

Nos. 16-1238 & 16-1287

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

**GRILL CONCEPTS SERVICES, INC.,
D/B/A THE DAILY GRILL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE LOCAL 11

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

JARED D. CANTOR
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0656
(202) 273-0016

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Grill Concepts Services, Inc., d/b/a The Daily Grill (“the Company”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. UNITE HERE Local 11 (“the Union”), was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Grill Concepts Services, Inc., d/b/a The Daily Grill*, 364 NLRB No. 36 (June 30, 2016).

C. Related Cases

This case has not previously been before this or any other court. On March 30, 2017, the Court granted the Company’s unopposed motion to sever from this case the Board’s finding that the Company had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an arbitration agreement requiring individual arbitration of work-related claims. The Court has held that case (Nos. 17-1100 and 17-1121) in abeyance pending further order of the Court.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

A.	The deferred joint appendix
Br.	The Company's opening brief
The Agreement	The Company's Dispute Resolution Arbitration Agreement
The Board	National Labor Relations Board
The Company	Grill Concepts Services, Inc., d/b/a The Daily Grill
The Daily Grill	Daily Grill on Century Boulevard
The LMRA	Labor Management Relations Act, 29 U.S.C. § 141, et seq.
The NLRA	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Order	<i>Grill Concepts Services, Inc., d/b/a The Daily Grill</i> , 364 NLRB No. 36 (June 30, 2016)
The Union	UNITE HERE Local 11

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**ON PETITION FOR REVIEW AND
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Grill Concepts Services, Inc.,
d/b/a The Daily Grill (“the Company”) for review, and the cross-application of the

National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on June 30, 2016, and reported at 364 NLRB No. 36. (A. 529.)¹ UNITE HERE Local 11 (“the Union”), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the NLRA”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely because the NLRA places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(1) of the NLRA by, among other things, interrogating employees, creating an impression of surveillance, and maintaining an arbitration agreement that employees would reasonably understand to restrict their right to file unfair-labor-practice charges.

¹ “A.” references are to the deferred joint appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the NLRA by promulgating and maintaining numerous overbroad work rules.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the NLRA by prohibiting employees from wearing union buttons and threatening to discipline employees for wearing union buttons, and violated Section 8(a)(3) and (1) by disciplining employees for wearing union buttons.

4. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the NLRA by promising and implementing several benefits in order to discourage employee support for the Union.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the NLRA and other statutes are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations, Employee Handbook, and Arbitration Agreement

The Company operates 33 restaurants throughout the country, including the Daily Grill on Century Boulevard ("the Daily Grill"), which is located in a hotel in Los Angeles. (A. 536; A. 252.) The Daily Grill is a "traditional American grill,"

where the customer is always right and the answer to any question is “yes.”

(A. 536; A. 251-52.) It serves as the Company’s training restaurant for new managers and employs approximately 80 hourly employees. (A. 536; A. 274, 296-97, 312, 338.)

The Company maintains various mandatory company-wide rules and policies, many in its employee handbook. (A. 541; A. 104-214.) It provides the handbook to new employees, and distributed the most recent version to all employees. (A. 536; A. 293.) Among other provisions, the handbook sets out standards governing employee uniforms, workplace conduct, and online communications, and describes the Company’s progressive-discipline policy. (A. 548-59; A. 104-217.) It also contains a Dispute Resolution Arbitration Agreement (“the Agreement”), which requires each employee “to submit for binding arbitration . . . any employment-related dispute,” unless the employee affirmatively chooses to opt-out by following specified procedures within 30 days. (A. 555; A. 172.)

B. The Organizational Campaign

In September 2013, the Union contacted employee Madcadel Goytia about organizing the Daily Grill’s employees. (A. 537; A. 36.) Goytia and other employees subsequently formed an organizing committee. (A. 537; A. 21, 37.) On the afternoon of February 18, 2014, several employees—including Goytia,

Salvador Tello, Alfredo Mejia, Ramin Azad, Danielle Sanchez, and Sandra Diaz—approached General Manager William White. (A. 537; A. 21, 45.) Goytia said that he represented the Daily Grill’s employees and that they wanted to unionize. (A. 537; A. 22.) White said nothing in response and returned to his office. (A. 537; A. 22, 46.) The group learned that Vice President of Operations Thomas Kachani was willing to see them and approached him in the dining room, where numerous employees detailed specific, work-related concerns. (A. 537; A. 22-23, 46.) Before they left, Goytia requested assurance, which Kachani provided, that there would be no intimidation or retaliation for employees’ attempts to unionize. (A. 537; A. 24, 48.) Thereafter, Kachani informed Christopher Gehrke, the Company’s vice president for human resources, about the encounter. (A. 537; A. 295.)

Later that evening, White emailed Gehrke, identifying employees who had approached Kachani and listing their upcoming shifts. He copied Kachani and Michael Burnett, another manager. (A. 537; A. 325.) Several hours later, White again emailed Gehrke, copying Kachani, Burnett, and Area Director Robert Robertson, stating that he would soon send the employees’ schedules so that Gehrke could talk with them. White also reported that employee Azad had said that the “movement” was only beginning, and had signed up more employees. White suggested that Gehrke speak with Azad and that human resources speak

with all employees to ascertain how many were involved. (A. 537; A. 378.)

Gehrke responded that he would talk with the employees over the next week.

(A. 537; A. 325.)

On February 20, Gehrke sent Kachani an email with a link to the Union's Facebook post containing a video of the February 18 encounter. (A. 537; A. 323.)

Four days later, Gehrke distributed talking points to Kachani, Robertson, and Burnett, with copies to other managers, explaining that it could be used as a reference for conversations with employees. (A. 537; A. 317.) Among other things, the talking points set forth the Company's position that it did not want a union, which it believed was a waste of money and time. (A. 537; A. 319.)

Concerned about morale, Robertson met one-on-one with each hourly Daily Grill employee to learn why employees were dissatisfied and to ensure that they understood the unionization process. (A. 537; A. 303-06.)

C. The Company Orders Employees To Remove Union Buttons and Disciplines Those Who Do Not

Servers and bussers must dress according to the Company's uniform standards. (A. 537; A. 116-17, 215-17.) Servers wear a white, long-sleeved dress shirt, black shoes and slacks, and a company-provided black apron and brown vest. (A. 537; A. 215-17.) Bussers dress entirely in black, including a company-provided jacket. (A. 538; A. 215-17.) A server may wear a pin indicating

“trainer” status; the handbook allows no other adornment. (A. 538-39; A. 215-17, 257, 279.)

Over the course of several days in March 2014, employees Tello, Sanchez, Diaz, Mejia, and Goytia wore union buttons while working at the Daily Grill. (A. 538-39; A. 25-26, 48-49, 55-57, 66-71, 218, 220, 228-29, 242-44.) One button was less than one inch in diameter and said “UNITE HERE! Local 11” in red and black letters against a white background, the other measured approximately one and a half inches, with the same text against a darker background. (A. 538; A. 218, 220.) Each employee was ordered by a supervisor or manager to remove the button or to leave immediately. (A. 538-39; A. 26-27, 50-53, 56-62, 72-73, 229-32, 244-47.) In addition, some employees were given written discipline or threatened with future discipline for wearing the union buttons. Robertson gave Tello a written warning and told him that he needed to decide if he wanted to “continue with the Union or . . . with the [Company]” (A. 538; A. 53, 59-62, 219), and shift supervisor Grace Truong warned Diaz that she would receive a written warning if she wore the button the following day (A. 539; A. 246-47). Each employee who was sent home early was paid only for the time worked, and most received no tips. (A. 538-39; A. 28, 53-55, 60-62, 73-74, 231-32, 247.)

D. Robertson Privately Discusses the Union with Mejia and Tello

In early April 2014, Robertson asked Mejia to follow him to a private dining room. Robertson explained how much the Union would cost Mejia and the Company. Mejia responded that he understood because he was a union member at his second job. When Robertson continued, Mejia said he was working and did not want to discuss the Union. Robertson then asked why Mejia wanted to unionize and Mejia responded that, among other things, he sought protection from retaliation. (A. 539, 529 n.5; A. 234-35.)

Robertson next asked Mejia what he could do to stop employees from unionizing. Mejia suggested that a group meeting the following week would allow Robertson to address employees, but advised Robertson that the union movement was very strong. Mejia also told Robertson that the Company had cut employees' hours in response to the Affordable Care Act ("ACA") and noted that if the Company thought the Union would be expensive, it could have provided health insurance for employees. (A. 539-40; A. 236-37.)

That same month, Robertson told Tello to clock out and meet him in the private dining room, where Gehrke was waiting. Robertson said that he was surprised Tello participated in the February 18 meeting because he thought Tello liked his job. Tello replied that he "had [his] reasons." Robertson then asked if Tello knew how the Union worked, stating that it would change the employer-

employee relationship. Robertson also asked if employees were signing union-authorization cards; Tello refused to answer. (A. 540; A. 64.)

E. The Company Promises and Implements Several New Benefits

The Company conducts regular surveys to gauge employee satisfaction in a number of areas, including benefits, which indicated a decline in satisfaction on a company-wide basis from 2010 to 2014. (A. 536; A. 261, 334, 349-55, 380-85.) It also holds mandatory employee meetings annually. (A. 540; A. 308.) At the 2014 meetings, in late March or early April, Robertson announced four improvements to working conditions and benefits. (A. 540; A. 307.) First, employees would be able to request days off on a first-come, first-served basis, returning to a prior practice that employees preferred. (A. 540; A. 309-12.) Second, employees would be allowed to use flex time before vacation time when requesting time off, allowing employees to conserve vacation time which, unlike flex time, is payable when an employee leaves the Company. (A. 540; A. 238.) Third, the Company would soon offer full-time employment to certain employees whose hours had been cut in response to the ACA. (A. 540; A. 313.) Finally, employees would be paid time-and-a-half for holiday hours and, company-wide, the employee discount would increase from 30 to 50 percent. (A. 540; A. 312.)

In June, in response to Gehrke's inquiry, the Company's healthcare-benefits broker advised that the Company could provide health insurance at the Daily Grill

location only without running afoul of statutory nondiscrimination prohibitions.

(A. 540; A. 400-03.) On July 9, the Company held a mandatory employee meeting and announced that the Company would provide healthcare coverage for employees who worked at least 10 hours a week, and distributed various insurance-plan pamphlets. (A. 540-41; A. 31-34, 75-77, 222-26, 239-40.)

II. PROCEDURAL HISTORY

Following the investigation of charges filed by the Union, the Board's General Counsel issued a consolidated complaint, subsequently amended, alleging that the Company had committed numerous unfair labor practices. (A. 536; A. 78-103.) After a hearing, an administrative law judge found that the Company had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), in several respects, including by maintaining an unlawful arbitration agreement and several overly broad work rules, promising employees benefits to discourage union support, and coercively interrogating employees. (A. 529, 543-59.) The judge, however, dismissed certain other allegations, including those based on the Company's promulgation and enforcement of a ban on union buttons. (A. 541-43, 548, 553.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce; Members Hirozawa and McFerran) affirmed the judge's finding that the Company's maintenance of the Agreement, which requires individual arbitration of work-related claims, violates Section 8(a)(1)

pursuant *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), *petition for certiorari granted*, No. 16-307 (Jan. 13, 2017).² The Board further found, in agreement with the judge, that the Company had violated Section 8(a)(1) by: promulgating and maintaining an arbitration agreement that employees would reasonably understand to restrict their right to file unfair-labor-practice charges; making implied threats of job loss; soliciting employee complaints and grievances; interrogating employees about their and their coworkers' union activities; creating the impression that employees' union activity was under surveillance; promising employees several benefits in order to discourage union support; and promulgating and maintaining numerous overly broad work rules. Reversing the judge, the Board additionally found that the Company had violated Section 8(a)(1) by promulgating and maintaining a rule prohibiting employees from wearing union buttons and by threatening to discipline

² On March 30, 2017, the Court granted the Company's unopposed motion to sever that unfair-labor-practice finding from this case, and held that case (Nos. 17-1100 and 17-1121) in abeyance pending further order of the Court. In granting the motion, the Court ordered the parties to remove any discussion of the severed issue from their final briefs in this case.

an employee if she again wore a union button, and had violated Section 8(a)(3) and (1) by disciplining employees for violating its union-button ban. (A. 529-30.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of NLRA rights. Affirmatively, the Order requires the Company to: make employees whole for any loss of earnings or benefits suffered as a result of the Company ending their scheduled shifts early; remove from its files any references to their unlawful discipline; and notify them in writing of that expungement and that the discipline will not be used against them. The Order further requires the Company to rescind its unlawful rules, and either (1) furnish all current employees with an insert for its current handbook that (a) advises employees that the unlawful rules have been rescinded or (b) provides lawfully worded rules, or (2) publish and distribute to employees revised handbooks that (a) do not contain the unlawful rules or (b) provide lawfully worded rules. (A. 532-33.)

The Order also requires the Company to rescind or revise the Agreement in all its forms to make clear to employees that the Agreement does not: (1) waive their right to maintain employment-related joint, class, or collective actions in all forums, or (2) restrict their right to file charges with the Board. The Order further requires the Company to notify all current and former employees who were bound

by the Agreement of its rescission or revision and, if revised, to provide them a copy of the revised agreement. Finally, the Company must post a remedial notice at the Daily Grill, and a second remedial notice at all other locations where the unlawful rules and Agreement were in effect. (A. 532-33.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Company committed numerous unfair labor practices. Many of those violations are uncontested on appeal, including that the Company unlawfully interrogated employees, created an impression of surveillance, and maintained an Agreement that employees would reasonably understand to restrict their right to file unfair-labor-practice charges. With respect to the contest violations, the Board reasonably found that the Company maintained overbroad work rules that expressly restricted, or that employees would reasonably construe as restricting, protected activity including discussions of wages or employment conditions.

The Board also reasonably found that the Company had failed to justify its blanket prohibition of union buttons and, consequently, that it had unlawfully threatened and disciplined employees for wearing them. Finally, the Board reasonably found that the Company had unlawfully promised or granted several benefits to Daily Grill employees in order to discourage them from organizing. The Company does not seriously contest the facts underlying the foregoing

violations, and fails to show that the Board's application of well-settled precedent to those facts was unreasonable.

STANDARD OF REVIEW

In enacting the NLRA, Congress established the Board and charged it with the primary authority to interpret and apply the statute. *See Garner v. Teamsters, Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953). Accordingly, the Board's reasonable interpretation of the NLRA is entitled to affirmance. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "statutory text forecloses" agency's interpretation) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board "need not show that its construction is the best way to read the statute"); *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003) (Court "review[s] with deference" Board decisions that implicate its expertise in labor relations).

When supported by substantial evidence, the Board's findings of fact are "conclusive." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies that test to the Board's "application of law to the facts, and accords due deference to the reasonable inferences that the Board draws

from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Accordingly, “a decision of the NLRB will be overturned only if the Board’s factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA

The Board found, based on substantial evidence, that the Company violated Section 8(a)(1) of the NLRA by:

- impliedly threatening Tello with job loss unless he ceased supporting the Union (A. 543; A. 53);
- interrogating Mejia and Tello about their and their coworkers' union activities (A. 544-46; A. 63-64, 235-37);
- creating the impression that Tello's union activity was under surveillance (A. 529 n.4, 544-45; A. 63);
- soliciting grievances from Mejia (A. 529 n.5, 545; A. 236);
- maintaining a solicitation rule prohibiting non-working employees from soliciting in work areas (A. 554-55; A. 137);
- maintaining a rule requiring employees to cooperate, unconditionally, in company investigations (A. 553; A. 134);³
- maintaining the Agreement, which employees would reasonably understand to restrict their right to file unfair-labor-practice charges (A. 559; A. 172).

The Company expressly foregoes (Br. 12 n.8) any challenge to the Board's finding that the solicitation rule is overbroad. It implicitly accepts the additional six unfair-labor-practice findings above by failing to challenge them. Accordingly,

³ The Company only challenges the Board's finding that another provision (confidentiality) located in the same rule is also unlawful. *See infra* pp. 28-30.

the Board is entitled to summary enforcement of all seven violations. *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015).

II. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY PROMULGATING AND MAINTAINING NUMEROUS OVERBROAD WORK RULES

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” As this Court has held, “Section 7 thus protects employees’ rights to discuss organization and the terms and conditions of their employment, to criticize or complain about their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters.” *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) and other cases), *petition for reh’g en banc filed*, D.C. Cir. Nos. 14-1231, 14-1265 (filed Sept. 12, 2016).

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” A workplace rule that explicitly restricts Section 7 activity thus violates Section 8(a)(1). *Quicken Loans*, 830 F.3d at 545; *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 647 (2004). Moreover,

the Board and this Court will find that a rule violates Section 8(a)(1), even without explicit restrictions, when “employees would reasonably construe the [rule’s] language to prohibit Section 7 activity.” *Lutheran Heritage*, 343 NLRB at 647; accord *Quicken Loans*, 830 F.3d at 545. That standard is objective and it is not dependent on any particular employee’s construction. *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (no evidence regarding “employees’ actual interpretation of [a work] rule . . . is required to support the Board’s conclusion that the rule is overly broad”).

To determine whether a rule would lend itself to an unlawful interpretation, the Board reads the rule from the position of non-lawyer employees. *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007). In addition, “Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer.” *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014). “This principle follows from the [NLRA’s] goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer.” *Flex Frac*, 358 NLRB at 1132. As the Board explained, it need not “wait[] until that chill is manifest, . . . [to] undertake the difficult task of dispelling it.” *Id.*; see also *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that “Board’s rule is intended to

be prophylactic and . . . is subject to deference”). Indeed, if a rule is likely to chill protected activity, the Board may conclude that its maintenance is an unfair labor practice “even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *accord Quicken Loans*, 830 F.3d at 546.

As demonstrated below, substantial evidence supports the Board’s findings that several company rules violate Section 8(a)(1) under the foregoing, well-established principles. The Company requests (Br. 27-29) that the Court reject those principles in favor of a new approach, but failed to raise that argument before the Board. Rather, in its Objections to the Administrative Law Judge’s Recommended Decision (A. 510-24), it argued that the rules are lawful pursuant to that established standard, which both the judge and Board applied. Consequently, the Court lacks jurisdiction to reconsider the applicable standard. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court.”); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 560 (D.C. Cir. 2012) (same).

A. Code of Ethics: Relationships with Outside Parties

Substantial evidence supports the Board’s finding (A. 550) that the “Code of Ethics: Relationships with Outside Parties” rule expressly restricts employees’ Section 7 activities. The rule bars employees from giving “entertainment, meals or

gifts” to government employees and union officials, unless de minimus and “clearly appropriate under the given circumstances.” (A. 124.) It further states: employees “may entertain socially any relatives of friends employed by or representing government agencies or trade unions. However, it should be clear, that the entertainment is not related to the business or union affairs” of the Company. (*Id.*) As the Board found (A. 550), “the rule on its face prohibits Section 7 activity of employees discussing union matters when entertaining union officials.”

The Board rejected (A. 551) the Company’s claim (Br. 34-35) that the rule merely restricts conduct—giving “things of value” to unions or their officials—prohibited by the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 186. The rule does not mention the LMRA. Therefore, the Company’s interpretation could only be “clear to one trained in labor law” (A. 551), whereas rules are assessed from the perspective of non-lawyer employees. *See supra* p. 18. Moreover, the LMRA provision the Company cites does not restrict employee conduct; it applies to employers. Finally, despite the Company’s assertion (Br. 35), nothing in the rule, found in the employee handbook, suggests that it does not cover employees.

B. Team Member Relations/Positive Culture

The Board reasonably found (A. 548-49) that employees would construe the “Team Member Relations/Positive Culture” rule as restricting their Section 7 rights. That rule provides, in relevant part, that if employees “have concerns about working conditions, wages or benefits, they are encouraged to voice these concerns openly, respectfully and directly” to their general manager or a higher official. (A. 115.) It further states that “everyone is to be treated with courtesy and respect at all times, under all situations. Yelling, threatening, meanness, sarcasm, intolerance, impatience, belittling and any other form of harassment [are] not tolerated at any time” (*Id.*)

The Board found the rule unlawful (A. 548) first because employees would reasonably construe as mandatory its “encouragement” that they voice concerns regarding working conditions to management—core Section 7-protected activity—“respectfully.”⁴ As the Board reasoned, subsequent portions of the rule “are phrased in terms of a requirement.” (A. 549.) Citing *Casino San Pablo*, 361 NLRB No. 148, 2014 WL 7330998, at *1 (Dec. 16, 2014), it explained (A. 549) that such a requirement unlawfully chills protected activity. There, the Board found a rule proscribing “[i]nsubordination or other disrespectful conduct”

⁴ Contrary to the Company’s contention (Br. 31), the Board did not find that employees would construe the rule as barring any form of collective action.

unlawful because, in a “typical workplace, where traditional managerial prerogatives and supervisory hierarchies are maintained, employees would reasonably understand this phrase as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority” *Id.* at *3. It gave, as examples of protected but arguably “disrespectful” conduct, “concertedly objecting to working conditions imposed by a supervisor [or] collectively complaining about a supervisor’s arbitrary conduct.” *Id.*; *see also Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (overbroad rule proscribed “negative conversations” about managers).

The Board additionally found (A. 549) unlawfully overbroad the rule’s categorical ban on specific conduct, such as “yelling” and “impatience,” which “commonly arise[s] in a multitude of protected activities.” As the Board noted, it is well established that protected concerted speech may include “intemperate, abusive and inaccurate statements.” (A. 549 (quoting *Linn v. United Plant Guards*, 383 U.S. 53, 61 (1966)).) The Board acknowledged the Company’s legitimate “intent . . . to foster mutual respect among coworkers,” but faulted the rule’s failure to make clear that the enumerated proscriptions “do[] not encompass Section 7 activity.” (A. 549.)⁵ *See, e.g., Flamingo Hilton-Laughlin*, 330 NLRB 287, 295

⁵ The Board did not, as the Company implies (Br. 31-32), find unlawful the final paragraph of the rule, admonishing employees not to “take anger out” on guests or coworkers. (A. 529 n.6, 549.)

(1999) (overbroad rule prohibited “[u]sing loud, abusive or foul language” without defining terms). Accordingly, it found that employees reasonably would understand the rule to restrict protected concerted conduct in violation of Section 8(a)(1). Contrary to the Company’s suggestion (Br. 32), it is immaterial whether there is record evidence that the rule actually discouraged specific employees from engaging in Section 7 activity. See *Quicken Loans*, 830 F.3d at 546; *Lafayette Park Hotel*, 326 NLRB at 825.

C. Timekeeping

The Board reasonably found (A. 550) that employees would construe the Timekeeping rule as “prohibiting employees from gathering before and after their shifts to engage in Section 7 activities.” That rule reads, in relevant part, “[p]lease DO NOT loiter on restaurant property when not working. While off the clock and waiting to punch in, Team Members should not be in the restaurant earlier than 15 minutes prior to their scheduled starting time nor should they remain more than 15 minutes after they clock out.” (A. 120.) Such restrictions are unlawful under established Board law, which holds that employers may not “maintain overbroad no-loitering rules that reasonably tend to chill the exercise of Section 7 rights.” *Metro-West Ambulance Serv., Inc.*, 360 NLRB No. 124, 2014 WL 2448663, at *59 (May 30, 2014) (citation omitted) (employees would reasonably construe employer’s email that it would enforce “the existing practice of not loitering in the

workplace, or on the property, when you're not scheduled," as prohibiting Section 7 activity); *see also Lutheran Heritage*, 343 NLRB at 649 n.16, 655 (rule prohibiting "[l]oitering on company property . . . without permission from the Administrator" reasonably construed to bar employees from lingering after work to engaged in protected discussions).

The Board rejected (A. 550) the Company's claim (Br. 33-34) that the rule's purpose is to enhance accurate timekeeping and prevent uncompensated work. Other provisions of the rule address those concerns; the loitering/access ban would be superfluous if it had no distinct meaning. Moreover, nothing in the language of the ban supports the Company's proposed interpretation. Indeed, the Company does not seriously argue that the ban does not restrict Section 7 activity, instead it asserts (Br. 34) that its "peripheral, feather-light" restrictions preserve adequate opportunities for such activity. The Company provides no authority for the proposition that it may lawfully constrain Section 7 activity so long as employees retain some outlet for such activity. Off-duty employees have a right to engage in protected activities *in the workplace* absent a legitimate justification for restrictions. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8, 803 n.10 (1945). And the Company does not substantiate its purported justification (Br. 33), based on speculation that off-duty employees might interfere with the work of on-duty employees absent the loitering ban. This Court would be barred,

moreover, from considering any such defense, which the Company failed to raise to the Board. *See* 29 U.S.C. § 160(e); *KLB Indus.*, 700 F.3d at 560.

D. Team Member Conduct While Representing the Restaurant

The Board reasonably found (A. 551) that employees would construe the “Team Member Conduct While Representing the Restaurant” rule as restricting Section 7 activity. That rule requires employees to “refrain from any negative behaviors (as listed in this manual) off the property while representing the Restaurant.” (A. 129.) It defines “representing” to include “[r]epresentation or recognition on a public online social media website” and “events in which you are recognized as an official [employee] or . . . identity as a [employee] is recognized or assumed.” (*Id.*)

The Board found (A. 551) the rule unlawful because “the term ‘negative behaviors’ is broad and vague, and easily interpreted to include protected concerted activities protesting working conditions.” *See Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at *1 (Apr. 1, 2014) (unlawful rule prohibiting “negative comments” about coworkers and “engag[ing] in or listen[ing] to negativity or gossip”); *Roomstore*, 357 NLRB 1690, 1690 n.3, 1705 (2011) (unlawful rule prohibiting “[a]ny type of negative energy or attitudes”). It further found (A. 551), contrary to the Company’s claim (Br. 38), that the rule’s express definition of when an employee “represents” the Company does not limit—but,

rather, amplifies—the rule’s breadth. “Representation” expressly includes merely being recognized at a party or on a social media site as a company employee. To illustrate protected activity prohibited by the overbroad rule, the Board gave the example of an employee, identified or recognized as such, complaining about working conditions at a union event or on social media.

Finally, the Board properly rejected (A. 551) the Company’s claim that the rule is “fundamentally the same” (Br. 36) as the lawful rules in *Lafayette Park*, 326 NLRB at 826-27, and *Flamingo Hilton*, 330 NLRB at 288-89, both of which were restricted to misconduct that directly affects the employer or workplace.⁶ As the Board found (A. 551), the language in those rules was aimed at conduct “clearly” outside the NLRA’s protection, and their scope was not magnified, as here, by covering comments on social media.

E. Online Communications

The Board reasonably found (A. 554) the “Online Communications” rule unlawful in two respects. First, the Board found that the rule’s directive that employees “may not knowingly communicate information that is untrue or deceptive” (A. 131), reasonably construed, would unlawfully stifle employees’ protected discussions concerning union matters and other terms and conditions of

⁶ The Board did not find unlawful the portion of the rule reserving the Company’s right to discipline employees “who jeopardize[] the welfare and/or reputation” of the Daily Grill. (A. 529 n.6, 551.)

employment. See *Grandview Health Care Ctr.*, 332 NLRB 347, 348, 357 (2000) (prohibiting “false or misleading work-related statements”), *enforced*, 297 F.3d 468 (6th Cir. 2002); *Lafayette Park*, 326 NLRB at 828 (prohibiting “false, vicious, profane or malicious statements”).⁷ More fundamentally, as noted, the Supreme Court has made clear that protected concerted conversations remain protected even if they include “intemperate, abusive and *inaccurate* statements.” *Linn*, 383 U.S. at 61 (emphasis added).

Second, the Board found (A. 554) that employees would reasonably construe the rule’s final requirement—that they keep non-public information, including “personal Team Member data,” confidential (A. 131)—as unlawfully barring protected discussion of wages and other working conditions. See, e.g., *Quicken Loans*, 830 F.3d at 545 (rule prohibiting employees from disclosing confidential “Personnel Information,” which included “personnel lists, rosters, [and] personal information of co-workers” such as contact information, reasonably construed as restricting protected discussions); *Flex Frac*, 358 NLRB at 1131-32 (rule prohibiting employees from engaging in “[d]isclosure” of “personnel information

⁷ To argue that language is lawful, the Company cites (Br. 39) *Dresser-Rand Co.*, 358 NLRB 254 (2012). That decision was issued by a panel that included a Board Member whose recess appointment was invalidated. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

and documents” to persons “outside the organization” reasonably construed as restricting protected discussions).

The Board reasonably rejected (A. 554) the Company’s assertion (Br. 38-39) that the rule applies only to employees representing the Company. The rule’s second non-numbered, introductory paragraph references “communications . . . on behalf of” the Company and the first numbered paragraph applies to employees “engaging in online, electronic dialogue as a delegate of the company,” but the ensuing numbered paragraphs—including the ones containing the unlawful restrictions—contain no such limiting language. (A. 131.) As the Board reasoned, if the limiting language in the second introductory paragraph applied to the entire rule, the similar limiting language in the first numbered paragraph would be redundant. As the Board concluded, the applicability of the rule to employees not speaking on the Company’s behalf is at best unclear, and such ambiguity must be construed against the Company. *See supra* pp. 17-19.

F. Progressive Discipline: Gross Misconduct

The Board reasonably found (A. 552-53) overbroad the portion of the “Progressive Discipline: Gross Misconduct” rule stating that an employee may be terminated for “unauthorized disclosure of confidential or privileged information concerning [the] company or Team Members.” (A. 134.) As the Board found, employees would reasonably construe that language as barring disclosure of

information about employees' or their coworkers' (i.e., Team Members') wages and working conditions. See *Quicken Loans* and *Flex Frac*, *supra* p. 27-28.

Contrary to the Company's assertion (Br. 36-37), other handbook provisions addressing "confidential" information fail to clearly remove such protected topics from the rule's blanket coverage of "confidential or privileged" Team Member information. Neither of the cited provisions defines "privileged," and neither excludes information regarding employees or terms and conditions of employment. (A. 125, 178.) Moreover, another handbook provision undermines the Company's argument by defining "Team Member/Manager activities" as confidential.

(A. 131.)

Given the rule's (and the handbook's) ambiguity on the subject of whether employee information is "confidential" or otherwise restricted, the Company does not advance its cause (Br. 37) by relying on *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003). In that case, the Board found that a ban on disclosure of "customer and employee information, including organizational charts and databases" would not be understood to bar protected discussion of terms and conditions of employment when listed only as a type of "intellectual property" in a provision specifically prohibiting the disclosure of "Proprietary Information," itself defined to include "information assets and intellectual property." *Id.* at 278-79 (noting other examples of proprietary information included "business plans,"

“trade secrets,” and “copyrights”). As described, neither the Progressive Discipline rule nor any other provision of the handbook limits the ban on disclosure of employee information in a similar manner.⁸

III. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY BANNING UNION BUTTONS AND THREATENING TO DISCIPLINE EMPLOYEES FOR WEARING UNION BUTTONS, AND VIOLATED SECTION 8(a)(3) AND (1) BY DISCIPLINING EMPLOYEES FOR WEARING UNION BUTTONS

Employees have a Section 7 right to wear union-related paraphernalia while at work to communicate about self-organization or support their union. *See Republic Aviation*, 324 U.S. at 803-04; *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015). An employer thus violates Section 8(a)(1) by restricting union insignia in the workplace, unless it establishes a “special circumstances” defense. *Republic Aviation*, 324 U.S. at 803-04; *see also Beth Israel*, 437 U.S. at 492-93; *HealthBridge Mgmt.*, 798 F.3d at 1067-68. As the Board found (A. 530-31), the Company’s “de facto rule prohibiting the wearing of union buttons” plainly restricts employees’ right to display union insignia. The Company does not contest that finding but asserts (Br. 16-25) that the rule is justified to protect its public image. Substantial evidence, however, supports the

⁸ *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), cited by the Company (Br. 38), is also distinguishable. That rule was limited to “confidential information” (as opposed to “confidential or privileged” information), and did not define such information as including employee “activities”.

Board's finding (A. 530-31) that the Company failed to meet its burden of demonstrating that affirmative defense.

“The Board has found special circumstances justifying proscription of union insignia and apparel when their display may . . . unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Bell-Atl.-Pa., Inc.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom., Commc'ns Workers of Am., Local 13000 v. NLRB*, 99 F. App'x. 233 (D.C. Cir. 2004). But “customer exposure to union insignia, standing alone,” is not such a special circumstance, *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997), and neither is a “requirement that employees wear a uniform,” *AT&T*, 362 NLRB No. 105, 2015 WL 3492100, at *4 (June 2, 2015); *see also P.S.K. Supermarkets*, 349 NLRB at 35. To establish a public-image justification, an employer must demonstrate both its deliberate cultivation of a particular image as part of its business plan, and that the limitations it has imposed are tailored to protect that image without overly impeding its employees' rights. *Bell-Atl.-Pa.*, 339 NLRB at 1086; *Nordstrom, Inc.*, 264 NLRB 698, 701-02 (1982).

As the Board found (A. 530), the Company failed to justify its blanket ban on union buttons because it “presented no evidence on how the Union's small, inconspicuous, and non-inflammatory buttons would unreasonably interfere with a

server's ability to provide reliable service or interfere with the [Company's] public image." In making that finding, the Board rejected (A. 530) the Company's unsupported contention (Br. 16-25) that discreet union buttons, worn on employees' uniforms as they served customers, would unreasonably tarnish its public image as a "traditional American grill" where customers come to get "predictable, reliable" service and the servers' role is to be "seen and not heard"—to "deliver food [without making] any statements of any kind, other than supporting [the] restaurant."

The Company details its service philosophy, restaurant design, and uniform requirements (*see, e.g.*, Br. 4-11), all of which the Board acknowledged (A. 530). But it utterly fails to articulate (Br. 16-25) *how* small buttons bearing the Union's name, without any slogan or image, affect—much less unreasonably interfere with—the public image its policies create or the service its employees provide. The apparent premise of the Company's argument—that customers would be jarred by any deviation, however benign, from its uniform standards—is plainly contrary to Board law (which it fails to address) that neither customer exposure to union insignia nor a proscribed uniform, standing alone, justifies banning all union insignia regardless of size, color, or specific message. *See, e.g., P.S.K. Supermarkets*, 349 NLRB at 34-35.

Contrary to the Company's claim (Br. 17) that *W San Diego* is "strikingly similar" to this case, the Board reasonably found that decision "readily distinguishable" and based on "narrow factual circumstances." (A. 530 (quoting *Boch Honda*, 362 NLRB No. 83, 2015 WL 1956199, at *2 n.6 (Apr. 30, 2015), *enforced*, 826 F.3d 558 (1st Cir. 2016).) As the Board explained, the employer in *W San Diego* aimed "to provide an 'alternative hotel experience referred to as 'Wonderland' where guests [could] fulfill their 'fantasies and desires'" (A. 530 (quoting *W San Diego*, 348 NLRB 372, 372 (2006)).) To foster that unique experience, the hotel spent thousands of dollars commissioning custom uniforms (which it provided and laundered) to "achieve a trendy, distinct, and chic look," and banned all adornments except for a small "W" pin. *W San Diego*, 348 NLRB at 372 & n.4. The hotel also encouraged employees to "interact with guests on a personal level, and require[d] employees to introduce themselves by name to each guest."⁹ *Id.* at 372.

Based on those facts, the Board in *W San Diego* found that the hotel had lawfully applied its uniform policy to prohibit an employee from wearing a 2-inch square button declaring "JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. LOCAL

⁹ The Company argues (Br. 17) that its justification "is even stronger" than the hotel's because its servers spend more of their time with guests. That argument is unpersuasive in light of its mandate that employees interact as little as possible while serving customers.

30” in blue or red letters on a yellow background. *Id.* at 373. In doing so, the Board emphasized that the conspicuous, controversial button was likely to interfere with the employer’s specially cultivated public image. *Id.* As the Board found (A. 531), the Company has “provided no comparable evidence” suggesting the discreet union buttons its employees wore would similarly undermine its public image or its employees’ ability to provide impeccable, reliable service. *See, e.g., Register-Guard*, 351 NLRB 1110, 1110 n.2, 1137 (2007) (newspaper failed to demonstrate that employee’s pro-union armband “adversely affected [its] business” when worn in public), *enforced in relevant part*, 571 F.3d 53, 61 (D.C. Cir. 2009) (no evidence armband reasonably would affect newspaper’s public image of neutrality, decrease number of customers, or negatively impact business); *Nordstrom*, 264 NLRB at 701-02 (employer failed to demonstrate “small, tasteful, and inconspicuous” banned steward button unreasonably interfered with professional, fashionable public image); *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962) (employer failed to demonstrate that “small, neat, and inconspicuous” union buttons “detracted from the dignity of the hotel” or hurt business), *enforced as modified*, 318 F.2d 545 (5th Cir. 1963).

The Company’s argument (Br. 17-19) that its ban is lawful because it applies “only while serving guests” misses the point. As this Court has held, Section 7 protects employees’ rights to “communicate . . . with third parties . . .,” *Quicken*

Loans, 830 F.3d at 545, and to wear union insignia while working, *HealthBridge Mgmt.*, 798 F.3d at 1067-68. The Company has not shown why a complete ban on union insignia, no matter how discreet, is essential to maintaining an image as a reliable, low-key, American grill where employees serve customers without engaging them. Accordingly, as the Board concluded (A. 530), if it were to find special circumstances justifying the Company's blanket restriction of employees' Section 7 right to display union insignia, "the exception would become so broad as to ultimately consume the rule."¹⁰

Consistent with its finding that the Company's ban on union buttons is unlawful, the Board further found (A. 531) that the Company had violated Section 8(a)(1) by threatening to discipline employee Diaz if she again wore a union button while working, and violated Section 8(a)(3) and (1) by disciplining 5 employees (i.e., sending them home mid-shift) for violating the rule. *See, e.g., AT&T*, 2015 WL 3492100, at *2-*7 (where employer maintained unlawful rule prohibiting union insignia, employer also violated Section 8(a)(1) by threatening employees if they wore insignia and Section 8(a)(3) and (1) by disciplining employees for violating the rule). The Company does not dispute the substantial evidence

¹⁰ The Company inexplicably devotes pages (Br. 19-25) to litigating whether its rule was unlawful because it was promulgated in response to union activity. Having rejected the Company's special-circumstances defense, the Board found "it unnecessary to pass on" that alternative theory of liability. (A. 531 n.8.)

supporting those findings, relying solely on its defense of the button ban. (Br. 26.)

It has, consequently, waived any independent challenges to those additional violations.

IV. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY PROMISING AND GRANTING SEVERAL BENEFITS IN ORDER TO DISCOURAGE EMPLOYEE SUPPORT FOR THE UNION

A. An Employer May Not Promise or Grant Benefits To Discourage Employees' Organizational Activity

As previously set forth, Section 7 protects, among other things, employees' rights freely to join and support unions. Section 8(a)(1) prohibits employers from interfering with those "rights by either granting or withholding a benefit. Whether interference is accomplished by dangling a carrot or brandishing a stick, the Supreme Court has long counseled that it is interference all the same." *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016) (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)). As the Supreme Court explained, "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Exchange Parts*, 375 U.S. at 409.

"Although 8(a)(1) allegations are typically analyzed under an objective standard, [where] motive is irrelevant, the 8(a)(1) analysis under *Exchange Parts* is

motive-based.” *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007) (internal citation omitted). To find a violation, the Board determines “whether the record evidence as a whole, including any proffered legitimate reason for the [promise or grant of benefits], supports an inference that [the promise or grant] was motivated by an unlawful purpose to coerce or interfere with [employees’] protected union activity.” *Id.* Because direct evidence of unlawful motive is often impossible to obtain, the Board may rely on circumstantial evidence, including timing. *See Lampi, LLC*, 322 NLRB 502, 502-03 (1996); *see also Care One*, 832 F.3d at 358 (where newly reinstated benefit withheld from election-eligible employees, “particulars of the timing further support the Board’s finding of unlawful motive”). Accordingly, the NLRA “requires . . . that the employer make its benefits decisions ‘precisely as it would if the union were not on the scene.’” *Care One*, 832 F.3d at 357 (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005)). Consistent with that focus on employer motive, and contrary to the Company’s wholly unsupported assertion (Br. 39-40), proof that an unlawful promise or grant of benefits “had an actual causal impact” on union support is not necessary to establish a violation.

B. The Company Unlawfully Promised or Granted Benefits To Discourage Union Support

Substantial evidence supports the Board’s finding (A. 546-47) that the Company unlawfully promised or granted numerous benefits to discourage

employees from supporting the Union. The Company failed to establish that it would have taken the same actions at the times it did in the absence of the organizing drive.

1. Unlawful Benefit Announcements at March/April Meetings

As the Board found (A. 546), the Company's announcement of a favorable change to time-off scheduling resulted directly from employees' unionization efforts, for "there is no legitimate explanation for the timing of this change." Just after employees mentioned unionization to Kachani on February 18, and contemporaneous with employees wearing union buttons over several days in March, Area Director Robertson held one-on-one sessions with all Daily Grill employees to ascertain why they were dissatisfied and if they understood the unionization process. (A. 303-06.) Robertson learned that time-off scheduling practices were a top concern. (A. 309.) The Company devised a policy change to address that concern, which it announced at the March/April mandatory meetings. (A. 309-12.) Robertson's admission that he learned of the issue by consulting with employees in response to, and about, the union campaign belies the Company's contention (Br. 45-46) that the policy change was "nothing more than a course correction" resulting from an ongoing practice of soliciting and remedying grievances, unrelated to the campaign. For that reason, the Company's citation (Br. 46) to *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796, 798, 804-06

(2011), where the employer relied on such an ongoing adjustment process, is inapposite.

Similar reasoning supports the Board's finding (A. 546) that the organizational campaign motivated the Company's promise, at the same mandatory meetings, to reconsider and reverse prior reductions to employees' hours and offer full-time employment. Employees had explicitly complained about the reduced hours to Kachani on February 18 (A. 22-23), shortly before the Company's March/April announcement of its reversal. The Board reasonably rejected (A. 546) the Company's explanation for the new policy (Br. 43-45)—that the decision to restore work hours company-wide had been made based on national economic conditions and a company-wide employee survey, and that implementation had begun in 2013. (A. 313-16.) As the Company concedes (Br. 43-45), that purported policy change was not communicated to Daily Grill employees until after they started organizing in 2014. (A. 313, 316.) Nor does the evidence suggest that the policy had been implemented unannounced. Employees complained to Kachani about reduced hours in February and Robertson stated (A. 29-30), when announcing the new policy, that he and Burnett planned to solicit employees' hour preferences for implementation. Moreover, Robertson's one-on-one sessions following employees' February 18 meeting with Kachani, and his "newly discovered concern" that employees were unhappy, would have been

“superfluous had the surveys already formed the source of the Company’s response,” as the Company claims (Br. 44-45). As the Board observed (A. 546), “[i]f the decision had been made in 2013, the timing of both communicating the benefit to employees and implementing it does not make sense,” unless it was intended to discourage employees from supporting the Union.

Finally, as the Board found (A. 547), “the timing of the [mandatory] meetings, coupled with the other promises that . . . were intended to discourage support for the Union,” establish that the Company timed and announced the implementation of its new holiday-pay and employee-discount benefits *at the Daily Grill* in order to discourage employee support for the Union. Therefore, there is no merit to the Company’s claim (Br. 42-43) that the company-wide nature of those benefits precludes any unfair-labor-practice finding.

2. Health insurance

Based on the same underlying evidence, the Board found (A. 547) that the Company’s July announcement of a new health-insurance benefit—only at the Daily Grill location—likewise was intended to discourage employee support for the Union, and that employees would perceive that. The Board reasonably rejected (A. 547-48) the Company’s explanations (Br. 47-48) of the announcement’s timing on the heels of the organizational campaign and of the selection of the Daily Grill,

the one company location subject to an organizing drive, as the test location for the benefits.

Regarding timing, the Company's assertion (Br. 48) that the organizing effort "was a distant memory" by June (when it planned the benefit announcement and chose the Daily Grill location) is simply incorrect. There was a union demonstration at the Daily Grill in mid-April and the Company was aware of an employee's union leafleting in early May. (A. 547-48; A. 321, 418.) The Company's further timing argument (*e.g.*, Br. 47-48)—that the test-location plan was timed to precede a 2015 ACA deadline that had originally been set in 2014—is also faulty. As the Board reasoned (A. 547), "it is curious a similar test case implementation plan was not discussed and documented [a year earlier], prior to the time the [Company] (or anyone) knew there would be a 1-year delay." The Company produced no evidence of having planned a test before learning of employees' organizational efforts in February 2014.

The Board also found (A. 547) that the Company's "unique choice" of the Daily Grill as the health-benefit test location "does not withstand scrutiny." It rejected the Company's contention (Br. 47) that it chose the Daily Grill because a local pay ordinance insulated it from an otherwise-applicable federal, anti-discrimination mandate, or because the insurance broker's attorney said that was the case. Legally, as the Board found (A. 547), the Company failed to explain how

those local and federal laws mesh or to identify which specific statutory provisions formed the basis of its rationale, despite the judge's instruction to provide that information. (A. 340-41.) Factually, the Board found (A. 547) that "it is clear from the email exchanges between Gehrke [and the broker] that the [Daily Grill] was chosen as the implementation site prior to the request for advice regarding discrimination." Specifically, the advice request was in a June 3 email, but discussions about implementing health insurance at the Daily Grill occurred at least a full day earlier.

CONCLUSION

As the Board found, and as demonstrated above, the Company, in response to its employees' organizational campaign, committed numerous unfair labor practices, including interrogating employees, impliedly threatening job loss, and creating an impression of surveillance. The Company further unlawfully prohibited employees from, and threatened and disciplined them for, exercising their right to wear union buttons, as well as promised and implemented several benefits to discourage union support. Moreover, it maintains numerous work rules that interfere with employees' Section 7 rights.

Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order, except with respect to the portion severed and still pending before the Court in Case Nos. 17-1100 and 17-1121.

Respectfully submitted,

/s/ Kira Dellinger Vol

KIRA DELLINGER VOL

Supervisory Attorney

/s/ Jared D. Cantor

JARED D. CANTOR

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-0656

(202) 273-0016

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

May 2017

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69:

Sec. 7 [Sec. 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(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

Sec. 10 [Sec. 160]

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

local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to 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) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such 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 [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.

**Relevant provision of the Labor Management Relations Act,
29 U.S.C. § 141, et seq.:**

§ 186 [Restrictions on financial transactions]

(a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

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

GRILL CONCEPTS SERVICES, INC.,)	
d/b/a THE DAILY GRILL)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1238 & 16-1287
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	31-CA-126475
)	31-CA-132845
Respondent/Cross-Petitioner)	31-CA-135061

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,275 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 9th day of May, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

Karl M. Terrell, Esq.
Stokes Wagner Hunt Maretz & Terrell
One Atlantic Center
1201 W Peachtree Street, Suite 2400
Atlanta, GA 30337-0000

Kristin L. Martin, Esq.
Davis, Cowell & Bowe, LLP
595 Market Street
Suite 800
San Francisco, CA 94105

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 9th day of May, 2017