

Nos. 17-1058, 17-1108

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

**LOCAL 58, INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS (IBEW), AFL-CIO**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

RYAN GREENE

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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)	Nos. 17-1058, 17-1108
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CB-149555
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
RYAN GREENE)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, Amici

Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (“the Union”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Ryan Greene was the charging party before the Board and is the intervenor before the Court. The Union, the Board’s General Counsel, and Greene

appeared before the Board in Case 07-CB-149555. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Union's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on February 10, 2017, reported at 365 NLRB No. 30.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/Linda Dreeben

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Dated at Washington, DC
this 29th day of June, 2017

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory provisions.....	2
Statement of the issues	2
Statement of the case.....	3
I. Procedural history	4
II. The Board’s findings of fact	4
III. The Board’s conclusions and Order	5
Standard of review	6
Summary of argument.....	7
Argument.....	10
I. Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by maintaining a policy that restrains employees in the exercise of their statutory right to resign their union membership.....	11
A. Applicable principles.....	11
B. The policy constitutes an unlawful restriction because it imposes a significant burden on employees’ exercise of their Section 7 right to resign their union membership	13
II. Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by maintaining a policy that restrains employees in the exercise of their statutory right to revoke their prior authorizations for the deduction of union dues from their pay	24
A. Applicable principles.....	24

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The policy constitutes an unlawful restriction because it imposes a significant burden on employees' exercise of their Section 7 right to revoke their dues-deduction authorizations.....	27
C. The policy is unlawful for the independent reason that it establishes new requirements on the revocation of dues-deduction authorizations without obtaining individual employees' assent	29
Conclusion	37

TABLE OF AUTHORITIES

Cases	Page(s)
<i>AFM Wheel Goods Div.</i> , 247 NLRB 231 (1980)	26
<i>Armco, Inc. v. NLRB</i> , 832 F.2d 357 (6th Cir. 1987)	25
<i>Auto Workers Local 148 (Mcdonnell-Douglas)</i> , 296 NLRB 970 (1989)	20
<i>Banner Health Sys. v. NLRB</i> , 851 F.3d 35 (D.C. Cir. 2017)	33, 34
<i>BASF Wyandotte Corp.</i> , 274 NLRB 978 (1985), <i>enforced</i> , 798 F.2d 849 (5th Cir. 1986)	26
<i>Boston Gas Co.</i> , 130 NLRB 1230 (1961)	29
<i>Brockton Hosp. v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002)	6
* <i>Cameron Iron Works</i> , 235 NLRB 287 (1978), <i>enforcement denied on other grounds</i> , 591 F.2d 1 (5th Cir. 1979)	25, 30, 31, 34
<i>Cintas Corp. v. NLRB</i> , 482 F.3d 463 (D.C. Cir. 2007)	22-23
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008)	16

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Engineers & Scientists Guild (Lockheed-California),</i> 268 NLRB 311 (1983).....	12
<i>Felter v. S. Pac. Co.,</i> 359 U.S. 326 (1959).....	25, 28
<i>Ford Motor Co. v. NLRB,</i> 441 U.S. 488 (1979).....	6
<i>*Hawaiian Dredging Constr. Co., Inc.,</i> 362 NLRB No. 10 (Feb. 9, 2015), <i>enf. denied on other grounds,</i> No. 15-1039, 2017 WL 2294162 (D.C. Cir. May 26, 2017).....	35
<i>HealthBridge Mgmt., LLC v. NLRB,</i> 798 F.3d 1059 (D.C. Cir. 2015).....	33
<i>HTH Corp. v. NLRB,</i> 823 F.3d 668 (D.C. Cir. 2016).....	33
<i>*Int'l Bhd. of Elec. Workers, Local No. 2008 (Lockheed Space Operations Co.,</i> <i>Inc.),</i> 302 NLRB 322 (1991).....	24, 25, 26
<i>*Int'l Ladies' Garment Workers' Union, Upper S. Dep't, v. Quality Mfg. Co.,</i> 420 U.S. 276 (1975).....	32, 33
<i>*Int'l Union of Elevator Constructors Local Union No. 8 v. NLRB,</i> 665 F.2d 376 (D.C. Cir. 1981).....	11, 12, 13, 21
<i>Int'l Union of Painters & Allied Trades, Local Unions No. 970 & 1144 v. NLRB,</i> 309 F.3d 1 (D.C. Cir. 2002).....	33

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Int'l Union, United Auto, Aerospace & Agr. Implement Workers of Am. v. NLRB</i> , 865 F.2d 791 (6th Cir. 1989)	20
<i>Jefferson Elec. Co.</i> , 274 NLRB 750 (1985), <i>enforced</i> , 783 F.2d 679 (6th Cir. 1986)	36
<i>Local 702, Int'l Bhd. of Elec. Workers v. NLRB</i> , 215 F.3d 11 (D.C. Cir. 2000).....	6, 7
<i>Machinists Local 1327 (Dalmo Victor II)</i> , 263 NLRB 984 (1982)	13, 20
* <i>Machinists Local 1414 (Neufeld Porsche-Audi)</i> , 270 NLRB 1330 (1984).....	11, 12, 13, 14, 17, 18, 19
* <i>Newport News Shipbuilding & Dry Dock Co.</i> , 253 NLRB 721 (1980), <i>enforced, sub nom. Peninsula Shipbuilders' Ass'n v.</i> <i>NLRB</i> , 663 F.2d 488 (4th Cir. 1981)	15, 27, 28, 30, 31, 34-35
* <i>NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527</i> , 523 F.2d 783 (5th Cir. 1975)	25
<i>NLRB v. Bhd. of Ry., Airline & S.S Clerks</i> , 498 F.2d 1105 (5th Cir. 1974)	25
<i>NLRB v. Granite State Joint Bd., Textile Workers Union of Am., Local 1029</i> , 409 U.S. 213 (1972).....	11
<i>NLRB v. Local 73, Sheet Metal Workers' Int'l Ass'n</i> , 840 F.2d 501 (7th Cir. 1988)	12

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Oklahoma Fixture Co.</i> , 332 F.3d 1284 (10th Cir. 2003)	26
<i>NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 16</i> , 873 F.2d 236 (9th Cir. 1989)	12
<i>NLRB v. WTVJ, Inc.</i> , 268 F.2d 346 (5th Cir. 1959)	36
<i>Noel Foods, a Div. of Noel Corp. v. NLRB</i> , 82 F.3d 1113 (D.C. Cir. 1996).....	33
<i>Nova Se. Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015).....	32, 33
* <i>Pattern Makers' League of N. Am. v. NLRB</i> , 473 U.S. 95 (1985).....	6, 11, 13, 18
* <i>Peninsula Shipbuilders' Ass'n v. NLRB</i> , 663 F.2d 488 (4th Cir. 1981)	15
<i>Pepsi Am., Inc.</i> , 339 NLRB 986 (2003)	36
* <i>Scofield v. NLRB</i> , 394 U.S. 423 (1969).....	12, 13, 18, 20
* <i>Sheet Metal Workers Local 73 (Safe Air)</i> , 274 NLRB 374 (1985), enforced, 840 F.2d 501 (7th Cir. 1988)	12, 13, 22

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Steelworkers (Am. Screw Co.),</i> 122 NLRB 485 (1958).....	27
<i>Stewart v. NLRB,</i> 851 F.3d 21 (D.C. Cir. 2017).....	24
<i>Trico Prod. Corp.,</i> 238 NLRB 1306 (1978).....	25
<i>U.S. Testing Co., Inc. v. NLRB,</i> 160 F.3d 14 (D.C. Cir. 1998).....	6-7
<i>United Food & Commercial Workers Dist. Union Local One v. NLRB (“UFCW Local One”),</i> 975 F.2d 40 (2d Cir. 1992)	25, 31
<i>Universal Camera Corp. v. NLRB,</i> 340 U.S. 474 (1951).....	7
* <i>Woelke & Romero Framing, Inc. v. NLRB,</i> 456 U.S. 645 (1982).....	32

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

TABLE OF AUTHORITIES

Statutes:	Page(s)
Labor Management Relations Act (29 U.S.C. § 141, et seq.)	
Section 302 (29 U.S.C. § 186)	24, 26, 30
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	3, 5, 7, 8, 11, 13, 14, 16, 17, 18, 19, 25, 26, 27
Section 8 (29 U.S.C. § 158)	21, 26
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))	2, 4, 5, 10, 11, 12, 13, 24, 29, 31, 35
Section 10(a) (29 U.S.C. § 160(a))	2
*Section 10(e) (29 U.S.C. § 160(e))	2, 7, 32, 33
Section 10(f) (29 U.S.C. § 160(f))	2

Regulations

29 C.F.R. § 102.48(c).....	33
----------------------------	----

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

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (“the Union”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order (365 NLRB No. 30) issued against the Union on

February 10, 2017. (A. 84-97.)¹ Ryan Greene, the charging party before the Board, has intervened on the Board's behalf.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Union's petition and the Board's cross-application were timely because the Act imposes no limit on the time for initiating actions to review or enforce Board orders. The Board's Order is final, and the Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board to cross-apply for enforcement.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

In 2014, the Union unilaterally implemented a written policy governing how its members may resign their union membership or revoke their prior written authorizations for the deduction of union dues from their pay. The issues presented for review are whether the Union violated Section 8(b)(1)(A) of the Act by maintaining a policy that facially restrains employees in the exercise of their

¹ "A." references are to the joint appendix. "Br." references are to the Union's opening brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

Section 7 rights to resign from membership and revoke their dues-deduction authorizations.

STATEMENT OF THE CASE

This case involves a policy, unilaterally created by the Union's business manager and maintained by the Union, that imposes new and significant requirements on employees who wish to resign their union membership or to revoke their prior dues-deduction authorizations. The Board decision, which relates only to the unique policy at issue here, addresses the requirements that are explicitly stated on the face of the policy. In particular, the Board found that the policy's requirements (for both resignation and revocation of dues authorization) that union members must appear in person at the union hall and present picture identification, impose a significant burden that restricts employees' Section 7 rights to resign or otherwise refrain from union activity. The Board found the policy's alternative procedure, which allows a member who believes that appearing in person poses an "undue hardship" to make alternative arrangements with the Union, imposed its own burden on employees and created uncertainty about whether alternative arrangements could be successfully negotiated. Additionally, the Board found the Union's policy regarding the revocation of dues-deduction authorizations unlawful for the independent reason that the policy unilaterally

imposed new requirements on the exercise of that right without obtaining individual employees' assent, as the statutory scheme demands.

I. PROCEDURAL HISTORY

After an investigation, the Board's General Counsel issued a complaint, based on an unfair-labor-practice charge filed by employee Ryan Greene, alleging that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by maintaining a policy that restrains union members' rights to resign from the Union and to revoke dues-deduction authorizations. Following a hearing, an administrative law judge issued a decision recommending that the complaint be dismissed. The General Counsel and Greene filed exceptions to the judge's decision. On review, the Board found, contrary to the judge's recommendation, that the Union violated the Act as alleged. (A. 84-88.)

II. THE BOARD'S FINDINGS OF FACT

The facts of this case are not in dispute. The Union operates a union hall in Detroit, Michigan and represents about 4,000 employees across southeastern Michigan who work under several collective-bargaining agreements. (A. 84; A. 19, 36-37, 39-40, 57, 63, 158.) On October 1, 2014, the Union's business manager and financial secretary, Michael Richard, unilaterally instituted a union policy ("Policy") that imposed new requirements on union members who desired to resign from the Union or to revoke their dues-deduction authorizations. (A. 84, 87; A. 33,

36, 40-41, 43, 52, 158.) The Policy, entitled “Policy Regarding Procedure For Opting Out Of Membership Rights, Benefits, And Obligations,” states, in part:

IT IS HEREBY RESOLVED that any member that desires to opt out of membership or dues deduction must do so in person at the Union Hall of IBEW Local 58 and show picture identification with a corresponding written request specifically indicating the intent of the member.

IT IS FURTHER RESOLVED that any member that feels that appearing in person at the Union Hall of IBEW Local 58 poses an undue hardship may make other arrangements that verify the identification of the member by contacting the Union Hall.

IT IS FURTHER RESOLVED that any other requirements in any other agreement, authorization or notices of IBEW Local 58 or the International Union of IBEW remain in place.

(A. 84; A. 158.) The Union posted the Policy at its union hall and distributed it to its stewards, staff, and elected officers. The Union continues to maintain the Policy. (A. 84; A. 33, 40, 53.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (then-Acting Chairman Miscimarra and Member McFerran; Member Pearce dissenting) found that the Union violated Section 8(b)(1)(A) of the Act by maintaining its policy that on its face restrains its members’ exercise of their Section 7 rights to resign their union membership and to revoke their authorizations for the deduction of union dues from their pay. (A. 84-88.) The Board’s Order directs the Union to cease and desist from the unfair labor practices found, and from, in any like or related manner, restraining or

coercing employees in the exercise of their rights under the Act. Affirmatively, the Order requires the Union to rescind its Policy and to post a remedial notice. (A. 88.)

STANDARD OF REVIEW

The Board possesses “special competence in the field of labor relations” and is charged with “the primary responsibility for applying the general provisions of the Act to the complexities of industrial life.” *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 100, 114 (1985) (internal quotation marks omitted).

Accordingly, its construction of the Act is entitled to “substantial deference” and must be upheld if “reasonable,” even if a reviewing court “might prefer another view of the statute.” *Id.* (internal quotation marks omitted); accord *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (the Board’s interpretation of the Act must be upheld if “reasonably defensible”). This Court therefore will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)).

The Court “applies the familiar substantial evidence test to the Board’s findings of fact and 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 [C]ourt might have reached a different conclusion *de novo*.” *U.S.*

Testing Co., Inc. v. NLRB, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-85, 488 (1951). Where, as here, “the Board has disagreed with the [administrative law judge] . . . the standard of review with respect to the substantiality of the evidence does not change.” *Local 702, Elec. Workers*, 215 F.3d at 15; accord *Universal Camera*, 340 U.S. at 496 (substantial-evidence standard “is not modified in any way” when Board disagrees with judge).

SUMMARY OF ARGUMENT

The Board reasonably found that the Union’s new Policy facially restrains its members’ exercise of their Section 7 rights. On its face, the Policy explicitly requires that, before a member may effectuate her right to resign from union membership or revoke her prior dues authorization, she must first appear in person at the union hall and present picture identification, or, if the member feels that appearing in person would pose an undue hardship, contact the Union and make unspecified “other arrangements” to verify her identification.

Applying settled principles to the Policy’s unique language, the Board reasonably determined that the Policy significantly burdens, and therefore unlawfully restricts, employees’ fundamental right to resign their union

membership. By demanding that members, wherever they live or work, visit the union hall in person, the Policy requires that members expend both time and money, as well as partake in a potentially uncomfortable face-to-face exchange with a union representative, before they may resign. And, by ordering that they present a picture identification, the Policy erects another substantial hurdle for any member who lacks such identification and must acquire it, if she can. The Policy's allowance that members may make "other arrangements" if they believe that appearing in person will create an "undue hardship" fails to save the Policy. Instead, it aggravates the burden by suggesting a member take on the uncertain and potentially confrontational endeavor of convincing the Union to accept an alternative arrangement. Such an uncertain process, left to the Union's discretion, invites delay and creates doubt about whether a member will be able to resign at all, if she cannot secure the Union's consent. Thus, the Board reasonably found that the Policy's requirements substantially impede and discourage members' exercise of their right to resign from the Union.

For essentially the same reasons, the Board reasonably concluded that the Policy's requirements also unlawfully burden and restrict the employees' Section 7 right to revoke their dues-deduction authorizations. The identical in-person, picture-identification, and other-arrangements hurdles that impede members' free

access to resignation similarly obstruct their freedom to revoke their dues authorizations.

Additionally, the Board reasonably found the Policy unlawful for the independent reason that the Union “simply had no authority to unilaterally impose any restrictions on the revocation of” employees’ dues-deduction authorizations.

(A. 87.) Such written authorizations are contracts between the individual employee and her employer, which must set forth any qualification on the employee’s freedom to revoke her consent to the continued deduction of union dues from her pay. Thus, applying established law, the Board reasonably determined that the Policy’s indisputably new and unilaterally imposed requirements unlawfully engrafted a limitation onto the employees’ existing dues authorizations without obtaining their individual consent.

The Union’s challenges to the Board’s decision rest on mischaracterizations of the Board’s reasoning, findings, and the language of the Policy itself. As such, the Union has provided no basis for overturning the Board’s Order.

ARGUMENT

This case presents the narrow question of whether a union unilaterally may impose new and substantial requirements on employees' exercise of their statutory rights to resign their union membership or revoke their prior dues-deduction authorizations. In light of well-established Board precedent, approved by the Supreme Court, the Board found that the policy was facially unlawful and violated Section 8(b)(1)(A) of the Act. Primarily, as described below, the Board found unlawfully burdensome the twin requirements that union members appear in person at the union hall and show picture identification in order to exercise their rights, as well as the alternative provision that allowed individuals who considered appearing in person an undue hardship to contact the Union and make unspecified 'other arrangements' to verify their identity. Contrary to the Union's repeated and hyperbolic assertions (Br. 5, 19, 27, 30 n.8, 31-32, 39-40, 44), this case does not stand for the broad proposition that any and all union rules that address the manner or method by which members may resign or revoke dues authorizations are "per se" unlawful. Indeed, the Board specifically reaffirmed that a union may require its members "to take minimal affirmative steps to effectively communicate [their] intention to the union," such as putting a resignation in writing and sending it to a designated union officer. However, as the Board reasonably found, the Union's new policy here does not involve such minimal steps, but rather, imposes a

significant burden on union members that restricts their statutory rights to resign and revoke their dues authorizations.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY MAINTAINING A POLICY THAT RESTRAINS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHT TO RESIGN THEIR UNION MEMBERSHIP

A. Applicable Principles

Section 7 of the Act guarantees employees not only the right to join and assist unions and to engage in other concerted activities, but also the right “to refrain from any or all of such activities.” 29 U.S.C. § 157; *accord NLRB v. Granite State Joint Bd., Textile Workers Union of Am., Local 1029*, 409 U.S. 213, 216 (1972). Section 7 therefore protects an employee’s right to resign her union membership. *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 102-07 (1985); *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330, 1333-36 (1984). This right reflects and supports the fundamental policy of “voluntary unionism” imbedded in the Act. *Pattern Makers’ League*, 473 U.S. at 104-07, 114.

Section 8(b)(1)(A) of the Act implements Section 7’s guarantees by making it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of [Section 7] rights.” 29 U.S.C. § 158(b)(1)(A). The mere maintenance of a union rule may violate Section 8(b)(1)(A). *Int’l Union of Elevator Constructors Local Union No. 8 v. NLRB*, 665 F.2d 376 (D.C. Cir. 1981)

(upholding Board finding of unlawful maintenance); *NLRB v. Sheet Metal Workers' Int'l Ass'n, Local 16*, 873 F.2d 236 (9th Cir. 1989) (same); *NLRB v. Local 73, Sheet Metal Workers' Int'l Ass'n*, 840 F.2d 501 (7th Cir. 1988) (same). Such rules, even if not enforced, may chill or discourage employees from exercising their statutory rights. *Elevator Constructors*, 665 F.2d at 381-82; *Sheet Metal Workers Local 73 (Safe Air)*, 274 NLRB 374, 375 (1985), *enforced*, 840 F.2d 501 (7th Cir. 1988); *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311, 311 (1983). The tendency of a particular union rule to restrain or coerce employees is a matter “for the expertise of the Board.” *Elevator Constructors*, 665 F.2d at 382.

Section 8(b)(1)(A) also contains a proviso stating that the prohibition against union restraint and coercion “shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.” 29 U.S.C. § 158(b)(1)(A). However, the Supreme Court has explained that this proviso only shields a union rule that is “a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.” *Scofield v. NLRB*, 394 U.S. 423, 430 (1969); *accord Neufeld*, 270 NLRB at 1332-33 (quoting and discussing *Scofield*). These are “separate and distinct conjunctive requirements” in determining the lawfulness

of a union rule—not factors to be “balanc[ed].” *Machinists Local 1327 (Dalmo Victor II)*, 263 NLRB 984, 990-92 (1982) (Van de Water and Hunter, concurring); *see Neufeld*, 270 NLRB at 1331, 1333-36. Thus, it is settled that a union rule that “impairs [a] policy Congress has imbedded in the labor laws” is invalid under Section 8(b)(1)(A), *Pattern Makers’ League*, 473 U.S. at 104, 114 (quoting *Scofield*)—even if the rule reflects a legitimate union interest. *Scofield*, 394 U.S. at 430; *Neufeld*, 270 NLRB at 1333-36; *Dalmo Victor II*, 263 NLRB at 990-92 (concurrence); *see also Elevator Constructors*, 665 F.2d at 378-79 (union unlawfully maintained bylaw in conjunction with lawful contract clause notwithstanding bylaw’s legitimate purpose).

B. The Policy Constitutes an Unlawful Restriction Because It Imposes a Significant Burden on Employees’ Exercise of Their Section 7 Right to Resign Their Union Membership

For more than 30 years, with Supreme Court approval, the Board has adhered to the principle that “any restrictions placed by a union on its members’ right to resign . . . are unlawful.” *Neufeld*, 270 NLRB at 1333; *Sheet Metal Workers Local 73*, 274 NLRB at 375, *enforced*, 840 F.2d 501, 505-06 (7th Cir. 1988); *Pattern Makers’ League*, 473 U.S. at 103-05 & n.13. As the Board explained in its seminal decision in this area, when a union’s restrictions delay “or otherwise impede” a member’s resignation, it “directly impairs the employee’s Section 7 right to resign or otherwise refrain from union or other concerted

activities.” *Neufeld*, 270 NLRB at 1333. Here, the Board reasonably found that, given the “significant burden” imposed by the requirements that a member appear in person at the union hall with a picture identification, as well as the “other arrangements” requirements, the Union’s Policy unlawfully restricts members’ Section 7 right to resign their membership. (A. 86.)

The Policy erects a substantial barrier by its twin requirements that employees “must” appear in person at the union hall and show picture identification in order to exercise their statutory right to resign. (A. 84-87; A. 158.) As the Board found, appearing in person at the union hall obviously would cost employees time and money, especially those who live or work some distance from the hall. (A. 86.) Indeed, the Union admits (Br. 14-15), as it must, that it is burdensome for employees like Greene, who lives about two hours from the union hall (A. 57, 63), to appear in person. Moreover, as the Board recognized, the requirement to appear in person would force an employee to participate in a “face-to-face encounter” at the union hall with a union representative whose job is to administer a policy that deems resignation harmful to its members.² (A. 86.) Thus, the in-person requirement sets up a potentially uncomfortable and confrontational encounter that many employees who are seeking to resign their membership would

² The Policy states the Union’s view that “loss of membership or financial contribution in IBEW Local 58 results in the loss of substantial rights of members and access to member-only benefits. The loss of such rights and benefits have an adverse effect on our members.” (A. 84; A. 158.)

wish to avoid. The prospect of such an encounter could serve as a particularly strong deterrent in the context of a strike or lockout, when tensions often are at their height and unions are acutely in need of solidarity and support.

For these reasons, the Board reasonably found that the Policy's directive that individuals appear "in person at the Union Hall" substantially burdens employees' right to resign their membership. (A. 86.) The Board's finding is consistent with its holding in *Newport News Shipbuilding & Dry Dock Co.*, a case involving revocation of dues-deduction authorizations, that "a requirement that employees appear in person at a union hall . . . impose[s], inherently, an unconscionable impediment" to employees' free exercise of their rights. *Newport News Shipbuilding & Dry Dock Co.*, 253 NLRB 721, 731-32 & n.34 (1980), *enforced, sub nom. Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488 (4th Cir. 1981). In enforcing the Board's order in that case, the Fourth Circuit agreed that such an in-person requirement "clearly could dampen" employees' rights, notwithstanding that "there [was] no evidence that employees . . . were harassed at the [union] office." *Peninsula*, 663 F.2d at 493.

The Policy's "picture identification" requirement further burdens employees' exercise of their resignation right by establishing another hurdle for the member seeking to resign. (A. 86.) As the Board explained, that requirement "creates an obstacle . . . for any member who lacks such identification and who

must acquire it, if he can.” (A. 86.) Such a process, the Board explained, may require the expenditure of both time and money. As such, it not only burdens the exercise of an employee’s right to resign but further delays the execution of her resignation. Finally, the Board noted the additional consideration that the picture requirement imposes a burden on “members who, like some in our society, object to ‘picture identification’ as a matter of religion or principle.” (A. 86.) *See generally Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197-99 (2008) (recognizing, in political-election context, burden imposed on prospective voters by state’s photo-identification requirement). Thus, the Board reasonably determined that, taken together, the Policy’s twin requirements—that members “must” appear in person at the union hall and show picture identification—impose a significant burden on employees’ Section 7 right to resign their membership. (A. 85-86; A. 158.)

The Board reasonably rejected the claim that the Policy’s alternative arrangements provision—inviting members who believe that appearing at the union hall would create an undue hardship to instead “make other arrangements that verify the identification of the member by contacting the Union Hall”—saved the Policy from its burdensome requirements on the employees’ right to resign. (A. 86.) To begin, the Board noted that the provision created uncertainty about whether a member would even be able to exercise her right at all if she is unable to

negotiate a successful arrangement with the Union. In particular, the Board recognized that the policy was silent about what such “other arrangements” might be or how the Union would exercise its apparent discretion to determine whether the arrangement was sufficient. While the “other arrangements” provision may express the Union’s willingness to discuss an employee’s request for an alternative to appearing in person,³ it makes clear that “whether and what alternative means are acceptable in a particular case is subject to the [Union’s] consent.” (A. 86 n. 10.) As the Board found, “[a]t a minimum, the policy . . . can reasonably be interpreted to give ultimate authority to the [Union].” (A. 86 n.10.) As such, the procedure places yet another, albeit different, restriction on the member’s right to resign, with the Union ultimately determining through an uncertain procedure how that resignation is effected.

Additionally, as the Board recognized, the alternative procedure also imposes its own burden because the requirement that a member reach an agreement with the Union—whatever that may be—may ultimately delay or impede a member’s resignation. (A. 86.) *See Neufeld*, 270 NLRB at 1333 (when a union seeks to delay or otherwise impede a member’s resignation, it directly impairs the employee’s Section 7 right to resign or otherwise refrain from union or

³ Notably, the provision in no way suggests that the Union would entertain a member’s request to be excused from the picture-identification requirement. (A. 158.)

other concerted activities). Indeed, there is no indication about how the Union will exercise its discretion in determining if the arrangements are sufficient. And not unlike the other restrictions placed on resignation, the requirement that a member contact the Union to make alternative arrangements presents a potentially confrontational process with the very representatives who consider such resignation detrimental to the Union. In the face of this uncertain arrangement, the Board reasonably found that the alternative arrangements provision was more than a ministerial matter and would tend to discourage union members from pursuing their statutory right to resign. (A. 86.)

The Board also properly rejected (A. 85 & n.5, 86 n. 6, n.8) the claim that the Policy serves a legitimate union interest, finding that the Union's interests cannot shield a union rule that impairs a policy Congress has imbedded in the labor laws. *Scofield*, 394 U.S. at 430; *Neufeld*, 270 NLRB at 1333-36. As the Board explained, among the policies imbedded in the Act is the policy reflected in Section 7 to afford employees the right freely to resign their union membership. In *Pattern Makers' League*, 473 U.S. at 104-05, the Supreme Court agreed with the Board that a rule regarding resignation during a strike impaired a policy imbedded in the labor laws and was invalid, finding "the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism" supported the Board's finding. So too here, the obstacles imposed by the Union's Policy

substantially burden and restrict the right to resign in contravention of the policy of voluntary unionism and the concomitant right to resign membership. (*see also* pp. 11-13 above.) As the Board stated, “[w]hatever legitimate interests a union may have for restricting the right to resign are immaterial: ‘regardless of their legitimacy, the union’s interests simply cannot negate or otherwise overcome fundamental Section 7 rights.’” (A. 85 (quoting *Neufeld*, 270 NLRB at 1334).)⁴

Nevertheless, it is worth noting that, as the Board found, at least one of the Union’s primary justifications for its Policy is factually untrue. (A. 86 n.6.) Specifically, despite the Policy’s declaration that the Union “has had experiences in the past where members have lost their membership through fraudulently submitted paperwork” (A. 158), Business Manager Richard admitted that the Union “has never had a single example of fraud or falsification” with respect to either a resignation of membership or a revocation of a dues-deduction authorization. (84-85, 86 n.6; A. 50.) Indeed, the only evidence of any purported fraud is that Richard once heard, about six or seven years before he created the Policy, that a different local union had experienced problems with members fraudulently removing other members from its hiring-hall list. (A. 84-85, 86 n.6; A. 41-42, 50, 58.)

⁴ Accordingly, the Union plainly errs in its repeated claims (Br. 5, 15, 18, 23-28, 31-32, 46-47) that the Board should have balanced the Policy’s restriction on employees’ Section 7 rights against the Union’s purported “legitimate interests” in issuing the Policy.

Before this Court, the Union's numerous attacks rest primarily on mischaracterizations of the Board's findings as well as its Policy.⁵ To begin, as discussed above (pp. 10-11), this case is not an assault on the Union's right to make its own internal rules. It is well settled that the Board does not involve itself in "judging the fairness or wisdom" of such rules. *Scofield*, 394 U.S. at 429. However, as *Scofield* and its progeny teach, the Union may not make rules that impair a policy Congress has imbedded in the labor laws. As discussed above, the Union's policy does just that and is therefore not permissible. Moreover, and contrary to the Union's repeated assertions (Br. 19, 30 n.8, 31-32, 39-40, 44), this case does not disturb the settled precedent that unions may lawfully require members to send their resignations in writing to a designated union officer; the Board expressly affirmed and reasonably distinguished such precedent. (A. 86.) *See Int'l Union, United Auto, Aerospace & Agr. Implement Workers of Am. v. NLRB*, 865 F.2d 791, 797 (6th Cir. 1989); *Auto Workers Local 148 (McDonnell-Douglas)*, 296 NLRB 970, 971 (1989).⁶ As the Board explained, such rules merely require that members take "minimal affirmative steps" to effectively communicate

⁵ Notably, however, the Union concedes (Br. 24 n.6) that if its Policy restricts the right to resign, it is invalid.

⁶ *See also Dalmo Victor II*, 263 NLRB at 992-93 & n.52 (concurrence) (hypothetical requirements that resignations are not effective unless made in writing and received by union would be "simply the ministerial acts necessary to ensure that a member's resignation is voluntary and has, in fact, occurred," rather than unlawful restrictions on resignation).

their intention to the union. In sharp contrast, the distinct in-person, picture-identification, and other-arrangements requirements here “demand[] far more of union members” and “impose[] a significant burden” that is inconsistent with the Act. (A. 86.)

The Union also mischaracterizes its policy. Incredibly, ignoring the language of its Policy, the Union argues (Br. 41-45) that the Policy’s directive that members “must” (A. 158) appear in person at the union hall is “completely voluntary” and “entirely up to the discretion of the member” (Br. 41), because the “other arrangements” provision “[leaves] it up to . . . the member as to how they wish to verify the authenticity.” (Br. 45.) These assertions are squarely refuted by the Policy’s language, which, as shown (pp. 16-18), clearly places ultimate authority regarding any potential alternative arrangements in the hands of the Union. Moreover, as the Board noted (A. 86 n.10), even if the Policy were ambiguous on this point, members could reasonably interpret it to give the Union such authority. As this Court has recognized, “[i]mpressions created by ambiguous union rules . . . may themselves coerce employees in violation of Section 8 of the Act.” *Elevator Constructors*, 665 F.2d at 381-82 (union unlawfully maintained “ambiguous” bylaw that “left [members] to speculate” about how it would be applied or enforced). Furthermore, the Union’s assertions defy common sense; they amount to the claim that it has issued a policy that explicitly commands

members to appear in person only to grant them the unfettered discretion to ignore that command at will.

The Union also widely misses the mark in relying (Br. 41-43) on Business Manager Richard's testimony as to his intent regarding "how [the Policy] would be applied in terms of" what alternative arrangements he "would accept"—stating that he intended to accept "any reasonable method." (A. 45-46). This testimony is utterly irrelevant to the Board's finding that the plain language of the Policy's text, on its face, unlawfully discourages and restrains employees in the exercise of their right to resign. (A. 85-86.)

Similarly, the Union does not help itself by pointing (Br. 14-15, 45) to its purported application of the Policy to Greene.⁷ As the Board explained, since the issue here is whether the Union's Policy is facially unlawful, "whether Greene actually was restrained or coerced in exercising his right to resign is immaterial." (A. 86 n.7.) *See, e.g., Sheet Metal Workers Local 73*, 274 NLRB at 375 (union rule was facially unlawful where Board found it would discourage employees from pursuing resignation, even absent evidence of enforcement); *cf. Cintas Corp. v.*

⁷ While there is no evidence as to whether Greene was aware of the Policy, he sent his employer a letter stating his intent to resign from the Union at some point after the Policy was implemented. After the employer forwarded the letter to the Union, a union representative called Greene using the telephone number it had on file and asked him whether he had sent the letter. Greene orally confirmed that he had sent it, and the Union accepted his resignation. (A. 85; A. 45-46, 57-58, 62-64.)

NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007) (“evidence of actual employee conduct cannot vindicate” a facially unlawful employer rule).⁸

⁸ Throughout its brief, the Union confusingly attacks (Br. 33-39, 49) arguments that purportedly were made by the charging party and/or the General Counsel in the proceeding below, but that the Board did not accept in its decision. Before the Court, the sole issue is whether the Board’s decision is reasonable, not whether the charging party’s or the General Counsel’s arguments below withstand scrutiny.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY MAINTAINING A POLICY THAT RESTRAINS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHT TO REVOKE THEIR PRIOR AUTHORIZATIONS FOR THE DEDUCTION OF UNION DUES FROM THEIR PAY

A. Applicable Principles

A union-represented employee may authorize her employer to deduct union dues from her paycheck and remit them to the union. Section 302 of the Labor Management Relations Act (29 U.S.C. § 186), which generally prohibits payments from an employer to a union, includes an express exception for the payment of union dues. Specifically, Section 302(c)(4) permits an employer to deduct union membership dues from employees’ wages and remit those moneys to their exclusive collective-bargaining representative, “Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.” 29 U.S. C. § 186(c)(4). *See generally Stewart v. NLRB*, 851 F.3d 21, 22-23 (D.C. Cir. 2017), as amended (Mar. 23, 2017); *Int’l Bhd. of Elec. Workers, Local No. 2008 (Lockheed Space Operations Co., Inc.)*, 302 NLRB 322, 324-25, 327-29 (1991).

Section 302 thus requires that dues deductions must be authorized in writing by “each employee”—a requirement intended for the protection of the individual

worker. *NLRB v. Atlanta Printing Specialties & Paper Prod. Union* 527, 523 F.2d 783, 786 (5th Cir. 1975); *Cameron Iron Works*, 235 NLRB 287, 289 (1978), *enforcement denied on other grounds*, 591 F.2d 1 (5th Cir. 1979). Whether to grant such an authorization is reserved to each employee's "voluntary choice" and "individual freedom of decision." *Atlanta Printing*, 523 F.2d at 786-87 (quoting *Felter v. S. Pac. Co.*, 359 U.S. 326, 334 (1959)); *accord Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987).

Thus, "the fundamental basis for [a dues deduction] is the voluntary consent of an employee." *NLRB v. Bhd. of Ry., Airline & S.S Clerks*, 498 F.2d 1105, 1109 (5th Cir. 1974). And, if granted, the written dues-deduction authorization constitutes "a contract" between the individual employee and her employer. *Atlanta Printing*, 523 F.2d at 785; *accord Lockheed Space*, 302 NLRB at 327; *Cameron Iron Works*, 235 NLRB at 289. Therefore, any limitation on the employee's freedom to revoke her consent "must . . . be expressed in" the written terms of the authorization itself. *United Food & Commercial Workers Dist. Union Local One v. NLRB* ("*UFCW Local One*"), 975 F.2d 40, 44 (2d Cir. 1992); *accord Trico Prod. Corp.*, 238 NLRB 1306, 1309 (1978); *Cameron Iron Works*, 235 NLRB at 289.

Just as Section 7's "right to refrain" from union activities protects an employee's right to resign her union membership, so too it protects her right to

revoke any prior authorization for the deduction of union dues from her pay.

Lockheed Space, 302 NLRB at 327; *see also AFM Wheel Goods Div.*, 247 NLRB 231, 233 (1980) (Section 7 protects right to refrain from authorizing dues deductions). The right to revoke a prior dues authorization is an important aspect of the policy of “voluntary unionism” imbedded in the Act. *Lockheed Space*, 302 NLRB at 327-28. (see p. 11.)

Although the Board is not responsible for enforcing Section 302, “neither does the statute bar the Board, in the course of determining whether an unfair labor practice has occurred, from considering arguments concerning Section 302 to the extent they support, or raise a possible defense to, unfair labor practice allegations.” *BASF Wyandotte Corp.*, 274 NLRB 978, 978 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986); *accord NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc) (the Board’s interpretation of Section 302 as it affects labor-law issues is entitled to “some deference,” provided that Board’s interpretation is “reasonable or permissible” and “not in conflict with interpretive norms regarding criminal statutes”); *Lockheed Space*, 302 NLRB at 325 n.8 (the Board may consider policies underlying Section 302 in deciding dues-deduction-related issues under Section 8 of the Act).

B. The Policy Constitutes an Unlawful Restriction Because It Imposes a Significant Burden on Employees' Exercise of Their Section 7 Right to Revoke Their Dues-Deduction Authorizations

Here, the Board reasonably found that just as the Union's policy unlawfully restricts the Section 7 right to resign union membership, so does it impermissibly restrain the right to revoke dues-deduction authorizations. (A. 86.) By the Policy's plain terms, the same "in person," "picture identification," and "other arrangements" requirements that restrict members' efforts to resign similarly restrict their efforts to revoke their dues authorizations. (A. 158.) As demonstrated (pp. 14-18), those restrictions place a substantial burden on employees, unlawfully impeding members' right to refrain from this union activity.

The Board, with court approval, has found a union's requirement that employees appear in person at the union hall to revoke their dues authorizations to be an "impediment to the statutorily guaranteed right of free choice." *Newport News*, 253 NLRB at 731, *enforced, sub nom. Peninsula*, 663 F.2d 488; *see also Steelworkers (Am. Screw Co.)*, 122 NLRB 485, 486 n.3, 488-89 (1958) (union unlawfully coerced employee in his right to refrain from signing dues-deduction authorization by requiring that he either sign authorization or pay his dues in person at union office located some 50 miles away). Not only does the in-person requirement erect a hurdle for the member seeking to revoke her dues

authorization, but the requirement sets up a potentially confrontational situation. As the Board recognized in *Newport News*, where revocation of a prior dues authorization is concerned, “the interest of the employees and the union are in direct conflict.” 253 NLRB at 732 (internal quotation marks omitted). Thus, employees seeking to revoke their dues authorization would tend to be discouraged from asserting their right in the face of this requirement.

Contrary to the Union’s claims (Br. 37-39) the Supreme Court’s decision in *Felter v. Southern Pacific Company*, 359 U.S. 326 (1959), a Railway Labor Act case, lends support to the Board’s finding. In that case, the Supreme Court found unlawful a requirement that employees must make their dues-deduction revocations on a particular form furnished by the union, which, once completed, the union would forward to the employer.⁹ *Id.* at 327-29. In finding the requirement “meaningfully burdensome” from the employees’ perspective, the Court refused to allow the employees’ freedom to be eroded in the name of procedure, and reasoned that the requirement might deter employees from exercising their rights. *Id.* at 334-38. As in *Felter*, the Union’s requirements here burden members’ right to revoke dues authorizations, and, contrary to the Union’s claim (Br. 38) are not narrowly tailored to achieve a legitimate purpose.

⁹ Contrary to the Union’s suggestion (Br. 37-38), the employees in *Felter* were not required to appear in person anywhere in order to obtain the form. *See Felter*, 359 U.S. at 327-29. Indeed, as the Court noted, the union there mailed the form to Mr. Felter. *Id.* at 329.

The Union concedes (Br. 13 n.4, 49-51) that union rules governing revocation are, as relevant here, subject to the same legal principles and analysis as those governing resignation. It offers no real challenge to the Board's finding that its Policy unlawfully restricts members' revocation right other than referencing (Br. 49-51) some of the same meritless contentions that it raises concerning resignation. Although the Union cites (Br. 50) *Boston Gas Co.*, 130 NLRB 1230 (1961), that case stands only for the proposition that simply requiring employees to give written notice of their revocations to their employer and union is "not unduly burdensome upon employees" and therefore permissible. 130 NLRB at 1231. As established above (pp. 10, 20-21), the Board has acknowledged that a writing requirement is lawful. But the Union's policy here is dramatically more burdensome and *Boston Gas* is therefore inapposite.

C. The Policy is Unlawful for the Independent Reason that It Establishes New Requirements on the Revocation of Dues-Deduction Authorizations Without Obtaining Individual Employees' Assent

The Board found that the Union's Policy violates Section 8(b)(1)(A) of the Act for the independent reason that it "impos[es] new requirements" on employees' revocation of their dues-deduction authorizations "without the assent of individual members." (A. 87.) That finding is supported by substantial evidence and consistent with law.

As shown above (pp. 24-25), the fundamental basis for a dues deduction is the voluntary consent of an employee and any limitation on the employee's freedom to revoke her consent must be in the terms of her written authorization. Accordingly, a union violates the Act by changing the revocation procedure that employees have agreed to in their dues-deduction authorizations—including by “impos[ing] an additional . . . requirement” on that procedure—without obtaining the assent of the affected individual employees. *Cameron Iron Works*, 235 NLRB at 289; *accord Newport News*, 253 NLRB at 730 (union and employer may not, through collective bargaining, “engraft[] an additional condition on revocation beyond that specified” in employees' authorizations). Otherwise, the terms of the dues-deduction authorization would become meaningless, and the individual employee would “lose[] the protection intended by the requirement in Section 302(c)(4) of a ‘written assignment.’” *Cameron Iron Works*, 235 NLRB at 289; *accord Newport News*, 253 NLRB at 730 (allowing unions and employers to create, through collective bargaining, additional limitations on employees' ability to revoke would mock Section 302's protective purpose).

It cannot be questioned that the Union failed to obtain individual members' assent because it is undisputed that the Union acted “unilaterally” in establishing the Policy. (A. 84, 87.) Indeed, Business Manager Richard readily admitted that

he drafted and issued the Policy on his own, without anyone else's involvement or subsequent approval. (A. 40-41, 43, 52.)

Ample evidence also supports the Board's finding that the Policy's revocation requirements were indisputably "new," and thus, were not pre-existing limitations on revocation established by the employees' prior dues authorizations. (A. 87.) As the Board emphasized (A. 87 & n.16), Richard specifically admitted that the policy he unilaterally created and put in place on October 1, 2014 was "new." (A. 40-41, 46, 52, 58.) Further, if, as Richard claimed (A. 40-42, 44, 46), the policy was designed to fix an alleged problem in the status quo, then, obviously, its requirements were not part of the revocation procedure under the existing dues authorizations.

The Board therefore reasonably found that the Union's Policy created new limitations on members' freedom to revoke their authorizations without securing their individual consent. (A. 87.) Accordingly, it reasonably concluded that the Union thereby violated Section 8(b)(1)(A) of the Act. *See Cameron Iron Works*, 235 NLRB at 289; *Newport News*, 253 NLRB at 722, 730-31; *see also UFCW Local One*, 975 F.2d at 44 (union violated 8(b)(1)(A) by refusing to honor employees' requests for partial revocations where existing dues-deduction authorizations did not clearly forbid such revocations).

Before this Court, the Union asserts (Br. 20, 51-52) only three cursory challenges to the Board's finding that the Policy is unlawful. Specifically, the Union contends that substantial evidence does not support this finding because the dues-deduction authorizations themselves are not in the record; that the language of the Policy's final paragraph, which provides that any other requirements in any agreement or authorizations remain in place, fatally undermines the finding; and that this independent finding improperly rests on a theory that had not been litigated.

Because the Union did not raise any of these contentions to the Board, the Court does not have jurisdiction to consider them. Section 10(e) of the Act provides in relevant part: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Courts thus "lack[] jurisdiction to review objections that were not urged before the Board." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *accord Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015).

When an issue not addressed by the administrative law judge is instead addressed for the first time in the Board's decision, a party seeking to challenge it on appeal must first assert its challenge to the Board via a motion for reconsideration or reopening of the record. *Int'l Ladies' Garment Workers' Union*,

Upper S. Dep't, v. Quality Mfg. Co., 420 U.S. 276, 281 n.3 (1975); *Nova Se.*, 807 F.3d at 313, 316; *see also* 29 C.F.R. § 102.48(c). In the absence of such a motion, Section 10(e) bars a reviewing court from considering the party's challenge—even if the challenge is grounded in due process. *Quality Mfg.*, 420 U.S. at 281 n.3; *Banner Health Sys. v. NLRB*, 851 F.3d 35, 44 (D.C. Cir. 2017); *Int'l Union of Painters & Allied Trades, Local Unions No. 970 & 1144 v. NLRB*, 309 F.3d 1, 4-5 (D.C. Cir. 2002); *Noel Foods, a Div. of Noel Corp. v. NLRB*, 82 F.3d 1113, 1120-21 (D.C. Cir. 1996).

Here, the Union did not file a motion for reconsideration or reopening of the record, and did not otherwise assert before the Board the contentions it now raises challenging the Board's independent finding.¹⁰ (A. 87.) Nor has the Union claimed, much less shown, “extraordinary circumstances” that might excuse its failure.¹¹ The Court, therefore, is without jurisdiction to review those contentions. *See, e.g., Quality Mfg.*, 420 U.S. at 281 n.3 (Court may not consider objection “that

¹⁰ Notably, the Union never moved to reopen the record so that it could introduce the existing dues authorizations.

¹¹ To the extent the Union may claim that its failure is excused by dissenting Member Pearce's articulation of objections to the majority's finding (A. 90-91), or by the majority's rejection of those objections and its discussion of related issues (A. 87), those claims must fail. It is settled that a party “may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself.” *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016); *accord HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015).

[employer] was denied procedural due process because the Board based its order upon a theory of liability . . . allegedly not charged or litigated,” since employer failed to file a petition for reconsideration); *Banner*, 851 F.3d at 44 (employer’s argument that Board violated due process by finding a violation on a theory not litigated was not properly before the Court because employer failed to raise it before the Board).

In any event, the Union’s contentions would lack merit even if properly before the Court. First, it is immaterial that the dues-deduction authorizations themselves are not in the record because, as demonstrated, substantial evidence shows that the Policy’s revocation requirements were new. No more is needed to reveal that the dues authorizations, whatever their exact language, did not establish the limitations on revocation instituted by the Policy at issue here.

Second, the Union plainly misconstrues the import of the Policy’s final paragraph, which merely states that “any *other* requirements in any . . . authorization . . . remain in place.” (A. 158 (emphasis added).) But the Board did not find that the new policy eliminated existing requirements. Rather, the language in this final paragraph confirms the Board’s finding (A. 87) that the Policy is unilaterally adding new requirements that are not already found in those authorizations. (A. 87.) *See Cameron Iron Works*, 235 NLRB at 289 (union unlawfully imposed additional requirement on existing authorizations); *Newport*

News, 253 NLRB at 730 (union unlawfully engrafted an additional condition on existing authorizations).

And, finally, the Union's argument that the Board erred in independently finding a violation based on a theory that was not litigated is also meritless. As the Board found, "no due process concerns are implicated" here, where "the violation is alleged in the complaint, the factual basis for the violation is clear from the record, [and] the law is well established." (A. 87 n.17.) Specifically, the complaint alleged that the Union violated Section 8(b)(1)(A) of the Act by maintaining its Policy. (A. 122.) In making its independent finding, the Board concluded that the Union violated that same statutory provision by precisely the same conduct. (A. 87 & n.17.) The Board simply relied on a different *theory* than that applied by the judge or the General Counsel.¹² (A. 87 & n.17.) Yet, as the Board explained, it has, with court approval, "repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint." (A. 87 n.17 (emphasis in original).)

Hawaiian Dredging Constr. Co., Inc., 362 NLRB No. 10 at n.6 (Feb. 9, 2015), *enf. denied on other grounds*, No. 15-1039, 2017 WL 2294162 (D.C. Cir. May 26,

¹² As the Board observed (A. 87), the judge expressly acknowledged this independent theory in his decision. (A. 97). However, he incorrectly determined that the evidentiary record was insufficient to support finding a violation on this basis. (A. 87, 97).

2017); *see also* *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 347-48 (5th Cir. 1959); *Pepsi Am., Inc.*, 339 NLRB 986, 986 (2003); *Jefferson Elec. Co.*, 274 NLRB 750, 750-51 (1985), *enforced*, 783 F.2d 679 (6th Cir. 1986).

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.

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June 2017

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

LOCAL 58, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS (IBEW), AFL-CIO)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1058, 17-1108
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CB-149555
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
RYAN GREENE)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 8,173 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 29th day of June, 2017

**STATUTORY AND REGULATORY
ADDENDUM**

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 7..... ii

Section 8(b)(1)(A)..... ii

Section 10(a) ii

Section 10(e) iii

Section 10(f)..... iii

Labor Management Relations Act, 29 U.S.C. § 141, et seq.

Section 302..... iv

Regulations

29 C.F.R. § 102.48(c)..... vii

THE NATIONAL LABOR RELATIONS ACT

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

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 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) provides:

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

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

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

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding 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 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. . . . 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 Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

THE LABOR MANAGEMENT RELATIONS ACT

Section 302 (29 U.S.C. § 186) provides in relevant part:

(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.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title

49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the

administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be

prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

REGULATIONS

29 C.F.R. § 102.48(c) provides:

Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

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

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

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RYAN GREENE)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 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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