

(Consolidated with Nos. 16-1076 & 16-1110)

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

**VERITAS HEALTH SERVICES, INC.,
d/b/a CHINO VALLEY MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF
HEALTH CARE PROFESSIONALS, NUHHC, AFSCME, AFL-CIO,**

Intervenor for Respondent/Cross-Petitioner

JOSE LOPEZ, JR.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**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
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERITAS HEALTH SERVICES, INC.,)
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v.)

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UNITED NURSES ASSOCIATIONS OF)
CALIFORNIA/UNION OF HEALTH CARE)
PROFESSIONALS, NUHHCE, AFSCME,)
AFL-CIO,)
)
Intervenor for Respondent/Cross-Petitioner)

Nos. 16-1058
16-1076
16-1110

Board Case No.
31-CA-107321

JOSE LOPEZ, JR.,)
)
Petitioner)

v.)

NATIONAL LABOR RELATIONS BOARD,)
)
Respondent)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Veritas Health Services, Inc., d/b/a Chino Valley Medical Center (“Chino”) is the Petitioner in case No. 16-1058, and the Cross-Respondent in case No. 16-1110. Jose Lopez, Jr. is the Petitioner in case No. 16-1076. The Board is the Respondent in case No. 16-1058, the Cross-Petitioner in case No. 16-1110, and the Respondent in case No. 16-1076. United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO (“the Union”) is the Intervenor for the Board in Case Nos. 16-1058 and 16-1110, and was the charging party before the Board in unfair-labor practice case No. 31-CA-107321.

B. Ruling under Review

The case under review is a Decision and Order issued by the Board, entitled *Veritas Health Services, Inc., d/b/a Chino Valley Medical Center and United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO*, 363 NLRB No. 108 (Feb. 4, 2016).

C. Related Cases

The ruling under review was not previously before this or any other court. On April 3, 2013, the Board issued a decision and order in another case finding that Chino committed multiple unfair labor practices during the Union’s 2010 organizing campaign. *See Veritas Health Servs., Inc. (Veritas III)*, 359 NLRB 992 (2013), *adopted by* 362 NLRB No. 32, 2015 WL 1278687 (Mar. 19, 2015). The

Board considered Chino's unfair labor practices in *Veritas III* in determining the appropriate remedies in the instant case. *Veritas III* is currently pending before the United States Court of Appeals for the Ninth Circuit, which heard oral argument on December 7, 2016. See *United Nurses Ass'ns of Cal./Union of Health Care Prof'ls, NUHHCE, AFSCME, AFL-CIO v. NLRB (UNAC v. NLRB)*, Nos. 15-70920, 15-71045 & 15-71390 (9th Cir.).

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Dated at Washington, DC
this 10th day of April 2017

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GLOSSARY

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board	National Labor Relations Board
Br.	Opening brief of Veritas Health Services, Inc., d/b/a Chino Valley Medical Center
Chino	Veritas Health Services, Inc., d/b/a Chino Valley Medical Center
Order	<i>Veritas Health Services, Inc., d/b/a Chino Valley Medical Center and United Nurses Associations of California/ Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO</i> , 363 NLRB No. 108 (Feb. 4, 2016)
The General Counsel	Counsel for the Board's General Counsel
JA	Joint Appendix
LBr.	Brief of Jose Lopez, Jr.
Lopez	Chino employee Jose Lopez, Jr.
The Union	United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO
Veritas I	<i>Veritas Health Servs., Inc.</i> , No. 31-RC-008795 (Jan. 25, 2011)
Veritas II	<i>Veritas Health Servs., Inc.</i> , 356 NLRB No. 137, 2011 WL 1396024 (Apr. 12, 2011), <i>enforced</i> , 671 F.3d 1267 (D.C. Cir. 2012)
Veritas III	<i>Veritas Health Servs., Inc.</i> , 359 NLRB 992 (2013), <i>adopted by</i> 362 NLRB No. 32, 2015 WL 1278687 (Mar. 19, 2015), <i>review pet. filed sub nom. United Nurses Ass'ns of Cal./Union of Health Care Prof'ls, NUHHCE, AFSCME, AFL-CIO v. NLRB</i> , Nos. 15-70920, 15-71045 & 15-71390 (9th Cir.).

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Veritas Health Services, Inc., d/b/a Chino Valley Medical Center (“Chino”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against Chino on February 4, 2016, and reported at 363 NLRB No. 108. United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO (“the Union”) has intervened on the Board’s behalf. Employee Jose Lopez, Jr. also filed a petition for review of the same Order, and the cases were consolidated. The Board’s Order is final with respect to all parties, and the Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f). All filings with the Court were timely. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, *id.* § 160(a).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board’s finding that Chino violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union.
2. Whether the Court should summarily enforce the Board’s broad cease-and-desist order, notice-mailing and posting requirements, and general affirmative

bargaining order, and whether the Board properly exercised its broad remedial discretion in ordering a notice reading.

3. Whether the Board properly exercised its discretion in denying Lopez's motion to intervene in the unfair-labor-practice proceeding, such that his claims are not properly before the Court.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Chino violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union as the exclusive collective-bargaining representative of a unit of Chino's employees. Chino does not dispute its withdrawal of recognition and refusal to bargain. Instead, Chino contests the Board's findings that those actions were unlawful because: (1) Chino based them on a decertification petition tainted by its unfair labor practices during the Union's 2010 organizing campaign; (2) Chino acted during the Union's certification year; and (3) Chino failed to prove that the Union had actually lost majority support among unit employees when it withdrew recognition and refused to bargain. The procedural history of this case and the Board's findings of fact are summarized below.

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves the Union's quest to represent a unit of registered nurses employed at Chino's acute-care hospital in Chino Valley, California. (JA 5; JA 215 & n.2, 312 at ¶ 2.)¹ In May 2008, the Union filed objections after losing a Board-supervised election to represent that unit. Subsequently, the Board's Regional Director issued a report finding that Chino engaged in objectionable conduct affecting the election outcome. Chino filed exceptions, but the Union withdrew its objections while the matter was pending before the Board. (JA 5; JA 215 n.2.)

A. *Veritas I and Veritas II*

In April 2010, based on a new petition, the Board conducted another election in the same unit; this time, the Union prevailed. (JA 5; JA 215-16.) In January 2011, the Board certified the Union as the unit's exclusive collective-bargaining representative. (JA 5; JA 229-31 (*Veritas I*.) Chino was then required to honor the Union's certification for one year. *See* 29 U.S.C. § 159(c)(3); *Mar-Jac Poultry Co.*, 136 NLRB 785, 786 (1962).

¹ Abbreviations in this final brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Subsequently, Chino refused to bargain in order to challenge the Union's certification.² In April 2011, resolving an unfair-labor-practice complaint filed by the Board's General Counsel, the Board issued a decision finding that Chino's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered Chino to bargain with the Union. (JA 5; JA 232-34 (*Veritas Health Servs., Inc. (Veritas II)*), 356 NLRB No. 137, 2011 WL 1396024 (Apr. 12, 2011)).) The Board also ordered an extension of the certification period, specifying that it would run one year from the date Chino began to bargain in good faith. (JA 5; JA 233.) On March 13, 2012, this Court denied Chino's petition for review and enforced the Board's order in full. (JA 5; JA 235-49 (*Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012)).)

B. *Veritas III*

On February 23, 2011, shortly after filing the complaint in *Veritas II*, the General Counsel issued another complaint, this one alleging that Chino committed multiple unfair labor practices during the Union's 2010 organizing campaign. (JA 5; JA 254-55.) It alleged that Chino: (a) threatened to: discharge a known union supporter; close the facility and discharge employees if they voted for the Union;

² See *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996) (explaining that the Act's scheme allows employers to seek judicial review of Board certification decisions by refusing to bargain and defending the ensuing unfair-labor-practice charge on the ground that the election was flawed (citing *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964))).

lay off employees and abridge their benefits if they supported the Union; and enforce work policies more vigorously because they voted for the Union; (b) coercively interrogated employees about their union activities and created the impression that those activities were under surveillance; (c) discharged a known union supporter and imposed stricter discipline for minor tardiness and attendance violations; and (d) ceased its practices of paying employees for time spent attending certification classes and letting them exchange shifts; prohibited them from talking to the media about employment and union-related matters; and unlawfully subpoenaed them for information about their union-related activities. (JA 254-55.)

On October 17, 2011, an administrative law judge found that Chino violated the Act as alleged, and the Board affirmed the judge's decision on April 30, 2013. (JA 5; JA 250-74 (*Veritas Health Servs., Inc. (Veritas III)*), 359 NLRB 992 (2013).) Chino petitioned this Court for review, but the case was put in abeyance pending litigation over the President's recess appointments of three Board members.³ On March 19, 2015, after reviewing the record *de novo*, a properly constituted Board issued a new decision incorporating the prior decision by reference and finding that Chino violated the Act as alleged. (JA 1 n.2; *Veritas Health Servs., Inc.*, 362

³ Two recess appointees, Members Griffin and Block, joined Chairman Pearce in affirming the judge's decision. In June 2014, the Supreme Court found those appointments invalid. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

NLRB No. 32, 2015 WL 1278687 (Mar. 19, 2015).) Chino petitioned for review in the Ninth Circuit, which heard oral argument on December 7, 2016. *See United Nurses Ass'ns of Cal./Union of Health Care Prof'ls, NUHHCE, AFSCME, AFL-CIO v. NLRB (UNAC v. NLRB)*, Nos. 15-70920, 15-71045 & 15-71390 (9th Cir.).

C. The Instant Case and Lopez's Motion to Intervene

After investigating unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint, later amended, alleging that Chino violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union as the exclusive collective-bargaining representative of unit employees. (JA 4; JA 31, 33, 35-44, 95-105.) Employee Jose Lopez, Jr. filed a motion to intervene in the proceeding, claiming that he sought to oppose the "re-imposition of [the Union] as the employees' workplace bargaining representative." (JA 4 n.1; JA 45-66.) Lopez argued that he possessed "legally protected interests distinct and separate from" Chino, which would not be adequately protected unless he could participate in the proceedings. (JA 47, 48-52.) Associate Chief Administrative Law Judge Gerald Etchingham found that Lopez's participation was "irrelevant and inappropriate" because there was "identical overlap" between his stated interest in opposing a remedial bargaining order and Chino's defense that it lawfully withdrew recognition and refused to

bargain. (JA 70.) Accordingly, he denied Lopez's motion without prejudice to its renewal before the judge assigned to hear the case. (JA 4 n.1; JA 67-70.)

On November 18, 2014, the parties convened for a hearing before Administrative Law Judge John McCarrick. Lopez then renewed his motion, which the judge denied because he had not offered any new evidence or supporting argument. (JA 4 n.1; JA 327-30.) Following the hearing, which Lopez and his attorney attended, the judge issued a recommended decision and order finding that Chino violated the Act as alleged. (JA 4-13.) The judge made the following findings of fact, which the Board affirmed, with modifications to his recommended order. (JA 1.)

II. THE BOARD'S FINDINGS OF FACT

A. After a Year of Negotiating, Chino and the Union Reach an Agreement

On March 20, 2012, a week after this Court enforced the Board's order in *Veritas II*, the Union requested that Chino bargain and provide information relevant to negotiating a collective-bargaining agreement. (JA 6; JA 281-82.) On March 22, Chino's Assistant General Counsel, Mary Schottmiller, supplied some of the requested information to the Union's Director of Collective Bargaining and Representation, Barbara Lewis. Schottmiller also asked Lewis for "available dates ... for negotiations so we can get started right away." (JA 6; JA 283.) However, the unit had incurred nearly 50 percent turnover in the two years since the election,

and Chino had not given the Union any of the information necessary to reconnect with employees and train them to participate in contract negotiations. (JA 6; JA 341-45, 347-52, 360-61.) Ultimately, the parties agreed to start bargaining on June 13, 2012. (JA 6; JA 284-85, 314 at ¶ 8.)

The parties met over 25 times in the ensuing year. By May 24, 2013, they had reached agreement on all but a handful of contract articles: Chino had rejected the Union's proposal for one article, and the Union had not acquiesced to Chino's proposals for three others. (JA 6; JA 314-17 at ¶¶ 8-9, 11-12, JA 364.) On May 28, the parties agreed to meet on again on July 2 to continue their negotiations. (JA 292, 318 at ¶ 13.) At no time did Chino withdraw its proposals for the three articles to which the Union had not agreed. (JA 6-7; JA 333, 334-35, 337-38, 371-72, 374.)

On June 10, 2013, Lewis sent a letter informing Schottmiller that the Union was accepting Chino's three proposed articles and withdrawing the one Chino had rejected. (JA 6; JA 297-306, 318 at ¶ 14.) Lewis added, "Based on the above, this now concludes all negotiations between the parties, as there are no outstanding issues that remain. Effective today, June 10, 2013 the parties are in full agreement. The three year contract shall expire on June 10, 2016." (JA 298.) Lewis's letter was delivered to Chino by courier service at 3:41 P.M.⁴ (JA 6; JA 307.)

⁴ Also on June 10, the Union informed employees that negotiations were complete and that there would be a meeting to ratify the new agreement. (JA 310.)

B. Chino Withdraws Recognition and Refuses To Bargain

On the same day, at 5:09 P.M., Lewis received a letter from Schottmiller stating that Chino had “received objective evidence on June 9, 2013 that a majority of employees ... no longer wish to be represented by” the Union and that Chino would not continue bargaining.⁵ (JA 7; JA 309, 318 at ¶ 15, JA 338-39.) On June 13, however, Schottmiller sent Lewis another letter “revoking and rescinding” her earlier letter, claiming it was “sent ... in error.” (JA 7; JA 311, 318 at ¶ 16.) Schottmiller admitted that she had received the Union’s June 10 letter accepting Chino’s proposals, but added, “Because you have accepted proposals that were no longer were [sic] on the table, we are treating your acceptance as a counter-proposal subject to the company’s acceptance.” (JA 7; JA 311.) Schottmiller then informed Lewis that Chino was withdrawing recognition from the Union because it had received “notice that a majority of unit employees no longer support[ed]” the Union, but she did not identify that evidence. (JA 7; JA 311.) Although Chino asserted during the unfair-labor-practice hearing that it had received a decertification petition signed by a majority of employees (JA 331-32), it never introduced the petition into the record or produced any other evidence that the Union had lost majority support. (JA 7, 9; JA 405.)

⁵ Schottmiller’s letter was dated June 9, 2013, but was sent to Lewis as an e-mail attachment on June 10.

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 4, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a Decision and Order finding, in agreement with Judge McCarrick, that Chino violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain. (JA 1.) The Board based its finding on three independent grounds: (1) the decertification petition on which Chino relied was tainted by its unremedied unfair labor practices during the 2010 organizing campaign; (2) Chino withdrew recognition during the Union's extended certification year; and (3) Chino failed to show that the Union had actually lost majority support when it withdrew recognition. (JA 1 n.3, 7-9.) The Board also found that the denial of Lopez's motions to intervene was not abuse of discretion, but rather fell within established precedent. (JA 1 n.1.)

The Board's Order, which modified portions of the judge's recommended order,⁶ requires Chino to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (JA 1, 2-3.) Affirmatively, the Order requires Chino to bargain on request with the

⁶ The Board *sua sponte* modified several portions of the judge's recommended order. Specifically, the judge had recommended a narrow cease-and-desist order, a limited affirmative bargaining order, and a notice-mailing remedy that would apply only if Chino went out of business or closed the hospital. (JA 10, 11-12.) The Board substituted a broad cease-and-desist order, a general affirmative bargaining order, and an unqualified notice-mailing remedy. (JA 1-2.)

Union for a reasonable period—defined as no less than six months, but no more than one year—and, if an understanding is reached, to embody that understanding in a signed agreement. (JA 1-2 & n.7.) The Order also requires Chino to physically and electronically post a remedial notice, and to mail copies of that notice to all per-diem employees and former employees employed since June 20, 2013. Finally, the Order requires the notice to be read aloud to employees, at a meeting scheduled for that purpose, either by a Chino official or by a Board agent in the presence of a Chino official.⁷ (JA 1 n.5, 3.)

SUMMARY OF ARGUMENT

Employers have a duty under the Act to recognize and bargain with their employees' chosen representative. The Board found that Chino violated that duty on three independent grounds. Substantial evidence supports all three findings, any one of which, standing alone, would provide a basis for upholding the Board's unfair-labor-practice findings.

First, the Board found that Chino could not rely on the decertification petition to withdraw recognition and refuse bargaining because it was tainted by the litany of unfair labor practices that Chino committed during the Union's 2010 organizing campaign. Substantial evidence supports the Board's determination

⁷ The Board's Order also requires Chino to reimburse costs and expenses incurred by the General Counsel and the Union in investigating, preparing, presenting, and conducting the unfair-labor-practice proceeding. (JA 1 n.5, 3.) As explained at p. 34, the Board does not seek enforcement of that aspect of its Order.

that those highly coercive violations, which were detailed in *Veritas III* and remain unremedied, caused employee disaffection and were likely to endure in employees' memories and color their view of the Union's effectiveness.

Second, the Board reasonably found that Chino's withdrawal of recognition and refusal to bargain were independently unlawful because it took those actions during the extended certification year, when the Union's majority status could not be impugned. Under established Board law, where, as here, an employer refuses to bargain with a duly elected union in order to seek judicial review of the underlying election, the certification year is extended, and does not begin until the parties' first bargaining session. Moreover, if a significant period has passed since the election, the union is allowed some time to reestablish contacts with unit employees. Because Chino waited two years to recognize the Union, the Board reasonably rejected Chino's claim that the Union unduly delayed the parties' initial bargaining session by taking 12 weeks to reestablish those contacts.

Third, the Board found that Chino's withdrawal of recognition and refusal to bargain were independently unlawful because it failed to offer any evidence that the Union had actually lost majority support among unit employees. An employer that relies on a decertification petition to withdraw recognition bears the burden of authenticating that petition. Given Chino's failure to even offer the petition into

evidence, or put forward any other evidence that the Union had lost majority status, the Board reasonably determined that Chino failed to carry its burden.

If the Court agrees that Chino violated the Act, then it should summarily enforce various aspects of the Board's Order that Chino failed to preserve below and/or waived by not challenging in its opening brief.⁸ Specifically, under Section 10(e) of the Act, the Court lacks jurisdiction to consider Chino's challenges to the broad cease-and-desist order and notice-mailing requirement because the Board adopted those remedies *sua sponte* and Chino never moved for reconsideration. In any event, the Board acted well within its discretion in ordering that relief. Similarly, Section 10(e) bars judicial review of the general affirmative bargaining order, which the Board also adopted *sua sponte*, and in addition, Chino's opening brief waives any challenge to that remedy. Chino's opening brief likewise waives any challenge to the notice-posting requirement.

Indeed, Chino preserved a challenge to only one of the remedies adopted by the Board—namely, the notice-reading requirement. The Board, however, acted well within its discretion in ordering that relief. As the Board explained, Chino, including upper-level management, committed widespread and egregious violations during the 2010 campaign. Given Chino's recidivism in this case, the

⁸ As explained at p. 34, the Board does not seek enforcement of those portions of its Order requiring Chino to reimburse parties' litigation expenses.

Board reasonably determined that a notice-reading was necessary to assure employees of their rights and Chino's obligations under the Act.

Finally, the Board, affirming the rulings of two administrative law judges, properly exercised its discretion in denying Lopez's motion to intervene in the unfair-labor-practice case against Chino. As the Board found, intervention was not necessary to vindicate Lopez's interest in opposing the Union and supporting the decertification effort because Chino shared those interests and was well positioned to protect them in defending against the General Counsel's complaint. Moreover, Lopez's participation would not have added any evidence that would have changed the outcome of the case. Lastly, because the Board did not abuse its discretion in denying Lopez's motion to intervene, his meritless claims about the validity of his petition and the Board's remedial general bargaining order are not properly before the Court.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CHINO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND REFUSING TO BARGAIN WITH, THE UNION

The basic command of Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), is that an employer must recognize and bargain with a labor organization selected by the majority of its employees. *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 (D.C. Cir. 2015). The necessary corollary to that rule is that an employer who withdraws recognition from, and refuses to bargain with, a majority union violates Section 8(a)(5) and (1) of the Act.⁹ *Flying Foods Grp., Inc.*, 345 NLRB 101, 109 (2005), *enforced sub nom. Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178 (D.C. Cir. 2006).

The Board identified three independent grounds for finding that Chino unlawfully withdrew recognition from, and refused to bargain with, the Union. First, the Board found that the decertification petition on which Chino relied to withdraw recognition was tainted by its unremedied unfair labor practices in

⁹ Section 8(a)(5) makes it “an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Section 8(a)(1) makes it unlawful “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” *id.* § 158(a)(1), which includes employees’ “right ... to bargain collectively through representatives of their own choosing,” *id.* § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Pac. Coast Supply*, 801 F.3d at 325 n.2.

Veritas III. Second, the Board found that Chino unlawfully withdrew recognition during the Union's extended certification year. Third, the Board found that Chino failed to show the Union had actually lost majority support when it withdrew recognition. (JA 1 n.3, 7-9.) Substantial evidence supports all three findings, any one of which suffices on its own to establish that Chino violated the Act.

A. Standard of Review

The Board's findings of fact "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Under that test, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*." *Id.*; accord *Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005). Finally, the Court defers to the Board's interpretation of the Act if it is "reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citation omitted).

B. The Petition on Which Chino Relied Was Tainted by Unremedied Unfair Labor Practices

A union enjoys a conclusive presumption of majority status during the year following its certification as the employees' exclusive collective-bargaining representative. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-38

(1987). Thereafter, the employer may unilaterally withdraw recognition by showing that the union has, in fact, lost majority support within the unit. *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725 (2001). However, “an employer may only withdraw recognition [of a union] if the expression of employee desire to decertify represents the free and uncoerced act of the employees concerned.” *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 7 (D.C. Cir. 2012) (alteration in original) (quotation marks and citation omitted).

Accordingly, and with judicial approval, the Board has long held that an employer cannot withdraw recognition based on a union’s alleged loss of majority support where the employer’s unremedied unfair labor practices contributed to that loss. *See, e.g., Guerdon Indus., Inc.*, 218 NLRB 658, 659, 661 (1975); *accord BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 217-18 (D.C. Cir. 2003).

The Board found that Chino’s unfair labor practices in *Veritas III*, which were serious, widespread, and unremedied, irredeemably tainted the petition on which Chino relied to withdraw recognition. (JA 1 n.3, 7-8.) Where, as here, the unfair labor practices are not directly related to the decertification effort, the Board will find a violation only if the evidence shows a causal link between the employer’s conduct and the union’s loss of support. *SFO Good-Nite*, 700 F.3d at 7-8. To determine the existence of such a link, the Board considers four factors: (1) the nature of the illegal acts, including the possibility of their detrimental or

lasting effect on employees; (2) any possible tendency to cause employee disaffection from the union; (3) the length of time between the unfair labor practices and the withdrawal of recognition; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Id.* at 7 (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984)); *see also Lee Lumber & Bldg. Material Corp. (Lee Lumber II)*, 322 NLRB 175, 177 & n.16 (1996), *enforced in relevant part and remanded in part*, 117 F.3d 1454 (D.C. Cir. 1997).¹⁰

Applying the *Master Slack* factors to this case, the Board reasonably found a causal connection between Chino's unfair labor practices in *Veritas III* and the decertification petition. (JA 7-8.) Chino committed a litany of violations during the 2010 organization campaign, many of which were highly coercive and likely to have a detrimental effect on employees. Thus, Chino discharged a well-known union supporter and threatened to close the hospital and terminate all employees. These are "hallmark" violations that are likely to have "a lasting inhibitive effect on a substantial percentage of the work force" and remain in employees' memories

¹⁰ In deciding whether Chino's unremedied unfair labor practices tainted the decertification petition, the judge correctly relied on *Lee Lumber II* (JA 7), which Chino mistakenly refers to as *Lee Lumber I* (Br. 18). Adding to the confusion, Chino devotes an entire footnote (Br. 18 n.7) to distinguishing another case, *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), which Chino erroneously identifies as *Lee Lumber II*. The Board agrees with Chino that the 2001 case has no bearing on the issue of taint.

for a long period.” *Goya Foods of Fla.*, 347 NLRB 1118, 1121 (2006) (quoting *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980)), *enforced*, 525 F.3d 1117 (11th Cir. 2008). “[T]he discharge of an active union supporter is exceptionally coercive and not likely to be forgotten,” *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001), and “convey[s] to employees the notion that any support for the Union may jeopardize their employment,” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000).

Chino’s other violations were similarly likely to have detrimental or lasting effects. For instance, Chino implemented a new policy of strictly enforcing work rules, particularly those related to tardiness and attendance, and disciplining employees for minor violations that were previously ignored. Chino also rescinded its practice of paying employees during mandatory certification classes and allowing them to exchange work shifts. These types of violations have lasting effects that are felt by employees on a daily basis, and thus have the propensity to undermine support for the Union over the long term. *See Vincent Indus.*, 209 F.3d at 738 (“[T]he unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees’ chosen collective-bargaining agent.”).

The nature and scope of Chino’s unfair labor practices also supports the Board’s finding that they had a tendency to cause employee disaffection from the

Union. The Board's findings in *Veritas III* show that Chino orchestrated a campaign, led by its highest officials, to convey the message that supporting or joining the Union could cause employees to lose benefits or even their jobs. That message was made even clearer by Chino's decisions to terminate a visible union supporter, impose stricter discipline for minor violations, and rescind practices beneficial to employees. See *United Supermarkets, Inc.*, 287 NLRB 119, 120 (1987) (unlawful discharge of union supporter "is precisely the type of coercive conduct that may be expected to impress the remaining work force and not soon be forgotten" (citations omitted)).

The relatively short time between the unfair labor practices and the decertification petition also supports the Board's determination. The Board found, and Chino does not dispute, that Chino has not taken a single step to remedy the violations found in *Veritas III*, and therefore "the coercive effect of th[ose] unfair labor practices ... has in no way dissipated." *Overnite Transp. Co.*, 333 NLRB 1392, 1395 (2001) (citations omitted). Moreover, as discussed above, the violations in question are "precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described as cautionary tales to later hires." *Id.* (citation omitted).

Chino errs in asserting that its unlawful conduct did not affect employee morale under the fourth *Master Slack* factor. (Br. 20) Chino bases its claim on

testimony by union organizer Olivia Guevara, where she noted that factors like slow-moving negotiations and high turnover affected morale. (JA 384-85.) But Chino ignores her further testimony that union supporters also reported that they didn't know who they could trust, and that they felt isolated, as though coworkers were avoiding them. (JA 376-77, 382-85.) Even if Guevara's testimony was inconclusive (which it is not), the Board has made clear that, when the first three *Master Slack* factors support that an employer's violations tainted a decertification petition, a lack of evidence on the fourth factor will not negate that finding. *See, e.g., Overnite Transp.*, 333 NLRB at 1395 n.16 (lack of specific evidence regarding actual effect of unfair labor practices does not preclude finding taint where remaining *Master Slack* factors indicate a causal connection between unlawful conduct and decertification petition).

Chino's claim that the Board "completely side-stepped" the *Master Slack* analysis (Br. 19) raises the question whether Chino even bothered to read the Board's Decision. The Board not only recited the *Master Slack* standard, but also matched the evidentiary record against those factors. Moreover, the Board detailed the similarities between this case and *United Supermarkets*, 287 NLRB at 119, which Chino tellingly ignores. In *United Supermarkets*, the Board found that a decertification petition had been tainted by the employer's "extensive and serious" violations committed during the union's organizing campaign at least five years

earlier. *Id.* at 119. As here, the violations included retaliatory discharges, coercive interrogations, threats of closure and losses of benefits, and surveillance of union-related activities. *Id.* at 119, 123. Also like this case, the employer was continuing to litigate the unfair labor practices and had not taken any steps to remedy them when a decertification petition appeared. *Id.* at 119. The Board found that, under the circumstances, the petition was “unreliable as an indicator of uncoerced employee sentiment because it arose during the time when the [employer] had not yet fully remedied its many unfair labor practices.” *Id.* at 120 (citation omitted). Given the similarities between these cases, the Board’s conclusion in *United Supermarkets* applies with equal force here.

Chino’s focus (Br. 19) on the judge’s unrelated subpoena ruling is simply an attempt to distract from its failure to refute the merits of the Board’s decision.¹¹ That attempt is all the more transparent because Chino makes no effort to argue that the judge’s ruling prejudiced its ability to show that the petition was untainted. *See SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 314 (D.C. Cir. 2015) (“[W]e will only reverse the Board’s decision not to enforce a subpoena if prejudicial.” (quotation marks and citation omitted)). Chino claims that the judge’s

¹¹ Before the hearing, Chino subpoenaed the Union for information on a range of topics, including the decertification effort, the duration of the certification year, the scheduling of bargaining sessions, the tainting of the decertification petition and the Union’s status as the unit’s collective-bargaining representative. The judge found Chino’s information requests irrelevant to the issues at hand and revoked the subpoenas in full. (JA 148-57.)

ruling shows he decided the issue before taking any evidence and applied a “*per se* rule” that the 2010 unfair labor practices tainted the petition. (Br. 19-20.) This argument reflects a misunderstanding of the *Master Slack* analysis. As the Board has explained, “[e]xcept for the fourth factor, the *Master Slack* analysis weighs the *objective tendency* of the unfair labor practices to undermine union support, and evidence of the actual impact of the Employer’s unfair labor practices is not required.” *Overnite Transp.*, 333 NLRB at 1397 n.22 (emphasis added). The severity and pervasiveness of Chino’s 2010 violations was laid out in great detail in *Veritas III*, and Chino never claimed to have remedied any of them by the time of the events in this case.

C. Chino’s Withdrawal of Recognition and Refusal to Bargain Were also Independently Unlawful Because Chino Acted During the Union’s Extended Certification Year

The Board found that, even if Chino’s unremedied unfair labor practices had not tainted the decertification petition, Chino still violated Section 8(a)(5) and (1) of the Act by prematurely withdrawing recognition and refusing to bargain during the extended certification year. (JA 1 n.3, 8-9.) Substantial evidence supports this finding as well.

As shown, a duly certified union enjoys a conclusive presumption of majority status for the year following its certification. *See Fall River Dyeing*, 482 U.S. at 37-38, and cases cited at p. 18. However, where, as here, an employer

refuses to bargain with that union in order to test its certification, the year does not begin to run until the date of the parties' first bargaining session. *Van Dorn Plastic Mach. Co.*, 300 NLRB 278, 278 (1990), *enforced*, 939 F.2d 402 (6th Cir. 1991). In both situations, the union's status as exclusive bargaining representative is insulated from challenge during the certification year, and an employer cannot withdraw recognition during that time even if it has objective evidence that the union has lost majority support. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1076 (D.C. Cir. 2002).

In this case, the Union was elected in April 2010 and certified in January 2011. In April 2011, the Board issued its decision in *Veritas II*, finding that Chino unlawfully refused to recognize the Union, and ordered Chino to bargain in good faith, with the certification year running from the date Chino actually began bargaining. Chino, however, refused to bargain in order to test the Union's certification, and it was not until March 13, 2012, that this Court enforced the Board's bargaining order. On March 22, Chino responded to the Union's request to bargain, and the parties held their first session less than three months later, on June 13.¹² Accordingly, as the Board reasonably found, the certification period ran for one year from that first bargaining session. (JA 8.)

¹² Chino's portrayal of itself as the "initiator" of the bargaining effort is patently false. (See Br. 3 (claiming that it "attempted to initiate" bargaining on March 22, 2012), 24 n.8 (claiming that this case contrasts with *Dominguez Valley Hospital*,

Chino does not dispute that the bulk of this delay is solely attributable to its refusal to recognize the Union until March 2012. Instead, Chino claims that the brief ensuing interval before the first bargaining session constituted “inexcusable delay” by the Union, and therefore that Chino’s withdrawal of recognition and refusal to bargain occurred outside the certification year. (Br. 21-25.)

Chino’s argument has no basis in law or fact. The Board has long held that, when a significant period has passed since a union’s election, and absent unwarranted delay, “some time can reasonably be allowed before the certification year begins for the union to reestablish contacts with unit employees to facilitate bargaining on their behalf.” *Van Dorn Plastic*, 300 NLRB at 278-79 (quoting *Dominguez Valley Hosp.*, 287 NLRB 149, 150 (1987), *enforced sub nom. NLRB v. Nat’l Med. Hosp. of Compton*, 907 F.2d 905 (9th Cir. 1990)). Given that nearly two years had passed since the election, a 12-week hiatus before the first bargaining session was hardly unreasonable. *See, e.g., Dominguez Valley*, 287 NLRB at 149-50 & n.1 (3-month delay found reasonable where 3 years elapsed between election and start of bargaining).

Moreover, the record amply supports the Board’s finding (JA 8) that the delay in question was not “attributable to inexcusable procrastination or other

287 NLRB 149 (1987), because “in that case, it was the Union that promptly requested bargaining”).) The record uncontrovertibly shows that the Union made the first request to bargain when it reached out to Chino on March 20. (JA 281-82.)

manifestations of bad faith” by the Union. *Dominguez Valley*, 287 NLRB at 150. As the Board found, once Chino agreed to bargain, the Union’s first order of business was to reconnect with unit employees. That task was significantly complicated by the fact that Chino had denied the Union access to its facility for over two years, and that the unit had experienced about 50 percent turnover since 2010. (JA 6, 8; JA 341, 360-61.) The Union had to request new employee lists, contact employees individually, and organize meetings to reestablish those relationships. (JA 6; JA 341, 344-45.) Then, the Union had to facilitate the selection and training of a bargaining team (JA 344-45, 348), survey employees about workplace priorities (JA 320-21, 348, 350-52, 357), review agreements between Chino’s parent company and other unions (JA 6; JA 343-44, 347), and compile other information relevant to bargaining (JA 367-70). Finally, the Union had to formulate actual contract proposals and submit those drafts to the bargaining team for review. (JA 6; JA 347-48.)

Chino lobs several challenges at the Board’s ruling, all equally unfounded. First, Chino asserts that the judge “took no evidence” on this issue, and that he decided it “in prehearing proceedings.” (Br. 22, 24.) As the preceding paragraph demonstrates, however, the judge heard ample evidence on this matter. Chino also alleges that the Union’s asserted need to re-establish employee contacts was “a *post-hoc* invention of the [Union’s] witness” because it “was not

contemporaneously communicated to Chino.” (Br. 22.) But because Chino never *inquired* about the reasons for the delay, it can hardly complain about not receiving an explanation. Chino’s indignation rings particularly hollow given the absence of evidence that it ever mentioned the alleged delay when the parties were scheduling bargaining, or when the Union proposed the June 13 start date.¹³

Seeking to distract from its inability to refute the Board’s findings, Chino commits to another fool’s errand (Br. 22-24), arguing that the judge erred in revoking its subpoenas. *See* p. 23 n.11. As relevant here, those subpoenas sought documents relating to “the expiration date of the certification year for the Union as representative of the Bargaining Unit,” and “the scheduling of in-person negotiation sessions between the Union and Chino from January 2011 to the present.” (JA 150-51.) It is well settled that the decision to revoke a subpoena must be upheld unless the Board abused its discretion, and that the party challenging the denial bears the burden to demonstrate it was prejudiced by the

¹³ The cases on which Chino relies are inapposite because they involved delays for which no satisfactory explanation was provided. *See Hudson Chem. Co.*, 258 NLRB 152, 157 (1981) (employer’s explanation for 30-day delay—he “had some other things that [he] had to get done”—found insufficient to satisfy his bargaining obligations); *Wright Motors, Inc.*, 237 NLRB 570, 571, 575 (1978) (employer offered no explanation for 3-month delay, despite union protest); *Johnstown Am. Corp.*, No. 06-CA-032504, 2003 WL 1831898 (NLRB Div. of Judges, Apr. 4, 2003) (employer offered no explanation for 40-day delay despite union protest). Furthermore, the Board never reviewed the judge’s decision in *Johnstown*, and therefore it has no precedential value. *Sw. Reg’l Council of Carpenters*, 356 NLRB 613, 635 (2011) (“it is axiomatic that administrative law judge decisions without Board review ... have no precedential authority”).

error. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000). Chino fails to show that his ruling prejudiced its ability to litigate the extension of the certification year.

Simply put, the judge, affirmed by the Board, applied well-established precedent in finding that given Chino's two-year refusal to recognize the Union, 12 weeks was a reasonable period for the Union to re-establish contacts with unit employees. Given the legal nature of this determination, the judge did not abuse his discretion by revoking a subpoena that had the appearance of a fishing expedition. In any event, Chino is unable to show it was prejudiced by the subpoena ruling because the delay issue was fully litigated. The judge heard evidence about the Union's need for the extra time, and Chino cross-examined the Union's witness on that point. (JA 362-63.) And because Chino opted not to present any evidence—including testimony by its witnesses that might support its claims of delay—its allegations are reduced to meaningless conjecture.

Finally, Chino's reliance on *Ozark Automotive Distributors, Inc. v. NLRB* is unavailing because there the revocation of the employer's subpoena prevented it from proving a "critical" element of its case. 779 F.3d 576, 582 (D.C. Cir. 2015). By contrast, the judge here based his ruling on a reasonable legal determination, and Chino had every opportunity to fully litigate the delay issue at the hearing. In any event, the subpoena ruling did not prejudice Chino because the Board had two

other independent grounds for finding its withdrawal of recognition unlawful.

See pp. 17-24, 30-33.

D. Chino's Withdrawal of Recognition and Refusal to Bargain Were also Independently Unlawful Because It Failed to Show that the Union Had Lost Majority Support When Chino Took Those Actions

The Board found that, even if Chino had not based its withdrawal of recognition on a tainted petition, and even if it had not acted before the certification year ended, its withdrawal still would be unlawful because it failed to offer any evidence that the Union had actually lost majority support among unit employees. (JA 1 n.3, 9.) Like the Board's other findings, this one is supported by substantial evidence and consistent with law.

An incumbent union's presumption of majority status continues beyond the certification year, but instead of being conclusive, it becomes subject to rebuttal by the employer. *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 777-78 (1990); *St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 145 (D.C. Cir. 1989). To rebut the presumption and legally withdraw recognition from the union, the employer must provide objective evidence that the union actually lost majority support within the unit. *Levitz Furniture*, 333 NLRB at 725; *accord Flying Food*, 471 F.3d at 182-84. When that evidence consists of a decertification petition ostensibly signed by a majority of employees, the employer's burden includes authenticating the signatures, either at the time of withdrawal or at an unfair-labor-practice hearing.

Ambassador Servs., Inc., 358 NLRB 1172, 1172 n.1, 1182 (2012), *adopted by* 361 NLRB No. 106, 2014 WL 6482780 (Nov. 19, 2014), *enforced*, 622 F. App'x 891 (11th Cir. 2015) (per curiam); *Flying Food*, 471 F.3d at 184.

At the start of its case-in-chief, Chino sought to introduce by stipulation a decertification petition allegedly signed by a majority of unit employees, but the Board's General Counsel and the Union refused to stipulate to the authenticity of the petition or its signatures. (JA 9; JA 389-90, 401.) There ensued a discussion about Chino's burden under *Levitz* to prove that the Union had truly lost majority support when Chino withdrew recognition. (JA 9; JA 390-404.) The judge assured Chino that he would "give [it] an opportunity to" authenticate the petition and its signatures, but Chino withdrew the petition and rested its case. (JA 9; JA 405.)

The analysis on this issue could not be more straightforward. Chino based its withdrawal of recognition on a decertification petition purportedly signed by a majority of unit employees. Therefore, it was Chino's burden to authenticate those signatures and show that the Union actually lost majority support. However, Chino not only failed to authenticate the signatures, it failed to even *offer* the petition into evidence. In these circumstances, the Board reasonably found that Chino failed to rebut the presumption of majority status and unlawfully withdrew recognition from the Union. (JA 1 n.3, 9.)

Chino does not dispute its failure to offer the petition into evidence and authenticate it. Instead, Chino attempts to blame the judge for its failure, asserting, “[t]he ALJ ruled that Chino *could not introduce* the decertification petition into evidence *unless* Chino could show that it had authenticated the signatures on the petition prior to the withdrawal of recognition.” (Br. 25 (emphases added).) This is a flagrant misrepresentation of the judge’s ruling. The judge clearly stated that he would give Chino an “opportunity to show” that the Union had lost majority support by offering the petition and authenticating its signatures. (JA 405.) Indeed, elsewhere in his colloquy, the judge specifically observed that Chino could offer the petition through Schottmiller, who was present as Chino’s representative.¹⁴ Instead of availing itself of that opportunity, however, Chino withdrew the petition altogether.

Chino also seeks to disown its decision by claiming, implausibly, that it had “no choice but to withdraw the [petition]” because the judge purportedly mischaracterized its burden to authenticate the petition’s signatures. (Br. 12.) There are two problems with that argument. First, there was an obvious alternative: Chino could have simply proceeded with its case, and if the judge had denied its attempt to authenticate the signatures, it could have sought review of that

¹⁴ Specifically, when the judge asked who had received the petition, Chino’s counsel replied that it was Schottmiller. The judge then stated, “Ms. Schottmiller can testify to that. She can testify, ‘This is what we got and this is what we did based upon receiving this.’” (JA 394.)

ruling by the Board and this Court. Second, Chino's claim is based entirely on conjecture: the judge never had a chance to consider Chino's authenticating evidence, and thus Chino can only speculate as to how he would have ruled. For this, Chino has only itself to blame.¹⁵

II. THE COURT SHOULD SUMMARILY ENFORCE THE BOARD'S BROAD CEASE-AND-DESIST ORDER, NOTICE-MAILING AND POSTING REQUIREMENTS AND GENERAL AFFIRMATIVE BARGAINING ORDER, AND HOLD THAT THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ORDERING A NOTICE READING

Drawing on its unique expertise in effectuating the policies of the Act, the Board ordered certain remedies designed to alleviate the coercive effects of Chino's unfair labor practices. Specifically, the Board imposed a broad cease-and-desist order, a general affirmative bargaining order, and requirements to post, mail, and read aloud a remedial notice to employees. As explained below, Chino preserved a challenge only to the notice-reading remedy, but the Board acted well within its broad discretion in ordering that relief. Further, given that Chino either failed to preserve or waived challenges to the broad cease-and-desist order, general affirmative bargaining order, and notice-posting and mailing requirements, those

¹⁵ Chino's argument (Br. 26) that the judge misconstrued its burden of proof under *Levitz* and *Ambassador* is just another attempt to shift the blame for its failure to prosecute its defense. The record, including the judge's colloquy, plainly shows that he invited Chino to introduce and authenticate the petition, and that Chino turned him down.

remedies should be summarily enforced if the Court agrees that Chino violated the Act.

In addition to the aforementioned remedies, the Board ordered Chino to pay costs and expenses incurred in the investigation, preparation, presentation, and conduct of the unfair-labor-practice proceeding. (JA 1 n.5, 3.) However, in light of this Court's decisions in *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016), and *Camelot Terrace, Inc. & Galesburg Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016), the Board does not seek enforcement of those portions of its Order.

A. Objections to the Broad Cease-and-Desist Order, the General Affirmative Bargaining Order, and the Notice-Mailing Remedies Are Jurisdictionally Barred and Meritless; Chino Has Waived any Challenge to the Notice-Posting

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board ... shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). This “jurisdictional bar” precludes appellate courts from considering arguments that were not raised to the Board in the first instance. *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550 (D.C. Cir. 2016) (citation omitted). Moreover, the Section 10(e) bar applies when the Board modifies a judge's recommended order or addresses a particular issue in the first instance. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66

(1982) (holding that failure to seek reconsideration of an issue raised *sua sponte* by the Board “prevents consideration of the question by the courts” (citing *Int’l Ladies’ Garment Workers’ Union, Upper S. Dept., AFL-CIO v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975))); accord *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2015) (same).

The judge’s recommended order proposed several remedies, including having Chino post a remedial notice and requiring the notice to be read aloud by a Chino official or by a Board agent. (JA 11-12.) Chino excepted to both of those remedies (JA 180), which the Board adopted unchanged (JA 1 n.5, 3). In its opening brief, Chino repeats its objection to the notice-reading requirement, but it does not challenge the notice posting. Chino’s objections to that latter remedy are therefore waived, and on that basis the Board is entitled to summary enforcement of the notice-posting. *See, e.g., N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issues not raised in opening brief are waived); *SFO Good-Nite*, 700 F.3d at 5 (Board is entitled to summary enforcement of the uncontested portions of its order).

The judge’s other recommended remedies included a narrow cease-and-desist order, an affirmative order to bargain over the effective date of the parties’ agreement, and a requirement that Chino mail copies of the remedial notice to employees if it went out of business or closed the hospital. (JA 10, 11-12.) The

Board *sua sponte* modified those recommendations, substituting a broad cease-and-desist order and a general affirmative bargaining order, and removing the condition on notice mailing. (JA 1-2.) Chino, however, failed to file a motion with the Board to reconsider those new remedies, even though it was entitled to do so under the Board's Rules and Regulations. *See* 29 U.S.C. § 102.48(d)(1) (party can move for reconsideration after Board issues its Decision and Order).

Accordingly, the Court lacks jurisdiction to hear challenges to those remedies, which should be summarily enforced if the Court agrees that Chino violated the Act. *See Quality Mfg.*, 420 U.S. at 281 n.3 (barring review of Board orders entered *sua sponte* and not challenged in motion for reconsideration); *accord Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) (Court lacks jurisdiction to hear issue that could have been raised in motion to reconsider).¹⁶

In any event, the Board properly exercised its discretion in adopting a broad cease-and-desist order. (JA 1 & n.6.) Under established Board law, approved by this Court, this type of remedy is warranted where an employer "is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 NLRB 1357, 1357 (1979); *NLRB v.*

¹⁶ Even if Chino had sought reconsideration of the general affirmative bargaining order that the Board imposed *sua sponte*, summary enforcement would still be warranted because Chino does not challenge that remedy in its opening brief. *See SFO Good-Nite*, 700 F.3d at 5.

Blake Const. Co., 663 F.2d 272, 285 (D.C. Cir. 1981). As the Board found in *Veritas III*, Chino committed serious and pervasive unfair labor practices during the 2010 campaign, which demonstrated its utter lack of regard for its employees' protected rights. Then, having made no effort to remedy those violations, Chino recidivated by withdrawing recognition from the Union and refusing to bargain. Not only did Chino act on the basis of a tainted petition, but it did so during the Union's certification year, the very purpose of which is to help give effect to the employees' choice to be represented. *See* cases cited at pp. 54-55. Chino's egregious conduct, here and in *Veritas III*, demonstrate its proclivity to violate the Act.

Chino arguments against this remedy border on the ridiculous. For instance, Chino describes the Board's decision as "conclusory [and] supported with nothing more than a bare citation to [*Veritas III*]" (Br. 29), but the Board's detailed analysis of that case speaks for itself. (JA 2, 5.) Nor can Chino realistically claim that its conduct in these cases—a campaign to prevent employees from freely expressing their preference for the Union, followed by a deliberate attempt to sabotage the bargaining relationship—did not display the "requisite similarity" (Br. 30) establishing its proclivity to violate the Act. Finally, the Court should reject Chino's feeble claim (Br. 30-31) that this case does not fit the "pattern" for imposing a broad cease-and-desist order. Chino can point to no Board precedent

requiring a particular number or pattern of violations to justify this remedy. And even if the cases cited by Chino (Br. 30-31) involved worse offenders, Chino cannot hide behind their actions to dodge its own remedial obligations.

The Board also properly exercised its discretion in ordering Chino to mail the notice to all per-diem and former employees employed at any time since June 10, 2013. (JA 2.) The Board found that this was “necessary to effectuate the policies of the Act because former employees lack access to [Chino’s] facility and will not see the posted notice, and per diem employees do not regularly report to that location.” (*Id.*) Chino offers no basis to dispute the Board’s rationale, which is supported by evidence that the unit experienced nearly 50 percent turnover in the two years following the Union’s election. (JA 6; JA 341, 360-61.)

B. The Board Acted Within its Broad Remedial Discretion in Ordering the Notice Reading

In Section 10(c) of the Act, Congress conferred upon the Board the power to remedy unfair labor practices by ordering a labor-law violator to “take such affirmative action ... as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The Board’s remedial power under Section 10(c) is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citation omitted). “In fashioning its remedies ... , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v.*

Gissel Packing Co., Inc., 395 U.S. 575, 612 n.32 (1969); *see also Fibreboard Paper*, 379 U.S. at 216 (“[T]he relation of remedy to policy is peculiarly a matter for administrative competence” (citation omitted)). Accordingly, the Supreme Court has held that courts must enforce the Board’s chosen remedies “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper*, 379 U.S. at 216 (citation omitted); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (“The [Board’s] choice of remedies is entitled to a high degree of deference by a reviewing court.” (internal quotes and citation omitted)).

The Board orders special remedies when unfair labor practices are “so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found.” *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (internal quotes and citation omitted), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). One such remedy is to require a reading of the Board’s remedial notice by a Board agent or responsible company official. This measure helps counteract the chilling effect of an employer’s repeated violations by “ensur[ing] that the important information set forth in the notice is disseminated to all employees, including those who do not consult the [employer]’s bulletin boards.” *Excel Case Ready*, 334 NLRB 4, 5 (2001); *see also J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969) (“For repeated

violations persisted in despite intervening declarations of illegality ... the reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance.” (footnote omitted)).

The Board’s decision to require a notice reading (JA 1 n.5, 11) is well within its remedial discretion. As described at pp. 5-6, Chino committed multiple egregious violations during the Union’s 2010 campaign, including threatening to close the hospital and terminate all employees, threatening to discharge and discharging a known union supporter, disciplining employees because they supported the Union, coercively interrogating employees about union activities, threatening to enforce work policies more vigorously and imposing stricter discipline for minor violations, threatening losses of benefits and curtailing practices beneficial to employees, and threatening layoffs. *See Veritas III*, 359 NLRB at 997-1012. The Court has repeatedly recognized that such actions exemplify the kind of “pervasive[] and outrageous” conduct, *Federated Logistics*, 340 NLRB at 256, that justifies a notice reading. *See, e.g., Federated Logistics*, 400 F.3d at 923-28, 930 (enforcing notice-reading remedy where employer withheld wage increases, disciplined employees for protected conduct, threatened union supporters, interrogated employees and created an atmosphere of surveillance); *United Food & Commercial Workers v. NLRB*, 852 F.2d 1344, 1346, 1348-49 (D.C. Cir. 1988) (same where employer threatened to close plant and

discharge employees, threatened to withhold promotions and bonuses, and discharged pro-union employees); *Conair v. NLRB*, 721 F.2d 1355, 1361-65, 1386-87 (D.C. Cir. 1983) (same where employer threatened to close plant and discharge employees, threatened losses of benefits if union was elected, pre-emptively offered new benefits, and refused to reinstate striking employees); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 308, 402-03 (D.C. Cir. 1981) (same where employer promised benefits to induce employees to reject the union, threatened discharges and layoffs as penalty for union activity, and carried out those threats).

It is also worth noting that several of Chino's most egregious violations were committed by upper-level management, which further supports the Board's choice of remedy. *See Federated Logistics*, 400 F.3d at 930 (enforcing notice-reading remedy where many violations were committed by high-level management officials); *United Food*, 852 F.2d at 1349; (same); *Conair*, 721 F.2d at 1387 (same). Specifically, Chief Medical Officer James Lally, one of Chino's highest-ranking officials, threatened to discharge a known union supporter (whose discharge was later carried out by Chino's director of human resources), threatened layoffs, and coercively interrogated an employee. *Veritas III*, 359 NLRB at 998-99, 1004. CEO Lex Reddy told assembled employees that work policies would be enforced more vigorously after the Union's election, and Lally followed up with a directive ordering managers to strictly enforce all written policies and procedures.

Id. at 1000, 1009-10. Finally, the threat to close the facility and terminate all employees was made by a labor consultant hired by Chino's management. *Id.* at 997.

Chino's entire argument against the notice-reading remedy—and the notice-mailing remedy, which, as noted at pp. 35-36, is unpreserved—is that unlawfully withdrawing recognition from the Union does not, by itself, merit the imposition of special remedies. (Br. 32-33.) Unable to completely ignore the Board's findings in *Veritas III*, Chino dismisses that case as “a set of aged ULPs from 2010” (Br. 32), but doing so only underscores the fact that Chino has yet to take a single step to remedy those violations or to mitigate their chilling effect. Furthermore, it bears remembering that only two years had passed when Chino withdrew recognition from the Union in 2012. That unlawful withdrawal compounded the effect of the 2010 violations, and further demonstrated Chino's contempt for the rights of its employees.¹⁷

Finally, Chino claims that the Board's reliance on *Veritas III* is improper because that case is currently pending review in the Ninth Circuit. (Br. 32.) However, Chino fails to mention that, in briefing *Veritas III*, it did not dispute the vast majority of the Board's unfair-labor-practice findings, including the hallmark

¹⁷ Although Chino insists that it bargained in good faith with the Union (Br. 32), it forgets to mention that it did so only when confronted with a court order. Also, bargaining with the Union did nothing to help employees who were discharged, disciplined, or who lost benefits as a result of Chino's unilateral actions.

violation of threatening to close the hospital and terminate all employees. Instead, Chino only challenged the Board's findings that it unlawfully fired a union supporter and subpoenaed employees for information about union-related activities. *See UNAC v. NLRB*, Dkt. No. 37-1, Chino Br. 33-71 (Dec. 9, 2015); *id.*, Dkt. No. 67, Chino Reply Br. 3-31 (Apr. 19, 2016). Given that Chino all but conceded the Board's remaining findings before the Ninth Circuit,¹⁸ it is particularly rich for Chino to assert in this Court that "the ignominy of a forced public reading cannot be undone if [*Veritas III*] is ultimately reversed on appeal." (Br. 33 (quotation marks and citation omitted).)

¹⁸ Chino's opening brief to the Ninth Circuit included a generalized due-process claim asserting that the entire Board order should be set aside because the judge's alleged bias against Chino precluded a fair hearing. *UNAC v. NLRB*, Dkt. No. 37-1, Chino Br. 70-71. As this Court well knows, the threshold to succeed on such claims is extraordinarily high, and requires showing either that the alleged bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case," or that the judge held a "favorable or unfavorable predisposition ... so extreme as to display clear inability to render fair judgment." *U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 965 (D.C. Cir. 2007) (alterations in original) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Liteky v. United States*, 510 U.S. 540, 551 (1994)). Chino's one-page argument fails to offer any evidence to support its claim, and thus Chino cannot realistically expect to prevail on this point before the Ninth Circuit.

III. THE BOARD ACTED WITHIN ITS DISCRETION IN DENYING LOPEZ'S MOTION TO INTERVENE, AND THUS HIS CLAIMS ARE NOT PROPERLY BEFORE THE COURT

A. Denying Intervention Was Not an Abuse of Discretion

Judge Etchingham denied Lopez's motion to intervene after determining that Chino shared Lopez's interest in getting rid of the Union and was well positioned to protect that interest and defend against the General Counsel's complaint.

(JA 70.) When Lopez renewed his motion at the hearing, Judge McCarrick denied it again because Lopez had not offered any new evidence or supporting argument.

(JA 4 n.1.) Both rulings, and the Board's affirmance of them (JA 1 n.1), were firmly within the Board's discretion over such matters.

Intervention in an unfair-labor-practice case is "[i]n the discretion of the [judge] conducting the hearing or the Board," 29 U.S.C. § 160(b), and may be allowed "to such extent and upon such terms as [they] may deem proper," 29 C.F.R. § 102.29; *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW-AFL-CIO v. NLRB*, 392 F.2d 801, 809-10 (D.C. Cir. 1967) ("intervention is a matter of discretion for the [judge] or the Board"). The Board properly denies a motion to intervene when "none of the parties seeking intervention proffers any additional facts which might affect the outcome of the unfair labor practices alleged in th[e] case." *United Dairy Farmers Co-Op Ass'n*, 242 NLRB 1026, 1045 n.3 (1979), *enforced*, 633 F.2d 1054 (3d Cir. 1980).

Courts have generally found no abuse of discretion in the Board's denial of employees' motions to intervene in unfair-labor-practice cases against employers. For example, in *Oughton v. NLRB*, the court affirmed the denial of intervention in a refusal-to-bargain case by employees seeking to demonstrate lack of support for the union, holding that "th[e] matter was immaterial to a complaint proceeding (under Sec. 10) for the abatement and dissipation of unfair labor practices." 118 F.2d 486, 496 (3d Cir. 1941) (en banc); *accord, e.g., Tenneco Auto., Inc.*, 357 NLRB 953, 967 n.1 (2011) (denying intervention by employees who filed a decertification petition), *enforcement denied on other grounds*, 716 F.3d 640 (D.C. Cir. 2013); *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, 1107 (1950) (same), *enforced*, 195 F.2d 350 (5th Cir. 1952); *NLRB v. Todd Co.*, 173 F.2d 705, 707 (2d Cir. 1949) (denying intervention by employees seeking to register opposition to union); *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir. 1947) (same).

The Board, affirming both judges, acted within its discretion in finding that Chino shared Lopez's interests and would adequately protect them. It is abundantly clear from Chino's decision to withdraw recognition that, like Lopez, it had no desire for a continued relationship with the Union. Moreover, Chino's ongoing defense of this case shows it is keen to avoid a finding of liability and its attendant remedies. Ultimately, the best evidence of their common interest is that,

if Chino succeeds in winning this case, Lopez's desire to be rid of the Union will be fulfilled as well.

Lopez fails to offer any evidence or argument that undermines this conclusion. (LBr. 18-20.) As an initial matter, any quarrel Lopez may have with Chino's prosecution of this case (LBr. 21) has no bearing on whether the Board abused its discretion in denying his motion. Moreover, the possibility that Chino could lose this case, and that this loss could have consequences for Lopez, is not evidence that their interests diverge.

Lopez fares no better in arguing that the denial of his motion prevented him from authenticating the petition's signatures and testifying to employees' views of the Union. (LBr. 16, 17, 20, 25.) First, the judges' rulings on intervention did not preclude Chino from calling Lopez as a witness. Second, Chino's failure to have Lopez testify did not retroactively morph the judges' rulings into an abuse of discretion. Third, and most important, even if Chino had called Lopez to authenticate the petition and its signatures, Chino's withdrawal of recognition would still have been unlawful for the other two independent reasons found by the Board. *See* pp. 17-30. Thus, any additional evidence Lopez could have contributed would not have changed the outcome of this case. *See United Dairy Farmers*, 242 NLRB at 1045 n.3.

Furthermore, and contrary to Lopez's assertion (LBr. 17-21), intervening in this case was not necessary to vindicate his interest in opposing the Union. It is well established that employees "are not indispensable parties" in unfair-labor-practice cases under Section 10 of the Act. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940); accord *Lopez v. NLRB*, 655 F. App'x 859, 861 (D.C. Cir. 2016) (per curiam) ("An unfair labor practice case is, at bottom, a dispute between the Board and the charged party."). Because the relevant forum for evaluating employee support for a union is a representation proceeding under Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1), this holds true even when employees seek to intervene in unfair-labor-practice cases addressing their employer's duty to bargain. See *Int'l Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 83 (1940) ("Sec. 9 of the Act provides adequate machinery for determining ... questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice."). Therefore, the proper forum for Lopez to vindicate his interest in ousting the Union is a representation proceeding, which he is free to pursue after Chino fully complies with the Board's order. See *id.*

The cases on which Lopez relies (LBr. 22-24) do not advance his argument. Just because the Board occasionally permits employees to intervene in unfair-labor-practice proceedings does not mean *ipso facto* that the Board abused its

discretion in this case. Nor does Lopez cite any case in which a court held that denying intervention under such circumstances was an abuse of discretion.

Lopez's cases are also distinguishable. For example, the employees in *Boeing Co.*, No. 19-CA-032431, 2011 WL 2451725 (NLRB June 20, 2011), were given only limited permission to intervene for the sole purpose of filing a post-hearing brief and, unlike here, that qualified intervention was unopposed. In *Washington Gas Light Co.*, a case involving an employer's unlawful refusal to withhold union dues, the employee who intervened had no other forum to vindicate his interest. 302 NLRB 425, 425-26 & n.1 (1991). As for *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), that case was not about intervention. The Court simply observed that the Board's order would affect employees' Section 7 rights, while noting that their absence from the proceeding was "not controlling." *Id.* at 300. The court made no finding that those employees should have been parties to the litigation or, as Lopez claims, that "no other litigant could speak for them." (LBr. 24.)¹⁹

¹⁹ The other cases that Lopez cites (LBr. 22-23 & n.3) are similarly inapplicable. The sole issue in *New England Confectionary Co.*, 356 NLRB 432 (2010), which contained no analysis of the intervention issue, was whether decertification petitions were tainted by employer conduct. In *Gary Steel Products Corp.*, 144 NLRB 1160, 1160 n.1 (1963), *Sagamore Shirt Co.*, 153 NLRB 309, 311, 322 (1965), and *J.P. Stevens & Co.*, 179 NLRB 254, 254 n.1 (1969), the employers' refusal to bargain after receiving union-authorization cards could have been lawful if they had harbored a good-faith doubt that the cards truly indicated majority support for the unions. Therefore, the intervening employees' testimony as to

Lopez's further contention (LBr. 27-30) that the denial of his motion to intervene violated his due-process rights is equally off base. Lopez can hardly complain that the Board foisted the Union upon him (LBr. 29), when in fact a majority of unit employees freely elected the Union as their representative. (JA 229.) Lopez's true objection is thus to the Union's status as the exclusive bargaining representative of all unit employees, but he offers no basis to reconsider that fundamental tenet of federal labor policy. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200 (1944) (explaining that, once elected, a union "represent[s] all [unit] members, regardless of their union affiliations or want of them."). Moreover, the Act provides a way for employees opposed to a union to further their interest, through a representation proceeding under Section 9(c)(1). Lopez offers no explanation for not availing himself of that avenue, but his failure to do so does not give him a right, due-process or otherwise, to shoehorn himself into this proceeding.

Nor is there any merit to Lopez's claim that the denial of his motion "undermine[d] his right of free association to not be forcibly represented by a labor

whether they were coerced into signing was, unlike here, relevant to whether a violation occurred. In *Camay Drilling Co.*, pension-fund trustees were allowed to intervene "[i]n light of the rigorous fiduciary obligations imposed upon the[m] by ERISA," and because they had evidence that could affect the remedy for the employer's failure to make payments into the fund. 239 NLRB 997, 998 (1978). Finally, *Renaissance Hotel Operating Co.*, No. 28-CA-113793 (NLRB Div. of Judges, July 18, 2014), is a non-precedential ruling by an administrative law judge. *See Sw. Reg'l Council*, 356 NLRB at 635.

union.” (LBr. 27.) Simply put, no such right exists. Congress specifically provided in Section 8(a)(3) of the Act that employers may make “agreement[s] with ... labor organization[s] ... to require as a condition of employment membership therein,” and that unions may require employees to pay “periodic dues and ... initiation fees” as a condition of membership. 29 U.S.C. § 158(a)(3); *see also NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (unions may condition employee membership upon payment of fees and dues). Thus, employees who object to a union’s representation must not only tolerate its presence, they can also be required to pay dues. *See Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (noting that employees who object to union representation can be required to financially “support union activities germane to collective bargaining, contract administration, and grievance adjustment”); *accord Pirlott v. NLRB*, 522 F.3d 423, 427 (D.C. Cir. 2008) (same). Lopez’s argument completely ignores this settled authority.²⁰

²⁰ The cases cited by Lopez may give his brief a rhetorical flourish, but they are inapposite to the issue at hand. *See, e.g., Vaca v. Sipes*, 386 U.S. 171 (1967) (holding that the Act does not preempt duty-of-fair-representation claims by employees against unions under the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185); *Int’l Ladies’ Garment Workers’ Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961) (holding that employer and union violate the Act by entering into a collective-bargaining agreement absent majority support); *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010) (holding that employee had Article III standing to bring suit under the LMRA, 29 U.S.C. § 186).

Lastly, even assuming that the denial of Lopez's motion implicated his due-process rights, Lopez fails to show any resulting prejudice. *See Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) ("The burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury."). The thrust of Lopez's claim is that, had he been allowed to intervene, he would have defended the validity of his petition as evidence of employee opposition to the Union. (LBr. 17-18, 25.) However, Lopez does not dispute that Chino's withdrawal of recognition was unlawful because it occurred during the certification year. Nor does Lopez contest that, because his petition was compiled before the year ended, Chino was precluded from relying on it to withdraw recognition. *See Chelsea Indus.*, 285 F.3d at 1076 ("[A]n employer may not withdraw recognition from a union based upon evidence acquired during the certification year." (citing *United Supermarkets*, 287 NLRB at 120)). Therefore, Lopez's participation would not have affected the outcome of this case, and he cannot show prejudice from the denial of his motion to intervene.

B. The Decertification Petition Was Unlawfully Compiled During the Certification Year, When the Union's Majority Status Was Insulated From Challenge

As shown at pp. 24-30, one of the Board's three independent reasons for finding that Chino's withdrawal of recognition and refusal to bargain were unlawful is that Chino took those actions during the extended certification year,

which ran one year from the parties' first bargaining session on June 13, 2012. (JA 1 n.3, 8.) As the Board correctly found, because the decertification petition was compiled during the certification year, it could not lawfully serve as a basis for Chino to withdraw recognition.²¹

The Court should not entertain Lopez's attempts to salvage the validity of his petition, given that the Board properly denied his motion to intervene. In any event, his claims are entirely lacking in merit. To begin, Lopez asserts that his petition was not premature, but he offers no argument in support. (LBr. 30.) Alternately, he argues that even though the petition was compiled during the certification year, it was still a valid showing of employee disaffection upon which Chino could rely to withdraw recognition.²² (LBr. 31.) This claim must fail because an employer cannot withdraw recognition based on evidence obtained at a time when the incumbent union has a conclusive presumption of majority status. *See Chelsea Indus.*, 285 F.3d at 1076.

²¹ In its first withdrawal-of-recognition letter, Chino asserted that it had "received objective evidence on June 9, 2013 that a majority of employees ... no longer wish to be represented by" the Union. (JA 7; JA 309.) Therefore, the Board reasonably concluded that "employee signatures [on the petition] were collected prior to June 9, 2013 ... and within the certification year." (JA 9.) And Chino never proved otherwise.

²² Lopez also claims, again without elaboration, that his petition was not tainted by Chino's unfair labor practices during the 2010 organization campaign. That argument is dispelled at pp. 17-24.

Lopez fares no better with his claim (LBr. 31) that this case is “analogous” to *LTD Ceramics, Inc.*, 341 NLRB 86 (2004), *enforced*, 185 F. App’x 581 (9th Cir. 2006). The Board correctly rejected that argument (JA 8-9), which completely misrepresents the facts of that case. In *LTD Ceramics*, the Board found that an employer lawfully withdrew recognition based on a petition for which about half of the signatures had been gathered on the last day of the certification year, and the rest were added the following week. 341 NLRB at 88. The Board reasoned that the employer’s reliance on the petition, which was received after the certification year expired, was not invalidated by the fact that some employees signed the document “during the last hours of the last day of the certification year.” *Id.* at 88, 94. Here, by contrast, Chino received the petition and withdrew recognition during the certification year, and every last signature was obtained before the certification year expired. (JA 8-9.) Thus, the *de minimis* exception of *LTD Ceramics* has no application to this case.

Lopez’s attacks on the Board’s settled certification-year doctrine are entirely unfounded. (LBr. 31-32.) Thus, Lopez’s claim that the certification-year doctrine is confusing to employees ignores the fact that, in the vast majority of cases, calculating one year from a union’s date of certification is a straightforward affair. And while the end of the certification year can vary when an employer refuses to respect the majority choice of its employees, as happened here, Lopez’s apparent

alternative—allowing employees to file petitions at an undefined point before the certification year expires—adds no clarity to the existing rule.

Equally unavailing is Lopez’s misleading claim that the certification-year doctrine “chills” protected conduct because “employees who dislike the union ... must park their Section 7 rights at the door and do nothing for an entire calendar year.” (LBr. 31-32.) In fact, the certification-year doctrine only limits the *employer’s* ability to withdraw recognition; it does not impose any restriction on the ability of *employees* to organize against an incumbent union, short of seeking formal decertification. Nor do Board rules create a double standard for employees and unions, as Lopez would claim. (LBr. 32.) Indeed, just as employees cannot challenge a union’s majority status during the certification year, a union that loses an election must wait for a year before it can seek another ballot. 29 U.S.C. § 159(c)(3).

More fundamentally, Lopez’s argument ignores longstanding precedent as well as the Board’s institutional role. In approving the certification-year doctrine, the Supreme Court noted that it “enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified.” *Fall River Dyeing*, 482 U.S. at 38 (citing *Brooks v. NLRB*, 348 U.S. 96, 100 (1954)). At the same time, it “remove[s] any temptation on the part of the

employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Id.* The end result, as recognized by the Supreme Court, is to further the Act's policy of fostering industrial peace by "promoting stability in collective-bargaining relationships, without impairing the free choice of employees." *Id.* (brackets and citation omitted). As such, the certification-year doctrine is simply "the inevitable by-product of the Board's striking a balance between stability and employee free choice in labor relations, as it frequently must do." *Chelsea Indus.*, 285 F.3d at 1077. The Board's balancing of those interests is based on its decades-long expertise in labor relations, and thus worthy of significant deference. *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 764-65 (D.C. Cir. 2012).

C. Lopez's Challenge to the Board's Affirmative Bargaining Order Is Not Properly Before this Court and Otherwise Lacks Merit

Because the Board acted within its discretion in denying Lopez's motion to intervene, the Court need not entertain his arguments against the Board's affirmative bargaining order. But in any event, the Board choice of remedy was appropriate given the circumstances of this case and was also within the Board's broad remedial discretion.

In finding that an affirmative bargaining order was appropriate in this case, the Board proceeded in the manner prescribed by this Court. (JA 2 (applying balancing analysis set forth in *Vincent Indus.*, 209 F.3d at 738).) Specifically, the

Board found that an affirmative bargaining order would vindicate the Section 7 rights of employees who were denied the benefits of collective bargaining due to Chino's unlawful conduct. At the same time, the Board found that employees opposed to the Union would not be unduly prejudiced because the order would last no longer than reasonably necessary to remedy the effects of Chino's conduct. (JA 2.) This disproves Lopez's claim that the Board ignored the sentiment of employees opposed to the Union in fashioning its remedy. (LBr. 33.) The Board also found that such an order would serve the purposes of the Act by removing Chino's incentive to delay bargaining in the hope of discouraging union support, while ensuring that the Union would not be pressured by the possibility of a decertification petition or by Chino's withdrawal of recognition to achieve immediate results at the bargaining table. Finally, the Board found that simply ordering Chino to cease-and-desist from its refusal to bargain would be inadequate because it would expose the Union to future challenges before the taint of the unlawful withdrawal of recognition could dissipate and before employees could fairly assess the Union's effectiveness for themselves. (JA 2.) The Board's analysis is thorough, comprehensive, and amply supports its finding that an affirmative bargaining order is warranted here.

Lopez's only rejoinder, that the Board's remedy ignores the unit's "majority sentiment" (LBr. 33), blithely ignores the Board's findings that the petition was

tainted by Chino's unfair labor practices and that Chino unlawfully withdrew recognition during the Union's certification year. Moreover, Lopez's repeated characterization of the Union as a "minority union" (LBr. 17, 18) may make for good rhetoric, but it is without legal force since the Union enjoyed a presumption of majority status when these events took place. Lopez's remaining arguments (LBr. 34-35) simply reprise his and Chino's claims that the petition was neither premature nor tainted, without any additional support.

Lastly, the cases on which Lopez relies (LBr. 33-34) are no help to this cause. *McKinney v. Southern Bakeries, LLC*, 786 F.3d 1119 (8th Cir. 2015), and *Ohr v. Arlington Metals Corp.*, 148 F. Supp. 3d 659 (N.D. Ill. 2015), both involve a different inquiry relevant to granting preliminary injunctions under Section 10(j) of the Act, 29 U.S.C. § 160(j). *See McKinney*, 786 F.3d at 1124 (when seeking Section 10(j) relief, General Counsel must show likelihood of success on the merits and overcome the "relatively high hurdle" of establishing irreparable injury (citation omitted)). Moreover, those cases did not involve allegations of taint or that the employer unlawfully withdrew recognition during the certification year. *See id.* at 1124 & n.5 (Board did not dispute validity of petition and scheduled decertification election in accordance with majority wishes); *Ohr*, 148 F. Supp. 3d at 678 (Board challenged only employer's failure to authenticate signatures). Lastly, *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 652 (D.C. Cir. 2013),

stands for the unremarkable proposition that this Court will not enforce an affirmative bargaining order if it finds that an employer acted lawfully in withdrawing recognition. Unlike in *Tenneco*, however, substantial evidence supports the Board's finding here that Chino violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union.

CONCLUSION

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

Respectfully submitted,

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April 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERITAS HEALTH SERVICES, INC.,)
d/b/a CHINO VALLEY MEDICAL CENTER,)
)
Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD,)
)
Respondent/Cross-Petitioner)

-----)

UNITED NURSES ASSOCIATIONS OF)
CALIFORNIA/UNION OF HEALTH CARE)
PROFESSIONALS, NUHHCE, AFSCME,)
AFL-CIO,)
)
Intervenor for Respondent/Cross-Petitioner)

Nos. 16-1058

16-1076

16-1110

Board Case No.

31-CA-107321

JOSE LOPEZ, JR.,)
)
Petitioner)

v.)

NATIONAL LABOR RELATIONS BOARD,)
)
Respondent)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 13,844 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the

Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 10th day of April 2017

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 9(c) of the Act (29 U.S.C. § 159(c)) provides in relevant part:

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are

consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and

cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

* * *

(e) 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 proceeding, as provided in section 2112 of title 28, United States Code. 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 question 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.

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

* * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. §102.29 *Intervention; requisite; rulings on motions to intervene.*

Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the regional director issuing the complaint; during the hearing such motion shall be made to the administrative law judge. An original and four copies of written motions shall be filed. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties. The regional director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served upon each of the other parties, or may refer the motion to the administrative law judge for ruling. The administrative law judge shall rule upon all such motions made at the hearing or referred to him by the regional director, in the manner set forth in §102.25. The regional director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

29 C.F.R. § 102.48 *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.*

* * *

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of

material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERITAS HEALTH SERVICES, INC.,)
d/b/a CHINO VALLEY MEDICAL CENTER,)
)
Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD,)
)
Respondent/Cross-Petitioner)

-----)

UNITED NURSES ASSOCIATIONS OF)
CALIFORNIA/UNION OF HEALTH CARE)
PROFESSIONALS, NUHHCE, AFSCME,)
AFL-CIO,)
)
Intervenor for Respondent/Cross-Petitioner)

Nos. 16-1058
16-1076
16-1110

Board Case No.
31-CA-107321

JOSE LOPEZ, JR.,)
)
Petitioner)

v.)

NATIONAL LABOR RELATIONS BOARD,)
)
Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that

this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-1714

Dated at Washington, DC
this 10th day of April 2017