

Nos. 15-1135, 15-1167

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

FRED MEYER STORES, INC.

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

FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

ROBERT J. ENGLEHART
Supervisory Attorney

ERIC WEITZ
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2978
(202) 273-3757

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

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

FRED MEYER STORES, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1135,
	* 15-1167
and	*
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 36-CA-010555
Respondent/Cross-Petitioner	*
	*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Intervenor

Fred Meyer Stores, Inc. was the respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. United Food and Commercial Workers Local 555 was the charging party before the Board, and is the Movant-Intervenor in this court proceeding.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on April 30, 2015, and reported at 362 NLRB No. 82 (incorporating by reference 359 NLRB No. 34).

C. Related Cases

The Board's Decision and Order under review (362 NLRB No. 82) has not previously been before this Court. A previous Decision and Order (359 NLRB No. 34) in the same underlying case was issued on December 12, 2012; a petition for review was filed with this Court; this Court put the case in abeyance on January 25, 2013; the Board subsequently set aside its Decision and Order; and this Court granted a motion to dismiss the petition for review on September 17, 2014.

/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 5th day of July, 2016

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Relevant statutory addendum.....	3
Statement of the case.....	3
I. The Board’s findings of fact	4
A. Background; the Union’s role as bargaining representative	4
B. The bargaining relationship and the store-visitation clause	5
C. The parties bargain unsuccessfully for successor agreements	7
D. On October 14, two union representatives are warned that they must speak with employees in the store breakroom; the Union plans to send eight representatives to the Hillsboro store	8
E. On October 15, the Company’s manager-on-duty prohibits two union representatives from speaking with unit employees on the store floor.....	10
F. The Company’s manager-on-duty orders a unit employee not to speak with the union representatives, and makes disparaging remarks regarding the Union	12
G. The Company calls the police and asks for the union representatives to be removed; three union representatives are arrested and charged with criminal trespass	13
II. The Board’s conclusions and order	16
Summary of argument.....	18
Standard of review	20

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	21
I. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) and (5) of the Act by denying union representatives the right to speak with unit employees on the store floor	21
A. An employer violates Section 8(a)(1) by prohibiting union representatives from speaking with employees pursuant to a lawful access right, and violates Section 8(a)(5) by unilaterally changing an established union-access policy.....	21
B. The Company’s manager-on-duty prohibited two union representatives from having any conversations with unit employees on the store floor.....	22
C. The Board’s findings are largely premised on its reasonable credibility determinations, which the Company does not meaningfully contest.....	24
D. The Company’s contentions on appeal are irrelevant to the Board’s unfair-labor-practice findings and, in any event, the Union neither planned the Company’s unlawful response, nor breached the terms of the store-visitation clause	26
1. The Court is jurisdictionally barred from entertaining the Company’s new arguments that the union representatives lost the protection of the Act.....	26
2. The question of whether the Union planned the incident on October 15 is irrelevant and, in any event, the union did not plan the Company’s unlawful conduct	27
3. The question of whether the Union breached the terms of the store-visitation clause is irrelevant and, in any event, the Union did not actually breach the agreement.....	29
a. The number of union representatives present in the store did not breach the agreement or justify the Company’s unlawful conduct.....	30

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
b. The existence of a bargaining-related petition did not breach the agreement or justify the Company's unlawful conduct.....	32
c. The Union did not interfere with customers, and the Company does not possess unfettered discretion to prohibit union contact with represented employees	33
II. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by causing the arrests and prosecutions of three union representatives	34
A. An Employer violates the Act when it causes the arrests of union representatives in an effort to restrain protected conduct	34
B. The Company caused union representatives Reed, Marshall, and Clay to be arrested and charged with criminal trespass.....	34
C. The Court is jurisdictionally barred from considering the Company's First Amendment argument and, in any event, the Company's unlawful conduct was not constitutionally privileged.....	37
D. The make-whole relief contained in the Board's Order is a reasonable remedy based on well-established precedent	40
III. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by making a number of coercive statements	42
A. An Employer's statements violate the Act if they have a reasonable tendency to restrain protected conduct.....	42
B. The Company does not independently contest the Board's reasonable findings that Dostert unlawfully ordered England not to speak with Reed, informed Reed and Witt that they could not speak with employees on the store floor, and instructed security to call the police.....	43

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
C. Dostert threatened to have Reed and Witt removed from the store or arrested.....	45
D. Dostert coercively disparaged the Union in the presence of an employee, and the Court is jurisdictionally barred from entertaining the Company's unavailing Section 8(c) argument.....	46
Conclusion	50

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Albertson’s, Inc.</i> , 319 NLRB 93 (1995).....	44
* <i>Alden Leeds, Inc. v. NLRB</i> , 812 F.3d 159 (D.C. Cir. 2016).....	20, 24, 33, 38, 48
<i>Ariz. Portland Cement Co.</i> , 281 NLRB 304 (1986).....	31
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	20
* <i>Baptist Mem’l Hosp.</i> , 229 NLRB 45 (1977), <i>enforced</i> , 568 F.2d 1 (6th Cir. 1977).....	34, 36, 41
<i>Capital Cleaning Contractors, Inc. v. NLRB</i> , 147 F.3d 999 (D.C. Cir. 1998).....	25
<i>Casino Ready Mix, Inc. v. NLRB</i> , 321 F.3d 1190 (D.C. Cir. 2003).....	28
<i>Citizens Inv. Servs. Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005).....	20
<i>Clark Manor Nursing Home Corp.</i> , 254 NLRB 455 (1981), <i>enforced in relevant part</i> , 671 F.2d 657 (1st Cir. 1982).....	40, 41
<i>Davis Supermarkets, Inc.</i> , 306 NLRB 426 (1992), <i>enforced</i> , 2 F.3d 1162 (D.C. Cir. 1993).....	41, 42

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
* <i>Downtown Hartford YMCA</i> , 349 NLRB 960 (2007)	34, 35, 40, 41
<i>Dynabil Indus., Inc.</i> , 330 NLRB 360 (1999)	27
<i>Enloe Med. Ctr. v. NLRB</i> , 433 F.3d 834 (D.C. Cir. 2005).....	38
* <i>Ernst Home Ctrs., Inc.</i> , 308 NLRB 848 (1992)	22, 24
<i>Fieldcrest Cannon, Inc.</i> , 318 NLRB 470 (1995)	49
<i>Fresh & Easy Neighborhood Mkt., Inc.</i> , 361 NLRB No. 12, 2014 WL 3919910 (Aug. 11, 2014).....	27
* <i>Frontier Hotel & Casino</i> , 309 NLRB 761 (1992), <i>enforced sub nom.</i> <i>NLRB v. Unbelievable, Inc.</i> , 71 F.3d 1434 (9th Cir. 1995).....	22, 23, 31, 34
<i>Gilliam Candy Co.</i> , 282 NLRB 624 (1987)	22
<i>Hard Rock Holdings, LLC v. NLRB</i> , 672 F.3d 1117 (D.C. Cir. 2012).....	25
* <i>HealthBridge Mgmt., LLC v. NLRB</i> , 798 F.3d 1059 (D.C. Cir. 2015).....	24, 26, 33, 38, 48
<i>Highlands Hosp. Corp. v. NLRB</i> , 508 F.3d 28 (D.C. Cir. 2007).....	48

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	20
<i>M.J. Mech. Servs., Inc.</i> , 324 NLRB 812 (1997), <i>enforced mem.</i> , 172 F.3d 920 (D.C. Cir. 1998).....	28
<i>Med. Ctr. Hosps.</i> , 244 NLRB 742 (1979), <i>enforced mem.</i> , 626 F.2d 862 (4th Cir. 1980)	40
<i>Monmouth Care Ctr. v. NLRB</i> , 672 F.3d 1085 (D.C. Cir. 2012).....	25
<i>New York New York, LLC</i> , 356 NLRB 907 (2011), <i>enforced</i> , 676 F.3d 193 (D.C. Cir. 2012)	41
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	42
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	22
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	3
<i>Parsippany Hotel Mgmt. Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	20
<i>Petrochem Insulation, Inc. v. NLRB</i> , 240 F.3d 26 (D.C. Cir. 2001)	41
<i>Progressive Elec., Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006).....	42

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Provena St. Joseph Med. Ctr.</i> , 350 NLRB 808 (2007)	38
<i>Roadway Package Sys., Inc.</i> , 302 NLRB 961 (1991)	45
<i>Schear's Food Ctr.</i> , 318 NLRB 261 (1995)	35
* <i>Schlegel Okla., Inc.</i> , 250 NLRB 20 (1980), <i>enforced</i> , 644 F.2d 842 (10th Cir. 1981)	44, 45, 46
<i>Sears, Roebuck & Co.</i> , 305 NLRB 193 (1991)	42, 43
<i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012)	43
* <i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	36, 38
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001)	42
* <i>Turtle Bay Resorts</i> , 353 NLRB 1242 (2009), <i>incorporated by reference</i> , 355 NLRB 706 (2010), <i>enforced sub nom.</i> <i>Oaktree Capital Mgmt., L.P. v. NLRB</i> , 452 F. App'x 433 (5th Cir. 2011)	34, 43, 44, 49
<i>United Credit Bureau of Am., Inc.</i> , 242 NLRB 921 (1979), <i>enforced</i> , 643 F.2d 1017 (4th Cir. 1981)	28

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>United Food & Commercial Workers v. NLRB</i> , 852 F.2d 1344 (D.C. Cir. 1988).....	21
<i>Venetian Casino Resort v. NLRB</i> , 484 F.3d 601 (D.C. Cir. 2007).....	39
<i>Venetian Casino Resort v. NLRB</i> , 793 F.3d 85 (D.C. Cir. 2015).....	38, 39, 40
<i>Vico Prods. Co. v. NLRB</i> , 333 F.3d 198 (D.C. Cir. 2003).....	24
<i>W. Lawrence Care Ctr. Inc.</i> , 308 NLRB 1011 (1992).....	30
<i>Wild Oats Mkts., Inc.</i> , 336 NLRB 179 (2001).....	35, 36

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.)	
Section 7 (29 U.S.C. § 157).....	21
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 16, 17, 21, 23, 34, 42- 45, 49
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 3, 16, 17, 21, 22, 23
Section 8(c) (29 U.S.C. § 158(c)).....	42, 46, 48
Section 10(a) (29 U.S.C. § 160(a)).....	1, 2
Section 10(e) (29 U.S.C. § 160(e)).....	2, 20, 26, 33, 37, 38, 46, 48
Section 10(f) (29 U.S.C. § 160(f)).....	2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15-1135, 15-1167

FRED MEYER STORES, INC.

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

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Fred Meyer Stores, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on April 30, 2015, and reported at 362 NLRB No. 82. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”).

29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties, and this Court has jurisdiction on appeal pursuant to Section 10(e) and (f) of the Act.

29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. On July 9, 2015, a motion for leave to intervene in support of the Board was filed by United Food and Commercial Workers Local 555 (“the Union”).¹

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) and (5) of the Act by denying union representatives the right to speak with unit employees on the store floor, in contravention of past practice and a contractual store-visitation clause.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act and should be required to compensate the Union for causing the arrests and prosecutions for trespass of three union representatives.

3. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by making numerous coercive statements restraining union representatives and unit employees from engaging in protected activities.

¹ The Court directed the parties to address the motion for leave to intervene in their briefs. The Board does not oppose the Union’s motion.

RELEVANT STATUTORY ADDENDUM

The attached addendum contains all applicable statutory provisions.

STATEMENT OF THE CASE

This case stems from a series of actions undertaken by the Company on the morning of October 15, 2009. Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) and (5) of the Act. Following a twelve-day hearing, an administrative law judge issued a recommended order finding that the Company violated the Act as alleged. On December 12, 2012, a Board panel (Chairman Pearce and Members Hayes and Griffin) issued a Decision and Order, reported at 359 NLRB No. 34, affirming the judge's findings ("the 2012 Order"). The Company filed a petition for review with this Court, but before the Board filed the record this Court put the case in abeyance on January 25, 2013.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012, including the appointment of Member Griffin, were invalid under the Recess Appointments Clause. Subsequently, the Board issued an order setting aside the 2012 Order, and on September 17, 2014, this Court granted a motion to dismiss the existing petition for review. On April 30, 2015, a properly-constituted Board panel (Chairman Pearce and Members Hirozawa and Johnson)

considered de novo the record and the administrative law judge’s decision, and issued the Decision and Order now before the Court (“the 2015 Order”), reported at 362 NLRB No. 82. The Board affirmed the judge’s rulings, findings, and conclusions; adopted the judge’s recommended order, as modified; and incorporated by reference the 2012 Order and the reasoning contained therein. (JA 192 & n.2.)²

I. THE BOARD’S FINDINGS OF FACT

A. Background; the Union’s Role as Bargaining Representative

The Company is engaged in the retail grocery business and operates a number of large “big box” stores selling groceries and a wide variety of additional products in Oregon and several other states. (JA 165; 794-811.) In particular, the Company operates a 165,000-square-foot store in Hillsboro, Oregon. (JA 165; 741.) A substantial number of the Company’s employees at its stores in Oregon and Washington are represented by United Food and Commercial Workers Local 555 (“the Union”), including employees at the Hillsboro store. (JA 165; 794-811.) The Union serves as the exclusive representative of employees at the Hillsboro store in four separate bargaining units: (i) the grocery, produce, and delicatessen

² “JA” references are to the Joint Appendix. Concurrent “JX 9” references are to timestamps of video surveillance footage entered into the record as Joint Exhibit 9(a)-9(j). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief to the Court.

unit; (ii) the combined checkstand unit; (iii) the retail meat unit; and (iv) the non-food unit. (JA 165-66; 794-811.)

B. The Bargaining Relationship and the Store-Visitation Clause

Two of the four bargaining units at the Hillsboro store—the grocery unit, and the retail meat unit—are covered by multiemployer bargaining agreements negotiated between the Union and a multiemployer association headed by three large grocery employers in the region, including the Company. (JA 166; 556-637.)

The combined checkstand unit and non-food unit are covered by agreements negotiated by the Union and the Company individually. (JA 166; 638-675, 704-38.) The collective-bargaining agreements covering the grocery unit, retail meat unit, and combined checkstand unit all expired in July 2008, but were extended by written agreement until the parties reached new collective-bargaining agreements, as ultimately occurred in early 2010. (JA 166; 676-703.)

For at least twenty years, and continuing into the present, the agreements between the Company and the Union covering the represented employees in the above units have contained a store-visitation clause granting union representatives the right to contact represented employees during working hours. (JA 166 & n.3; 409, 440-41, 739.) Both the multiemployer agreements and the individually-negotiated agreements contain or are governed by the same clause. (JA 166; 201-

04, 739.) The store-visitation clause, which remained in effect throughout 2009, reads as follows:

It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

(JA 166; 676-77, 739.) Pursuant to the store-visitation clause, for many years the Union has utilized its staff to make regular visits to the Company's stores in which represented employees are employed, including the Hillsboro store. (JA 166; 210-11, 537-41.)

The Union's practice during store visitations is to avoid unreasonably interrupting operations by not speaking with employees who are busy assisting customers, and by limiting conversations with on-duty employees to a reasonable period of time. (JA 177; 212, 266.) The understanding—derived from the parties' established past practice—is that a reasonable period of time for conversations with on-duty employees normally amounts to a minute or two, or longer depending on the circumstances. (JA 192-93; 267, 272.) Routine visits to the Company's stores typically involve one to two union representatives who are assigned to that particular store. (JA 177-78; 244, 281.) There is no established practice placing a limit on the number of union representatives who can visit a store, or defining a

number of union representatives that would constitute an unreasonable disturbance. (JA 193; 400-01, 532, 542.)

C. The Parties Bargain Unsuccessfully for Successor Agreements

Following the expiration of the agreements covering the grocery unit, retail meat unit, and combined checkstand unit in July 2008, the parties bargained unsuccessfully for more than a year to reach new agreements. (JA 167; 207, 333.) In July 2009, the Union sought the assistance of its International, including several international representatives, to help encourage and sustain employee support for the Union during the protracted bargaining. (JA 167; 205-07.) Subsequently, decertification petitions were filed at two of the Company's Oregon stores (not including the Hillsboro store) seeking to displace the Union as the employees' exclusive representative, which intensified the Union's efforts to encourage employee support for the Union and the ongoing bargaining. (JA 168; 445.) In September and October 2009, the Union began sending delegations of up to eight representatives to the Company's stores in order to more efficiently contact large numbers of represented employees. (JA 168; 216, 243.)

D. On October 14, Two Union Representatives Are Warned that They Must Speak with Employees in the Store Breakroom; the Union Plans To Send Eight Representatives to the Hillsboro Store

On October 14, 2009, teams of union representatives were sent to represented stores in the Portland area to update employees on the bargaining and to ask employees to sign a petition supporting the Union's bargaining position. (JA 168; 256.) Mary Spicher, who was the union field representative normally assigned to the Hillsboro store, visited that store with international representative Joe Price. (JA 168; 273.) At one point, Price requested Spicher's assistance in answering a unit employee's questions about health insurance, and Spicher instructed the employee to continue working while she answered his questions. (JA 168; 274-75.) Store manager Gary Catalano later approached the two union representatives and informed them that they were required to talk with employees in the store breakroom. (JA 169; 276-77.) Both Price and Spicher responded that union representatives were allowed to talk with employees on the store floor, and Price briefly argued with Catalano. (JA 169; 277.) Before Catalano walked away, Price made a comment about returning to the store the following day with a group of people. (JA 169; 397.)

Subsequently, Catalano called company human resources representative Terry Robinson and informed her of his conversation with Price and Spicher. (JA 169; 397-98.) After consulting with Vice President of Labor Relations Cindy

Thornton, Robinson told Catalano to contact her or Thornton at the regional human resources office if a dispute arose, to ask the representatives to leave if they refused to comply with his instructions, and to call the police if they refused to leave. (JA 169; 398-99.) Catalano conveyed this directive to the store's department managers. (JA 169; 399.)

Spicher and Price returned to the union offices and reported their encounter with Catalano. (JA 170; 278-79.) As part of a plan to visit a number of the Company's stores on October 15, the Union decided to send eight representatives to visit the Hillsboro store in pairs the following morning. (JA 170; 209, 257.) In anticipation of the possibility that the Company might call the police or cause the arrest of a union representative, it was determined that international representative Jenny Reed would "take" such an arrest if necessary. (JA 170; 365-66.) One of the union representatives scheduled to visit the Hillsboro store, union special assistant Brad Witt, subsequently called press photographer Donna Nyberg on his own initiative and indicated that she may want to take photographs at the store the following morning. (JA 170; 300, 324, 385-86.) Nyberg was not employed by the Union, but was instead a freelance photographer and the campaign manager for Witt, who serves as an elected representative in the Oregon House of Representatives. (JA 170; 251, 296-99, 385.)

E. On October 15, the Company's Manager-on-Duty Prohibits Two Union Representatives from Speaking with Unit Employees on the Store Floor

On the morning of October 15, 2009, eight union representatives traveled by carpool to the Company's Hillsboro store in order to talk with unit employees, pass out union flyers, and solicit signatures for a petition supporting the Union's position in the ongoing bargaining. (JA 178; 213-14, 812.) The decision to send a team of eight representatives was consistent with the Union's broader plans for more efficiently updating employees in large, multiunit stores. (JA 194; 209, 216-17.) The team of representatives sent to the Hillsboro store was one of numerous teams that visited different stores on the morning of October 15. (JA 170; 215.)

Before entering the store, the eight representatives divided into pairs in order to more quickly reach employees throughout the 165,000-square-foot facility. (JA 178; 304.) One pair of representatives, international representative Reed and union special assistant Witt, entered the store and went directly to the customer information desk in order to notify the store manager of the union representatives' presence. (JA 178; 219-21, 752, JX 9(i) at 9:39:30.) Since store manager Catalano was not present, an employee notified manager-on-duty Jim Dostert, who came to the information desk to meet with Reed and Witt. (JA 178; 222, 752, JX 9(i) at 9:43:10.)

After Reed and Witt introduced themselves as representatives of the Union, Dostert stated that they could only speak with unit employees in the store breakroom, and that any contact with employees on the store floor must be limited to identification and introductions only. (JA 193; 223, 260, 371, 827, 793.) Reed and Witt disagreed with Dostert's pronouncement, and asserted that union representatives had a right to speak with unit employees on the store floor during working hours. (JA 181; 223-24, 371.) Witt began recording portions of the ongoing conversation with Dostert in contemporaneous handwritten notes. (JA 180; 370, 827-30.)

Reed and Witt attempted to show Dostert a copy of the contractual store-visitation clause, but he refused to read it. (JA 193; 223-24.) Dostert eventually stated that he would have the union representatives "trespassed" if they attempted to speak with on-duty employees. (JA 171; 372, 827.) Neither Reed nor Witt made any comments that suggested that they were seeking to talk with unit employees for an unlimited duration or in a manner inconsistent with the parties' established practice. (JA 180-81; 223, 373, 525.) Dostert was initially unaware that there were six additional union representatives in other parts of the store. (JA 194; 471-72.)

F. The Company's Manager-on-Duty Orders a Unit Employee Not To Speak with the Union Representatives, and Makes Disparaging Remarks Regarding the Union

While continuing to stand in the vicinity of Reed and Witt, Dostert called Vice President of Labor Relations Thornton using his cellphone and informed her of the situation. (JA 173; 475.) After several minutes, the two representatives and Dostert began walking away from the customer information desk toward the apparel department, and Reed approached unit employee Alicia England at the apparel department checkstand. (JA 193; 225-26, 374, 751-52, JX 9(h) at 9:48:25, JX 9(i) at 9:48:10.) Reed attempted to introduce herself as a union representative, but Dostert immediately interjected and in a raised voice ordered England not to speak with Reed, after which the union representatives and Dostert continued to argue. (JA 171-72; 226, 478, 497.)

The two union representatives and Dostert then began backing away from the apparel department checkstand into the broad aisle separating the apparel department from the electronics department. (JA 229, 376-78, 480, 741, 751, JX 9(h) at 9:49:10.) Still within several meters of England, Dostert began angrily disparaging the Union; stating that union representatives are “jerks,” that unions are “outdated and ridiculous,” and that union dues are “ridiculous.” (JA 184; 375-79, 827-29.) Dostert further stated in a raised voice that the union representatives were only there for the employees’ dues, that the employees “did not need a

union,” that the Union stole money from its members, and that he did not believe in unions. (JA 193; 231.) Dostert ordered Reed and Witt to leave the store, and Reed again asserted the representatives’ right to speak with unit employees on the store floor. (JA 193; 231-32.) Dostert stated that he would have the union representatives “removed from the store.” (JA 172; 376, 827.)

G. The Company Calls the Police and Asks for the Union Representatives To Be Removed; Three Union Representatives Are Arrested and Charged with Criminal Trespass

After several more minutes, Dostert had by then placed or received numerous calls on his cellphone and was aware that there were more than two union representatives in the store. (JA 173; 481.) After ending a second call with Thornton, Dostert stated that he “had his boss’s backing” and that the union representatives would be removed from the store. (JA 378.) Store security officer Michael Kline then arrived, and informed the two union representatives that Dostert wanted them out of the store and that they had to leave. (JA 193; 233.) Dostert verbally instructed Kline to call the police to have the union representatives removed from the premises. (JA 193; 431.)

Shortly thereafter, two uniformed police officers arrived in the store and approached Reed and Witt, who were by that point standing near the electronics department. (JA 171-72; 234-35, 751, JX 9(h) at 10:12:25.) Dostert informed the officers that he wanted the union representatives removed from the store. (JA 193;

235, 382, 513-14, 517, 521.) At the direction of the police officers, Witt began to leave the store. (JA 172; 383.) Reed attempted to show the police officers the parties' contract and to explain that the union representatives had a right to be present in the store, but she was quickly handcuffed and escorted out of the store. (JA 193; 236-37, 751, JX 9(h) at 10:13:30-10:14:20.)

In addition to Witt, the remaining three pairs of union representatives also began to leave the store after learning of the dispute with Dostert and the presence of the police. (JA 175; 306.) Michael Marshall, the Union's assistant director of collective bargaining, exited the store into the parking lot and approached the car he had arrived in, which he found to be locked. (JA 175; 307.) Dostert had also moved into the parking lot, and he yelled to Marshall asking him to stop Nyberg from taking photographs. (JA 175; 307-08.) Marshall was then approached by a police sergeant who had arrived at the store. (JA 175; 308.) The police sergeant ordered Marshall to leave the premises and, while attempting to explain that he was unable to do so until the driver of the locked car arrived, Marshall was approached by another police officer, handcuffed, and arrested. (JA 175, 182; 308-11.) Dostert was standing approximately twenty feet away during Marshall's arrest. (JA 175; 311.)

During the extended dispute between Dostert and the union representatives over their right to speak with employees on the store floor, Union President Daniel

Clay was informed by telephone that there was an incident at the Hillsboro store. (JA 175; 334.) Clay drove to the store and observed Reed and Marshall handcuffed in the parking lot near a police car. (JA 175; 336.) Clay subsequently parked his car and approached a police officer who was talking to Dostert, and Clay attempted to explain that he was the union official responsible for Reed and Marshall being present at the store, and that the Union had a contractual right to visit employees at the store. (JA 175; 337.) The police officer asked Dostert whether he wanted Clay on the premises, and Dostert responded that Clay had no right to be there. (JA 193 n.6; 338.) When Clay again attempted to explain the contractual store-visitation agreement, he was arrested and taken into custody by the police. (JA 175; 339.) Roughly twenty minutes after the union representatives left the premises, Dostert created a typed summary of the events that had transpired. (JA 180; 494-95, 793.)³

Reed, Marshall, and Clay were each arrested for trespass. (JA 176; 831-40.) All three union representatives were taken into custody, incarcerated, booked for criminal trespass, and released on bail later in the afternoon on October 15, 2009. (JA 176; 214-16, 340-41.) The terms of the bail releases prohibited each of the

³ Dostert's typed summary states, in part: "I informed Brad Witt and female rep what is was told on Wednesday (14th) that they could approach associates and hand out their card and they would be in the break room for further information. They proceeded to pull out a piece of paper with a Supposed federal law/union contract saying they can talk to the associates while they are working that I would be violating federal law if I did not let Them." (JA 793.)

three union representatives from having contact with one another or from visiting the Company's property. (JA 176; 317-18, 814-15, GCX 10, GCX 14.)⁴ Those restrictions were subsequently modified on October 27, 2009, during arraignment. (JA 176; 318, 816.) The three union representatives were compelled to post bail and to secure legal counsel throughout the process following their arrests that ultimately resulted in the criminal trespass charges being dropped by the State of Oregon. (JA 176; 319-20, 342, 826.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Member Hirozawa; Member Johnson, dissenting in part) found that the Company violated Section 8(a)(1) and (5) of the Act. In agreement with the administrative law judge, the Board credited the testimony of union representatives Reed and Witt to the effect that on the morning of October 15 company manager Dostert immediately prohibited them from speaking with unit employees on the store floor. The Board found that the Company thus violated Section 8(a)(1) and (5) by preventing union representatives from speaking with unit employees, and by contravening past practice and the contractual store-visitation clause without first bargaining with the Union. (JA 193.) The Board also found that the Company violated Section 8(a)(1)

⁴ The release agreements for Marshall and Clay were received into the record before the Board as General Counsel Exhibits 10 and 14, but were inadvertently omitted from the Joint Appendix filed by the Company.

by directly causing union representatives Reed, Marshall, and Clay to be arrested and charged with criminal trespass. (JA 193). Finally, the Board found that the Company violated Section 8(a)(1) based on a number of coercive statements made by company manager Dostert. (JA 194-45.)⁵

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by the Act. (JA 188.) Affirmatively, the Order requires the Company to make-whole the Union or union representatives Reed, Marshall, and Clay for any and all legal, representational, and related costs arising from their arrests and related proceedings, with interest; notify the appropriate law enforcement and court authorities of the illegality of the arrests and seek the expungement of associated records, and notify Reed, Marshall, and Clay that this has been done; and post a remedial notice at its union-represented stores that are covered by the collective-bargaining agreements at issue. (JA 188.)

⁵ Member Johnson, dissenting in part, disagreed with the Board's findings that the Company violated Section 8(a)(1) and (5) by prohibiting union representatives from speaking with unit employees on the store floor; that the Company violated Section 8(a)(1) by causing the arrests and prosecutions of three union representatives; and that certain statements by manager Dostert (excluding the order to a unit employee not to speak with the union representatives) violated Section 8(a)(1). (JA 195-98.)

SUMMARY OF ARGUMENT

This case involves a series of unlawful actions undertaken by the Company at its Hillsboro store on the morning of October 15, 2009. As the Board noted, this case fundamentally turns on the Board's factual findings and its credibility determinations based on witness testimony at the unfair-labor-practice hearing. Relying on the testimony of multiple witnesses found to be credible, as well as contemporaneous written evidence, the Board concluded that the Company, through its agent, wholly prohibited union representatives from speaking with unit employees on the store floor. Such prohibition was in direct contravention of a contractual store-visitation clause and an established past practice that had been in existence for several decades.

The Company's manager stated this prohibition before he was aware that there were more than two union representatives in the store, before the two representatives he was speaking to had approached a single employee, and without any grounds for asserting that the two representatives intended to depart from past practice. As such, many of the Company's contentions on appeal are either irrelevant or require this Court to directly reverse the Board's factual findings and its reasonable credibility determinations. In addition, the Court is jurisdictionally barred by the Act from considering many of the Company's arguments on appeal, because the Company failed to first raise them before the Board.

Having determined that the Company violated the Act by unlawfully repudiating the union-visitation policy, the Board found that the Company further violated the Act when its manager-on-duty directed the store security officer to summon the police to have the union representatives removed from the premises. Ultimately, three union representatives were arrested and charged with criminal trespass, solely because the Company's manager wrongly informed the police that the union representatives had no right to be on the premises. The Board's Order follows well-established precedent by requiring the Company to compensate the union representatives for the costs arising from their unlawful arrests.

Finally, the Board concluded that the Company violated the Act through a number of coercive statements made by its manager-on-duty, including his order to a unit employee not speak with the union representative, his threat to have the union representatives removed from the store or arrested, and his disparaging comments regarding the Union, which the Board reasonably found to be unlawfully coercive given the context in which they made. Substantial evidence supports all of the Board's unfair-labor-practice findings, which are grounded in a reasonable evaluation of the record evidence considered as a whole, the credibility of witnesses, and settled Board and judicial case law.

STANDARD OF REVIEW

The Court’s review of Board decisions is “tightly cabined” and the Board is afforded a high degree of deference. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). The Board’s findings of fact are “conclusive” when supported by substantial evidence on the record considered as a whole, even if the Court would reach a different result under de novo review. 29 U.S.C. § 160(e); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005). Indeed, the Court will only reverse the Board’s findings “when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016) (quoting *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011)).

Meanwhile, the Court must accept the Board’s credibility determinations unless they are “patently insupportable.” *Alden Leeds*, 812 F.3d at 166; *Inova Health Sys.*, 795 F.3d at 80. The mere presence of conflicting evidence is insufficient, since “such a conflict is present in every instance in which a credibility determination is required.” *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996). Finally, the Board’s discretion in tailoring remedies is “very broad,” and the Board’s choice of remedies must be upheld unless shown to be “a patent attempt to achieve ends other than” the effectuation of

the Act. *United Food & Commercial Workers v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) (citation omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY DENYING UNION REPRESENTATIVES THE RIGHT TO SPEAK WITH UNIT EMPLOYEES ON THE STORE FLOOR

A. An Employer Violates Section 8(a)(1) by Prohibiting Union Representatives from Speaking with Employees Pursuant to a Lawful Access Right, and Violates Section 8(a)(5) by Unilaterally Changing an Established Union-Access Policy

Section 7 of the Act grants employees the “right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of their statutory rights. 29 U.S.C. § 158(a)(1). An employer’s conduct in prohibiting protected union-related communications between employees and union representatives constitutes just such an attempt to interfere with, restrain, and coerce the exercise of protected rights. As such, when union representatives possess a right to visit represented employees on the employer’s premises pursuant to a collectively-bargained access provision or an established past practice, the employer violates Section 8(a)(1) by interfering with that right and by prohibiting union representatives from speaking

with employees. *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), *enforced sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995); *Gilliam Candy Co.*, 282 NLRB 624, 626 (1987).

Section 8(a)(5) makes it an unfair labor practice for an employer to “refuse to bargain collectively” with its employees’ chosen bargaining representative. 29 U.S.C. § 158(a)(5). An unlawful refusal to bargain includes an employer’s unilateral change to terms and conditions of employment without first notifying and bargaining with its employees’ chosen representative. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Thus, when an employer unilaterally changes an established union-access policy, whether derived from a contractual agreement or from past practice, the employer violates Section 8(a)(5). *Frontier Hotel & Casino*, 309 NLRB at 766; *Ernst Home Ctrs., Inc.*, 308 NLRB 848, 848-49 (1992).

B. The Company’s Manager-on-Duty Prohibited Two Union Representatives from Having Any Conversations with Unit Employees on the Store Floor

Based on the credited testimony of union representatives Reed and Witt, there can be little doubt that Dostert violated the Act by repudiating the established visitation policy. It is undisputed that the contractual store-visitation clause and several decades of past practice permit union representatives to speak with on-duty employees on the store floor, typically for no more than two minutes to avoid unreasonable interruptions. However, when Reed and Witt notified Dostert of

their presence on the morning of October 15, Dostert immediately stated that they could only speak with unit employees in the store breakroom, and that any contact with unit employees on the store floor must be limited to identification and introductions only. This is confirmed by Dostert's own contemporaneous written summary, which states that he informed Reed and Witt that "they could approach associates and hand out their card and they would be in the break room for further information," and that he disagreed with the suggestion that the union representatives could "talk to the associates while they are working." (JA 793.)

Moreover, Dostert's unlawful repudiation of the store-visitation clause is not merely a hypothetical in this case, because when Reed attempted to have a brief conversation with unit employee England, Dostert unlawfully interjected and ordered England not to speak with the union representatives. Throughout his interaction with Reed and Witt on the morning of October 15, the sole justification provided by Dostert was that the union representatives did not have a right to speak with on-duty employees on the store floor. As a result, the Company, through its agent, violated Section 8(a)(1) by denying the union representatives their lawful, collectively-bargained right to visit with unit employees. *Frontier Hotel & Casino*, 309 NLRB at 766. In addition, the Company violated Section 8(a)(5) by unilaterally changing the union-access policy without first notifying or bargaining

with its employees' chosen bargaining representative. *Id.*; *Ernst Home Ctrs.*, 308 NLRB at 849.

C. The Board's Findings Are Largely Premised on Its Reasonable Credibility Determinations, Which the Company Does Not Meaningfully Contest

Despite the Company's various arguments on appeal, the outcome of the present case primarily turns on the Board's findings of fact as to what precisely occurred on the morning of October 15, which the Board based on its evaluation of the record evidence and its concurrent credibility determinations. The Court will not set aside such determinations unless "patently insupportable." *Alden Leeds*, 812 F.3d at 166. This is particularly true when assessing the credibility of witness testimony, which "is a matter for Board determination," *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003) (citation omitted), since "the Board is obviously best situated to assess the credibility and demeanor" of witnesses at the unfair-labor-practice hearing, *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1072 (D.C. Cir. 2015) (citation omitted).

Following a twelve-day hearing, the administrative law judge noted that the case turns almost entirely upon "which version" of events is credited. (JA 179.) The judge, as subsequently affirmed by the Board, thus engaged in an extensive analysis of the various witnesses' credibility: relying in significant part on an "observation of the witnesses"; the witnesses' demeanor; the character of the

witnesses’ testimony; the fact that certain witnesses (including company manager Dostert) were not sequestered; the presence of conflicting contemporaneous evidence; and the consistency or inconsistency of other witness testimony. (JA 179-81.) Upon consideration of all the relevant evidence, the Board ultimately credited the accounts of union representatives Reed and Witt—and discredited the account of Dostert—and the Company’s brief to the Court provides scant justification for overturning the Board’s credibility determinations.⁶

Nonetheless, the Company continues to rely on the discredited testimony of Dostert (Br. 24-30), which was in direct conflict with not only the credited testimony of Reed and Witt, but also Dostert’s own contemporaneous written account of the events at issue. The Board rejected Dostert’s discredited assertions that he merely asked Reed and Witt to comply with the terms of the store-visitation clause, and that Reed and Witt were expressly seeking to speak with employees for an unreasonable amount of time or to engage in other conduct inconsistent with established past practice. Instead, the Board concluded that Dostert “simply announced” in response to the union representatives’ presence that they were

⁶ See *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1124 (D.C. Cir. 2012) (finding no basis for overturning credibility determinations that were based in part on consistency or inconsistency with credited facts and other witness testimony); *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1091-92 (D.C. Cir. 2012) (finding no basis for overturning credibility determinations that were based in part on “testimonial demeanor”); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1006 (D.C. Cir. 1998) (finding no basis for overturning credibility determinations relying in part on demeanor and apparent truthfulness of witnesses).

required to “limit their contact with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom.” (JA 181.)

D. The Company’s Contentions on Appeal Are Irrelevant to the Board’s Unfair-Labor-Practice Findings and, in Any Event, the Union Neither Planned the Company’s Unlawful Response, Nor Breached the Terms of the Store-Visitation Clause

1. The Court Is Jurisdictionally Barred from Entertaining the Company’s New Arguments that the Union Representatives Lost the Protection of the Act

As a preliminary matter, the Company’s arguments that the union representatives’ conduct lost the protection of the Act (Br. 40 n.10, 47, 61-63) were not raised before the Board, and thus this Court is jurisdictionally barred by Section 10(e) of the Act from entertaining them on appeal. 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court . . . [absent] extraordinary circumstances.”); *HealthBridge Mgmt.*, 798 F.3d at 1069. In its exceptions before the Board, the Company relied on the factual contention that Reed and Witt expressly *sought* visitation with employees on terms that were inconsistent with the store-visitation clause, and that Dostert was thus justified in responding the way he did. The Company did not contend that any of the union representatives’ conduct lost the protection of the Act.

As a result, the Board made no finding as to whether the union representatives’ conduct would have been rendered unprotected based on an

alleged breach of the store-visitation clause occurring elsewhere in the store, which Dostert would not have been aware of. Meanwhile, the Board specifically reserved the question of whether the Union retained a statutory right to speak with the employees absent the contractual store-visitation clause. (JA 160-61.) Because the Board was never presented with the Company's new arguments, the Court lacks jurisdiction to consider them for the first time on appeal. In any event, the claim that the union representatives lost the protection of the Act would fail for the same reasons that the Company's arguments about a planned confrontation or breach of the store-visitation clause should fail, as discussed below.

2. The Question of Whether the Union Planned the Incident on October 15 Is Irrelevant and, in Any Event, the Union Did Not Plan the Company's Unlawful Conduct

The Company's argument that the Union "planned" the incident on the morning of October 15 (Br. 38-43, 61-62) is legally irrelevant. The Board applies an objective standard in determining whether conduct is protected under the Act, and the Board does not delve into the subjective motives of individual actors.

Fresh & Easy Neighborhood Mkt., Inc., 361 NLRB No. 12, 2014 WL 3919910, at *4 (Aug. 11, 2014); *Dynabil Indus., Inc.*, 330 NLRB 360, 362 (1999). Moreover, as the Board here observed, the Union was exercising its right to speak with unit employees pursuant to established practice and a contractual store-visitation clause that had not been changed through bargaining. (JA 181.) The Union "does not

lose or diminish that right by exercising it in the face of likely or even stated employer intention to halt or prevent such protected activities.” (JA 181.)

Even assuming, contrary to the credited evidence, that the Union anticipated the unlawful reaction by the Company’s manager—or even desired, for publicity purposes, that the Company would violate the Act—such facts would not privilege the Company to engage in deliberate unlawful conduct. *See M.J. Mech. Servs., Inc.*, 324 NLRB 812, 813-14 (1997) (noting that protected activities, such as union salting, do not lose the protection of the Act even if “intended in part to provoke an employer to commit unfair labor practices”), *enforced mem.*, 172 F.3d 920 (D.C. Cir. 1998); *see also Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1197 (D.C. Cir. 2003) (same); *United Credit Bureau of Am., Inc.*, 242 NLRB 921, 925 (1979) (rejecting employer’s defense that employee desired to provoke her own unlawful discharge, since “it is hardly a matter of defense that an employee could count on her employer to discharge her unlawfully”), *enforced*, 643 F.2d 1017 (4th Cir. 1981).

In any event, the Board rejected the Company’s claims that the Union “stag[ed] the confrontation” at the Hillsboro store, or that it planned to provoke the Company into violating the Act. (JA 194.) Once again, the Company implicitly seeks to overturn the Board’s credibility findings regarding witness testimony indicating that the Union did not plan the confrontation. (JA 194.) Although there

was testimonial evidence that Reed was designated the night before to “take” an arrest if necessary, the Board explicitly took this fact into consideration and noted that it was part of a “general cautionary practice” rather than evidence of a premeditated conspiracy. (JA 170.) Likewise, although Witt invited Nyberg to take photographs at the store, the Board noted that he invited her on his own initiative and that none of the Union’s leadership was aware of such invitation in advance. (JA 181.) Thus, substantial evidence supports the Board’s reasonable factual finding that the Union did not plan or anticipate the incident on the morning of October 15.

3. The Question of Whether the Union Breached the Terms of the Store-Visitation Clause Is Irrelevant and, in Any Event, the Union Did Not Actually Breach the Agreement

The Company also devotes a substantial portion of its brief to arguing that the Union breached the terms of the contractual store-visitation clause (Br. 43-54). However, the Board concluded that any such breach would have been irrelevant, insofar as Dostert violated the Act prior to learning of any alleged breach, and the Board rejected as a factual matter the claim that any of the union representatives actually breached the terms of the store-visitation clause.

a. The number of union representatives present in the store did not breach the agreement or justify the Company's unlawful conduct

The Board found that any alleged breach of the store-visitation clause based on the number of union representatives present would have been irrelevant, insofar as Dostert was not aware that there were more than two representatives in the store when he denied Reed and Witt the right to speak with unit employees on the store floor. (JA 160.) The credited testimony of Reed and Witt confirms that Dostert never cited the number of representatives as the reason he was denying them the right to speak with employees on the store floor (JA 301-03, 387-88, 529), and Dostert's contemporaneous written summary confirms that the number of representatives was not a motivating factor. (JA 180-81; 793.)

In any event, substantial evidence supports the Board's findings that the parties "did not have a clearly defined practice with regard to the number of union agents permitted to be in a store at any one time," and that the presence of eight representatives on the morning of October 15 did not breach the existing agreement. (JA 193.) It is clear that the store-visitation clause itself places no express limitation on the number of union representatives that may visit a store. (JA 739.) Although the Union typically sent only one or two representatives on store visits, such fact does not establish a binding past practice limiting the express terms of the store-visitation clause. *W. Lawrence Care Ctr. Inc.*, 308 NLRB 1011,

1012 (1992) (“Nor may an employer obtain authority [to restrict union access] by placing its own limiting gloss on the provision—especially a gloss in conflict with the provision’s plain meaning.”). Store manager Catalano testified at the hearing that he was unaware of any limitation on the number of representatives that could be present (JA 400-01), and the evidence shows that the Union had sent delegations of more than two representatives to the Company’s stores prior to October 15, 2009 (JA 216-17, 242-43, 269, 322, 542-45).⁷

Moreover, there is no evidence that the presence of eight representatives on the morning of October 15 was unreasonably disruptive. The representatives arrived around 9:30 a.m. on a weekday morning when the store was not particularly busy, split into four pairs, and spread out across the 165,000-square-foot store. (JA 193 n.4, 194 & n.7.) Despite the existence of surveillance footage covering the entire store (JA 746-52, JX 9), the Company does not point to a single instance of customers or employees being disrupted by the representatives’ conduct or presence. Indeed, any arguable disruption at the store was caused by the Company’s own unfair labor practices.

⁷ Likewise, the fact that Reed was formally employed by the Union’s International rather than Local 555 (Br. 7, 16, 37, 61) is immaterial, as it is well established that parties to collective-bargaining are free to designate their own representatives. *Frontier Hotel & Casino*, 309 NLRB at 766; *Ariz. Portland Cement Co.*, 281 NLRB 304, 307 (1986). The store-visitation clause in question simply refers to “representatives of the Union.” (JA 739.)

b. The existence of a bargaining-related petition did not breach the agreement or justify the Company's unlawful conduct

The Company also argues that the union representatives breached the terms of the store-visitation clause by soliciting employee signatures for a bargaining-related petition. (Br. 48-49.) However, any alleged breach of the store-visitation clause is once again irrelevant. Aside from the Company's post-hoc justifications, there is no evidence that Dostert denied the union representatives their contractual access rights because they possessed petitions. To the contrary, Dostert did not mention the petition in his contemporaneous written summary of the events (JA 793), and he ordered employee England not to speak to Reed or Witt despite there being no indication that Reed was soliciting England's signature for a petition.

In any event, the union representatives did not breach the store-visitation clause. The Company cites no evidence showing that any employees were asked to stop their work to sign the petition on the morning of October 15. The Company relies exclusively on an inapposite interaction between union representatives Nikki Miller and Mary Spicher, neither of whom was even present at the Hillsboro store during the events at issue in this case. Moreover, the petition in question was approximately six sentences long (JA 812), and could have easily been explained to employees who were not busy with customers within the customary one to two

minute interactions. The Company points to no compelling evidence that the solicitation of signatures for petitions was prohibited under past practice.

c. The Union did not interfere with customers, and the Company does not possess unfettered discretion to prohibit union contact with represented employees

The Company further argues, for the first time, that the Union breached the store-visitation clause by interfering with customers (Br. 51-52), and that the Company retained “unfettered discretion” to unilaterally determine what was unreasonable within the meaning of the contract (Br. 52-54). The Company raised neither one of these arguments before the Board. The Company’s brief to the Court is the first time it has ever mentioned a contractual management-rights clause in connection with this case. As a result, the Court is jurisdictionally barred from entertaining the Company’s new arguments on appeal. 29 U.S.C. § 160(e); *Alden Leeds*, 812 F.3d at 166-68; *HealthBridge Mgmt.*, 798 F.3d at 1069.

In any event, the Company’s arguments are unavailing. As the Board noted, there is “no evidence that any customer was ignored or that store operations were otherwise disrupted.” (JA 194.) As for the Company’s argument regarding its purportedly unfettered discretion to interpret the store-visitation clause, the Company again attempts to obfuscate the fact that its manager violated the Act by prohibiting any contact with unit employees on the store floor beyond identification and introductions—in direct contravention of the express terms of

the store-visitation clause and the Company's own stated interpretation of the contract (Br. 9-11).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CAUSING THE ARRESTS AND PROSECUTIONS OF THREE UNION REPRESENTATIVES

A. An Employer Violates the Act When It Causes the Arrests of Union Representatives in an Effort to Restrain Protected Conduct

An employer interferes with and restrains protected union activities, and thereby violates Section 8(a)(1) of the Act, when it evicts union representatives from its premises in contravention of a contractual access right. *Frontier Hotel & Casino*, 309 NLRB at 766. Likewise, an employer violates Section 8(a)(1) when it summons police officers to remove union representatives lawfully present on the employer's premises, and when it causes the arrests and prosecutions of union representatives in an attempt to restrain protected conduct. *Turtle Bay Resorts*, 353 NLRB 1242, 1242 n.6 (2009), *incorporated by reference*, 355 NLRB 706 (2010), *enforced sub nom. Oaktree Capital Mgmt., L.P. v. NLRB*, 452 F. App'x 433 (5th Cir. 2011); *Downtown Hartford YMCA*, 349 NLRB 960, 973 (2007); *Baptist Mem'l Hosp.*, 229 NLRB 45, 46 (1977), *enforced*, 568 F.2d 1 (6th Cir. 1977).

B. The Company Caused Union Representatives Reed, Marshall, and Clay To Be Arrested and Charged with Criminal Trespass

Substantial evidence supports the Board's finding that the Company was directly responsible for summoning the police and causing the arrests of union

representatives Reed, Marshall, and Clay for criminal trespass. Dostert called the police in order to evict Reed and the other union representatives from the Hillsboro store based on his unlawful repudiation of a contractual store-visitation clause that granted the union representatives the right to be present. Dostert had already threatened Reed and Witt that he would have them “trespassed” if they did not leave the store (JA 171; 372, 827), and Dostert specifically informed the responding police officers that he wanted Reed removed from the premises—causing her to be handcuffed and taken into custody. As Dostert looked on, the responding police officers continued by arresting Marshall and Clay for being present on the Company’s premises against Dostert’s wishes.

The Board found that the Company was liable for all three unlawful arrests given that Dostert summoned the police, informed the police that he wanted the union representatives removed from the premises, and looked on without intervening as the police arrested all three union representatives for criminal trespass. Dostert specifically requested that the responding police officers remove Reed from the premises. *Wild Oats Mkts., Inc.*, 336 NLRB 179, 181 (2001) (finding it “beyond cavil” that employer violates the Act by directly requesting that police remove lawfully-present union representative); *see Downtown Hartford YMCA*, 349 NLRB at 973; *Schear’s Food Ctr.*, 318 NLRB 261, 267 (1995). Likewise, as the Board explained, Marshall and Clay were arrested “because of

[the Company's] agent's initiation of the removal process," and once Dostert summoned the police he "was obligated to stop the arrests of Marshall and Clay—as he easily could have done, if he was to escape responsibility for their arrest." (JA 182.)⁸

Substantial evidence also supports the Board's finding that none of the three union representatives who were arrested had engaged in any misconduct that would have caused their arrests independent of Dostert's unlawful assertion that they were trespassing. (JA 182-83.) All three were arrested and booked solely for trespass. (JA 176; 523-24.) Indeed, surveillance footage confirms that Reed was handcuffed and escorted out of the store less than one minute after the two responding officers approached her. (JA 751, JX 9(h) at 10:13:30-10:14:20.) At trial, the responding officers confirmed that Reed "didn't give [them] any

⁸ The Board further explained that the arrests of Marshall and Clay, even if not specifically requested by Dostert, were the proximate result of his deliberate unlawful conduct in summoning the police to have the representatives of the Union removed from the premises. (JA 183.) Both the Board and the Supreme Court have held that employers are liable for the proximate and foreseeable results of their unlawful conduct. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895 (1984); *Wild Oats Mkts.*, 336 NLRB at 181-82. There can be little doubt that Dostert foresaw the potential arrests of union representatives at the Hillsboro store. Before summoning the police, Dostert expressly threatened that he would have the union representatives "trespassed" and removed from the premises, and after Reed had *already* been arrested he then stood by and watched as Marshall and Clay were arrested. Contrary to the Company's argument (Br. 65), the Board's finding is entirely consistent with *Baptist Memorial Hospital*, 229 NLRB 45, which is yet another Board decision supporting the result in this case, rather than an allegedly competing "standard" for analyzing unlawful arrests.

problems” and that she was arrested solely because Dostert did not want her there. (JA 500-01, 515, 522.) Likewise, Marshall and Clay were arrested solely for failing to leave the premises after Dostert indicated that he wanted them to leave. (JA 182-83; 516, 522, 834-38.)⁹ The Company’s attempt to blame the union representatives for causing their own arrests thus has no basis in the record.

C. The Court Is Jurisdictionally Barred from Considering the Company’s First Amendment Argument and, in Any Event, the Company’s Unlawful Conduct Was Not Constitutionally Privileged

The Company furthers alleges, for the first time, that its decision to call the police to have the union representatives arrested for trespass was privileged by the First Amendment (Br. 59-60), under the Supreme Court’s *Noerr-Pennington* doctrine. However, the Court is jurisdictionally barred from considering the Company’s new argument on appeal by Section 10(e) of the Act, which prohibits the consideration of any argument not raised before the Board, “unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *Alden Leeds*, 812 F.3d at 166-68;

⁹ The fact that Clay, unlike Reed and Marshall, did not first enter the store to speak with unit employees is irrelevant insofar as the Board found that Clay’s presence was directed at “making common cause with the union agents” and at contesting the Company’s unlawful denial of the Union’s contractual access right. (JA 183.) The Company’s belated argument that Clay was not engaged in protected activity and that his arrest “fails to implicate the Act” (Br. 63) was not raised before the Board below, and thus this Court lacks jurisdiction to consider it. 29 U.S.C. § 160(e). In any event, Clay’s attempt to enforce the Union’s contractual access right was undoubtedly protected conduct.

HealthBridge Mgmt., 798 F.3d at 1069. The Company made no First Amendment argument before the Board, and the Company has not articulated any extraordinary circumstances that would justify raising the new argument on appeal.

Although the Company now cites *Venetian Casino Resort v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015), an intervening decision by this Court that denied enforcement of a Board order based on the *Noerr-Pennington* doctrine, the pendency of such decision does not constitute an extraordinary circumstance excusing the Company's failure to previously raise its argument before the Board. Here there was no "substantial change in controlling law." *Sure-Tan*, 467 U.S. at 896 n.7 (noting that Section 10(e) bars consideration of a newly-raised First Amendment argument absent extraordinary circumstances, such as an intervening and substantial change in controlling law). This Court's decision in *Venetian Casino Resort* did not effectuate a change in Board law, as the Board is not bound in subsequent cases by the decisions of the courts of appeals. *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 814 & n.29 (2007); see *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005). Thus, the Board's determination in the first instance of any First Amendment claim in the present case would not have been controlled by *Venetian Casino Resort*.¹⁰

¹⁰ Moreover, *Venetian Casino Resort* did not constitute a substantial change in controlling law even within this circuit. The Court's recent decision came eight years after an initial decision in the case, and thus on the same facts the Court had

Furthermore, the Company had actual notice that the *Venetian Casino Resort* case was pending, because the administrative law judge provided an unprompted summary of the case in a footnote to his decision. (JA 183 n.20.) Despite such notice, the Company made absolutely no mention of the First Amendment or the *Noerr-Pennington* doctrine in its exceptions before the Board, thus robbing the Board of any opportunity to consider the argument as applied to the facts of this case. Likewise, the Company did not seek reconsideration by the Board, despite the fact that the Board's 2015 Order issued two weeks after *Venetian Casino Resort* had already been briefed and argued back on appeal in this Court. There are no extraordinary circumstances excusing the Company's deliberate failure to raise the issue before the Board, and thus the Court is jurisdictionally barred from entertaining the Company's argument on appeal.

In any event, this Court's recent decision in *Venetian Casino Resort* is readily distinguishable. That case involved union demonstrators staging a protest on a temporary public walkway that was part of the employer's private property, and thus the Court remanded the case to the Board to determine whether the employer's call to the police constituted a "valid attempt to secure its private property rights." 793 F.3d at 92. In contrast, here there was a contractual store-

already held that employer conduct which is otherwise unlawful under the Act may nonetheless be "protected by the First Amendment when it is part of a direct petition to the government." *Venetian Casino Resort LLC v. NLRB*, 484 F.3d 601, 611 (D.C. Cir. 2007).

visitation clause granting the Union a legal right to visit employees on the Company's property.

D. The Make-Whole Relief Contained in the Board's Order Is a Reasonable Remedy Based on Well-Established Precedent

The Board's Order in part requires the Company to remedy its unfair labor practices by making whole the Union or union representatives Reed, Marshall, and Clay for any costs arising from their arrests and prosecutions, and by notifying the appropriate law enforcement authorities in order to seek the expungement of any records relating to the arrests. (JA 188.) The Board's remedial order follows well-established precedent. *Downtown Hartford YMCA*, 349 NLRB at 973, 985-96 (requiring employer to pay costs relating to arrest of union representative for attempting to visit employees pursuant to established access right); *Med. Ctr. Hosps.*, 244 NLRB 742, 745 (1979) (requiring employer to pay costs and seek expungement relating to arrest of union supporter for lawful solicitation), *enforced mem.*, 626 F.2d 862 (4th Cir. 1980); *see also Clark Manor Nursing Home Corp.*, 254 NLRB 455, 459 (1981) (awarding legal expenses and requiring employer to seek expungement relating to trespass complaint brought against union supporters), *enforced in relevant part*, 671 F.2d 657 (1st Cir. 1982).

The Company wrongly asserts that the Board will only order legal expenses and other costs where an employer acted "egregiously" in causing the arrests of union representatives (Br. 67). The Board applies no such standard, and has

awarded the same remedy in similar cases without requiring the specific factual predicates unilaterally proposed by the Company. *See, e.g., Downtown Hartford YMCA*, 349 NLRB at 973, 985-86; *Baptist Mem'l Hosp.*, 229 NLRB at 46.

Moreover, requiring the Company to reimburse the union representatives for the costs incurred as a result of their unlawful arrests is the only way to effectuate the policies of the Act by attempting to restore the status quo prior to the unfair labor practices. *Baptist Mem'l Hosp.*, 229 NLRB at 46; *cf. Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 35 (D.C. Cir. 2001) (recognizing propriety of legal expenses awarded as compensation for costs directly caused by employer's unlawful conduct). As a result, this Court has enforced Board orders awarding legal expenses as a compensatory remedy in similar cases. *New York New York, LLC*, 356 NLRB 907, 920 (2011) (requiring employer to reimburse employees for legal expenses relating to unlawful trespass citations, and to request withdrawal of citations from city attorney), *enforced*, 676 F.3d 193 (D.C. Cir. 2012); *Davis Supermarkets, Inc.*, 306 NLRB 426, 428 (1992) (requiring employer to reimburse union for legal expenses relating to unlawful civil trespass complaint), *enforced*, 2 F.3d 1162 (D.C. Cir. 1993).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAKING A NUMBER OF COERCIVE STATEMENTS

A. An Employer's Statements Violate the Act If They Have a Reasonable Tendency to Restrain Protected Conduct

An employer's statements violate Section 8(a)(1) of the Act if, considering the totality of the circumstances, the statements had a "reasonable tendency" to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). When reviewing the Board's evaluation of the coercive effect of employer statements, the Court must "recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

Section 8(c) provides that no expression of any views or opinions shall constitute an unfair labor practice, unless such expression constitutes a coercive threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c); *Gissel Packing*, 395 U.S. at 617-20. Thus, "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991). However, an employer's disparaging remarks may constitute a violation of the Act if they are made in "context among other coercive statements." *Id.* Ultimately, employer statements

“must be viewed in context and not in isolation to determine if they [had] the reasonable tendency proscribed by Section 8(a)(1).” *Turtle Bay Resorts*, 353 NLRB at 1278 (citation omitted), *incorporated by reference*, 355 NLRB 706.

B. The Company Does Not Independently Contest the Board’s Reasonable Findings that Dostert Unlawfully Ordered England Not To Speak with Reed, Informed Reed and Witt that They Could Not Speak with Employees on the Store Floor, and Instructed Security To Call the Police

The Board found that the Company separately violated Section 8(a)(1) when its manager made a number of statements unlawfully restraining protected conduct. (JA 183-85.) In particular, during his running interaction with union representatives Reed and Witt, company manager Dostert made statements: ordering employee England not to speak with Reed, informing Reed and Witt that they could not speak with employees outside the store breakroom, and instructing store security officer Kline to call the police regarding the union representatives’ presence. As the Company does not independently contest the validity of these separate unfair-labor-practice findings, the Board is entitled to summary enforcement of the relevant portions of its Order. *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5-6 (D.C. Cir. 2012).

Dostert’s statements ordering England not to speak with Reed and wrongly informing Reed and Witt that they could not speak with employees on the store floor had the obvious effect of restraining protected communications between

union representatives and unit employees. As such, those statements violated the Act. *See Albertson's, Inc.*, 319 NLRB 93, 105 (1995) (finding Section 8(a)(1) violation where employer ordered employees not to speak with union representatives); *Turtle Bay Resorts*, 353 NLRB at 1273, 1286 (finding Section 8(a)(1) violation where employer wrongly told union representatives that they had no right to visit employees on employer's premises), *incorporated by reference*, 355 NLRB 706.

Likewise, Dostert further violated the Act through the statement he made in the union representatives' presence instructing Kline to call the police, separately from the Company's subsequent unfair labor practices in actually summoning the police and causing the arrests of three union representatives. Dostert's statement had the effect of threatening Reed and Witt that the police would be summoned if they did not cease their attempts to speak with employees, and thus that statement constituted a separate interference with protected conduct. *See Schlegel Okla., Inc.*, 250 NLRB 20, 24 (1980) (finding Section 8(a)(1) violation where employer threatened to call police on union supporters engaged in protected conduct, irrespective of fact that employer did not subsequently call police), *enforced*, 644 F.2d 842 (10th Cir. 1981).

C. Dostert Threatened To Have Reed and Witt Removed from the Store or Arrested

In addition to the statements discussed above, the Board found that the Company violated the Act when Dostert threatened to have Reed and Witt removed from the store or arrested. (JA 183-84.) As the credited evidence demonstrates, Dostert made a number of statements indicating that he was going to “have the union representatives removed from the store” (JA 376), and that “he had his boss’s backing and that the union reps were going to be removed from the store” (JA 378). Dostert had earlier stated that if the union representatives attempted to speak with employees he “would have [them] trespassed.” (JA 372, 827.) On these facts, Dostert violated Section 8(a)(1) by threatening Reed and Witt for engaging in protected conduct. *Roadway Package Sys., Inc.*, 302 NLRB 961, 974 (1991) (finding Section 8(a)(1) violation where employer threatened to have hand-billing employees removed from premises for engaging in protected conduct); *Schlegel Okla.*, 250 NLRB at 24.

The Company argues for the first time on appeal that there is “no evidence” that Dostert actually threatened to have the union representatives removed from the store or arrested (Br. 57), and that his unlawful threat is excused by the fact that he could not personally arrest anyone (Br. 57 n.14). However, the Company failed to raise these arguments before the Board, and thus the Court is jurisdictionally barred from reaching them. 29 U.S.C. § 160(e). In any event, the Company’s

arguments have no basis in law or fact. The credited testimony of Witt confirms that Dostert stated multiple times that he would have the union representatives removed from the store and charged with trespass. Whether Dostert specifically used the word “arrested” is immaterial. *See Schlegel Okla.*, 644 F.2d at 843 (rejecting “highly semantical argument” that threat to call police and have union supporters moved was not threat of arrest). The Company’s additional argument borders on the frivolous, since Dostert clearly had the power to *cause* the union representatives to be arrested for trespass—indeed, he proceeded to do just that.

D. Dostert Coercively Disparaged the Union in the Presence of an Employee, and the Court Is Jurisdictionally Barred from Entertaining the Company’s Unavailing Section 8(c) Argument

The Board further found, and the Company does not contest (Br. 55-56), that Dostert angrily and in a raised voice made a number of disparaging comments about the Union and its representatives. (JA 184; see *supra* pp. 12-13.) The Board credited the testimony of Reed and Witt in finding that Dostert made the comments shortly after he interrupted Reed’s attempt to speak with employee England at the apparel checkstand. (JA 184; 228-31, 375-81.) The conversation continued as Dostert and the union representatives moved away from the checkstand itself into the aisle separating the apparel and electronics departments. Witt testified that Dostert’s remarks occurred in the “immediate area” of England and the apparel checkstand, less than fifteen feet away and “within hearing range” of England.

(JA 378, 381.) This is confirmed by the surveillance footage in evidence, which demonstrates that a confrontation occurred immediately in front of England and continued for several minutes only meters away, before drifting off camera.

(JA 751, JX 9(h) at 9:48:25-9:53:20.)¹¹ Substantial evidence thus supports the Board's finding.

The fact that England has a hearing impairment does not establish that she would have been unable to hear a loud argument occurring within fifteen feet of her, whether she was facing the argument or not. The record simply does not contain sufficient evidence regarding the extent of England's impairment as to warrant overturning the Board's reasonable conclusions. Moreover, although England visibly turned away from the conversation at one point after it moved toward the aisle (Br. 57 n.13), she was also directly facing the conversation for much of its duration. (*See, e.g.*, JA 751, JX 9(h) at 9:51:50-9:55:10.) The Board

¹¹ Reed stated in her testimony that after ending her conversation with England, the union representatives and Dostert moved into the aisle separating the apparel and electronics departments. (JA 227-29.) However, Reed mistakenly surmised that she moved closer to the electronics department than the apparel department, "because there was—there's a basket of DVDs there that were, like, closeout or something," and that the employee within ten feet of the conversation "would've been [an employee] in the home electronics department" rather than England. (JA 229-30.) Based on Witt's credited testimony and the surveillance video, it is clear that Reed's recollection of the conversation's location was mistaken. The Board noted that neither Witt nor Reed was entirely "complete or perfect in his or her testimony" (JA 180), and reasonably concluded that Dostert made the disparaging comments shortly after Reed's attempt to speak with England, and that he therefore made them in the vicinity of England.

concluded that England would have heard the disparaging comments at issue, which Dostert made angrily and in a raised voice in England's immediate vicinity, and the Company has not demonstrated that "no reasonable factfinder" could have made such a finding. *Alden Leeds*, 812 F.3d at 165.

Finally, the Company argues that Dostert's disparaging comments were privileged by Section 8(c) of the Act, and that the Board misapplied precedent in finding the disparaging comments to be unlawful (Br. 55-58). As an initial matter, the Court is jurisdictionally barred from entertaining these newly-raised arguments. 29 U.S.C. § 160(e). The Company made no such arguments in its exceptions before the Board, where it instead relied solely on its factual contention that no employees overheard Dostert's disparaging comments. Although Member Johnson raised the issue of Section 8(c) in his partial dissent to the Board's decision, Section 10(e) bars this Court's review of "any issue not *presented* to the Board, even when the Board has discussed and decided the issue." *HealthBridge Mgmt.*, 798 F.3d at 1069 (citation omitted); *see also Alden Leeds*, 812 F.3d at 167-68; *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 33 (D.C. Cir. 2007).

In any event, the Board properly found that Dostert's disparaging comments were sufficiently coercive as to not be protected by Section 8(c) and as to constitute threats in violation of Section 8(a)(1). The Board determined that employees would have viewed the disparaging comments as coercive, in part

because of the ongoing context of Dostert's unlawful denial of the Union's visitation rights. (JA 195.) Dostert angrily disparaged the Union while *in the process* of refusing to allow union representatives to visit with employees, and thus employees would obviously have been chilled in their willingness to exercise their reciprocal right to talk with union representatives or engage in other protected activities. That finding is a reasonable evaluation of the context in which the comments were made, and has nothing to do with what the Company attempts to characterize as a "novel 'proximity' theory" (Br. 57).¹² As such, Dostert's comments violated the Act.

¹² The Board also relied on its finding that Dostert's disparaging comments were made alongside more direct unlawful threats, including his order to England not to speak with Reed, and his threat to have the union representatives arrested. (JA 195.) Thus, the present case is directly comparable to *Turtle Bay Resorts*, 353 NLRB at 1278-79, and *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 493, 499 (1995), where the Board determined that disparaging remarks violated the Act because they were made in the context of other coercive statements.

CONCLUSION

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

Respectfully submitted,

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Eric Weitz
ERIC WEITZ
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2978
(202) 273-3757

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 2016

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

FRED MEYER STORES, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1135,
	* 15-1167
and	*
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 36-CA-010555
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,680 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/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 5th day of July, 2016

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

FRED MEYER STORES, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1135,
	* 15-1167
and	*
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 36-CA-010555
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Mitchell Jay Cogen, Attorney
Bullard Law
200 SW Market Street, Suite 1900
Portland, OR 97201

/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 5th day of July, 2016

STATUTORY ADDENDUM

Except for the following, all applicable statutes are reproduced in the addendum to the opening brief of Fred Meyer Stores, Inc.

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*

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

Sec. 10. [§ 160.] (e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and

shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.