
Nos. 15-1231 & 15-1467

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

**CC1 LIMITED PARTNERSHIP,
d/b/a COCA COLA PUERTO RICO BOTTLERS**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-2989

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 Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

1. CC1 Limited Partnership, d/b/a Coca Cola Puerto Rico Bottlers was a respondent before the Board (Board Case Nos. 24-CA-011018 et al.) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters, was a respondent before the Board (Case Nos. 24-CB-002706 et al.).

4. The following individuals were charging parties before the Board: Carlos Rivera, Carlos Rivera-Sandoval, Benjamín Rodríguez-Ramos, Edwin Cotto-Roque, Héctor Sánchez-Torres, Jariel Rivera-Rojas, Héctor Vázquez-Rolón, Jorge Ramos-Arroyo, José Rivera-Ortiz, Vidal Arguinzoni, Miguel Cotto-Collazo, Jan Rivera-Mulero, Luis Bermúdez, Héctor Rodríguez, Juan Rivera-Díaz, José Collazo-Flores, Gabriel Rojas-Cruz, José Rivera-Barreto, Josué Rivera-Aponte, José Suárez, Jorge Oyola, Pedro Colón-Figueroa, José Sánchez, Luis Ocasio, Luis Rivera-Morales, José Rivera-Martínez, Virginio Correa, Carlos Rivera-Rodríguez,

Luis Meléndez, Dennes Figueroa, Eddie Rivera-García, Giovanni Jiménez, Rafael Oyola-Meléndez, Carlos Ortiz-Ortiz, Miguel Colón, Migdalia Magriz, Silvia Rivera, Jesús Baez Ortiz, Humberto Miranda Barroso, Orlando Hernández Doble, and Raymond Reyes Rivera.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on June 18, 2015, reported at 362 NLRB No. 125.

C. Related Cases

This matter was previously before the Court in *CCI Limited Partnership v. NLRB*, Case No. 13-1034, which was dismissed on the Board's motion. Board Counsel is unaware of any related cases pending in this Court or any other court.

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 3rd day of July, 2017

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GLOSSARY

“the Board” National Labor Relations Board

“Br.” Company’s opening brief

“DA.” Deferred Appendix

“the Act” National Labor Relations Act, 29 U.S.C. § 151, et seq.,
as amended

“the Company” CC1 Limited Partnership, d/b/a Coca Cola
Puerto Rico Bottlers

“the Union” Union De Tronquistas De Puerto Rico, Local 901,
International Brotherhood of Teamsters

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of CC1 Limited Partnership, d/b/a Coca Cola Puerto Rico Bottlers (“the Company”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board

Order issued against the Company, reported at 362 NLRB No. 125, 2015 WL 3814052 (June 18, 2015) (“DA 161-69.”)¹

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act,” 29 U.S.C. §§ 151, 160(a)). The Board’s Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides for the filing of petitions for review in this Circuit. The petition and cross-application were timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and ultimately discharging Miguel Colon for participating in the September 9 work stoppage?
2. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging four employees for participating in the October 20-22 strike?
3. Is the Board entitled to summary enforcement of its finding that the Company violated Section 8(a)(1) of the Act by coercing its employees, who were

¹ “DA.” Refers to the deferred 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.

suspended for participating in the October strike, to sign overbroad last-chance agreements as a condition of their reinstatement?

4. Does the Court lack jurisdiction to consider the Company's challenge to the Board's remedy requiring it to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. RELEVANT PROCEDURAL HISTORY

On the basis of dozens of unfair-labor-practice charges filed by the Company's employees, the Board's General Counsel issued a complaint raising various allegations against both the Company and the Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters ("the Union"), which represents production and warehouse employees at the Company's bottling plant in Cayey, Puerto Rico. (DA. 46.) Following a hearing, an administrative law judge found that the Company committed several violations of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), and that the Union committed several violations of Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). (DA. 57-68.)

On September 18, 2012, in response to exceptions filed by the Company, the Union, and the General Counsel, the Board (Chairman Pearce, Members Griffin and Block) issued a Decision and Order, affirming, with some modifications, the judge's findings, conclusions, and proposed order, and reversing several findings, as described below. (DA. 46-53.) On January 24, 2013, the Board denied the Company's motion for reconsideration of its decision and order. (DA. 108-13.)

The Company petitioned this Court for review of both the Board's September 18, 2012 Order, and its January 24, 2013 Order denying reconsideration. D.C. Cir. No. 13-1034 (DA. 114-18.). The Court put that case into abeyance pending the Supreme Court's decision in *NLRB v. Noel Canning*, No. 12-1281. On June 26, 2014, the Supreme Court issued its decision in *Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012 were invalid, including those of Members Griffin and Block. Subsequently, the Board set aside both of the Board's challenged orders in this case. *CCI Limited Partnership*, 2014 WL 2929759 (vacating Order); (DA. 161 (explaining Board vacated Order Denying Reconsideration)). The Board moved this Court to dismiss the petition for review, which the Court granted. *CCI Limited Partnership v. NLRB*, No. 13-1034, 2014 WL 4631879 (Aug. 19, 2014) (DA. 155.)

On June 18, 2015, the Board (Chairman Pearce and Member Hirozawa, Member Johnson, dissenting in part), issued the Decision and Order under review. (DA. 161-69.) The Board explained that it considered the judge's decision de novo, as well as the record in light of the exceptions and briefs, and the vacated Decision and Order and Order Denying Reconsideration. The Board affirmed the judge's findings and conclusions to the extent and for the reasons stated in the vacated Decision and Order, which it incorporated by reference. (DA. 161.) It also agreed with, and adopted in part the findings of, the Board's vacated Order denying reconsideration, which it incorporated by reference. (DA. 161 n.1.)²

II. THE BOARD'S FINDINGS OF FACT

Since at least 2003, the Union has been the designated bargaining representative of the Company's production and warehouse employees at the Company's Cayey plant. (DA. 54; 356-60.) The parties' initial collective-bargaining agreement took effect on July 1, 2003, and expired on July 1, 2008, which the parties extended until July 31. (DA. 46, 54; 360, 365.)

² Throughout the Board proceedings, the parties settled many of the charges filed against the Company, and all of the charges filed against the Union. (DA 46 n.1, 53 & nn. 4 & 5, 54.) Only the facts relevant to the unsettled issues are set forth below.

A. The September 9 Work Stoppage

On September 9, 2008, the parties participated in a collective-bargaining session beginning at 2:00 p.m. in their continuing efforts to negotiate a successor agreement. (DA. 55; 201, 202.) The Company was represented by attorney Miguel Maza and Senior Human Resources Director Lourdes Ayala. (DA. 55; 200.) The Union was represented by Jose Adrian Lopez, a business representative employed by the Union who served as chief negotiator, as well as five shop stewards at the plant: Carlos Rivera, Miguel Colon, Francisco Marrero, Romain Serrano, and Felix Rivera. (DA. 54; 404-06.) As the session was ending around 5:00 p.m., Lopez asked Ayala whether he could visit the plant at around 8:30 p.m. that evening to meet with employees on the third shift to discuss the status of negotiations and several issues pertinent to those employees.³ (DA. 55; 203.)

That evening, Ayala reported to Operations Director Carlos Trigueros that she told Lopez he could not visit the plant that night. (DA. 55; 275-76.) She then called security to alert them that Lopez could not enter the plant, and Trigueros passed along the news to supervisor Victor Colon. (DA. 55; 276-77, 287-90.)

³ Witnesses offered conflicting testimony over whether Ayala gave Lopez permission to return to the plant that evening. (DA. 55.) Because the relevant complaint allegations concern the shop stewards activities that night, and not Lopez's activities, the Board found it unnecessary to resolve that matter. (DA. 57.)

Lopez arrived at the plant around 8:30 p.m. with shop stewards Marrero and Felix Rivera. (DA. 55; 204.) The security guard at the entrance gate told Lopez that he was not authorized to enter. (DA. 55; 204.) Lopez asked the guard to check with Ayala, and when the guard ignored his request, Lopez drove past the main gate and entered the plant. (DA. 55; 205-06.) He went to the cafeteria to meet with employees. (DA. 55; 205.)

Trigueros, having learned that Lopez entered the plant, instructed supervisor Victor Colon to find him. (DA. 55; 270.) Colon located Lopez in the cafeteria meeting with 15-20 warehouse employees. (DA. 55; 207-08, 271-72.) Colon told Lopez to leave the plant or he would call the police. (DA. 55-56; 208-09, 272, 273.) The two argued, then Colon left the cafeteria and instructed security to call the police. (DA. 56; 209, 273.)

Lopez asked the employees to go to the warehouse area with him to discuss negotiations further. (DA. 56; 210-11.) As they walked from the cafeteria to the warehouse, and once there, stewards Carlos Rivera, Marrero, Serrano, and Felix Rivera encouraged their fellow bargaining-unit members to abandon their work stations and join the group heading to the warehouse area. (DA. 58; 210, 223, 274, 300, 312-15.) When the employees arrived in the “conventional area” in front of the warehouse, the group had grown to approximately 80-100 employees. (DA. 56; 283.)

Shop steward Miguel Colon, who had participated in the negotiation session earlier in the day, arrived at the plant between 8:40 and 8:45 p.m. to attend the meeting in the cafeteria. (DA. 56; 227.) After passing through security, he observed a state police car in the parking lot. (DA. 56; 227.) He entered the plant and, finding the cafeteria empty, called Carlos Rivera and learned that the employees were in the conventional area. (DA. 56; 227.)

Colon arrived at the conventional area after 9:00 p.m., where he found a large number of employees already meeting with Lopez. (DA. 56; 227.) He did not instruct or encourage any bargaining-unit employees to leave their workstations. (DA. 58; 229, 242.) He observed Victor Colon arrive in the area accompanied by several police officers, followed by Trigueros. (DA. 56; 228.) Trigueros spoke with Lopez, then Lopez informed the employees that a meeting would occur the next day and that employees should return to work. (DA. 56; 213, 229.) Shop steward Colon left the plant around 9:20 p.m. (DA. 56; 229.)

B. The Company Suspends the Shop Stewards and the Union Responds By Formulating Demands and Holding a Strike Vote

The following day, September 10, the five shop stewards were denied entry to the plant when they reported to work and were suspended without pay. (DA. 56; 214, 229-30.) On September 22, the Company sent each steward a letter stating they were suspended for “invading private property, encouraging others to abandon their job, verbally abusing the supervisors and intentionally paralyzing the

production line.” (DA. 56; 231-32, 366-70.) The Company did not discipline any of the bargaining-unit employees who left their work stations on September 9.

(DA. 57; 262.)

On September 10, after the shop stewards were suspended, Lopez met with the Union’s attorney, Jose Carreras, and Secretary-Treasurer German Vazquez, and then the three of them met with the stewards. (DA. 59; 214-15.) During that meeting they decided to convene an assembly with the bargaining unit on September 15 to discuss three demands they would make to the Company to resolve what took place on September 9. (DA. 59; 216.) Specifically, they would demand that the Company (1) immediately reinstate the stewards; (2) not file any Board charges against the Union based on the work stoppage, as it had threatened; and (3) return to the bargaining table. (DA. 59; 216, 366-70.)

Around September 12, Lopez met with Company attorney Maza. During that meeting, Lopez presented to Maza the Union’s three demands. (DA. 48, 59, 162; 217-18.) The Company rejected the Union’s offer. (DA 162; 217-19.)

Approximately 130-160 bargaining-unit members attended the September 15 assembly. (DA. 59; 219-20.) There, a motion passed unanimously authorizing a strike to protest the suspension of the five stewards, and to demand that the Company return to the bargaining table and not file Board charges. (DA. 59, 162; 219-21.) The following day, Secretary-Treasurer Vazquez sent a document to

Teamsters headquarters requesting approval for strike assistance. (DA. 48, 59, 162; 225-26, 438-39.) The Teamsters approved that request on October 14. (DA. 59, 162; 407-09.)

C. The Company Discharges the Five Shop Stewards; the Bargaining-Unit Members Again Authorize a Strike

On October 9, at the request of bargaining-unit members, the suspended shop stewards prepared and distributed a flyer at around 7:30 a.m. announcing another assembly on October 12 to further discuss the three demands to be presented to the Company. (DA. 59; 247.) Also on that date, suspended shop steward Colon was told by an attorney for the Union that the only way to secure the stewards' reinstatement was to go on strike. (DA. 59, 162 n.5; 249.) Later that day, a Union officer asked Colon not to divide the membership by voting to authorize a strike. (DA. 59, 162 n.5; 244.)

The next day, October 10, the Company discharged the five stewards. (DA. 57, 162; 371-74.) The discharge letter that each steward received states in part: "Your acts constituted violent acts, disturbance of the peace, threats and also lead and participated in an illegal strike." (DA. 59; 196, 371-74.)⁴

⁴ The parties settled the claims related to the suspension and discharge of shop stewards Carlos Rivera, Francisco Marrero, Romain Serrano, and Felix Rivera, leaving only the suspension and discharge of Miguel Colon in issue here. (DA. 162 n.2.); *see also* Br. 9.

On October 12, the suspended stewards held the assembly. All bargaining-unit employees in attendance signed a petition to authorize a strike unless the Company agreed to the Union's three demands. (DA. 59, 162; 233-36.) On October 14, shop steward Colon sent Union Secretary/Treasurer Vazquez the list of employees who signed the strike-authorization petition. (DA. 49, 59, 162; 237-38.) The Union never responded. (DA. 162; 238.)

The following day, October 15, the Union wrote to the Company to demand that negotiations resume. (DA. 162; 386-89.) In that letter, the Union threatened to take "legitimate actions, protected by law, in order to protect [employee] rights." (DA. 162; 386-89.) The Company agreed to resume negotiations, but did not agree to reinstate the discharged stewards or not file Board charges over the September 9 work stoppage. (DA. 162; 390-94.)

D. The Bargaining Unit Goes on Strike

On October 20, approximately 109 bargaining-unit employees went on strike, and remained on strike for three days, until October 22. (DA. 61 n.25, 162; 239.) During the strike some employees carried picket signs protesting supervisor Victor Colon's decision to have Lopez removed from the plant on September 9. (DA. 60; 239-40.) Other employees used a loudspeaker to protest the stewards' discharges, demand their reinstatement, and demand a return to the bargaining table. (DA. 49, 60, 162; 240, 253, 259-60, 261, 267-68.)

Also on October 20, the Company informed Union Secretary/Treasurer Vazquez that an illegal strike was going on. (DA. 60; 395-99.) In response, the Union wrote to the Company to say that the Union did not authorize the strike. (DA. 60; 400-03.) The Company copied the Union's letter and had security personnel distribute it to the striking employees. (DA. 49 n.14; 246, 284, 310.) The Union never informed the strikers that the strike was unauthorized or that it was inconsistent with the Union's position regarding the terminated stewards or with any other union objective. (DA. 49, 162; 319-20.)

The Company created a list of employees who participated in the strike. (DA. 60; 282.) Although the Company initially decided to terminate all bargaining-unit employees that had participated, it ultimately decided, based on its operational needs, that some employees would only be suspended. (DA. 60; 278, 281.) On October 23, the Company discharged 34 employees and suspended 52 employees for participating in the strike. (DA. 59, 162; 281.)⁵

E. The Company Requires That Employees Suspended for Participating in the Strike Sign “Last Chance” Agreements As A Condition of Their Reinstatement

After the Company suspended and discharged the striking participants, the Union sought reconsideration on behalf of those suspended. (DA. 64; 380 ¶ 4.)

⁵ The parties settled the charges of all employees who were disciplined as a result of the strike except for four who were discharged: Hector Sanchez-Torres, Jan Rivera-Mulero, Jose Suarez, and Luis J. Rivera-Morales. (Br. 9.)

The Union and Company negotiated last-chance agreements, which a number of employees subsequently executed, and which provided for their reinstatement subject to immediate termination for any violation of its terms. (DA. 64; 263-65, 375-85.) The agreements contained a provision, paragraph 7, stating “[t]he employee agrees not to testify, to provide evidence against the Company or the Union in any Court of law, administrative agency or hearing, or in any local or Federal forum, except when the employee is subpoenaed or ordered to do so by a Court of law or competent authority.” (DA. 64 & n.39; 382 ¶ 7.)⁶

III. THE BOARD’S CONCLUSIONS AND ORDER

The Board found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) by terminating shop steward Miguel Colon for his participation in the September 9 work stoppage, and suspending and/or terminating employees for participating in the October 20-22 strike. The Board also found that the Company violated Section 8(a)(1) by requiring employees to sign overbroad last-chance agreements as a condition of their reinstatement. (DA. 47 & n.6, 162-63 & n.7.) To remedy those violations, the Board ordered the Company to cease and desist from discharging, suspending, or otherwise discriminating against employees because they engaged in union or protected concerted activities and/or

⁶ Although the ALJ found that the Company also violated Section 8(a)(3) and (1) by terminating four employees for violating last-chance agreements that they signed following the strike, the parties later settled that issue. (DA. 64-65.)

encouraged other employees to do so; coercing employees into signing overbroad “last chance” agreements as a condition of their reinstatement; and discharging, suspending, or otherwise discriminating against employees because they participated in a protected strike; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

(DA. 164.) Affirmatively, the Board ordered the Company to offer reinstatement to Miguel Colon, Hector Sanchez-Torres, Jan Rivera-Mulero, Jose Suarez, and Luis J. Rivera-Morales; make them whole for their losses; compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award; remove from its files any reference to the unlawful suspensions and discharges and any reference to the last-chance agreements; and post a remedial notice. (DA. 164.)

SUMMARY OF ARGUMENT

In 2009, during attempts by the Union and the Company to negotiate a new collective-bargaining agreement, the Company engaged in a series of acts that punished employees for engaging in activities protected by the Act. First, the Company unlawfully suspended and ultimately discharged shop steward Miguel Colon for participating in the September 9 work stoppage. While the Company attempts to justify that discipline by insisting that Colon joined his fellow stewards in encouraging their fellow bargaining-unit employees to join the work stoppage, the evidence does not bear this out. Rather, it establishes that Colon arrived at the

facility after employees had already stopped working and gathered in the conventional area of the plant. Accordingly, substantial evidence supports the Board's finding that the Company disciplined Colon in violation of Section 8(a)(3) and (1) of the Act.

Second, the Company suspended and/or discharged employees who participated in a lawful strike from October 20-22 to further the Union's firmly established demands that the Company reinstate the stewards, return to the bargaining table, and rescind its threat to file Board charges over the September work stoppage. Although the Union did not authorize the employees to go on strike the employees' decision to do so remained protected under Section 7. The strike did not offend the majority-rule principle embodied in Section 9(a) of the Act, 29 U.S.C. § 159(a), because the employees did not seek to either bypass the Union and bargain directly with their employer or take a position that was inconsistent with any union objective. Accordingly, the Company violated Section 8(a)(3) and (1) by suspending and/or discharging employees for engaging in activity protected by the Act.

The Company also coerced employees who were suspended for participating in the October strike into agreeing not to engage in certain forms of protected activity in the future. Specifically, the Company required them to sign "last-chance" agreements that provided for their reinstatement subject to immediate

termination for any violation of its terms, which included a requirement that they not testify or provide evidence against the Company to an administrative agency or in any federal forum. In doing so, the Company interfered with its employees' right to engage in concerted activity, violating Section 8(a)(1) of the Act. The Company has waived any challenge to this finding by not raising it in its opening brief, entitling the Board to summary enforcement of its Order.

Finally, the Company challenges that portion of the Board's Order requiring that the Company compensate the discriminatees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum awards. The Company failed, however, to present that challenge to the Board in a motion seeking reconsideration of the Board's Order and has not asserted any extraordinary circumstances to excuse that failure. As a result, Section 10(e) of the Act jurisdictionally bars this Court from considering that argument. *See* 29 U.S.C. § 160(e).

STANDARD OF REVIEW

The Board's construction of the Act is entitled to affirmance if it is "reasonably defensible," even if a court would have preferred another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). And the Board's policy judgments will be upheld "[u]nless arbitrary or capricious." *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). And this Court will accept credibility determinations made by the judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING SHOP STEWARD MIGUEL COLON FOR PARTICIPATING IN THE SEPTEMBER 9 WORK STOPPAGE

A. An Employer Violates the Act by Interfering With Employees’ Exercise of Section 7 Rights and Discriminating Against Employees Because of Their Union Activity

Section 7 of the Act 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, and . . .

to refrain from any or all of such activities.” 29 U.S.C. § 157. Section 8(a)(1), in turn, makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). And Section 8(a)(3) of the Act bans “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.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by discharging or taking other adverse employment actions against an employee for engaging in union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).⁷

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-404 (1983), the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Applying that test, courts will enforce the Board’s order finding a discharge unlawful if substantial evidence supports the Board’s finding that an employee’s protected activity was “a motivating factor” in the employer’s discharge decision,

⁷ Because taking adverse action for union activity also interferes with an employee’s Section 7 right to engage in protected concerted activity, a violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *see also Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 218 (D.C. Cir. 2016). If the lawful reasons advanced by the employer for its actions were a pretext – that is, if the reasons either did not exist or were not in fact relied upon – the employer's burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *see also Ozburn-Hessey Logistics*, 833 F.3d at 219-20.

B. The Company Was Unlawfully Motivated When It Discharged Shop Steward Miguel Colon

The Board (DA. 162, 163 n.7), agreed with the judge (DA. 57), that Colon was engaged in protected activity on September 9 when he and his coworkers gathered in the conventional area to protect their right to meet with their union representative about ongoing negotiations. The Company has waived any challenge to that finding by not raising it in its opening brief. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not raised in opening brief are waived).

Moreover, the Company failed to challenge that finding on a timely basis in its exceptions filed with the Board, as is required by the Board's rules. *See* 29 C.F.R. § 102.46(b)(2) ("Any exception . . . not specifically urged shall be

deemed to have been waived.”). Accordingly, this Court is jurisdictionally barred from considering it by Section 10(e) of the Act, which provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (“[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.”).

Although the Company raised the issue in a motion seeking reconsideration of the Board’s Order, as the Board explained in denying that motion (DA. 161 n.1, *affirming and incorporating by reference* Order Denying Reconsideration, DA. 108-13), that was untimely, for the Company had the opportunity to challenge the judge’s finding in its exceptions yet failed to do so. *See Parkwood Dev. Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (holding 10(e) bars consideration of argument raised for first time in motion seeking reconsideration where argument could have been presented in exceptions brief).

Rather than challenge the finding that Colon’s actions were protected, the Company insists (Br. 37-43) that it validly suspended and discharged Colon for joining the other stewards in encouraging their coworkers to join the work stoppage, which the Company alleges violated Article 12 of the parties’ collective-

bargaining agreement.⁸ Article 12 prohibited stewards, while carrying out their duties, from “interrupt[ing] the work of the rest of the employees” and from “declar[ing] strikes or any other action that paralyzes or obstructs the work of the company or work place.” (DA. 47 n.9.) Substantial evidence, however, supports the Board’s finding (DA. 58, 163 n.7) that Colon did not encourage anyone to participate in the work stoppage, and merely joined the protest along with many other bargaining-unit employees, none of whom were disciplined.

The unrefuted evidence establishes that Lopez and stewards Francisco Marrero and Felix Rivera initiated the work stoppage after they left the cafeteria on Victor Colon’s orders and made their way to the conventional area. As described above (pp. 7-8), Stewards Carlos Rivera and Romain Serrano joined the group and encouraged additional employees to stop work and join them. Lopez and Victor Colon then had a second encounter which led Colon to call the police. By the time Miguel Colon arrived at the plant, there was already a state police car in the parking lot. He then made his way to the cafeteria and, finding it empty, located Lopez and the employees gathered in the conventional area, where he learned from others what had transpired between Lopez and Victor Colon.

⁸ Before the administrative law judge, the Company also insisted that it lawfully suspended and discharged Colon for violating Article 13 of the parties’ collective-bargaining agreement as well as the Company’s Rules of Conduct. (DA. 57.) The Company has abandoned those arguments in its opening brief.

As Colon testified (DA. 229, 242), and Lopez and employee Alexis Hernandez confirmed (DA. 212, 257), he was not present when the other stewards encouraged employees to stop working. In its attempt to refute that evidence, the Company (Br. 43) can only point to the brief testimony of Manager Armando Troche. Although Troche acknowledged (DA. 307) that Colon arrived last, when asked what he witnessed with respect to Colon, he responded (DA. 307): “Well, no, he arrived and he started doing what the others [were] doing . . . telling them to stop.” The judge (DA. 58), however, rejected that testimony in light of the evidence, described above, establishing that Colon did not arrive until after other stewards successfully encouraged employees to stop work. The Company has not challenged that credibility determination before the Court, which would necessitate showing that it was “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (citation omitted). Rather, it merely reiterates Troche’s rejected testimony without addressing the evidence to the contrary. Despite pushing its alternative version of the facts, it has not attempted to argue that the Board’s credibility findings were error; it has therefore waived any credibility challenges. *See N.Y. Rehab. Care Mgmt., LLC*, 506 F.3d at 1076. The Company has failed to overcome the Board’s well-supported findings.

Accordingly, the credited evidence establishes that Colon played no role in encouraging employees to stop working. Nevertheless, the Company suspended him, accusing him in its September 22 letter (DA. 231-32, 366-70) of “invading private property, encouraging others to abandon their job, verbally abusing the supervisors and intentionally paralyzing the production line.” But as the Board found based on the unrefuted testimony of Senior Human Resources Director Ayala (DA. 58; 285), there is no prohibition against employees entering the plant when they are not working. And there is no evidence that Colon engaged in any verbal abuse or disruption of production. Rather, he merely joined his coworkers at the conventional area and left when Lopez directed employees to return to work.

Returning to the *Wright Line* framework, there is no dispute that the Company was aware of Colon’s participation in the work stoppage and that it suspended and later discharged him for it. Moreover, substantial evidence supports the Board’s rejection of the Company’s purported reasons for its actions. The reasons given by the Company for suspending and discharging Colon – invading company property, encouraging coworkers to stop working, verbally abusing supervisors, and paralyzing production (DA. 366-70) – were, as described above, not supported by the record. Therefore, the Company’s defense was pretextual, supporting a finding of unlawful discriminatory motive. *See Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (Board’s finding of unlawful motive

gained “additional support” from finding that an employer’s action was taken “for pretextual reasons”). Moreover, because Colon’s participation in the strike was no different than that of other bargaining-unit employees, none of whom were disciplined, the Board reasonably found (DA. 58) that the Company’s disparate treatment of Colon is further evidence of its unlawful motivation. *See Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000).⁹ Finally, the Board’s finding is supported by the Company’s decision to summarily suspend and later discharge Colon based on unsupported accusations without providing Colon the opportunity to discuss the matter further. Had the Company asked Colon for his side of the story, it may have recognized that he played no role in encouraging other employees to join the work stoppage, and thus should have been treated like the other employees. Instead of doing so, the Company lumped him in with the other stewards relying solely on Troche’s discredited testimony. These actions support an inference that the Company was unlawfully motivated in suspending and discharging Colon. (DA. 58) (citing *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997)).

⁹ In light of the Board’s pretext and disparate treatment findings, it is evident that the Company did not satisfy the affirmative defense that it would have suspended and discharged Colon for his conduct even if he had not been engaged in protected activity.

In addition to its cursory challenge to the Board's finding that Colon did not encourage other employees to join the work stoppage, the Company challenges at length (Br. 37-42) the Board's 2012 finding (DA. 47 & n.5) that, even had Colon engaged in that conduct, it did not provide a lawful basis for discharging Colon under Article 12 of the parties' agreement as the Company maintains, because that provision expired with the agreement on July 31. But the Board did not reach that finding in its 2015 decision and order. More specifically, the Board in its 2012 Decision and Order only analyzed that issue when it found that the other four stewards had indeed encouraged others to join the work stoppage. Having concluded that the provision expired, and therefore provided no lawful basis for suspending and discharging the four stewards, the Board noted (DA. 47 n.5) that, even had Colon engaged in similar conduct, his suspension and discharge was likewise unlawful. By the time the Board revisited the case in 2015, however, the parties had settled the charges pertaining to the other four stewards. Accordingly, in addressing Colon's charge, the Board (DA. 163 n.7) adopted the judge's factual finding that Colon did not engage in the alleged misconduct, so the Company violated the Act by suspending and discharging him. The Board then noted (*id.*) that, because the other charges were settled, it made no findings regarding the lawfulness of their terminations. In other words, it was no longer necessary to

determine whether Article 12 survived contract expiration. Accordingly, that issue is not before the Court.

In sum, the Board's determination that Colon's discharge was unlawful turns solely on the Board's finding that he did not engage in the alleged wrongdoing during the September 9 work stoppage. For the reasons set forth above, that finding is amply supported in the record.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND/OR DISCHARGING EMPLOYEES FOR PARTICIPATING IN THE PROTECTED OCTOBER STRIKE

Substantial evidence supports the Board's findings that the Company unlawfully suspended and discharged employees for participating in the October 20-22 strike. As explained below, although the Union did not authorize the strike, the strike remained protected under established law.

A. Employees Who Engage in Concerted Activity Otherwise Protected by the Act Do Not Lose that Protection Merely Because It Was Not Authorized by Their Union

Section 7 protects employees' rights right to strike. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). Discharging employees for engaging in a lawful strike discourages participation in concerted activity and constitutes "discrimination in terms of employment" in violation of Section 8(a)(3), and derivatively violates Section 8(a)(1) of the Act by interfering with employees' right

to engage in concerted activity. *Id.*; accord *Consolidated Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 7 (D.C. Cir. 2016); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1368 n.56 (D.C. Cir. 1983).

Employees' right to strike may not, however, undermine the principle of exclusive representation established in Section 9(a) of the Act, in which Congress established "a regime of majority rule."¹⁰ *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Such exclusivity allows for effective bargaining over "improvements in wages, hours, and working conditions [but] extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Id.* at 63 (quoting *NLRB v. Allis-Chambers Mfg. Co.*, 388 U.S. 175, 180 (1967)). To balance Section 7's broad right to engage in concerted action, with Section 9(a)'s exclusivity principle, the Board, with court approval, has found that employees do not surrender the right to initiate or engage in concerted activity, including strike activity, merely because they have authorized a bargaining agent to represent them. *See Silver State Disposal Serv.*,

¹⁰ Section 9(a), in relevant part, provides the following:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Inc., 326 NLRB 84, 85 n.8, 103-04 (1998); *Bridgeport Ambulance Serv., Inc.*, 302 NLRB 358, 363 (1991), *enforced*, 966 F.2d 725, 729 (2d Cir. 1992) (agreeing with Board that attempts by employees to bargain directly with employer are unprotected by virtue of Section 9(a), as established in *Emporium Capwell*, but not all unauthorized activity is outside the Act's protection); *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 105 (7th Cir. 1971) (“[b]y authorizing a bargaining agent to represent them, the employees cannot be said to have waived all rights to protect themselves against an employer’s unlawful actions, since their individual action . . . in such circumstances [was] not an attempt to undermine their representative’s position”).

As the Board explained here, and as will be discussed in detail below (p. 32-34), employees may engage in concerted activity that is otherwise protected by the Act, even if unauthorized by their union, unless the employees either (1) attempt to bargain directly with their employer; or (2) take a position that is inconsistent with their union’s objectives. (DA. 161-62) (citing *Silver State Disposal Serv.*, 326 NLRB at 103-04 (additional citations omitted)). That determination fits comfortably within the Board’s “responsibility for developing and applying national labor policy” and is therefore entitled to “considerable deference.” *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786-87 (1990); *accord Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012) (Board entitled to

deference in examining nature of parties' bargaining relationship under Sections 8(f), 29 U.S.C. § 158(f), and 9(a) of the Act). Indeed, this Court has explained specifically that the Board's interpretation of the interplay between Section 7 and Section 9(a) is entitled to deference unless it is "manifestly contrary" to the NLRA or otherwise arbitrary and capricious. *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015) (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

The Board's determination is also consistent with both the Supreme Court's construction of Section 9(a), and several courts of appeal.¹¹ In *Emporium Capwell Co.*, the Supreme Court agreed with the Board that, under the exclusivity principle of Section 9(a), employees lose the protection of the Act when they attempt to bypass their union and bargain directly with their employer. 420 U.S. at 60-61, 69-70. Consistent with that holding, several circuits have agreed with the Board that employees' unauthorized action is protected unless it "is likely, regardless of its purpose, to impair the union's performance as exclusive bargaining representative." *E. Chicago Rehab. Ctr., Inc. v. NLRB*, 710 F.2d 397, 402 (7th Cir.

¹¹ This Court has not had occasion to review a Board decision finding an unauthorized strike protected. In *Fournelle v. NLRB*, 670 F.2d 331, 338 (D.C. Cir. 1982), a case cited by the Company (Br. 23), the Court affirmed that an employee does not engage in protected activity when he participates in an unauthorized strike that violates a no-strike provision in a collective-bargaining agreement. Here, the Company has not argued that the October strike violated the parties' collective-bargaining agreement.

1983) (unauthorized strike protected where employees showed no dissatisfaction with union and no desire to negotiate on their own behalf); *see also NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1972) (unauthorized strike protected because no evidence employees were at odds with, or attempted to bypass, their union); *W. Contracting Corp. v. NLRB*, 322 F.2d 893, 899 (10th Cir. 1953) (unauthorized work stoppage to demand heat in trucks, in support of union's previous request, was "in support of rather than in derogation of the union's position").

The Company has not cited any case that rejects the Board's position, which is consistent with the cases cited above, finding that some unauthorized strike activity is protected. The cases cited by the Company (Br. 22-23) as establishing a broad prohibition against unauthorized activity are consistent with the balance struck by the Board between the interests of Section 7 and 9(a) articulated here. For instance, in *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786, 791 (5th Cir. 1970) (Br. 22), as the Board explained here (DA. 49 n.14), employees went on strike to protest a co-worker's discharge before the union had the opportunity to even consider whether it should support the objective of protesting the discharge and, if so, whether it should strike to support that objective. Once the union learned of the strike after it began, it notified the employees that it disapproved of the strike and ordered the employees to return to work. *Id.* Even there, however, the Board

explained that in certain circumstances an unauthorized strike may nevertheless be protected by Section 7. *Id.* In *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) (Br. 22-23), the court found that employees lost the protection of the Act when they engaged in an unauthorized strike to express their discontent with an agreement, entered into between their employer *and their union*, to delay a bargaining session. *Id.* at 204. The Court explained that, in doing so, the employees sought “to take the bargaining out of the hands of the legally chosen representatives and proceed with it themselves.” *Id.* Likewise, in *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, 221 (9th Cir. 1969) (Br. 22), as in *Emporium Capwell*, the court found that employees lost the Act’s protections when they attempted to bypass their union and bargain directly with their employer over nondiscriminatory hiring policies. *See also Harnischfeger Corp. v. NLRB*, 207 F.2d 575, 578 (7th Cir. 1953) (court found unauthorized work stoppage lost protection where discontented employees sought to “take charge of and direct the actions of” their union in negotiations).

The Company (Br. 22-24) asks this Court to set aside the Board’s expert construction of the Act and declare that all unauthorized strikes – even those in support of stated union objectives – are unprotected under Section 7. That argument must fail for several reasons. First, the Supreme Court has “often reaffirmed that the task of defining the scope of [Section] 7 ‘is for the Board to

perform in the first instance as it considers the wide variety of cases that come before it” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)). And as discussed above (p. 28-29), the Board’s construction of the Act, including the interplay between Section 7 and Section 9(a), is entitled to deference unless it is “manifestly contrary’ to the NLRA or otherwise arbitrary and capricious.” *Children’s Hosp. & Research Ctr. of Oakland, Inc.*, 793 F.3d at 59 (internal quotation omitted). Indeed, in *East Chicago Rehabilitation Center*, the Seventh Circuit acknowledged the Board’s expertise in determining the impact of unauthorized strikes on unions and employers, and explained that “if the Board chooses to distinguish between wildcat strikes that undermine the union’s position as exclusive collective bargaining representative and ones that do not, as it did in th[at] case and has done in others, [the court] must let it.” 710 F.2d at 402-03 (internal citations omitted).

Second, despite the Company’s claim to the contrary (Br. 23-24), *Emporium Capwell* does not establish, or command the establishment of, a per se rule declaring all unauthorized work stoppages unlawful. There, a small group of employees bypassed their union in making public statements and engaging in picketing to pressure their employer to bargain *directly with them* over the terms and conditions of employment as they affected racial minorities. 420 U.S. at 60. Such conduct is antithetical to the exclusive-bargaining principle established in

Section 9(a). That holding does not preclude the Board's court-approved construction of Section 7 and 9(a) as leaving room for concerted activity that retains Section 7's protection despite being unauthorized.

B. Substantial Evidence Supports the Board's Findings that Although the October Strike Was Unauthorized, the Employees Did Not Seek To Bargain Directly with the Company or Contravene the Interests of the Union, and Thus Did Not Lose the Act's Protections

Substantial evidence supports the Board's findings (DA. 162-63) that although the employees engaged in an unauthorized strike, they did not lose the Act's protections. As shown below, the employees did not seek to bargain directly with the Company or take a position inconsistent with that of the Union.

Addressing the second consideration first, the employees' actions were consistent with the Union's interests. Days after the Company suspended the five stewards based on the September 9 work stoppage, the Union met with the employees and determined that they would demand that the Company:

(1) immediately reinstate the stewards; (2) agree not to file, as it had threatened,

Board charges against the Union based on the work stoppage; and (3) immediately

return to the bargaining table. After the Company rejected those demands, the

Union held a meeting on September 15 and conducted a vote to authorize a strike if

the Company would not agree to those demands, which passed unanimously.

When the Company still would not agree, and at the request of a number of

bargaining-unit employees, the stewards distributed a flyer announcing a meeting on October 12, at which the employees signed a petition to strike based, again, on the Union's three demands.¹² Although no Union officers were present at that meeting, they became aware of that vote on October 14, when the stewards faxed the strike authorization petition to the Union.

Notably, as the Board found (DA. 162, 163), the Union – knowing that the employees had again voted to strike – did not inform the stewards or any employee that a strike would be incompatible with the Union's position or that a strike was unauthorized. Instead, it wrote to the Company on October 15 (DA. 386-89) to demand that the Company resume bargaining and threaten to take “legitimate actions, protected by law, in order to protect [employee] rights.” Although the Company agreed to resume negotiations, while rejecting the other demands, there is no evidence that the Union either responded to the Company's offer or informed bargaining-unit members of the Company's response or otherwise attempted to allay the employees' concerns. Once the strike began on October 20, the

¹² The Company speculates (Br. 26-27) that the bargaining-unit members “deliberately” changed the date of their meeting from October 13 to October 12 at the last minute to coincide with a Union-called meeting. There is no record support for that conjecture. Rather, unrefuted testimony (DA. 243, 247, 251-52) established that, while the stewards were distributing the flyer on October 9, they realized the date was wrong and corrected it, and only later learned that the Union had called a meeting for October 12. (DA. 250.) In any event, the Company's claim does not undermine the Board's ultimate finding that the strike was not inconsistent with the Union's objectives.

employees continued to assert the same three demands, which included issuing those demands over a loudspeaker used throughout the strike. Despite having almost a week between receiving the employees' faxed strike authorization petition and the strike's start, the Union did not inform the employees that the strike was not authorized, instruct them to stop the strike, or disavow the three demands they were making.

In sum, the employees' actions at every turn were taken to support the Union's explicit demands of the Company. Substantial evidence thus supports the Board's finding (DA. 163) that the employees did not take a position inconsistent with the Union's position.

To challenge that finding, the Company (Br. 26-28) paints the stewards and striking employees as a "rogue" group who struck in defiance of the Union. But it relies largely on assertions that were not established by the record, and evidence that does not compel a finding that the strike was inconsistent with the Union's objective. For instance, while the Company (Br. 26) attempts to make much of the fact that Lopez and the stewards supported a rival slate of candidates in the Union's October 3 internal election, who were defeated by the incumbent officers, that does not change the fact that the employees struck over the identical three demands that those incumbent officers established after the September work stoppage. And while the Company argues (Br. 27) that a Union officer asked

steward Colon on October 9 not to divide the membership by voting to authorize a strike, that single statement does not establish that the employees were taking a position that was inconsistent with the Union. *See W. Contracting Corp.*, 322 F.2d at 897 (statement of union organizer that union had not called strike insufficient to establish that employees opposed Union's opposition). Moreover, it was countered that same day by one of the Union's attorneys, who informed Colon that a strike was the only way to have the stewards reinstated. (DA. 59; 249.) Regardless, while there may have been natural tension at a time when the Company was discharging the stewards and the Union was holding a contested election, that does not establish that the employees' action in striking several weeks later was inconsistent with the Union's objectives. *See Bridgeport Ambulance Serv.*, 966 F.2d at 729 ("the fact that there may have been some generalized dissatisfaction with the Union would not in and of itself establish that the employees' actions [in engaging in unauthorized sit-in] impinged on the Union's role as the exclusive representative for collective bargaining").

As to the other consideration in determining whether employees engaged in action violative of Section 9(a)'s majority-rule principle, substantial evidence supports the Board's finding (DA. 163) that the employees never sought to bypass the Union and bargain directly with the Company. As discussed, the employees called the strike to support the same three demands that the Union established

immediately after the September work stoppage. This included a demand that the Company return to the bargaining table with the Union. There is no evidence in the record that the striking employees sought to form a new bargaining committee.

The Company claims (Br. 28-29), based solely on the testimony of employee Hector Sanchez, that during an October 13 meeting with Operations Director Trigueros, employees stated that “they wanted the Shop Stewards – and not the Union appointees – to bargain on their behalf” with the Company. But that misstates the record. Employee Sanchez answered in the affirmative when asked (DA. 255-56) whether the employees had “informed the [Company] that they wanted the five employees [stewards] to be the ones who bargained with the Employer.” This does not support the Company’s position, however, because the stewards, along with Lopez, made up the Union’s bargaining committee before they were suspended and later discharged based on their participation in the September work stoppage. Moreover, at that time, the Union had not selected new bargaining-committee members. Accordingly, the Board reasonably found that the employees did not seek to bargain directly instead of via the Union, but rather to “recognize the stewards *“as the Union’s representatives* on the bargaining committee.” (DA. 49) (emphasis added).¹³

¹³ The Company also claims (Br. 31) that the shop stewards and bargaining-unit employees were “dissatisf[ied]” with the Union’s delay in electing a new

Although strike was unauthorized, the employees' actions remained protected by the Act because they did not "denigrate the Union's role as collective bargaining representative" under Section 9(a) by either attempting to bargain directly with the Company or taking a position inconsistent with the Union's. *See Bridgeport Ambulance Serv.*, 966 F.2d at 729. Accordingly, the Board reasonably concluded that the Company violated Section 8(a)(3) and (1) by suspending and/or discharging employees for participating in the strike.

III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCING ITS EMPLOYEES, WHO WERE SUSPENDED FOR PARTICIPATING IN THE OCTOBER STRIKE, TO SIGN OVERBROAD LAST-CHANCE AGREEMENTS AS A CONDITION OF THEIR REINSTATEMENT

In its opening brief, the Company does not contest the Board's finding (DA. 47, 64-65) that it violated Section 8(a)(1) of the Act by coercing employees, who were suspended for participating in the October strike, into signing overbroad last-chance agreements that provided for their reinstatement subject to immediate termination for any violation of its terms. Paragraph 7 of the agreements (DA. 382 ¶ 7) conditioned reinstatement on the employees' agreement not to testify or provide evidence against the Company to an administrative agency or in any federal forum. The Board (DA. 47 & n.6, 64) found that paragraph unlawful

bargaining committee and acting on the unit's demands, but offers no support for that assertion.

because it interfered with employees' protected right to participate in Board proceedings and further was part of the discipline unlawfully imposed on employees who engaged in the protected strike. By failing to challenge these findings in its opening brief, the Company has waived any such argument, warranting summary enforcement of the Board's Order with respect to this violation. *See Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) ("it is [this Court's] longstanding rule that '[t]he Board is entitled to summary enforcement of the uncontested portions of its order[s]'" (quoting *Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006))); accord *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015).

IV. THE COMPANY FAILED TO CHALLENGE THE BOARD'S ADVERSE-TAX-CONSEQUENCE REMEDY BEFORE THE BOARD, BARRING THIS COURT'S CONSIDERATION OF THAT ISSUE

The Company challenges (Br. 43-46) the portion of the Board's Order (DA. 161 n.2) requiring that the Company "reimburse discriminatees for the adverse tax consequences, if any, of receiving lump-sum backpay awards." But the Company failed to present any such challenge to the Board, so this Court is jurisdictionally barred from considering it.

In *Latino Express, Inc.*, the Board first announced that it would routinely require employers to reimburse discriminatees for adverse tax consequences

occasioned by a lump-sum backpay award. 359 NLRB 518, 520-21 (2012).¹⁴ That decision postdated the judge's decision here, as well as the Board's 2012 Order, which issued several months before *Latino Express*. When, however, the validly constituted Board issued its 2015 decision finding that the Company violated the Act, it modified the judge's recommended order, consistent with *Don Chavas*, *supra* p. 41 n.14, to include the adverse-tax-consequence remedy. Thereafter, the Company had the opportunity to challenge that aspect of the Board's order in a motion for reconsideration, but failed to do so.

Because the Company never challenged that aspect of the Order before the Board, this Court is jurisdictionally barred from considering it by Section 10(e) of the Act, 29 U.S.C. § 160(e) (discussed above, p. 21). As the Supreme Court explained in *Woelke & Romero Framing, Inc. v. NLRB*, the Section 10(e) bar applies to issues not raised before the Board by any party, even if the Board decided the issue sua sponte, because a party can object to such a finding in a motion for reconsideration. 456 U.S. 645, 665-66 (1982). This Court has reaffirmed that principle many times, including in *Enterprise Leasing Co. of Fla. v. NLRB*, where, like here, the employer failed to raise in a motion for

¹⁴ Like this case, *Latino Express* was issued by a panel of the Board that included members who received recess appointments later deemed invalid in *Noel Canning*, *supra* p. 4, and was thereafter vacated. The Board reaffirmed its decision to routinely impose adverse tax consequence liability on respondents in *Don Chavas, LLC*, 361 NLRB No. 10, 2014 WL 3897178, at *3-6 (Aug. 18, 2014).

reconsideration, its objection to a remedy issued by the Board sua sponte.

831 F.3d 534, 551 (D.C. Cir. 2016). *See also, e.g., W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (“If aggrieved by the Board’s remedy, [the employer] should have filed a motion for reconsideration pursuant to the Board’s rules and regulations.”). Likewise, the Court has held that the Board’s sua sponte imposition of a remedy does not constitute an “extraordinary circumstance” under Section 10(e) excusing its failure to present the challenge to the Board in the first instance. *NLRB v. FLRA*, 2 F.3d 1190, 1195-96 (D.C. Cir. 1993) (citing *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 398 (D.C. Cir. 1981)).

To permit the Company to present its argument directly to this Court would be contrary not only to the language of Section 10(e), but would also contravene the “salutary policy” embodied in that provision of “affording the Board opportunity to consider on the merits questions to be urged upon review of its order.” *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943) (per curiam). As it now stands, the Court has no Board position to review on the Company’s argument (Br. 45) that it “deserves more justification for the imposition of such a burden” Accordingly, the Court lacks jurisdiction to consider the untimely challenges to the Board’s remedy articulated for the first time in the Company’s opening brief.

CONCLUSION

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

s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

s/ Jeffrey W. Burritt

JEFFREY W. BURRITT

Attorney

National Labor Relations Board

1015 Half Street, S.E.

Washington, D.C. 20570

(202) 273-2948

(202) 273-2989

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

July 2017

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

CC1 LIMITED PARTNERSHIP, d/b/a COCA)	
COLA PUERTO RICO BOTTLERS)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1231 & 15-1467
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	24-CA-011035 et al.
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,702 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 3rd day of July, 2017

STATUTORY ADDENDUM

**UNITED STATES COURT OF APPEALS
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STATUTORY ADDENDUM

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

Section 7 (29 U.S.C. § 157)2

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....2

Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....2

Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))3

Section 8(f) (29 U.S.C. § 158(f))3

Section 9(a) (29 U.S.C. § 159(a))4

Section 10(a) (29 U.S.C. § 160(a))4

Section 10(e) (29 U.S.C. § 160(e))5

Section 10(f) (29 U.S.C. § 160(f))6

NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157): Right of employees as to organization, collective bargaining, etc.

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 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(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 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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of

such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

...

(b) Unfair labor practices by labor organization

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 157 of this title: *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

...

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in

the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.

- (a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

- (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 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 predominantly 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 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 proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

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

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Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 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.

/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 3rd day of July, 2017