above at pp. 18-19, those cases adapt *Republic Aviation* to the hospital setting by stating that the employer’s burden in cases, such as this one, is to show that the “prohibition is needed to prevent patient disturbance or disruption of health

care operations.” (JA 377, citing *Baptist Hosp.* and *Beth Israel*). Because the Board’s decision to apply *Republic Aviation*’s analytical framework, modified for the acute-care setting, comports with both Supreme Court and Board precedent, its decision is entitled to deference. *Elec. Workers Local 702 v. NLRB*, 215 F.3d at 15 (when Board’s “interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices”).

2. The Hospital’s Challenges to The Board’s Decision To Apply *Republic Aviation* and Its Progeny Are Without Merit

Asserting that the Board’s decision is not entitled to *Chevron* deference, the Hospital falsely accuses (Br. 17-18) the Board of failing to balance the respective rights of the parties, claiming incorrectly that the Board found that *Republic Aviation*, *Beth Israel*, and *Baptist Hospital* “had already performed the requisite balancing.” The Hospital additionally argues that the Board should have required the off-duty employees to show that they could not otherwise have safely or effectively picketed off premises on public property before they could be allowed to picket on the Hospital’s premises. As shown below, the Board’s decision to apply *Republic Aviation* and its progeny here is entitled to deference. The Hospital’s preferred test disregards the important distinctions made by the Board and the courts based on their consideration of who is engaging in the activity (employees vs.

nonemployees), who owns the property, and what activity is being prohibited. In particular, the Hospital’s “alternative means” test ignores that the actors here are employees at their own employer’s workplace, where their Section 7 rights are at their strongest. The Hospital also incorrectly urges that all picketing—no matter its nature—warrants a lesser weight in the balance than other Section 7 rights and that the Board erred in relying on *Town & Country*. As explained below, the Hospital is wrong on all counts, and thus has failed to disturb the Board’s reasonable determination that *Republic Aviation* and its progeny provide the proper analytical framework.

a. The Board balanced the parties’ competing rights, which included a consideration of the Hospital’s interests

Contrary to the Hospital’s claims (Br. 17-18), the Board did not find that *Republic Aviation* and its progeny “already performed the balancing test.” Rather, the Board thoroughly explained the parameters of that test—which appropriately considers the rights of the respective parties—and reasonably determined that it was appropriate to apply it to the instant case. (JA 374-78.) As the Board explained, “*Republic Aviation* itself explicitly required a balance between employees’ Section 7 rights and employers’ property rights and business interests.” *See Republic Aviation*, 324 U.S. at 802 n.8 (“[i]nconvenience, or even some dislocation of property rights, may

be necessary in order to safeguard the right to collective bargaining”). And in *Eastex*, the Supreme Court stated that “any incremental intrusion on petitioner’s property rights” from employees’ Section 7 activity on their employer’s own property “would be minimal.” 437 U.S. at 575.

Accordingly, the Hospital’s claim (Br. 17-18) that the Board did not adequately account for the employer’s property rights in its balancing here misunderstands *Republic Aviation*. As shown, that test necessarily requires the balancing of employees’ Section 7 rights against their employer’s minimal property interests when—as here— employees are on their employer’s own property.

The Board therefore did not ignore the employer’s property rights, but focused primarily on the employer’s management interests given that the conduct at issue was by its own employees who were rightfully on its property. See *Eastex*, 437 U.S. at 573 (citations omitted) (noting that “[h]ere, as in *Republic Aviation*, petitioner’s employees are already rightfully on the employer’s property, so that in the context of this case it is the employer’s management interests rather than its property interests that primarily are implicated”). The Board further recognized the Hospital’s additional interest in preventing patient disturbance and disruption of its health care operations, by applying the modification set forth in *Baptist*

Hosp. and *Beth Israel*. (JA 378.) Thus, the Hospital has failed to show that the Board ignored any of its relevant interests in the balance; the Hospital has only shown that it dislikes the Board's balancing outcome. But that claim is insufficient to show that the Board's decision to utilize the *Republic Aviation* balancing test, and its application of that framework to the facts of this case (see below at pp. 43-45), are not entitled to *Chevron* deference. See *Chevron*, 467 U.S. at 843 (Board's interpretation of the Act entitled to deference).

b. The Hospital's alternative means test improperly treats the off-duty employees engaged in an informational picket on their employer's own property like non-employee trespassers or like off-duty employees engaged in a strike or work stoppage

The Hospital repeatedly makes an incorrect, sweeping assertion (Br. 11, 40-41, 49) that picketing must take place on public property surrounding the employer's premises unless it is established that the picketing on public property is neither safe nor effective. Thus, the Hospital argues (Br. 28-33) that the Board should have applied an "alternative means" test, rather than the *Republic Aviation* test, in assessing the respective parties' rights here. As shown below, however, the Hospital has failed to demonstrate that the Board acted unreasonably in rejecting the applicability of such a test in cases

such as this one, which “involve[] employee Section 7 activity.” (JA 378 n.14.)

As an initial matter, the Hospital’s argument ignores both the identity of the picketers and the picketing location. Specifically, here, the picketers were employees on their own employer’s property. The Hospital neglects to recognize the well-settled principle that the employee’s own workplace is a uniquely appropriate space to exercise their Section 7 rights. *Eastex*, 437 U.S. at 574; *New York New York*, 356 NLRB at 915. Indeed, as the Supreme Court stated in *Beth Israel*, “employees’ interests are at their strongest . . . [when] the activity [is] carried on by employees already rightfully on the employer’s property.” 437 U.S. at 504-05. The Hospital’s urged test improperly conflates such employees’ Section 7 rights with the lesser rights of non-employees and off-site employees. In contrast, as discussed above (pp. 20-22), *Republic Aviation*, modified by cases in the hospital context, is the Board’s longstanding test for off-duty employees exercising Section 7 rights on their own employer’s premises, such as the employees at issue here.

The Board’s decision not to apply an alternative means test is fully consistent with the longstanding principle, acknowledged by the Hospital (Br. 18), that there is a substantive distinction between the rights of

employees and the rights of nonemployee union representatives. *See Babcock & Wilcox*, 351 U.S. at 113 (requiring Board to distinguish “between rules of law applicable to employees and those applicable to nonemployees”). This is because “[b]y its plain terms . . . the [Act] confers rights only on *employees*, not on unions or their non-employee organizers.” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). In cases like the instant one involving an employer’s own employees, the employees are not strangers to the employer’s property, but are already rightfully on the employers’ property pursuant to their employment relationship. *Nashville Plastic Prods.*, 313 NLRB 462, 463 (1993) (an off-duty employee is a “stranger” neither to the property nor to the employees working there). In contrast, in cases involving nonemployees—such as union organizers—the non-employees are not invitees nor are they already on the property pursuant to their employment relationship. Thus, the Act draws a “distinction of ‘substance’ . . . between the union activities of employee and non-employees.” *Lechmere*, 502 U.S. at 537 (quoting *Babcock*, 351 U.S. at 113). That “critical distinction” is grounded in the recognition that Section 7 directly grants rights to employees while it applies “only derivatively” to nonemployee organizers. *Id.* at 533 (rights of nonemployee union organizers derive from right of employees to learn about

advantages of self-organization). Therefore, the Board applies a more restrictive test, which can include an assessment of “alternative means” available to nonemployees, to analyze nonemployees’ access to the employer’s property.

But as the Board recognized here (JA 377 n.10), off-duty employees should not be subject to the principles applicable to non-employees in this regard. *Nashville Plastic Prods.*, 313 NLRB at 463 (rejecting employer’s argument that the access rights of off-duty employees should be equated with those of nonemployees). The Board has explained that it is unnecessary to apply an alternative means test to employees “seeking to exercise their own statutory rights in and around their own workplace,” because “imposing such a prerequisite burdens employees’ Section 7 rights more than is necessary to adequately protect the property owners’ rights and interests.” *New York New York*, 356 NLRB at 919.

Accordingly, to the extent that the Hospital relies (Br. 40, 41) on cases involving the rights of non-employees, such as *Babcock* and *Lechmere*, or on cases involving off-site employees (Br. 10, 17, 26, 27-29), *see Hudgens v. NLRB*, 424 U.S. 507 (1976), and *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974), they do not advance its call for an alternative means test. They are inapposite because they do not involve employees exercising their own

rights on the employer's property at which they work, and therefore require different considerations and accommodations when balancing the parties' respective rights. *See Babcock*, 351 U.S. at 113 (“[N]onemployee organizers . . . access to a company's property is governed by different considerations [than employee access].”); *ITT Indus. II*, 413 F.3d at 73-74 (Board's test for offsite employees of property owner demonstrates a commitment to analyzing an employer's business justifications with greater deference when offsite rather than onsite employees are involved).

The Hospital also fails in its attempt (Br. 14-17) to classify the picketers as trespassers. Longstanding precedent supports the Board's determination that “the off-duty employees [] [a]re not trespassers.” (JA 391). *See Hudgens*, 424 U.S. at 521 n.10. As the Board stated in *Town & Country*, unlike non-employees, “who may be treated as trespassers,” employees “are not strangers to the employer's property, but are already rightfully on the employer's property, pursuant to their employment relationship.” 340 NLRB at 1414. The Hospital has not shown otherwise.

Indeed, in trying to equate the employees here with trespassers, the Hospital relies (Br. 14-15) on inapposite precedent and equally irrelevant state statutes and local regulations. Citing to *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), the Hospital contends (Br.14-15) that the

conduct of an off-duty employee can change his status from an invitee to a trespasser. The Hospital made a similar argument to the Board, which the Board properly rejected because *Hillhaven* addressed the status of off-site employees, not on-site employees such as those here. (JA 389.) Moreover, unlike here, *Hillhaven* involved the enforcement of a rule barring offsite employees from access to facilities other than the jobsite where they worked. As the Board found, “[t]here is no such general access rule in this case” because the off-duty employees were allowed on the Hospital’s property so long as they did not picket. (JA 389-90.)

The Hospital selectively quotes *New York New York*, 356 NLRB at 916, to further support its trespass theory. (Br. 15.) There, in addressing the right of off-duty employees of an onsite contractor (Ark) to handbill on the owner’s property (New York New York Hotel), the Board noted that, “purely from the perspective of state property law, the [off-duty] employees were trespassers at the moment they began to distribute handbills.” *New York New York*, 356 NLRB at 916. The Hospital, however, has taken this quote out of context. As the Board here explained, the portion to which the Hospital cites “concerned the New York New York hotel owners’ property rights when employees of food service provider Ark (who contracted with the hotel) distributed handbills in areas of the hotel outside of Ark’s

leasehold.” (JA 390, citing *New York New York*, 356 NLRB at 916.) The *New York New York* Board, however, came to a “rather different” conclusion when determining the rights of Ark employees with respect to the areas in front of the Ark-operated restaurants in the hotel. (JA 390, citing 356 NLRB at 915.) The Board did not consider the Ark employees to be akin to trespassers in those areas because they were exercising rights in front of their own workplace, as did the off-duty employees here. *New York New York*, 356 NLRB at 915. Thus, the Board reasonably concluded that the cited portion of *New York New York* is “inapplicable here, as the Hospital owned the property where the disputed activity occurred.” (JA 390.)

The Board also reasonably rejected (JA 389) the Hospital’s reliance (Br. 15) on inapplicable trespassing prohibitions in a Washington state law and a local Olympia ordinance. As shown above, the off-duty employees on the Hospital’s property were simply not trespassers, and thus prohibitions on trespassing are not relevant. As the Board further noted (Br. 15), the Olympia ordinance also provides an explicit exception for persons protected by federal law, such as the employees here protected under the Act.

The Hospital also misplaces its reliance (Br. 29, 30, 32, 33, 34) on cases that involve off-duty employees who were picketing while out on strike, or otherwise engaged in work stoppages, to support its argument that

the picketing at its entrances was unlawful because it could have been safely performed on surrounding public property. *See Beverly Health & Rehab. Servs., Inc. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003) (strike); *Crookston Times Printing Co.*, 125 NLRB 304 (1959) (strike); *Hudgens v. NLRB*, 424 U.S. 507 (strike); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (strike); *Visceglia*, 498 F.2d 43 (strike); *40-41 Realty Assoc., Inc.*, 288 NLRB 200 (1988) (strike); *Paul Mueller Co.*, 332 NLRB 312 (2000) (strike); *Seattle-First National Bank v. NLRB*, 651 F.2d 1272 (9th Cir. 1980) (strike); *Advance Indus Div.-Overhead Door Corp. v. NLRB*, 540 F.2d 878 (7th Cir. 1976) (work stoppage); *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969) (work stoppage); *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) (work stoppage); *Cambro Mfg. Co.*, 344 NLRB 634 (1993) (work stoppage).

As the Board recognized, strikes, which pose greater threats of causing work stoppages, and work stoppages themselves, present greater risks to employer's property and management interests than employees merely engaged in off-duty informational picketing. *See* JA 391 ("threat of work stoppage in the strike context certainly does not carry over to the informational picket as it was implemented here"). Indeed, there is no evidence that the quiet, stationary, two-person picket at issue here, at a time when just a few people were entering the Hospital, shared any resemblance

to the sit-down strike in *Fansteel*, for example (306 U.S. at 252), or the 83-person work stoppage in the employer's parking lot in *Quietflex* (344 NLRB at 1058).⁴

While primarily relying on inapt cases involving non-employees, off-site employees, or striking employees, the Hospital does point to one case involving employees on their employer's own property engaged in picketing, *Providence Hospital*, 285 NLRB 320 (1987) (Br. 36-40.) In that case, the Board found that a hospital did not violate Section 8(a)(1) of the Act by prohibiting off-duty employees from picketing on the hospital's premises. But the Board properly rejected that case as controlling here, explaining that *Providence Hospital* relied on a now-defunct test and is no longer good law. (JA 377 n.12.) Specifically, in *Providence Hospital*, the Board applied the short-lived and now-overruled test set forth in *Fairmont Hotel*, 282 NLRB 139 (1986), a non-employee access case, requiring that if the parties' respective property and Section 7 rights were relatively equal, the Board would then consider whether the employees had "no reasonable

⁴ The Hospital provides no support for its confusing assertion (Br. 35) that strikers are "arguably entitled to claim greater rights" than off-duty employees engaged in informational picketing. This spurious claim does not refute what longstanding precedent establishes—that the Section 7 rights of employees are at their strongest where, as here, employees exercise them at their own workplace.

means for communicating with its intended audience.” *Providence Hosp.*, 285 NLRB at 322.

Two years later, in *Jean Country*, 291 NLRB 11 (1988), another non-employee access case, the Board overruled *Fairmont*, finding that an assessment of alternative means must be conducted even when the parties’ rights were not relatively equal. 282 NLRB at 32. The Supreme Court, however, overturned *Jean Country* in *Lechmere*, holding that *Jean Country* and its required consideration of alternative means was inapplicable to cases involving nonemployees. *Lechmere*, 502 U.S. at 527. As the Board noted here, following *Lechmere*, it has also declined to apply the *Jean Country* test to cases involving off-duty employee access to their own work premises. (JA 389.)

Ignoring the Board’s consistent refusal to apply *Jean Country* to cases involving both nonemployees and off-duty employees, the Hospital claims (Br. 37, 39) that *Jean Country*’s alternative means test—which it states merely “modified” *Fairmont*’s alternative means test (Br. 38)—applies to “every” access case, including to the off-duty employees here. (Br. 40). Therefore, according to the Hospital (Br. 40), “nothing in *Lechmere* undermines *Providence Hospital*” because *Providence Hospital* involves

off-duty employees and *Lechmere* only overturned the *Fairmont/Jean Country* alternative means test with regard to non-employees.

The Board properly determined that *Providence Hospital* did not require it to consider whether the off-duty employees here had alternative means of communication. As the Board explained, “even if *Providence Hospital* has not been expressly overruled, it turned on application of precedent that was overruled.” (JA 377, n.12.) Indeed, *Providence Hospital* predated *Lechmere*, and as noted above, the Board has not applied *Jean Country*’s balancing test to off-duty employees since *Lechmere*. (JA 389.)⁵ Thus, looking at its body of cases in context, the Board reasonably concluded that *Providence Hospital*, “which applied a now defunct test for non-employees, appears to be an outlier in the wake of the caselaw that has since developed concerning off-duty employees who engage in Section 7 activity in non-working areas of their own employees’ property.” (JA 390.)

In short, the Hospital has failed to disturb the Board’s reasonable decision to apply its longstanding *Republic Aviation* test—instead of the Hospitals’ preferred “alternative means test”—to balance the rights of the

⁵ The Board also observed that, unlike in *Jean Country*, the instant case does not involve a no-access rule or policy—“it is undisputed that off-duty employees were permitted to be on the hospital’s premises both on May 20 and before so long as they did not carry picket signs.” Therefore, it was not “access to the Hospital that is central to this case, but rather the pursuit of the Section 7 activity.” (JA 389.)

off-duty employees engaged in a peaceful picket on their employer's property against the Hospital's property and business interests.

c. The Hospital's assertion that *Republic Aviation* and its progeny should not apply to picketing is without merit

The Hospital also incorrectly asserts (Br. 23-26, 41-45) that the Board did not engage in "reasoned analysis" (Br. 25) or provide a "justification" (Br. 45) for applying *Republic Aviation*, which involved handbilling and solicitation, to picketing. To the contrary, the Board thoroughly explained the weaknesses in the Hospital's position that the differences between picketing on the one hand, and handbilling and solicitation on the other, require the Board to forgo the application of *Republic Aviation* to all picketing, including the quiet, stationary picketing at issue here.

As an initial matter, the Board properly relied on its decision in *Town & Country*, and the Hospital (Br. 42-44) has failed to impugn the Board's analysis. The Hospital claims (Br. 42-44) that the Board did not separately analyze the picketing and handbilling in *Town & Country*, and therefore that it never made a specific finding that the standard announced in *Republic Aviation* applied to picketing. But the Hospital misreads *Town & Country*, which recognized that because the employees were exercising Section 7 rights—which includes both picketing and handbilling—on their employer's

property, *Republic Aviation* provided the governing standard. 340 NLRB at 1413-14. As the Board explained here, in *Town & Country*, it “did not find it necessary or appropriate to apply different analyses to each activity, but instead, applied *Republic Aviation* to both.” (JA 376 n.9.) Likewise, because the employees’ “pursuit of Section 7 activity” is “central to this case,” *Republic Aviation* is also applicable here. (D&O 16.)

The Hospital’s other attempts to distinguish *Town & Country* fail to advance its cause. The Hospital makes (Br. 35, 42) a distinction without a difference out of the fact that the picketing in *Town & Country* was “organizational” (directed at fellow employees), but the picketing in this case was “informational” (directed at customers). However, “[n]either this Court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees.” *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196-97 (D.C. Cir 2012). To the contrary, both this Court and the Board have made clear that “the Act fully protects employee rights to seek support from nonemployees.” *Id.*, citing *Stanford Hosp. & Clinics*, 325 F.3d at 343 (D.C. Cir. 2003); *NCR Corp.*, 313 NLRB 574, 576 (“[e]mployees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations”).

The Hospital's remaining attempt to make hay out of insignificant differences between the instant case and *Town & Country* likewise misses the mark. The Hospital's claim (Br. 44) that the General Counsel had earlier posited a discrimination theory in that case, namely that the employer allowed other nonunion groups to engage in on-premises solicitation, is unavailing. As the Hospital acknowledges, the Board did not rely on that theory in finding unlawful the employer's ban on picketing and handbilling, rendering discrimination entirely irrelevant to the Board's analysis. And contrary to the Hospital (Br. 44), as the Board found (JA 377 n. 9), the employer's status as a leaseholder rather than the actual property owner in *Town & Country* was not relied on by the Board in that case. Accordingly, the Hospital has not impugned the Board's reliance on *Town & Country* for its decision to apply *Republic Aviation* to the off-duty employee picketing here.

Thus, the Hospital has not disturbed the Board's finding that its decision in *Town & Country* fully supports the application of *Republic Aviation* to picketing. As the Board noted, it is not aware of any "authority for the proposition that, *Town & Country* notwithstanding, picketing is excepted from the general rule of *Republic Aviation*." (JA 376 n.9.) The Hospital has provided no such authority.

Consistent with its application of *Town & Country*, and contrary to the Hospital's claims (Br. 23), the Board also found (JA 376 n.9) that "[t]here is nothing in the nature of picketing per se that would support a conclusion that *Republic Aviation* is inapplicable to that activity." The Board reasonably rejected the notion that picketing, unlike other Section 7 activity, requires a showing that employees are unable to safely and effectively do so on public property outside their employer's property before being allowed to picket on-site. (JA 376-377.) Although the Hospital relies (Br. 23-24) on *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988), to assert the "inherent" difference between picketing and other forms of Section 7 activity, the Board aptly pointed out that the Court in that case did not state that picketing is "necessarily or inherently coercive or disruptive." (JA 376 n.9.) Indeed, the Board explained that picketing is "often neither coercive nor disruptive," looking no further than the "peaceful display of picket signs by two employees that occurred in this case." (JA 376 n.9.)⁶

⁶The Hospital is incorrect (Br. 24-25) that because Section 8(b)(4) and (7) of the Act (29 U.S.C. §158(b)(4) and (7)) places restrictions on certain types of picketing, all types of picketing require less weight in the balancing of the parties' respective rights. Section 8(b)(4) and (7), respectively, prohibit certain types of secondary and recognitional picketing, but neither is at issue here.

Accordingly, the Board reasonably concluded that *Republic Aviation* adequately balances the respective parties' rights in picketing as well as in handbilling and solicitation cases. (JA 374-78.) Of course, as the Board cautioned, its decision does not "invalidat[e] all restrictions on employee on-premises picketing" (JA377), nor has the Board determined that picketing must always be permitted to the same degree as solicitation and handbilling, as suggested by the Hospital (Br. 25). Indeed, the Board rejected such a claim, stating, "[w]e can easily envision circumstances, not present here, where picketing on hospital property would disrupt operations or interfere with patient care while solicitation and distribution would not." (JA 376 n.9.) Under *Republic Aviation*, such picketing would be found unlawful, and any concern that it would be left unchecked by application of that test rather than the Hospital's preferred test is unwarranted.⁷

⁷ The Hospital's suggestion (Br. 50-51) that the Board did not sufficiently consider whether handbilling was an "adequate alternative" to picketing is unwarranted. To the contrary, the Board explained that the employees should not "be required to forgo their chosen method of communication, in this case, engaging in a quiet, stationary two-person picket outside of the hospital building, when the [Hospital] has not met its burden of showing that such restriction was necessary to prevent patient disturbance or disruption of health care operations." (JA 378 n.14.) Indeed, the Board also aptly noted that the picketing here was "less confrontational" than the permitted handbilling in that it "involved no direct contact with the recipient of the handbill." (JA 379 n.14.)

The Hospital misconstrues this Court’s precedent by asserting (Br. 35, 42), based on *United Food & Commercial Workers (UFCW), Local 880 v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996), that informational picketing “ranks lower on the [Section 7] hierarchy,” because “it is aimed at consumers.” Not so. The issue before the Court in *UFCW* was whether union members and organizers not employed on the property could access that property to pursue area standards and consumer boycott activity. Thus, in discussing the strength of the picketer’s right to engage in informational picketing, the Court was addressing the lesser rights of non-employees, as opposed to the stronger rights of the employees here, who were off-duty employees on their employer’s own property. *See UFCW*, 74 F.3d 298, 298 n.5. Indeed, as discussed above at p. 37, “[n]either this Court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees.” *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196-97 (D.C. Cir 2012); *see also New York New York*, 356 NLRB at 915 (noting that *UFCW* “is not to the contrary”).

Finally, contrary to the Hospital (Br. 45-48), the Board properly relied on Section 8(g) of the Act (29 U.S.C. §158(g)) to support its finding that picketing need not be subject to a different balancing test than solicitation or handbilling. (JA 377 n.10.) The Board noted that Congress gave hospital employees the right

to picket in the 1974 Health Care Amendments, and consequently passed Section 8(g) of the Act, which required a union to give 10-day advance notice to a hospital of any picketing or strike. (JA 376 n.9.) The Board observed that, by doing so, “Congress recognized the adverse effects that picketing might have on patient care, and explicitly balanced the interest in limiting such effects against workers’ newly granted rights.” (JA 376 n.9.) The Board also recognized that Congress did not see fit to put any additional restrictions—other than providing 10-day notice—on picketing in Section 8(g). As the Board explained, “once the notice requirement was satisfied, [there was] no suggestion that picketing on Hospital property, without regard to the circumstances, would be strictly prohibited.” (JA 376 n.9.)

Therefore, the Board’s reference to Section 8(g) is not a “red herring,” as the Hospital claims (Br. 47), but rather, supports its reasonable conclusion that picketing may be properly considered like any other Section 7 right when balanced against an employer’s interests. The Hospital’s related claim (Br. 46)—that the Board “misconstrues” Section 8(g) to explicitly allow picketing on a hospital’s premises as opposed to “immediately outside such property”—is a strawman. As shown, the Board simply relied on Section 8(g) of the Act as an indication that all picketing is not strictly prohibited by that provision. (JA 376 n.9.)

In sum, the Board engaged in reasoned decisionmaking and determined that it would apply *Republic Aviation* and its progeny to balance the rights of the off-

duty employees and the Hospital in this picketing case. None of the Hospital's claims to the contrary provide grounds to disturb that conclusion.⁸

3. Substantial evidence supports the Board's finding that the Hospital did not demonstrate that prohibiting its employees from picketing was needed to prevent patient disturbance or disruption of health care operations

Applying the above standard, the Board found that the Hospital failed to establish that prohibiting the "quiet, stationary two-person picket" here was necessary "to prevent patient disturbance or disruption of health care." (JA 378, 378 n.14.) To satisfy its burden, the Hospital had to put forward specific evidence of the disruption or disturbance that its ban sought to prevent, and in doing so, it could not rely on mere speculation, unsubstantiated surmise, or subjective belief. *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 847 (6th Cir. 2003); *UCSF Stanford Health Care*, 335 NLRB 488, 528-32 (2001), *enforced in relevant part*, 325 F.3d 334 (D.C. Cir. 2003). The Hospital failed to make such a showing.

Although the Board recognized that hospital official Morotti heard one visitor state that he usually did not cross picket lines, but that he had to in order to visit a patient, it found that there was "no other evidence regarding the likely

⁸ The Hospital's analogy to apples and oranges (Br. 27 n.4) is misplaced because, as shown above, it reads *Republic Aviation* too restrictively.

impact, if any of the picketing.” (JA 378.) Specifically, it was “unrefuted” that traffic at the front door was very low. (JA 391; 115, 152-53, 162-63, 176.) Moreover, the employee picketers did not “patrol[] the doorway, march[] in formation, chant[] or ma[k]e noise, create[] a real or symbolic barrier to the entryways, or otherwise engage[] in behavior that disturbed patients or disrupted hospital operations.” (JA 378; JA 115, 176, 152-53, 162-63, 182-95.) Indeed, police officer Smith testified that the employees’ behavior was not disruptive, he had no basis for removing them from the property, and if requested he would not have had them arrested. (JA 378; JA 182-95.) In addition, the Board correctly noted that “what had occurred previously when the employees handbilled”—which the Hospital readily permitted—only differed from what the picketing employees did because “they later carried picket signs.” (JA 391.) Thus, the Board reasonably concluded that there was no evidence that “merely holding a stationary picket sign near the entrance to the hospital was likely to be any more disruptive or disturbing than the distribution of literature, which the [Hospital] did not restrict.” (JA 378.)

The Hospital challenges (Br. 50-53) the Board’s finding by repeating the claims it made before the Board. Its parade of horrors (Br. 51) is untethered to the quiet, two-person stationary picket that actually took place. The Hospital’s assertion (Br. 51) that the Union “subjected these most

vulnerable Hospital patrons to additional stress” is similarly an overreach. Although it is true that one (non-patient) visitor made a statement about not crossing a picket line, there is no evidence that it caused him stress, and he entered without incident. Likewise, its contention (Br. 52) that the Board improperly “required the Hospital to show actual disruption or interference with patient care” is without merit. To the contrary, as the above analysis demonstrates, the Board correctly recognized that the Hospital was required to demonstrate “likely” or “potential” harm, but was unable to do so. The Hospital has accordingly failed to undermine the Board’s conclusion that the Hospital based its claim on just the kind of “speculative and exaggerated contentions about potential harm that could result from the picketing” that do not entitle it to restrict its employees’ Section 7 rights. (JA 378.)

Therefore, the Board’s finding that the Hospital’s repeated attempts to prevent the employees from engaging in their peaceful, two-person picket violated Section 8(a) (1) of the Act is entitled to enforcement.

D. The Hospital Violated Section 8(a)(1) of the Act By Threatening Employees With Discipline and with Arrest and by Summoning the Police

The Board also found that the Hospital violated the Act by threatening employees with discipline for picketing in front of the Hospital entrance, for threatening to arrest the employees, and for summoning the police. (D&O 374,

379, 391-92.) As discussed below, the Hospital has waived any separate challenge to the Board's threat of discipline finding, and the Court is jurisdictionally barred from addressing the Hospital's First Amendment challenge to the finding that its threat to arrest the employees and summoning of the police violated the Act.

1. The Hospital has waived any separate challenge to the Board's threat of discipline finding

The Hospital does not make any specific challenge to the Board's threat-of-discipline finding, other than its above, fully-debunked claims that the Board decided the case under the wrong test and the Hospital's property and business interests outweighed the employee's Section 7 rights to engage in their picketing. Accordingly, it has waived any other challenge to the Board's finding. Fed. R. App. P. 28(a)(8)(A) (argument in brief before 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).

In any event, as shown above, and the Hospital has not contested, Hospital Attorney Glenn Bunting told Union official Jenny Reed that that discipline could ensue if the employees continued picketing at the front entrance of the Hospital, and Reed conveyed that message to employee Arland. (JA 375, 375 n.7, 387, 391; JA 33-37, 139.) The Board reasonably found (JA 374, 379, 391-92) that this constituted an unlawful threat of discipline because it "would tend to coerce a

reasonable employee” in exercising her Section 7 rights to engage in the picketing discussed above. (JA 391; citing *Schrock Cabinet Co.*, 339 NLRB 182 (2003) (threat communicated to union representative rather than directly to employees, is legal equivalent of threat directed to employees)). *Accord Tasty Baking v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001) (threat of discipline violates Section 8(a)(1) of the Act).

2. The Hospital’s First Amendment Challenge to the Board’s Findings That the Hospital Unlawfully Threatened Employees With Arrest and Summoned the Police Is Jurisdictionally Barred

The Hospital does not dispute that it threatened to call the police and actually summoned the police to the scene due to the employee’s picketing at the front entrance to the Hospital. (JA 50, 126, 155-56, 175, 182-95, 198.) The Board found that the Hospital’s actions in this regard violated Section 8(a)(1) of the Act. (JA 374, 379, 391-92.) Before the Court, the Hospital for the first time asserts (Br. 16) that it was justified in threatening to call, and actually calling, the local police because “[t]o hold otherwise would mean that the Hospital had no First Amendment right to petition the government to protect the Hospital’s private property rights.” As shown below, the Hospital’s new claim is jurisdictionally barred from this Court’s consideration because the Hospital did not raise it before the Board.

Under Section 10(e) of the Act, the Hospital had to first raise this issue to the Board in order to preserve it for review. 29 U.S.C. §160(e) (“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.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) bars courts from considering issues not raised before Board). *See also Parkwood Dev. Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (court has “no jurisdiction” to consider claim not timely raised to Board). The critical question in satisfying Section 10(e) is whether the Board received adequate notice of the basis for the objection. *Alwin Mfg. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999).

Before the Board, the Hospital never challenged any of the Board’s findings on First Amendment grounds—either in its exceptions (JA 368-72) or its exceptions brief.⁹ There are no extraordinary circumstances present that would justify the Hospitals’ failure to raise this defense before the Board. Thus, the Court is jurisdictionally barred from considering the Hospital’s First Amendment claim. *See Ampersand Publishing, LLC v. NLRB*, available on PACER, D.C. Cir. Case Nos. 15-1074, 15-1130, 15-1082, 15-1154 (March 17, 2017) (unpublished) (*See*

⁹ The Board has moved to lodge the Hospital’s exceptions brief.

Addendum at *2-3) (finding Court was barred from considering First Amendment claim that party did not properly raise before Board).¹⁰

Thus, if the Court agrees that the Board applied the proper test and reasonably determined that under it, the Hospital was not justified in restricting the off-duty employees from engaging in picketing, it should also enforce the Board's finding that threatening employees with discipline and with arrest, and summoning the police, violated the Act.

¹⁰ Had the Hospital raised the issue to the Board, it arguably would have found support in *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 92 (D.C. Cir. 2015), where the Court held that an employer calling the police to exclude union demonstrators from its property could qualify as a direct petition to the government protected by the First Amendment.

CONCLUSION

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

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April 2017

ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1074

September Term, 2016

FILED ON: MARCH 3, 2017

AMPERSAND PUBLISHING, LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, DOING BUSINESS AS SANTA BARBARA NEWS-PRESS,
RESPONDENT

GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,
INTERVENOR

Consolidated with 15-1130

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

No. 15-1082

AMPERSAND PUBLISHING, LLC, DOING BUSINESS AS SANTA BARBARA NEWS-PRESS,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1154

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: KAVANAUGH and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

These cases were considered on the record from the National Labor Relations Board and the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is hereby

ORDERED and **ADJUDGED** that the petitions for review be **DENIED** and the Board's cross-applications for enforcement be **GRANTED**.

In 2000, Ampersand Publishing, LLC (Ampersand) acquired a daily newspaper known as the Santa Barbara News-Press (the News-Press or the Paper). Six years later, the Paper's news-gathering staff selected the Graphic Communications Conference, International Brotherhood of Teamsters (the Union) as their collective bargaining representative. The Union has since brought a bevy of unfair labor practice (ULP) charges against Ampersand, including the charges at issue here.

The first set of ULP charges (the First Case) stemmed from Ampersand's efforts to curb employee protests in 2006 and 2007. The Board sustained many of the ULP charges in the First Case, *see Ampersand Publ'g, LLC*, 357 NLRB 452 (2011), but we reversed the Board's decision, *see Ampersand Publ'g., LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012) (*Ampersand I*).

The second set of ULP charges is before us in Case Number 15-1074 (the Second Case), where the Union alleged—and the Board found—that Ampersand had violated the National Labor Relations Act (NLRA or Act) by: (1) telling employees that they could speak with Ampersand's attorneys if Board investigators were bothering them; (2) telling employees that management's statements in a mass employee meeting about terms and conditions of employment must be kept secret; (3) suspending and then discharging an employee for serving on the Union's bargaining committee; (4) shifting work that would ordinarily be performed by unionized employees to (non-unionized) independent contractors without consulting the Union; (5) changing the terms and conditions of employment for unionized writers without first negotiating with the Union; (6) failing to give the Union the information it needed to represent workers effectively; and (7) violating its obligation to bargain with the Union in good faith.

The third set of ULP charges is before us in Case Number 15-1082 (the Third Case), where the Union alleged—and the Board found—that, in the course of preparing for the administrative trial in the Second Case, Ampersand subpoenaed copies of confidential statements that Ampersand's current and former employees had provided to the Board, as well as any personal notes the witnesses made in preparation for trial. By serving the subpoenas, the Board held, Ampersand violated the employees' NLRA right to be free from a coercive work environment.

Ampersand has challenged both of the Board's decisions on First Amendment grounds, arguing that: (1) Ampersand is largely immune from ULP charges brought by the Union,

including those at issue in both the cases now before us, because the Union had a history of attempting to seize editorial control of the News-Press (the broad First Amendment argument); and (2) Ampersand is immune from the ULP charges that stem from Ampersand's refusal to bargain over reporter staffing decisions because Ampersand has a First Amendment right to choose the individuals who write articles for the paper (the narrow First Amendment argument).

As the Board has observed, our court lacks jurisdiction to consider Ampersand's broad First Amendment argument (that the entire Union is so tainted by its errant foray into editorial control that all of its ULP charges must be rejected). Section 10(e) of the NLRA provides that, when an argument has "not been urged before the Board," a reviewing court lacks jurisdiction to consider the argument absent "extraordinary circumstances." 29 U.S.C. § 160(e); *see W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008); 29 C.F.R. § 102.46(b)(2) (establishing that any exception "which is not specifically urged" before the Board is "waived"). Having considered all of the evidence in the record, as well as the documents that Ampersand submitted belatedly, we conclude that Ampersand failed to urge the broad First Amendment objection before filing its appeals in this court.

To urge an objection before the full Board, a litigant must raise the objection in a timely fashion. Thus, if a litigant objects to the results of a trial before an Administrative Law Judge (ALJ), the litigant must file an "exception" to the ALJ's decision. 29 C.F.R. § 102.46(b)(2), (g). Alternatively, if a litigant has no problem with the ALJ's decision but believes that the full Board made a mistake in reviewing it, the litigant must file a motion seeking reconsideration or rehearing of the Board's decision. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). In addition to raising an objection in a timely manner, a litigant must present its objection in sufficiently clear terms to "put the Board on notice" of a specific problem with the ALJ's analysis or the Board's reasoning. *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

Ampersand does not dispute that it failed to raise the broad First Amendment argument in its exceptions to the ALJ's decision or its motion for reconsideration in the Third Case. And we are not persuaded that Ampersand adequately pressed the argument in the Second Case. Ampersand's exceptions did fault the ALJ for characterizing as "Manichean" the Paper's suggestion that News-Press employees were attempting to "[w]rest editorial control from the publisher." 15-1074 J.D.A. 1918. Crucially, however, neither the exceptions nor the supporting brief suggested that the employees' misguided attempt to gain control of the paper immunized Ampersand from any and all ULP charges. *See Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998) (examining a litigant's exceptions and supporting brief to determine whether an argument had been preserved). To the contrary, the brief argued that Ampersand was immune from a handful of specific ULP charges. *See* Exceptions Br. 43-45. Thus, Ampersand's exceptions did not "put the Board on notice" of the broad First Amendment argument. *N.Y. & Presbyterian Hosp.*, 649 F.3d at 733. Nor did Ampersand raise a broad First Amendment challenge in its motion for reconsideration. *See* 15-1074 J.D.A. 2042 n.5. Ampersand therefore waived its broad First Amendment argument.

No “extraordinary circumstances” justify Ampersand’s failure to preserve its broad constitutional argument. 29 U.S.C. § 160(e). Ampersand contends that it would have been impossible to press the argument before the Board because the argument rests on our decision in *Ampersand I*, which postdates Ampersand’s exceptions to the ALJ decisions now under review. In *Ampersand I*, we held that Ampersand was free to discipline employees who had participated in pro-Union activities if the “focus” of those activities was taking control over the content of the Paper. 702 F.3d at 58. We handed down that decision on December 18, 2012—after Ampersand had argued these cases to the Board and briefed its motion for reconsideration. Even assuming our decision fortified its position, nothing prevented Ampersand from timely raising before the Board the very arguments that it presented to this court in its *Ampersand I* briefs.

Ampersand also claims that it would have been futile to raise the challenge because the Board in *Ampersand I* had rejected a version of the same argument. See *NLRB v. Fed. Labor Relations Auth.*, 2 F.3d 1190, 1197 (D.C. Cir. 1993) (extraordinary circumstances existed where the Board had already rejected the argument in an earlier proceeding, making it “futile” to raise again). But the Board’s *Ampersand I* decision was decided on a different record. In that case, the Board considered whether evidence of employee conduct between 2006 and 2007 demonstrated that reporters were running an impermissible campaign to wrest editorial control from the Paper’s publisher. This case concerns the broader swath of employee conduct between 2006 and 2009. With a larger body of evidence before it, the Board might have been willing to revisit its conclusions in *Ampersand I*. See 15-1074 J.D.A. 1762 (ALJ in the Second Case explaining that the Board’s *Ampersand I* opinion “contained a significant amount of uncontested background information which underlay the larger picture of the controversy”). Indeed, the Board in *Ampersand I* cautioned that, if post-2007 evidence showed that the Union was unlawfully pressuring the News-Press to change the way it reported the news, the Paper would “not be without recourse.” *Ampersand Publ’g, LLC*, 357 NLRB at 458. Thus, putting aside whether the argument itself ultimately would have been found meritorious, we cannot say that it would have been futile for Ampersand to have taken exception to the ALJ’s decision of all the ULP charges based on its broad First Amendment argument. We therefore hold that no extraordinary circumstances excused Ampersand’s failure to preserve its broad First Amendment argument, and we are without jurisdiction to consider it.

Ampersand’s narrower First Amendment argument about reporter staffing, by contrast, is properly before us because Ampersand raised the point during the trial before the ALJ in the Second Case and again in the brief supporting its exceptions to the ALJ’s decision. But the argument is unpersuasive on its merits. The Supreme Court has rejected the idea that “any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.” *Associated Press v. NLRB*, 301 U.S. 103, 131 (1937). Thus, the Court has recognized that, while newspapers have complete discretion to select authors for particular articles, and to fire authors who perform unsatisfactory work, they do not have an unfettered right to fire authors for engaging in protected union activities. See *Associated Press*, 301 U.S. at 132 (upholding a Board order reinstating a journalist who was fired for his union affiliation). Nor do news organizations have unilateral say over how to compensate their unionized employees. See *Ampersand I*, 702 F.3d at 58 (acknowledging that, in general, newsroom staff has a right to engage in concerted activity for

the purpose of obtaining higher wages). Consistent with those principles, the Board's decision in the Second Case did not obligate the News-Press to print any particular work a reporter submits, but held that the News-Press could not take a bargaining unit reporter off its payroll without consulting the Union; nor could it remove a reporter in response to legitimate union activities. In the same vein, the News-Press was free to hire individuals of its choosing to write pieces it requested for the paper, but it could not pay those individuals at the rate for freelance rather than unionized employees. Neither of those conclusions offends the First Amendment.

Ampersand has also raised a smattering of non-First-Amendment arguments in both cases. We reject Ampersand's non-First-Amendment arguments in the Second Case for the reasons stated in the Board's brief, with two minor clarifications. First, contrary to the Board's suggestion, there is no evidence that Ampersand had a settled practice of giving reporters merit-based wage increases before 2003. Rather, the evidence establishes that, from 2000 to 2003, Ampersand exercised complete discretion regarding employee raises, and only in 2003 did Ampersand "for the first time in several years" introduce a "structured system" for determining which employees would receive salary increases. Ampersand was obligated to consult the Union before modifying or scrapping that structured system. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("[A]n employer's unilateral change in conditions of employment under negotiation is . . . a violation of [the Act].").

Second, in accepting the Board's argument that Ampersand bargained in bad faith, we place weight on the Board's finding that, during the negotiation process, the Union made a genuine effort to leave Ampersand complete control over the editorial content of the paper. The Board observed, for example, that Ampersand's "own bargaining notes state[d] that the 'Union does not disagree that Management has a right to determine the content of the paper,'" and further observed that the Union proposed a collective bargaining agreement that specified that "[n]othing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper." 15-1074 J.D.A. 2043, *see id.* at 2048 (reaffirming after *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)). The Board found that, while the Union was trying to respect Ampersand's legal rights, Ampersand for its part was not making a good-faith effort to respect the Union's rights. Ampersand neither explained why it believed that the Union's proposals violated the First Amendment nor undertook to bargain with the Union over issues that had nothing to do with controlling the content of the paper. *See id.* at 2044 (Board explaining that, when the Union proposed language that would give Ampersand editorial control, Ampersand "refused to take 'yes' for an answer"); *id.* at 2048 (reaffirming after *Noel Canning*). We sustain the Board's finding that Ampersand failed to make a "sincere, serious effort" to "reach an acceptable common ground" with the Union. *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981).

Turning to the Third Case, substantial evidence supports the Board's conclusion that, under the totality of the circumstances, Ampersand's issuance of subpoenas to its workers demanding personally annotated copies of the witness statements they had provided to the Board had a reasonable tendency to coerce employees. *See Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 543-44 (D.C. Cir. 2016). The subpoenas were reasonably likely to undermine employees' confidence that their statements to Board investigators would be kept secret; lacking

such confidence, a reasonable employee likely would be less willing to cooperate with Board investigators in the future. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-42 (1978). And without employee cooperation, the Board would be less effective in vindicating employee rights against any unfair labor practices by Ampersand. *See id.* at 236, 240-41. Moreover, this is not the first time Ampersand has impermissibly subpoenaed employees' confidential statements to Board investigators. The Board previously quashed such subpoenas and ordered Ampersand to post a remedial notice, explaining that witness statements are to be maintained in confidence unless and until the witness testifies at an NLRB trial. *See* 29 C.F.R. § 102.118. In light of that remedial notice, Ampersand's service of the subpoenas at issue here appeared quite deliberate. To a reasonable employee, an employer willing to violate such a squarely applicable Board rule might seem especially prone to retaliate against workers who exercise their NLRA rights. Ampersand's subpoenas risked chilling concerted action, and thereby effectively coerced employees to accept their current working conditions.

For these reasons, we deny the petitions for review and grant the Board's cross-applications for enforcement of its orders.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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

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 of 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 158(a)(3) of this title].

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

(a) 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 157 of this title];

Section 8(b)(4) (29 U.S.C. § 158(b)(4)):

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

- (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object ...

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 8(b)(7) (29 U.S.C. § 158(b)(7)):

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

Section 8(g) (29 U.S.C. §158(g)) :

(g) Notification of intention to strike or picket at any health care institution. A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to

such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Section 10(a) (29 U.S.C § 160(a)):

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Section 10(e) (29 U.S.C. § 160(e)):

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, 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. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Section 10(f) (29 U.S.C. § 160(f)):

(f) Review of final order of Board on petition to court. 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, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if

supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Rules

Fed. R. App. P. 28(a)(8)(A)

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

.....

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

**UNITED STATES COURT OF APPEALS
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)	Nos. 16-1320, 16-1369
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)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	19-CA-105724
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS LOCAL 21)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 10,904 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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(202) 273-2960

Dated at Washington, DC
this 4th day of April, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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 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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Dated at Washington, DC
this 4th day of April, 2017