Final Brief Oral Argument Not Yet Scheduled

Nos. 16-1315, 16-1340

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC and VEGAS! THE SHOW, LLC and DAVID SAXE PRODUCTIONS, LLC and FAB FOUR LIVE, LLC

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioners/Cross-Respondents	)	Board Case Nos. 28-CA-075461, 28-CA-084151
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	ORAL ARGUMENT NOT YET SCHEDULED
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: David Saxe Productions, LLC, Vegas The Show, LLC, and Fab Four Live, LLC ("the Companies"), were the respondents before the Board and are the petitioners/cross-respondents before the Court. The Board's General Counsel was also a party before the Board, and the Board is the respondent/cross-petitioner before the Court. Anne Carter was the charging party before the Board. There are no intervenors or amici.

(B) Ruling Under Review: This case is before the Court on the Companies' petition for review and the Board's cross-application for enforcement

of the Board's Decision and Order in Case Nos. 28-CA-075461 and 28-CA-084151, issued on August 26, 2016, and reported at 364 NLRB No. 100.

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

s/Linda Dreeben
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this 8th day of May, 2017

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GLOSSARY

"Act"	The National Labor Relations Act
"Board"	The National Labor Relations Board
"Br."	The Companies' brief to this Court
"Companies"	David Saxe Productions, LLC, Vegas! The Show, LLC, and Fab Four Live, LLC
"JA"	Joint Appendix

UNITED STATES COURT OF APPEALS
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v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition for review of David Saxe Productions, LLC, Vegas! The Show, LLC, and Fab Four Live, LLC (collectively "the Companies"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Decision and Order issued by the Board on

August 26, 2016, and reported at 364 NLRB No. 100. (JA 1120-44.)[1] The Board had jurisdiction over the proceeding pursuant to 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Order is final with respect to all parties. The Court has jurisdiction over this proceeding under Section 10(e) and 10(f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court. The Companies petitioned for review on September 9, 2016, and the Board cross-applied for enforcement on September 27, 2016. Both filings were timely because the Act imposes no time limit on the initiation of proceedings to review and enforce Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portions of its Order addressing its uncontested findings that the Companies violated Section 8(a)(1) of the Act by:

- Maintaining clauses in the employment contracts that prohibited employees from discussing wages and other terms and conditions of

[1] Record references in this brief are to the Joint Appendix ("JA"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Companies' opening brief.

employment, and required them to acknowledge that their employment was non-union; and

- Prohibiting employees from engaging in protected concerted activity, and threatening and demeaning them for doing so.

2. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a)(1) of the Act by discharging employee Anne Carter for engaging in protected concerted activity.

STATEMENT OF THE CASE

After an investigation of unfair labor practice charges filed by employee Anne Carter, the Board's General Counsel issued a complaint alleging, in relevant part, that the Companies violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining overly broad and discriminatory work rules, prohibiting employees from engaging in protected concerted activities, disparaging and threatening them with discharge and unspecified reprisals for engaging in those activities, and discharging Carter because of her protected concerted activity. (JA 1130; 726-38.) A hearing was held before an administrative law judge, who issued a decision and recommended order finding that the Companies committed those unfair labor practices as alleged, except that she dismissed the allegation that Carter was unlawfully discharged. (JA 1130-44.) After considering the parties' exceptions, the Board issued a Decision affirming the judge's rulings, findings, and

conclusions, except for finding, contrary to the judge, that the Companies also violated the Act by discharging Carter. (JA 1120-25.) The Board accordingly modified the recommended Order to conform to its amended legal conclusions and clarify its requirements. (JA 1125-27.)

I. THE BOARD'S FINDINGS OF FACT

A. The Companies Hire Carter and Renew Her Contract Twice

David Saxe Productions, LLC, produces and manages live theatrical productions in Las Vegas, Nevada. (JA 1130.) Its owner and CEO, David Saxe, is also the owner and managing member of Vegas The Show, LLC, which is the corporate entity for the musical, *Vegas! The Show*. (JA 1130; 29-30.) Saxe and Terry McCoy are equal co-owners of Fab Four Live, LLC, which is the corporate entity for the *BeatleShow*. (JA 1130; 30.) Both *Vegas! The Show* and the *BeatleShow* are performed in the Miracle Mile Mall inside the Las Vegas Planet Hollywood. (JA 1131; 46-47.)

Saxe and Tiger Martina, *Vegas! The Show*'s choreographer and director, managed auditions for the show and selected the dancers, including Anne Carter. (JA 1131; 475-76, 648.) Carter signed an employment contract on May 7, 2010, and the show debuted on August 5, 2010. (JA 1131-32; 99-100, 873-78.) Over the course of Carter's contract, Martina thought that Carter's performance could be

improved and instructed the show's dance captains, Ryan Kelsey and Claudia Mitria, to work more with Carter. (JA 1132; 657-58.)

When Carter's first contract approached its expiration date, Martina advised Saxe to let it expire because her dancing style was not what he wanted and he believed she had a negative attitude. (JA 1121, 1132; 658-59, 678-79.) Kelsey began raising similar concerns to Saxe and Martina. (JA 1121, 1132; 299-300.) However, Saxe decided to renew Carter's contract to give her a chance to improve her performance. (JA 1121, 1132; 659.) Carter signed the new contract on December 26, 2010. (JA 1121, 1132; 883-91.) On April 26, 2011, she signed to extend the terms of this contract until January 2, 2012. (JA 1121, 1133; 892.)

In the spring of 2011, *Vegas! The Show*'s producer informed Carter and the other dancers that Saxe decided to use dancers from that show for the *BeatleShow*. (JA 1121, 1133; 106-07, 234-35.) Carter volunteered and was selected to perform in the *BeatleShow* two to three days per week. (JA 1133; 111.) Dancers for the *BeatleShow* do not sign employment contracts. (JA 1133.) During this time, McCoy decided that Carter did not have "the look" he wanted for dancers on the show, so he arranged to limit Carter's scheduling on the *BeatleShow*. (JA 1121, 1133; 448-50.)

B. Carter and Her Coworkers Inform Saxe of Their Concerns about Compensation and Scheduling; Saxe Admonishes Them for Speaking Out, Belittling Their Complaints as "Bitching," and Reminding Them of His Power over Their Jobs

In November 2011, *Vegas! The Show*'s production manager was terminated, and many dancers had concerns about whom they should approach with problems and concerns. (JA 1133; 231, 309-10, 393.) They arranged for a meeting with Saxe on December 13, and he met them in the women's dressing room after the show. (JA 1122, 1133; 232.) Carter began the meeting by informing Saxe that cast morale was low, and that the dancers wanted someone to whom they could raise their concerns. (JA 1122, 1133; 233.) Another dancer, Natacha Boychoure, asked Saxe about the potential for incentives for dancers who had stayed since the show's opening, as well as rehearsal and holiday pay. (JA 1122, 1133-34; 121, 233.)

Saxe responded by asking why the dancers were "bitching," and demanded rhetorically whether the contract provided for such things. (JA 1122, 1134; 121-22, 233.) Boychoure replied that she was not bitching, and added that they had not received overtime pay that they were owed. (JA 1122, 1133; 122.) Carter reiterated Boychoure's concern about rehearsal pay, and added that the dancers' contracts stated that Saxe had discretion over the matter. (JA 1122, 1133; 122.) Saxe responded, "All you do is bitch, bitch, bitch. I give you a job and all you do is bitch." (JA 1122, 1133; 122.) Carter and another dancer, Amanda Nowak, said

that they were merely raising concerns and not bitching. (JA 1122, 1134; 123, 234.) When Saxe asked what those concerns were, Carter noted that the requirement to dance six nights per week did not leave enough time for dancers to attend to injuries, and that they lacked sufficient time to prepare and stretch between the first and second shows. (JA 1122, 1133-34; 123.) Carter also explained that the "vanities," where one dancer prepares in a pretend dressing room in the audience's view, reduced dancers' time to prepare for the show. (JA 1122, 1133-34; 123.) Saxe replied that he would try to improve the scheduling issues, but that he did not want "all this bitching." (JA 1122, 1134; 123.)

C. Saxe Discharges Carter, Warning that Her "Constant Complaining and Negativity" Will Not Be Tolerated

After the December 13 meeting, Saxe consulted Martina, Kelsey, and Mitria about Carter's performance. (JA 1122, 1134; 312-13, 354, 511.) Martina and Kelsey recommended that Carter's contract not be renewed due to their previous concerns about her performance and attitude, and Mitria recommended that her contract not be renewed on the basis of attitude alone. (JA 1122, 1134; 313, 354-55, 511.) Martina and Kelsey had made similar recommendations before the December 13 meeting, but Saxe had rejected them. *See* p. 5 above.

One week after the December 13 meeting, Carter saw Saxe discussing contract renewals with other dancers. (JA 1122, 1134; 125-26.) On December 21, she emailed him to ask if she could schedule a time to speak with him. (JA 1122,

1134; 126, 898.) Saxe responded by sending her an email stating that he would not renew her contract "due to [her] constant negative attitude and lackluster performance." (JA 1122, 1134; 127, 899.) In his email, Saxe asked Carter to remain until her contract ended, but warned her that she needed to "cease all of the complaining in the dressing room." He also told her that "[c]onstant complaining and negativity can[']t be tolerated anymore." (JA 1122, 1134; 127, 899.)

Carter called Saxe two days later and told him that she felt blindsided by his email. (JA 1122, 1134; 127.) Saxe responded that he knew Carter's "type," that all she did was "bitch," that she was the most negative person in the dressing room, and that Martina thought she was "a pain in the ass." (JA 1122, 1134; 127-28.)

Saxe then called McCoy to ask whether he wanted Carter to continue performing in *The BeatleShow*, and McCoy replied that he did not. (JA 1122, 1134; 453-54, 552-53.) Saxe called Carter again to ask whether she would complete her contract, and to inform her that she was no longer performing in the *BeatleShow*. (JA 1122, 1134; 218, 552-53.) Carter spoke with Mitria and Kelsey a few days later to express her concern that she had not been warned that anything was wrong. (JA 1122, 1134; 128-30.) Kelsey replied, "Unfortunately David flies off the handle and doesn't like it when people talk back to him." (JA 1122, 1134; 129-30.)

D. The Companies Maintain Overly Broad and Discriminatory Work Rules Prohibiting Employees from Discussing Working Conditions, and Requiring Them To Acknowledge that Their Jobs Are Non-Union

Dancers hired to perform for *Vegas! The Show* are required to sign a six-month employment contract that can be renewed. (JA 1131; 77, 478, 873-78, 922-27.) The contract contains a paragraph titled "NON-DISCLOSURE" stating that employees may not "disclose the terms of this Agreement to third parties or fellow employees, without [the] Company's prior written consent." (JA 1131; 876, 886, 925.) The contract also states, "NON-UNION. Employee acknowledges that the Show is not under the jurisdiction of any labor union." (JA 1131; 876, 886, 925.) These paragraphs are enforceable, as the contract also provides that the "Company shall have the right to terminate this Agreement without notice in the event of breach by Employee of any covenant contained herein or for insubordination." (JA 1131; 874-75, 885-86, 924.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 26, 2016, the Board (Members Hirozawa and McFerran, then-Member Miscimarra dissenting in part) issued its Decision and Order. (JA 1120-29.) The Board adopted the judge's findings that the Companies, a single employer, violated Section 8(a)(1) of the Act on December 13, 2011, by threatening employees with discharge and unspecified reprisals for engaging in protected concerted activities, and by prohibiting them from engaging in such

activities and disparaging them for doing so. (JA 1120-21.) In further agreement with the judge, the Board found that the Companies again violated Section 8(a)(1) on December 21, by threatening Carter that her failure to stop engaging in protected activity would result in discharge. (JA 1120-21 & nn.3-4.) The Board also adopted the judge's findings that the Companies violated Section 8(a)(1) by requiring employees to acknowledge that their employment is non-union with penalties for breach of any contract provision, and by maintaining an overly broad and discriminatory rule prohibiting them from discussing working conditions. (JA 1120-21.) Finally, the Board found, in disagreement with the judge, that the Companies violated Section 8(a)(1) by discharging Carter for engaging in protected concerted activity. (JA 1120-21.)[2]

The Board's Order directs the Companies to cease-and-desist from the unfair labor practices found, and from in any like or related manner restraining, coercing, or interfering with employees' exercise of their rights under Section 7. (JA 1125-26.) Affirmatively, the Board's Order requires the Companies to rescind the non-union and non-disclosure provisions in their employees' contracts; to offer Carter full reinstatement to her former job or to a substantially equivalent position; and to

[2] In a dissenting opinion, Member Miscimarra explained that he disagreed with the Board majority's findings with regard to the non-union acknowledgment, Carter's discharge, and the threat contained in the email advising her that she was fired. (JA 1127-28.)

make her whole for lost earnings and benefits. (JA 1126.) Finally, the Order requires the Companies to post a remedial notice. (JA 1126-27, 1129-30.)

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of the portions of its Order remedying findings that the Companies do not contest. Specifically, the Companies do not contest that they violated Section 8(a)(1) of the Act at the December 13 meeting, when Saxe prohibited Carter and other employees from engaging in protected concerted activities, disparaged them for doing so, and threatened them with discharge and other unspecified reprisals. The Companies again indisputably violated the Act on December 21, when Saxe emailed Carter to prohibit her from engaging in protected concerted activity and threatened to discharge her for doing so. The Companies also do not dispute that they violated the Act by maintaining overly broad and discriminatory clauses in employment contracts that prohibited employees from speaking about their wages and other terms conditions of employment, and by maintaining a clause requiring employees to acknowledge that their employment is non-union, with penalties for violating any clause in the contract.

2. Substantial evidence supports the Board's conclusion that the Companies also violated Section 8(a)(1) of the Act by carrying out Saxe's December 21 threat to discharge Carter for engaging in protected concerted activity by raising concerns

about wages, hours, and working conditions at the December 13 meeting. Applying the established *Wright Line* analysis, the Board found that her protected concerted activity at the meeting was a motivating factor in the Companies' decision to discharge her. Ample evidence supports that finding. The Companies demonstrated their animus through their uncontested Section 8(a)(1) violations, starting with the December 13 meeting, where Saxe unlawfully prohibited Carter and her coworkers from engaging in protected concerted activities, and disparaged and threatened them with discharge and other unspecified reprisals for doing so. He again admittedly violated Section 8(a)(1) on December 21, by telling Carter that her failure to stop engaging in those activities would result in discharge. And he immediately made good on that threat by discharging her that very day.

Faced with this overwhelming evidence of unlawful motive, it was incumbent on the Companies to prove, as an affirmative defense, that they would have discharged Carter even absent her protected concerted activity. The Companies claim that Saxe, the decision-maker, got rid of her for performance and attitude problems unrelated to his displeasure with her "bitching" about wages, hours, and working conditions at the December 13 meeting. The Board, however, reasonably found that this stated rationale was a pretext, designed to mask the true motive of a decision-maker who repeatedly castigated Carter for "bitching" about protected subjects, and who "flies off the handle . . . when people talk back to

him." (JA 129-30.) In so finding, the Board acknowledged that some of Saxe's subordinates had previously complained about Carter's performance and attitude, and had recommended against renewing her contract. As the Board noted, however, Saxe previously rejected those recommendations and renewed her contract twice. He did not reverse course until immediately after Carter openly and forcefully complained about wages, hours, and working conditions at the December 13 meeting. In these circumstances, the Board reasonably found that the Companies failed to meet their burden under *Wright Line*, because they could not explain why Saxe previously tolerated Carter's shortcomings, but then suddenly changed his mind soon after she engaged in protected concerted activity, much to his chagrin.

The Companies incorrectly assert (Br. 39-44) that the Board's findings are not entitled to deference because the Board overruled the administrative law judge's credibility rulings. As the Board explained, it did not disturb the judge's credibility rulings. Indeed, the judge herself repeatedly noted that Saxe's "internally inconsistent" testimony was "a moving target," "unworthy of credence," and "very troubling." (JA 1139-41.) Rather, the Board accepted the judge's credibility rulings, but drew a different derivative inference from the record evidence, which is its prerogative. Moreover, the judge never considered whether Saxe's conflicting testimony about Carter's discharge necessitated a

pretext analysis. In these circumstances, the Board appropriately proceeded to conduct the missing pretext analysis, and found that Saxe's incompatible explanations of his decision to discharge Carter established that they were a pretext to mask his true motive, which was an unlawful one.

STANDARD OF REVIEW

This Court "'accord[s] a very high degree of deference to administrative adjudications by the [Board]' and [will] reverse its findings 'only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (quoting *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011)); *see INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992). Under that very deferential standard, the Court "must uphold the judgment of the Board unless, upon reviewing the record as a whole," it "conclude[s] that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (quoting *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011)); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also* 29 U.S.C. § 160(e).

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives 'substantial deference to inferences

the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (quoting *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993)). Thus, this Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072, 2016 WL 3361476, at *3 (D.C. Cir. Apr. 12, 2016) (reissued June 17, 2016) (internal quotation marks omitted); *see Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005).

This Court's review of credibility determinations made by the administrative law judge and adopted by the Board is particularly limited because they "may not be overturned absent the most extraordinary circumstances." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 838 (D.C. Cir. 1998) (internal quotation marks omitted); *accord Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Board, however, may make factual findings "'contrary to the findings of the [judge], and where there is substantial evidence to support the Board's findings, the court may not set them aside merely because the Board's view of the weight and credibility of the witnesses differed from that of the [judge].'" *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 211 (D.C. Cir. 2003) (quoting *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950)).

The Companies (Br. 32, 35 n.11) rely on a number of out-of-circuit cases that they regard as applying a heightened standard of review when the Board rejects the judge's findings. Those cases are inapposite because they involve circumstances where the Board rejected "testimonial inferences . . . that rest on direct observations of witness demeanor"—not "derivative inferences . . . that are drawn from the substance of the evidence." *NLRB v. Stor-Rite Metal Prods., Inc.*, 856 F.2d 957, 964 (7th Cir. 1988). Here, the Board accepted the judge's credibility rulings, but drew a different derivative inference from the record. In any event, to the extent the analysis supplied by those courts conflicts with this Court's test, in-circuit law controls. *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1003 (D.C. Cir. 2001). As this Court has made clear, the standard of review "'is not modified in any way'" where, as here, the Board has reached a result contrary to that of the administrative law judge and the difference between their conclusions does not rest on questions of credibility, but rather on legal issues and derivative inferences drawn from established facts. *United Steelworkers of America, Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1992) (quoting *Universal Camera*, 340 U.S. at 496). Simply put, as long as the Board "make[s] clear the basis of its disagreement" with the judge, it "is not precluded from reaching a result contrary to that of the [judge] when there is substantial evidence in support of each result,

and is free to substitute its judgment for the [judge]'s." *Local 702, IBEW v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (internal citations and quotation marks omitted).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER REMEDYING ITS UNCONTESTED FINDINGS

In their opening brief, the Companies leave uncontested a number of violations found by the Board, and therefore they have waived any challenge to those findings. Specifically, the Companies do not contest the Board's finding that they violated Section 8(a)(1) of the Act on December 13, when David Saxe prohibited Carter and other employees from engaging in protected concerted activities, disparaged them for doing so, and threatened them with discharge and other reprisals. (JA 1120, 1137-38.) Nor do the Companies challenge the Board's further finding that they again violated Section 8(a)(1) on December 21, when Saxe prohibited Carter from engaging in protected activity and threatened that her failure to stop would result in discharge. (JA 1121, 1141.) Finally, the Companies do not take issue with the Board's finding that they violated the Act by maintaining in employment contracts overly broad and discriminatory clauses prohibiting employees from speaking about their wages and other terms and conditions of employment, and a clause requiring them to acknowledge that their employment is non-union. (JA 1121, 1136-37.)

It is settled that parties waive their right to contest Board findings not challenged in their opening brief. *See* Fed. R. App. P. 28(a)(8)(A) (party must raise all claims in its opening brief); *accord New York Rehabilitation Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *Dunkin' Donuts Mid-Atlantic Distribut. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004). Given the Companies' complete failure to challenge those findings in their opening brief, the Board is entitled to summary enforcement of the portions of its Order that correspond to the uncontested findings.[3]

The unchallenged violations, however, do not disappear simply because the Companies fail to mention them in their opening brief. Rather, they remain, "lending their aroma to the context in which the [other] issues are considered." *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991). "It is against

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[3] The Companies also failed to file exceptions to the judge's finding that they violated the Act by maintaining overly broad and discriminatory contract clauses prohibiting employees from speaking about their wages and other terms and conditions of employment. (JA 1121 n.8.) The Board therefore adopted the judge's finding in the absence of exceptions. (JA 1121 n.8.) Thus, even if the Companies had attempted to challenge that finding in their opening brief, they would have been barred from doing so by Section 10(e) of the Act Act (29 U.S.C. § 160(e)), which provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the court," absent "extraordinary circumstances" not present here. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

this background [of uncontested violations] that we consider the Board's remaining findings." *NLRB v. Pace Manor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE ANNE CARTER FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. An Employer Violates Section 8(a)(1) of the Act by Discharging an Employee for Engaging in Protected Concerted Activity

Section 7 of the Act guarantees to employees not only the right to self-organization, but also the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements those guarantees by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1). As the Supreme Court long ago recognized, "the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must 'speak for themselves as best they [can].'" *Citizens Inv. Servs. Corp.*, 430 F.3d at 1197 (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)). Accordingly, it is well settled that an employer violates Section 8(a)(1) by discharging an employee for engaging in protected concerted activity. *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994); *MECO Corp. v. NLRB*, 986 F.2d 1434, 1436 (D.C. Cir. 1993).

The critical inquiry in such cases is whether the employer's animus towards the protected activity motivated the employer's decision. *MECO Corp.*, 986 F.2d at 1436. In *NLRB v. Transportation Management Corp.*, 462, U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases that was first articulated in *Wright Line, Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if the employee's protected activity is shown to be "a motivating factor" in the decision to take an adverse action against her, the action is unlawful unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-04; *accord Ozburn-Hessey Logistics*, 833 F.3d at 218. If the reasons advanced by the employer for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer's burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 225 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *see also Laro Maint. Corp*, 56 F.3d at 230; *Wright Line*, 251 NLRB at 1084.

Motive is a question of fact, and the Board may rely on direct as well as circumstantial evidence to find an improper motive. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003); *Laro Maint. Corp.*, 56 F.3d at 229.

Evidence of unlawful motivation includes the employer's knowledge of protected activity, *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 549 (D.C. Cir. 2006), its hostility toward protected conduct, including by the commission of other unfair labor practices, *Laro Maintenance Corp.*, 56 F.3d at 229, the timing of the adverse action, *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015); *Power, Inc.*, 40 F.3d at 418, and the pretextual nature of the employer's stated justifications, *Laro Maintenance Corp.*, 56 F.3d at 230; *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), *enforced*, 976 F.2d 744 (11th Cir. 1992).

In assessing the employer's affirmative defense, the Board need not accept at face value its explanation for a discharge if the evidence and the reasonable inferences drawn from it indicate that animus motivated the discharge. *Laro Maint. Corp.*, 56 F.3d at 230. As this Court has stated, the issue "'is not just whether the employer's action also served some legitimate business purpose, but whether the legitimate business motive would have moved the employer to take the challenged action absent the protected conduct.'" *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23 (D.C. Cir. 2015) (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327 (D.C. Cir. 2012)); *see Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984) ("[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.").

B. The Companies Unlawfully Discharged Carter Because of Her Protected Concerted Activity

1. The Companies Do Not Dispute, and Ample Evidence Shows, that Animus Was a Motivating Factor in Saxe's Decision To Discharge Carter

The Board, in agreement with the judge, reasonably found that Carter's discharge was motivated by the Companies' animus against her activity at the December 13 meeting with Saxe when she joined her coworkers in speaking out about wages, working conditions, and scheduling concerns. (JA 1123, 1139.) Saxe's undisputed knowledge of and hostility toward that protected concerted activity, the Companies' contemporaneous, uncontested violations of the Act, and the timing of her discharge—barely a week after the December 13 meeting where Saxe responded to her complaints by making unlawful threats—strongly support the Board's finding of unlawful motive. (JA 1123.) So too does the evidence establishing that the Companies' proffered reasons for her discharge were pretextual. (JA 1123.)

To begin, the Companies do not dispute that Carter engaged in protected concerted activity on December 13, when she joined her coworkers in arranging a meeting with Saxe to discuss wages, hours, working conditions, and other issues affecting employee morale. (JA 1123, 1132-33; 231, 310, 393-94.) Indeed, Carter opened the meeting by raising those concerns with Saxe in front of her coworkers. (JA 1122, 1133-34; 122-23, 232-23.) When another employee advocated for

rehearsal pay, Carter supported her by pointing out that their contracts gave Saxe discretion over that matter so he was free to grant such pay. (JA 1122, 1134; 122.) Carter also expressed concern that tight scheduling did not give dancers enough time to stretch or tend to performance-related injuries. (JA 1122, 1133-34; 123.) Of all the employees at the meeting, Carter was the most outspoken. (JA 1134; 250.)

Saxe responded to the employees' concerns by making a series of unlawful threats and statements that the Companies no longer contest, further demonstrating their animus and Saxe's "dim view of protected concerted activity," which he repeatedly disparaged as "bitching." (JA 1122-23, 1134, 1140; 121-122, 233.) Thus, when Carter and her coworkers tried to explain that they were not bitching and that their concerns were legitimate, Saxe replied by threateningly reminding them of his control over their jobs. (JA 1122, 1134; 122.) Specifically, he warned them: "All you do is bitch, bitch, bitch. I give you a job and all you do is bitch," and told them that he did not want "all this bitching." (JA 1122, 1134; 122-23.) By admonishing them in that manner, the Board found, he was prohibiting them from engaging in further protected concerted activity. (JA 1122, 1134; 123.) The Companies do not contest the Board's finding that Saxe's disparaging and threatening statements, as well as his prohibition against further protected concerted activity, violated Section 8(a)(1) of the Act. *See Vincent Indus. Plastics*

v. NLRB, 209 F.3d 727, 735 (D.C. Cir. 2000) (Section 8(a)(1) violations can support an inference of animus).

Nor do the Companies dispute that they again violated Section 8(a)(1) when Saxe told Carter on December 21—in the very email announcing her discharge from *Vegas! The Show*—that she was barred from "complaining in the dressing room," and threatened her that such "complaining and negativity" would not "be tolerated anymore." (JA 1122, 1134; 127, 899.) By simultaneously discharging her, Saxe "ma[d]e good" on his threat. *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970).

The timing of Carter's discharge also strongly supports the Board's finding of unlawful motive. (JA 1123.) Just eight days after the December 13 meeting where Saxe threatened her with reprisal for "bitching," he carried out his threat. (JA 1123.) *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (timing is a "telling consideration" in finding animus); *accord Power, Inc.*, 40 F.3d at 418 (following through on threat of adverse action shows unlawful motive). And within days the Companies also discharged Carter from the *Beatleshow*, another adverse action best explained by Kelsey's acknowledgement that Saxe "flies off the handle and doesn't like it when people talk back to him." (JA 1122, 1134; 129-30.)

The Companies attempt to explain away the timing of Carter's discharge by noting (Br. 47) that they discharged her around the time that employee contracts were expiring. As the Board aptly noted, however, on two prior occasions when Carter's contract was ending, Saxe decided to renew it despite complaints about her performance and attitude. Of course, that was before she engaged in protected concerted activity on December 13—and before Saxe sent her the December 21 email again threatening her with discharge for that activity. (JA 1121, 1141-42; 127, 899.) In these circumstances, the fact that Carter's contract was about to expire again in late December does not undermine the Board's reasonable finding that the timing of her discharge was itself evidence of the Companies' animus. Thus, the Board reasonably found that Carter's protected activity was "a motivating factor" in Saxe's decision to discharge her. (JA 1123.)

2. The Board Reasonably Found that the Companies Failed To Carry Their Burden of Proving that Saxe Would Have Discharged Carter even Absent Her Protected Concerted Activity

The Board reasonably inferred from the credited evidence that Saxe's proffered reasons for discharging Carter were a pretext to mask his real reason for her discharge—namely, Carter's outspoken "bitching" about rehearsal and holiday pay, working conditions, and scheduling issues, and her "constant complain[ts]" about those protected subjects. (JA 1123-24.) *See Citizens Inv. Servs. Corp.*, 430 F.3d at 1203 (employer's claim that it terminated employee for negativity and

attitudinal issues is "simply another way of indicating that he was terminated because he engaged in protected concerted activity") (internal citation omitted). In these circumstances, the Companies necessarily failed to meet their burden of showing that they would have discharged Carter even absent her protected concerted activity. (JA 1123.)

a. The Board Reasonably Inferred that Saxe's Stated Reasons for Discharging Carter Were Pretextual

Substantial evidence supports the Board's finding that the Companies advanced pretextual reasons for Carter's discharge, and therefore failed to demonstrate that they would have discharged her absent the protected concerted activity. In so ruling, the Board, like the administrative law judge, emphasized that Saxe gave two "very different explanations for Carter's discharge." (JA 1124.) Initially, he testified that after the December 13 meeting, he sought advice from Martina and the dance captains, and decided to discharge Carter after hearing their complaints about her performance and negative attitude. (JA 1123-24, 1140-41.) However, after being recalled to the witness stand, he testified that he made the decision not to renew Carter's contract much earlier, in October, and he denied basing his decision on employee complaints about her "attitude." (JA 1123-24, 1140-41.)

In analyzing these conflicting claims, the Board agreed with the judge that Saxe's "internally inconsistent" testimony "suffered from serious credibility

issues." (JA 1123-24 n.11, 1140-41.) As the Board noted, the judge attempted to resolve the conflict by crediting Saxe's initial testimony that he decided to discharge Carter after the December 13 meeting, but the judge based her ruling on a derivative inference that the Board reasonably rejected. (JA 1123-24.) Specifically, the judge noted that Saxe's subordinates (Martina, Mitria, and Kelsey) all credibly testified that they had expressed concerns about Carter's performance and attitude after the December 13 meeting. (JA 1123-24, 1140-41.) From that premise, the judge then inferred that their concerns would have led Saxe to decide against renewing Carter's contract even absent her protected concerted activity. (JA 1121, 1139-41.) The Board, however, reasonably rejected this derivative inference, as it was entitled to do. *See United Steelworkers of America, Local 14534*, 983 F.2d at 244, discussed above p. 16; *accord Carpenters Local 33*, 873 F.2d 316, 319 (D.C. Cir. 1989). As the Board aptly noted, the recommendations made by Saxe's subordinates after the December 13 meeting were "no different than" they had been "throughout Carter's tenure." (JA 1124; 312-13, 354-55, 511.) Thus, Martina had previously recommended against renewing Carter's initial contract, and Kelsey had expressed concerns about her negativity for almost a year. (JA 1124; 299-300, 658-69, 678-79.) Yet, Saxe overruled their concerns and renewed Carter's contract twice. (JA 1121, 1132-33; 883-92.) Simply put, as the Board explained, the judge never considered why Saxe

waited until after the December 13 meeting to seize upon their concerns as a basis for discharging Carter, a fact the Board found highly relevant. (JA 1121.)

It is settled that an employer's proffered reasons for discharging an employee are pretextual where, as here, the employer tolerated her shortcomings only until the employee engaged in protected concerted activity. *Southwire Co. v. NLRB*, 820 F.2d 453, 460, 464 (D.C. Cir. 1987); *NLRB v. Publishers Printing Co.*, 625 F.2d 746, 749 (6th Cir. 1980); *MDI Commercial Servs.*, 325 NLRB 53, 75 (1997), *enforced in relevant part* 175 F.3d 621 (8th Cir. 1999). Applying this established principle, the Board reasonably inferred that, because Saxe failed "to explain why Carter's performance and attitude issues suddenly became a concern" to him after the December 13 meeting, he would not have discharged her if she had not engaged in protected concerted activity at the meeting. (JA 1124.)

Moreover, despite the obvious internal conflicts in Saxe's testimony, the judge never considered whether those contradictions created an inference of pretext. Accordingly, the Board conducted the missing pretext analysis, and based on the irreconcilable conflicts in Saxe's testimony, found that his inconsistent explanations "were pretextual, offered in an attempt to mask his actual, unlawful motive for discharging Carter." (JA 1124.) *See Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (inference of pretext is reasonable where an employer provides shifting and inconsistent explanations); *accord GATX Logistics*,

Inc., 323 NLRB 328, 335 (1997), *enforced* 165 F.3d 32 (7th Cir. 1998) (same). In short, given the judge's finding that Saxe presented conflicting explanations for his action, it was entirely reasonable for the Board to infer that his shifting stories were "mere pretexts designed to mask an unlawful motive." (JA 1124.)

The Companies err in contending (Br. 39) that the Board "rejected all of the ALJ's credibility findings." In fact, the Board relied on the judge's credibility findings in analyzing Carter's discharge, and explicitly stated that it found "no basis for reversing the findings." (JA 1121 n.1, 1123-24.) The Companies fail to fully acknowledge that the judge herself repeatedly found Saxe's testimony to be incredible. (JA 1124 n.11, 1139-41.) Thus, she specifically noted that his "very troubling" testimony "fail[ed] to withstand scrutiny" because it was a "moving target," "inconsistent," "problematic," "equivocal, imprecise, and uncertain," and "unworthy of credence." (JA 1124 n.11, 1139-41.) As shown above pp. 26-27, despite the judge's utterly negative view of Saxe's credibility, she attempted to resolve his inconsistent stories by drawing a derivative inference that because Saxe's subordinates reiterated their concerns about Carter's attitude and performance after the December 13 meeting, their concerns would have led Saxe to discharge Carter even absent her protected concerted activity. (JA 1139-41.) The Board, however, was fully warranted in rejecting that derivative inference, and

finding instead that Saxe's stated reasons for discharging Carter were pretextual. (JA 1123-25.)

b. The Companies Err in Asserting that the Board's Decision Is Not Entitled to Deference

In finding that the Companies discharged Carter for engaging in protected concerted activity, the Board necessarily, and appropriately, relied on circumstantial evidence. *See, e.g.*, *Laro Maint. Corp.*, 56 F.3d at 229 ("In most cases only circumstantial evidence of motive is likely to be available."). Courts grant the Board great deference in "[d]rawing such inferences from the evidence." *Id.*; *accord Tenneco*, 716 F.3d at 647. Moreover, as shown above pp. 29, the Board did not reject the administrative law judge's credibility rulings, contrary to the Companies' claim. Rather, as the Board explained, it rejected one of her derivative inferences and examined a crucial factor that she had failed to consider—namely, that Saxe's stated reasons for discharging Carter were pretextual. (JA 1123-24.)

In these circumstances, the Companies err in relying (Br. 29-30, 32-34, 42) on out-of-circuit cases like *Slusher v. NLRB*, 432 F.3d 715, 729 (7th Cir. 2005), where the Board, unlike in the instant case, rejected the judge's demeanor-based credibility ruling on a question of motive without examining the evidence, derivative inferences, and credibility assessments on which the judge had relied. In *Slusher*, the Board simply stated that "the record . . . supports a different

conclusion," without articulating the basis for its finding. *Id.* The case thus could not be more different from the instant one, where the Board, far from rejecting the judge's credibility rulings, adopted them and then proceeded to conduct the pretext analysis that the judge had not considered, while fully explaining its reasons for drawing a different derivative inference from the credited evidence. As the Seventh Circuit itself recognized in *Slusher*, "the Board enjoys the prerogative to make factual findings independent of and even contrary to those of the [judge]," particularly with respect to findings that are not driven by witness demeanor. *Id.* at 727.

The Companies gain no more ground in relying (Br. 32, 35, 41) on another Seventh Circuit case, *Weather Shield Manufacturing, Inc. v. NLRB*, 890 F.2d 52, 58 (7th Cir. 1989), where the Board rejected the judge's credibility findings, and instead credited witnesses whose testimony conflicted with testimony explicitly credited by the judge. By contrast, as noted above, in the instant case the Board adopted the judge's credibility rulings, but drew derivative inferences that differed from the judge's, and also conducted a missing pretext analysis. (JA 1124-25.) As the Companies recognize, *Weather Shield* itself holds that the substantial evidence standard "'is not modified in any way' where, as here, 'the Board and the ALJ disagree as to legal issues or derivative inferences made from the testimony.'" (Br. 32 (quoting *Weather Shield*, 890 F.2d at 57).)

The Companies also are not helped by their citation (Br. 35, 42) of *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir. 1988), another inapplicable case where the Board "erroneously isolated [the employer's] acts and statements from their proper context," and "for some unknown reason disregard[ed]" one of the judge's implicit demeanor-based credibility rulings. By contrast, as shown above, the Board here fully accepted the judge's credibility rulings but drew a different derivative inference from the record, and conducted the missing pretext analysis. (JA 1124-25.) As the Seventh Circuit recognized in *Stor-Rite*, "'credibility' . . . refers to 'testimonial inferences . . . that rest on direct observations of the demeanor of the witnesses," not "derivative inferences . . . that are drawn from the substance of the evidence." *Id.* at 964 (internal citations omitted). Thus, even under the Seventh Circuit's mode of analysis, the standard of review would not be heightened here.

Finally, to the extent the Companies argue (Br. 35 n.11) that these and other out-of-circuit cases more broadly heighten the standard of review when the Board rejects the judge's findings, those cases are inconsistent with this Court's precedent, which is controlling here. *See, e.g.*, *United Steelworkers of America, Local 14534*, 983 F.2d at 244; *Local 702 IBEW*, 215 F.3d at 15. In any event, the Board's well-reasoned decision would meet that heightened standard.

In sum, in a *Wright Line* case like this, the Board's task is to determine whether an employee was discharged because of her protected activity, using well-established analytical tools for probing the employer's motive. *Laro Maint. Corp.*, 56 F.3d at 229; *Vico Prods. Co.*, 333 F.3d at 211. To be sure, as the Board noted, the concerns voiced to Saxe by his subordinates may constitute legitimate reasons for discharge. (JA 1124.) But as the Board fully explained, Saxe repeatedly ignored those concerns until Carter engaged in protected concerted activity, and his shifting and inconsistent explanations for her discharge strongly support the Board's inference that he was masking his true, discriminatory motive. (JA 1124-25.) In these circumstances, the Board reasonably found that the Companies failed to demonstrate that they would have discharged Carter absent her protected activity, and the action was unlawful.

CONCLUSION

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

Respectfully submitted,

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May 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC and VEGAS! THE SHOW, LLC and DAVID SAXE PRODUCTIONS, LLC and FAB FOUR LIVE, LLC	)	
Petitioners/Cross-Respondents	)	Nos. 16-1315, 16-1340
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-075461 28-CA-084151
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 7,603 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 8th day of May, 2017

ADDENDUM

ADDENDUM OF STATUTES AND REGULATIONS

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

Section 7 (29 U.S.C. § 157):

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

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

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

Section 10(a) (29 U.S.C. § 160(a)):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .

Section 10(f) (29 U.S.C. § 160(f)):

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

REGULATIONS:

Federal Rule of Appellate Procedure 28(a)(8)(A):

Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:
(8) the argument, which must contain:
(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC and VEGAS! THE SHOW, LLC and DAVID SAXE PRODUCTIONS, LLC and FAB FOUR LIVE, LLC	)	
Petitioners/Cross-Respondents	)	Nos. 16-1315, 16-1340
v.	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	28-CA-075461
	)	28-CA-084151
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 8th day of May, 2017