Oral Argument Not Yet Scheduled

No. 17-1944

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

WORKERS ORGANIZING COMMITTEE OF KANSAS CITY

Intervenor

v.

EYM KING OF MISSOURI, LLC D/B/A BURGER KING

Respondent

ON APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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SUMMARY OF THE CASE

The National Labor Relations Board seeks enforcement of its Order against EYM King of Missouri, LLC d/b/a Burger King ("EYM King"). The Board found that EYM King unlawfully disciplined six employees for engaging in a strike on April 15, 2015. The Board's conclusion is based on settled legal principles and factual findings supported by substantial evidence in the record. The six employees' strike activity was protected, EYM King knew of their activity, and it disciplined them for it. Thus, EYM King violated the Act.

Contrary to EYM King's claims, this case presents a very narrow and straightforward issue involving just one Kansas City restaurant, six employees, and their discipline for having participated in a single, one-day strike against EYM King. The Board reasonably rejected EYM King's central contention that other strikes against different employers or those purportedly occurring months after the disciplines at issue somehow could render unprotected the six employees' protected strike activity on April 15, 2015. Accordingly, the Board found it unnecessary to address questions concerning when intermittent-strike activity is protected.

Although the Board believes oral argument is not necessary, if the Court grants EYM King's request for argument, the Board requests the opportunity to participate and believes that 10 minutes per side would be appropriate.

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Decision and Order issued against EYM King of Missouri, LLC d/b/a Burger King ("EYM King") on January

24, 2017, and reported at 365 NLRB No. 16. (A. 241-56.)[1] The Workers Organizing Committee of Kansas City ("WOCKC"), the charging party before the Board, has intervened on the Board's behalf.

The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties. The Board's application for enforcement was timely because the Act imposes no time limit on the initiation of enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), and venue is proper because the unfair labor practices occurred in Kansas City, Missouri.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that EYM King violated Section 8(a)(1) of the Act by disciplining six employees for participating in a one-day strike on April 15, 2015.

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

Sutherland v. NLRB, 646 F.2d 1273 (8th Cir. 1981), *enforcing* 249 NLRB 1296 (1980).

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[1] "A." references are to the joint appendix and the supplemental appendix; "Tr." refers to specific transcript pages, where more than one transcript page appears on a cited appendix page. "Br." references are to EYM King's opening brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

CGLM, Inc., 350 NLRB 974 (2007), *enforced*, 280 F. App'x 366 (5th Cir. 2008).

29 U.S.C. § 158(a)(1)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves EYM King's discipline of six employees for participating in a one-day strike. After investigating unfair-labor-practice charges filed by WOCKC, the Board's General Counsel issued a complaint against EYM King, consolidating multiple unfair-labor-practice charges alleging violations of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3), (1)). Following a hearing, the administrative law judge found, among other findings, that EYM King violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by disciplining employees Kashanna Coney, MyReisha Frazier, Myesha Vaughn, Susana De la Cruz Camilo, West Humbert, and Osmara Ortiz because they had engaged in a strike on April 15, 2015.[2] On review, the Board found no merit to EYM King's exceptions and adopted the judge's findings and recommended order, as modified. (A. 241-42.)

[2] The administrative law judge's decision addresses the allegations in all three cases in the consolidated complaint. On June 23, 2016, the Board issued a Decision and Order (364 NLRB No. 33) adopting the judge's recommended order finding that EYM King unlawfully refused to hire union activist and former Strategic employee Terrance Wise, and severing the portion of the case currently before this Court regarding the discipline of the six employees who participated in a one-day strike. The Court subsequently enforced the Board's June 2016 Order in

II. THE BOARD'S FINDINGS OF FACT

A. EYM King and Its Acquisition of the Restaurant in March 2015; the Six Employees and Their Labor Activism

EYM King is a franchisee of Burger King restaurants located throughout the state of Missouri. (A. 243; A. 32, 103-04 (Tr. 241-42), 105-06 (Tr. 249-50), 117 (Tr. 286-87), 123 (Tr. 312), 321.) It acquired several such restaurants from another franchisee, Strategic Restaurants ("Strategic"), on March 26, 2015, including, as relevant here, a Burger King restaurant located at 1102 East 47th Street in Kansas City ("the restaurant"). (A. 243; A. 32-33, 56-58 (Tr. 61-63, 65-66), 81 (Tr. 150-51), 104 (Tr. 242-43), 127 (Tr. 327-28).)

EYM King has employed LaReda Hayes as the restaurant's general manager since the time it took over operations. Previously, Hayes served for a number of years as the general manager of the restaurant under Strategic. (A. 243; A. 32-33, 52 (Tr. 42), 127 (Tr. 327-28).) Shortly before EYM King assumed operation of the restaurant, Hayes met with the employees (cooks, cashiers, and other crew members) and told them that they must complete job applications and other personnel documents if they wanted to continue working at the restaurant after the change in ownership. (A. 243, 246-47; A. 33, 57 (Tr. 62-65), 81-83 (Tr. 151-61), 91 (Tr. 190-92), 95 (Tr. 207-08), 127-29 (Tr. 328, 332-37), 313-331.) Hayes,

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full. *See NLRB v. EYM King of Missouri, LLC*, __ F. App'x __, 2017 WL 2672669 (8th Cir. June 21, 2017) ("*EYM King I*").

whom EYM King had charged with sole hiring authority for the restaurant, unlawfully refused to hire experienced crew member Terrance Wise because he had engaged in protected union and other concerted activities. (A. 247; A. 33, 57 (Tr. 64-65), 127 (Tr. 329), 131-32 (Tr. 345-46).) *See EYM King I*, __ F. App'x __, 2017 WL 2672669 (8th Cir. June 21, 2017). Hayes hired several former Strategic crew members, including Kashanna Coney, MyReisha Frazier, Myesha Vaughn, Susana De la Cruz Camilo, West Humbert, and Osmara Ortiz, who began working as EYM King employees as of March 26, 2015. (A. 247; A. 32-33, 81 (Tr. 150-51), 90-91 (Tr. 189-90), 128-30 (Tr. 333-38).) None of the restaurant's employees were represented by a union. (A. 252-53; A. 61 (Tr. 78).)

The six employees—Coney, Frazier, Vaughn, Camilo, Humbert, and Ortiz—openly engaged in various forms of union and concerted activity both before and after EYM King's takeover. (A. 244, 254; A. 72-73 (Tr. 124-27), 75-76 (Tr. 136-38), 90 (Tr. 187-88), 96-97 (Tr. 213-15), 128-30 (Tr. 333-38).) Many of their activities were associated with WOCKC, which is the Kansas City chapter of the national Workers Organizing Committee ("WOC"), also known as the "Fight for $15." (A. 244 & n.10; A. 49 (Tr. 30-32).) WOCKC—with the assistance of WOC, other unions, churches, and other community groups—conducts local campaigns to improve wages, working conditions, and other issues, primarily in the fast-food and other low-wage industries. (A. 243-44, 252-53; A. 49 (Tr. 30-

33), 61 (Tr. 78), 64 (Tr. 91-92), 75 (Tr. 135), 85 (Tr. 167), 87 (Tr. 176), 92 (Tr. 196-97), 110 (Tr. 269).)

In March and April 2015, Ortiz's photograph appeared on the side of city buses in a promotion for WOCKC's campaigns. (A. 244; A. 73 (Tr. 126-27), 76 (Tr. 140), 96 (Tr. 210).) Ortiz also spoke publicly at WOCKC events, and she, as well as Frazier, Vaughn, Camilo, and Humbert, have been interviewed and/or featured by local and national news media concerning their organizing activities. (A. 244; A. 76-77 (Tr. 140-42), 260, 263.) Additionally, in March 2015, shortly before EYM King took over the restaurant, Coney, Camilo, Humbert, Ortiz, and other employees presented a health-and-safety petition to Hayes requesting that management repair the restaurant's kitchen equipment, fully stock its first-aid kits, and provide employees with protective equipment for hazardous tasks. (A. 244; A. 52-53 (Tr. 45-47), 71-73 (Tr. 121, 125-26), 90 (Tr. 188), 93 (Tr. 199-201), 96 (Tr. 210).) Prior to April 15, Hayes was aware of the six employees' labor activism and involvement with WOCKC. (A. 244, 254; A. 72-73 (Tr. 124-27), 128-30 (Tr. 333-38).)

B. The Six Employees Engage in a One-Day Strike on April 15, 2015

On April 15, Coney, Frazier, Vaughn, Camilo, Humbert, and Ortiz participated in a one-day strike organized by WOCKC. (A. 246; A. 84 (Tr. 162-63), 86 (Tr. 170-71), 91-92 (Tr. 193-94, 196), 266, 268, 295, 311.) That morning,

the six coworkers signed a written strike notice appearing on WOCKC letterhead and addressed to the management and ownership of the restaurant. (A. 241 n.4, 246; A. 84-86 (Tr. 162-63, 167, 169-71), 88 (Tr. 180-81), 91 (Tr. 193), 95 (Tr. 206), 266, 268, 295.) The notice stated, in part:

> **This is to notify you that on April 15th, 2015, we workers are going on strike for respect in the workplace.** We are striking to protest unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country. We are particularly concerned about ensuring a safe workplace. Here in Kansas City, workers have been subject to burns, lack of protective equipment, lack of first aid kits, and more. We are also striking to demand a $15 an hour wage and the right to join a union without retaliation. We are not making a present demand for recognition at this time.
>
> **We offer to return to work unconditionally after April 15th for our next regularly scheduled shift.** This is a peaceful, lawful, one-day strike . . . .

(A. 241 n.4, 246; A. 266, 268, 295 (bold in original).)

Consistent with their strike notice, the six employees did not report for their scheduled shifts on April 15. (A. 246, 254; A. 84 (Tr. 162), 86 (Tr. 170-71), 89 (Tr. 183), 91-92 (Tr. 193-94, 196), 133-35 (Tr. 351-53, 356-58), 142 (Tr. 389), 271-73.) At about 2:30 p.m. that afternoon, a WOCKC volunteer hand-delivered to Hayes a copy of the strike notice signed by Coney, Frazier, and Vaughn. (A. 246, 254; A. 107-10 (Tr. 257-58, 261-62, 265-68), 134 (Tr. 355), 142 (Tr. 389), 268, 295.) Hayes did not receive a separate copy of the notice that Camilo,

Humbert, and Ortiz had signed. (A. 246, 253-54; A. 109-10 (Tr. 265-68), 134 (Tr. 355-56), 266.)

C. The Six Employees Return to Work; EYM King Disciplines Them for Participating in the April 15 Strike

The six employees who participated in the one-day strike returned to work for their next scheduled shift after April 15. (A. 246, 254; A. 85-87 (Tr. 168-69, 172-74), 92-93 (Tr. 196-98), 136 (Tr. 364), 142 (Tr. 389), 266-68, 295.) On the morning of April 16, Camilo, Humbert, Ortiz, and a clergyperson met in the restaurant's parking lot. The three coworkers signed a return-to-work notice that, like the previous day's strike notice, appeared on WOCKC letterhead and was addressed to the management and ownership of the restaurant. (A. 246, 254; A. 84-85 (Tr. 165-69), 92-93 (Tr. 196-98), 267.) This notice stated, in part:

> We are unconditionally returning to work for our next regularly scheduled shift. We make this offer following our lawful, peaceful strike that began on April 15th, 2015, to demand a $15 an hour wage, the right to form a union without intimidation, and to protest unfair labor practices, unsafe working conditions, abusive supervisors, and wage theft occurring here, in workplaces in our city, and in solidarity with fast food and convenience store workers across the country.

(A. 246, 254; A. 267.) Before any of their shifts started, Camilo, Humbert, and Ortiz together walked into the restaurant and handed Hayes the signed return-to-work notice. (A. 246, 254; A. 85-86 (Tr. 166-69, 172-73), 92-93 (Tr. 196-98).)

Later on April 16, and continuing over the course of several days through April 22, Hayes issued written disciplines to the six employees who participated in

the April 15 strike. On the pre-printed disciplinary action report, Hayes entered as the reason "not showing for scheduled shift" on April 15. (A. 275-81.) Hayes prepared all six written disciplines on April 16. (A. 246, 254; A. 27, 33, 86-87 (Tr. 172-74), 89 (Tr. 183), 93 (Tr. 198-99), 136 (Tr. 363-64), 142-43 (Tr. 388-90), 275-81.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On January 24, 2017, the Board (then-Acting Chairman Miscimarra and Members Pearce and McFerran) issued its Decision and Order finding, in agreement with the administrative law judge, that EYM King violated Section 8(a)(1) of the Act by disciplining the six employees for participating in the April 15 strike.[3] (A. 241-42.) In doing so, the Board agreed with the judge's conclusion that the employees' one-day strike did not constitute unprotected intermittent-strike activity as EYM King had argued. (A. 241 n.4.) However, the Board emphasized that employees had engaged in only that one strike against EYM King at the time it disciplined the six employees. (*Id.*) Because the single, one-day strike was not an intermittent strike, the Board found it unnecessary to rely on the judge's analysis regarding when intermittent-strike activity is protected. (*Id.*)

[3] On January 27, 2017, the Board issued a correction amending the Decision and Order to show the Board Members' proper designations as of the issuance date. (A. 257.) Thereafter, on April 24, 2017, Acting Chairman Miscimarra was named Chairman of the Board.

The Board's Order directs EYM King to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. Affirmatively, the Order requires EYM King to remove from its files any references to the six unlawful disciplines and to post a remedial notice. (A. 241-42.)

STANDARD OF REVIEW

The Court "affords the Board's order great deference," *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001), and "will enforce the Board's order if it has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013) (internal quotation marks omitted); *see also* 29 U.S.C. § 160(e) (the Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole").

"'Substantial evidence' is evidence that 'a reasonable mind might accept as adequate to support' a finding." *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). "Where either of two inferences may reasonably be drawn from the facts, the [Court] is bound by the Board's findings even though the [Court] could have made a different choice if the matter were before it *de novo*." *Hall v. NLRB*,

941 F.2d 684, 688 (8th Cir. 1991); *accord Parsons Elec., LLC v. NLRB*, 812 F.3d 716, 719 (8th Cir. 2016).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that EYM King violated Section 8(a)(1) of the Act by disciplining six employees for participating in a one-day strike on April 15. The record evidence clearly demonstrates that the six employees participated in the April 15 strike to protest wages, working conditions, and employer unfair labor practices. Moreover, EYM King's General Manager Hayes knew that the six employees, who did not report for work on April 15, were participating in the strike. Notwithstanding this knowledge, in the days following the strike she issued written discipline to the six employees, noting the reason as "not showing for scheduled shift" on April 15. In these circumstances, the Board reasonably found that EYM King violated Section 8(a)(1) of the Act because the very conduct for which the employees were disciplined was itself protected, concerted activity.

EYM King has provided no basis for disturbing the Board's Order. Notably, it dedicates most of its brief to arguing an intermittent-strike case that is not before the Court. As the Board emphasized, it is uncontested that employees had engaged in only one strike against EYM King, on April 15, when it disciplined the six employees. The Board therefore found it unnecessary to address the issue of when

intermittent-strike activity is protected and did not adopt the administrative law judge's discussion of the matter, which EYM King uses as a foil. Instead, the Board properly decided this case on the narrow facts presented. EYM King's remaining arguments fail because they largely consist of unsupported challenges to the Board's findings, which were amply founded on the credited evidence, that Hayes knew of the employees' participation in the April 15 strike when she disciplined them.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EYM KING VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCIPLINING SIX EMPLOYEES FOR PARTICIPATING IN A PROTECTED, ONE-DAY STRIKE ON APRIL 15, 2015

A. An Employer Violates Section 8(a)(1) When It Disciplines Employees for Their Protected, Concerted Activity

Section 7 of the Act guarantees to employees not only the "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively," but also the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act protects that right by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) by taking adverse action against employees for engaging in concerted activities protected by the Act. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12-18 (1962); *Sutherland v. NLRB*, 646 F.2d 1273, 1274-75 (8th Cir. 1981), *enforcing* 249 NLRB 1296, 1299 (1980); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993); *Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987).

It is well settled that Section 7's broad guarantees apply to organized and unorganized employees alike, and include the right to strike. *Washington*

Aluminum, 370 U.S. at 14-15; *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840 (8th Cir. 2003). That right is expressly embodied in Section 13 of the Act, which provides: "Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163. "The essence of a strike is the voluntary concerted withholding of labor requested by an employer." *Urban Research Corp.*, 195 NLRB 147, 152 n.14 (1971) (internal quotation marks omitted); *accord Burnup & Sims, Inc.*, 256 NLRB 965, 977 (1981); *see also* 29 U.S.C. § 142(2) ("The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees."). Accordingly, unrepresented employees who band together in a strike to protest wages or working conditions are engaged in activities protected by the Act. *See Washington Aluminum*, 370 U.S. at 14-15; *Magna Visual v. NLRB*, 516 F.2d 876, 877 (8th Cir. 1975), *enforcing* 213 NLRB 162, 167-68 (1974); *Modern Motors v. NLRB*, 198 F.2d 925, 925-926 (8th Cir. 1952).

An employer that disciplines employees for participating in a protected strike violates Section 8(a)(1) of the Act because "'the very conduct for which employees are disciplined is itself protected concerted activity.'" *CGLM, Inc.*, 350

NLRB 974, 974 n.2 (2007) (*quoting Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)), *enforced*, 280 F. App'x 366 (5th Cir. 2008); *accord Atl. Scaffolding Co.*, 356 NLRB 835, 838 (2011). In such circumstances, no showing of motive or animus is necessary. Accordingly, there is no need to apply the Board's motive analysis set forth in *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Id.; accord Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App'x 524, 524 (D.C. Cir. 2003).

B. EYM King Unlawfully Disciplined the Six Employees for Engaging in the April 15 Strike

There is ample record evidence that the six employees—Coney, Frazier, Vaughn, Camilo, Humbert, and Ortiz—engaged in protected, concerted activity when they participated in a one-day strike on April 15, 2015 to protest various work-related grievances. (A. 241 n.4, 246, 252-254.) These employees concertedly refused to work each of their scheduled shifts that day in order to participate in the one-day strike against their employer. As both the strike notice and return-to-work notice explicitly demonstrate, the employees withheld their labor and participated in the strike to collectively protest wages, working conditions, and employer unfair labor practices. (*See* pp. 7-8.) As the Board found, the employees had previously complained of unsafe equipment at the same restaurant operating under a different owner, had engaged in activities in support of

WOCKC's efforts to raise their wages, and were well aware that EYM King committed an unfair labor practice when Hayes unlawfully refused to hire former coworker Wise because of his union and protected, concerted activities. (A. 253.) Thus, there is abundant evidence that by participating in the strike, the six employees engaged in "concerted activities for the purpose of . . . mutual aid or protection . . ." protected by the Act. 29 U.S.C. § 157. *See Washington Aluminum*, 370 U.S. at 14-15, and cases cited at pp. 13-14.

Likewise, there is ample evidence that EYM King disciplined the six employees in response to their participation in that protected, one-day strike. On April 16 Hayes prepared, and thereafter issued to each of the six employees, a "Disciplinary Action Report" for "not showing for [their] scheduled shift" on April 15. (A. 275-81; *see also* A. 27, 33.) Substantial evidence supports the Board's finding that Hayes knew the six employees missed their shifts on April 15 because they engaged in a one-day strike. In these circumstances, the disciplinary action reports provide clear evidence that Hayes took adverse action against them because of their protected strike activity.

It is undisputed (Br. 15), and Hayes admitted (A. 134 (Tr. 355), 142-43 (Tr. 389-90)), that she was aware by the afternoon of April 15 that a strike was in progress and that Coney, Frazier, and Vaughn were participating in the strike. By that time, Hayes had received the copy of the WOCKC strike notice that formally

announced the strike and was signed by the three employees. (A. 268, 295.) Notwithstanding this, Hayes prepared disciplinary notices for these employees the following day. Indeed, Hayes candidly acknowledged that she did not care that their names were on the strike notice; she disciplined them anyway, because "[t]hey just didn't show up for their shift." (A. 143 (Tr. 390).) Thus, there is conclusive evidence that EYM King disciplined Coney, Frazier, and Vaughn because of their April 15 strike activity.

Moreover, the Board reasonably inferred, based on circumstantial evidence, that Hayes knew by the afternoon of April 15 that Camilo, Humbert, and Ortiz also were participating in the strike, although Hayes did not receive the separate copy of their strike notice. (A. 253-54.) An employer's knowledge "may be proved by circumstantial evidence from which such knowledge may be reasonably inferred." *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir. 1980); *accord NLRB v. Sunnyland Packing Co.*, 369 F.2d 787, 793 (5th Cir. 1966); *see generally Parsons Elec., LLC v. NLRB*, 812 F.3d 716, 719 (8th Cir. 2016) (the Court is bound by the Board's reasonably drawn inferences, even where contrary inferences could also be reasonably drawn); *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889, 890-91 (8th Cir. 1977) ("In analyzing the evidence, whether circumstantial or direct, the Board is free to draw any reasonable inferences.").

Hayes admitted (A. 128-29 (Tr. 333, 336)), and EYM King concedes (Br. 6), that she was aware before April 15 of Camilo, Humbert, and Ortiz's protected union and concerted activities. For example, Ortiz's photograph appeared on the side of city buses in a promotion for WOCKC's campaigns; and Ortiz, Camilo, and Humbert were featured by various media concerning their WOCKC organizing activities. In addition, the three employees presented Hayes with a health-and-safety petition in March 2015 while Hayes served in her former position as Strategic's manager. Thus, the Board reasonably inferred that when Hayes learned that a WOCKC strike involving employees from her restaurant was in progress, and that Camilo, Humbert, and Ortiz had failed to report for their shifts, she knew that these three employee-activists had joined their coworkers in the strike. As the Board observed, "[t]he fact that the six employees, all of whom [were] active in WOCKC, were absent on the day of the strike would not appear as coincidental to a reasonable person." (A. 254.)

In any event, as the Board found (A. 246, 254), even if Hayes did not know on April 15 that Camilo, Humbert, and Ortiz had been participating in the strike, she indisputably knew by the following morning when the three employees appeared at the restaurant and presented Hayes with their signed return-to-work notice. (*See* p. 8.) That notice, on WOCKC letterhead, clearly advised Hayes that the three employees were unconditionally offering to "return[] to work for [their]

next regularly scheduled shift . . . following [their] lawful, peaceful strike that began on April 15th, 2015." (A. 267.)

Hayes did not dispute at the hearing, and EYM King now appears to concede (Br. 14, 52), that Hayes received this notice early on April 16. Further, the evidence is uncontroverted that Hayes issued the discipline to each of the employees only *after* she had received their return-to-work notice. Specifically, she issued disciplinary reports to Camilo and Humbert later in the day on April 16, and to Ortiz on April 22. Thus, even assuming that Hayes lacked the relevant knowledge on April 15, she unquestionably knew at the time she actually issued the disciplinary notices that Camilo, Humbert, and Ortiz had participated in the April 15 strike with Coney, Frazier, and Vaughn.

Thus, ample record evidence supports the Board's finding that EYM King disciplined the six employees for their participation in the one-day strike. As the Board found, such discipline violates Section 8(a)(1) of the Act because "the very conduct for which employees are disciplined is itself protected concerted activity." (A. 241 n.4 (citing *CGLM, Inc.*, 350 NLRB 974, 974 n.2 (2007), *quoting Burnup & Sims*, 256 NLRB at 976)).

C. EYM King's Arguments Are Factually and Legally Unsupported

EYM King's brief defends against the Board's unfair-labor-practice finding by arguing a case regarding intermittent-strike activity that, quite simply, is not

before this Court. The remainder of its arguments consist largely of unsupported challenges to the Board's findings, based on the credited evidence, that Hayes knew of Camilo's, Humbert's, and Ortiz's participation in the April 15 strike when she disciplined them. None provide a basis for denying enforcement of the Board's Order and we address each in turn.

1. EYM King's intermittent-strike arguments are misplaced

EYM King devotes the lion's share of its brief (Br. i, 6-14, 19-23, 26, 30-36, 43-54) to arguing that the April 15 strike was an unprotected intermittent strike. It implicitly concedes that if the employees' participation in that one-day strike did not constitute intermittent-strike activity unprotected by the Act, their participation was statutorily protected. Here, the Board expressly declined to address the question of when intermittent strike activity is protected in light of the unique and narrow facts of this case, stating that "[b]ecause the single 1-day strike was not an intermittent strike, we find it unnecessary to rely on the judge's analysis of when intermittent strike activity is protected." (A. 241 n.4.) Specifically, as the Board emphasized (A. 241 n. 4), it is undisputed that employees had engaged in only one strike against EYM King—the one-day strike on April 15, 2015—at the time that EYM King disciplined coworkers Coney, Frazier, Vaughn, Camilo, Humbert, and Ortiz for striking that day. EYM King ignores this critical and uncontested fact.

Instead, EYM King insists that the Board, for purposes of applying an intermittent-strike analysis, must combine the single strike against EYM King with other previous strikes involving different employers and/or with those that purportedly occurred months *after* the six disciplines at issue. EYM King has provided no legal support for its position, and the Board reasonably declined its request to break new ground. Because the Board did not rely on the judge's analysis, EYM King's extensive attacks (Br. 43-54) on the judge's statements on the issue are not relevant.

As the Board explained in declining EYM King's request that it take administrative notice of a November 2012 strike that occurred in New York City (A. 241 n.4, Br. 7), such a strike would not affect its disposition of this case. As the Board noted, the 2012 strike predated EYM King's ownership of Burger King restaurants, including the one involved here. (A. 241 n.4.) The same is true of the strikes that occurred in Kansas City and elsewhere in 2013 and 2014, during the period when a different employer, Strategic, owned and operated the restaurant and employed its workforce. In sum, the strikes predating April 15, 2015, had nothing to do with EYM King.

EYM King has cited no authority to support the novel proposition that the Board must or should combine strikes against different employers with the single April 15 strike against EYM King in order to apply an intermittent-strike analysis.

It relies (Br. 36-37) solely on *Pacific Telephone and Telegraph Company*, 107 NLRB 1547 (1954), which, despite EYM King's suggestion, involved just one employer. Moreover, in stark contrast to the single, one-day strike here, the employees in *Pacific Telephone* engaged in "a multiplicity" of work stoppages on "repeated" occasions over a nine-day period. *Id.* at 1548-50. Thus, that case lends no support to EYM King's claim here.

The Board also reasonably declined EYM King's request that it take administrative notice of strikes that purportedly occurred in Kansas City and elsewhere on November 15, 2015. (A. 241 n.4, Br. 10.) As the Board explained, EYM King's "unlawful discipline of employees in April 2015 cannot be legitimated by events occurring 6 months later."[4] (A. 241 n.4.) Before the Court, EYM King offers no argument or authority to challenge this sound determination.

In an effort to fit this case into the intermittent-strike activity box it has constructed, EYM King cites numerous cases that are factually distinct from the instant case. For example, in both *Valley City Furniture Company*, 110 NLRB 1589, 1592-95 (1954), and *Kohler Company*, 108 NLRB 207, 212-21 (1954),

[4] At the hearing in August 2015 (4 months after the disciplines), EYM King sought to elicit testimony or an offer of proof from Terrance Wise concerning whether future strikes would be organized or were planned at that time, which the judge, ruling on objections, precluded EYM King from doing. (A. 65-66 (Tr. 97-99).) For substantially the same reason as noted above, the Board reasonably determined that, even assuming arguendo the judge erred, such additional evidence would not affect its disposition of this case. (A. 241 n.3.)

union-represented employees began carrying out an announced plan of engaging in continuing, daily, partial refusals to work a portion of their regularly scheduled shift until the employer satisfied the union's demand. In stark contrast, here, EYM King's unrepresented employees participated in a single, one-day strike in which they refrained from working their entire shift (not a portion of it), without any contemporaneously announced plan or intention to strike again on any future occasion.[5] Given these narrow circumstances, the Board decided the case on the facts presented to it.

Likewise, EYM King cites (Br. 40) a General Counsel advice memorandum, *Land Mark Electric*, 1996 WL 323648 (May 17, 1996), for the proposition that "more than two separate strikes, or threats of repeated strikes" can constitute unprotected activity. Again, that memorandum, which concerned three separate work stoppages that were conducted within a four-hour period, presents a wholly different factual scenario from the one-day strike activity at issue here. In any

[5] EYM King asserts that "[h]ere, the employees expressed an intention to continue participation in one-day strikes at the Union's beck and call." (Br. 41.) But contrary to EYM King's suggestion, there is no evidence that any employee expressed any such intention at the time of the strike. It was only during the hearing—months after EYM King had already disciplined the six coworkers—that two employees (Ortiz and employee Sharon Jones, who worked at a different Kansas City restaurant) testified that they were willing or intended to participate in hypothetical strikes that WOCKC might organize in the future. (A. 96-97 (Tr. 211-16), 100 (Tr. 228-29).) Such testimony, concerning the after-the-fact inclinations of two unrepresented employees to participate in hypothetical future strikes, is more than a far cry away from the factual circumstances presented in *Valley City Furniture* and *Kohler*.

event, it is well established that "advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the Board, much less on the courts." *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123 n.36 (2d Cir. 2017), as amended (May 9, 2017) (internal citation omitted); *accord NLRB v. Gaylord Chem. Co., LLC*, 824 F.3d 1318, 1332 n.42 (11th Cir. 2016) (advice memoranda "are intended to serve as internal instruction for use by the Office of the General Counsel, and have no precedential value or authoritative weight") (internal quotation marks omitted); *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting as "rather silly" employer's argument that Board's decision was unreasonable because it conflicted with advice memorandum).[6]

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[6] Similarly, EYM King confusingly cites (Br. i, 21 n.25, 31 n.28) General Counsel Operations-Management Memorandum OM 17-02, available at https://www.nlrb.gov/reports-guidance/operations-management-memos, which reflects the General Counsel's prosecutorial position with the respect to the law concerning intermittent and partial strikes. Such memoranda, like General Counsel advice memoranda (discussed above), are non-precedential and do not constitute Board law. *See Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986) ("the General Counsel's legal position is not the equivalent of Board precedent"). Moreover, in this enforcement proceeding, the General Counsel (like the attorneys on this brief working under him) is not acting in his prosecutorial capacity, but rather, is serving as the Board's representative and attorney in seeking to enforce the Board's Order. *See NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1098 (9th Cir. 2009) (recognizing that the Board, pursuant to 29 U.S.C. § 153(d), has permanently delegated to the General Counsel the power to initiate and maintain enforcement proceedings); *Chelsea Indus.*, 285 F.3d at 1077 (noting that, although the General Counsel "investigates and prosecutes unfair labor practices before the Board, see 29 U.S.C. § 153(d); he must also defend the decisions of the Board on review, regardless whether the Board adopted the view he expressed as a party

2. EYM King's defense of its disciplinary actions is unsupported by the record evidence

EYM King presents no argument contesting Hayes' knowledge regarding Coney, Frazier, and Vaughn's participation in protected, concerted strike activity on April 15, nor could it, in the face of Hayes' admission that she issued discipline to those employees for not reporting to work and did not care that their names were on the strike notice. (A. 254; 143 (Tr. 390).) Instead, EYM King challenges (Br. 55-58) the Board's inference that Hayes possessed the relevant knowledge on April 15 that Ortiz, Humbert, and Camilo were engaged in protected activity, ignoring the substantial evidence to the contrary.

To begin, EYM King's claim that "there is no evidence that at the time Hayes *issued* the discipline she had knowledge regarding why Humbert, Camilo or Ortiz had missed work" is blatantly false. (Br. 56 (emphasis added).) As discussed above, irrespective of what knowledge she had on April 15, by the time that Hayes issued the disciplines to the employees between April 16 and April 22, she had received the return-to-work notice and knew that Camilo, Humbert, and Ortiz had missed work because they were engaged in concerted strike activity.

Moreover, as the Board found, "Hayes should reasonably have been aware from surrounding circumstances" on April 15 that the absent employees were on

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before it"). Thus, contrary to EYM King's apparent suggestion (Br. i), Operations-Management Memorandum OM 17-02 is not pertinent here.

strike, based on the announcement of the WOCKC-organized strike in the notice signed by Coney, Frazier, and Vaughn, the prior participation of all six employees in WOCKC and other protected, concerted activities, and the absence of all six union activists from their shifts on the same day. (A. 254.) Additionally, although EYM King cites (Br. 18, 56) Hayes' testimony in response to leading questions that she was not aware at the time she prepared the disciplines of the reason Camilo, Humbert, and Ortiz were absent, the judge, affirmed by the Board, implicitly discredited that testimony.[7] (A. 254.) Before the Court, EYM King has given no reason, much less demonstrated the "extraordinary circumstances" required, to set aside that credibility finding (*Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993)), which is entitled to "great deference." *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910 (8th Cir. 2004); *accord RELCO Locomotives*, 734 F.3d at 787 (the Court will not overturn credibility determinations affirmed by the Board "unless they shock the conscience").

Further, the Board may reasonably infer employer knowledge even when there is "no direct testimony supporting [it] and . . . direct testimony denying it." *D & D Distribution Co., Div. of D & D Sewing Co. v. NLRB*, 801 F.2d 636, 640-41

[7] Notably, the judge found Hayes not to be "an overall credible witness" (A. 250), based on her demeanor, as well as her often vague, shifting, and inconsistent testimony. (A. 243-44, 249-50.) *See also EYM King I*, 2017 WL 2672669, at *3 (8th Cir. June 21, 2017) (noting Hayes' "vague and inconsistent testimony throughout the hearing").

(3d Cir. 1986); *see also J. C. Penney Co. v. NLRB*, 416 F.2d 702, 704 (7th Cir. 1969) (upholding Board's inference of employer's knowledge, noting, "[t]hat the [employer's] evidence was not taken at face value does not mean that it was ignored"). The fundamental test remains "whether there is a rational connection between the facts proved and the fact that is to be inferred." *Alumbaugh Coal*, 635 F.2d at 1384. As shown, that test is satisfied here, and the Board's inference is entitled to acceptance. *Id.*

EYM King mistakenly asserts (Br. 57-58) that, in inferring knowledge, the Board relied on Hayes' failure to conduct an investigation concerning why Camilo, Humbert, and Ortiz were absent on April 15. However, the Board found based on other evidence that Hayes knew the employees failed to report for their shifts because they were engaged in protected, concerted activity. Although the judge mentioned (A. 254) the employer's failure to conduct an investigation, she did so in the context of discussing animus, which the judge acknowledged was not material here, where "the very conduct for which employees are disciplined is itself protected concerted activity." (A. 254 (citing *Burnup & Sims, Inc.*, 256 NLRB at 976).)

Although EYM King asserts (Br. 16 n.18, 17) that the employees were disciplined consistent with its no call/no show policy, which required employees to report for work on time and give three hours' notice if they would be late or absent,

it apparently recognizes (Br. 54) that such policy would be relevant only if the employees' strike activity were unprotected.[8] As discussed above, the Board found the one-day strike was protected activity. Further, by the time Hayes issued the discipline to each of the employees, she was aware that they failed to show up for their respective April 15 shifts because they were participating in a one-day strike. It is well established that an employer cannot take adverse action against employees because they engaged in protected, concerted strike activity. Indeed, disciplining employees for being absent from work, when the employer knows that their absence is due to their participation in a strike, is the same as disciplining them for participating in the strike. *Schnabel Assocs.*, 272 NLRB 1022, 1024 (1984) ("absenteeism cannot be used as justification for discharging strikers"), *enforced*, 789 F.2d 917 (4th Cir. 1986); *Trumbull Asphalt Co.*, 219 NLRB 131, 135-36 (1975) (to discharge employees for "failure to report for work" knowing they were on strike "was to discharge them for participating in the protected work stoppage"). As the Board has repeatedly held, with court approval, "'[c]alling a strike . . . an absence from work . . . is to write Section 13 out of the Act.'" *CGLM*, 350 NLRB at 979 (quoting *Anderson Cabinets*, 241 NLRB 513, 518-19 (1979), *enforced*, 611 F.2d 1225 (8th Cir. 1979)), *enforced*, 280 F. App'x 366 (5th Cir. 2008).

[8] The disciplinary notices did not reference the policy, nor did Hayes mention the policy when she gave the notices to the employees. (A. 142 (Tr. 389), 275-81.)

There is no basis for EYM King's absurd claim (Br. 58-61) that Ortiz did not participate in the one-day strike because she was at home when her shift actually began. Setting aside EYM King's offensive comments (Br. 60), the argument misunderstands the essential nature of strike activity, which is the concerted voluntary withholding of labor from an employer. (*See* cases cited at p. 14.) That is precisely what Ortiz did. She refrained from reporting to work on April 15, withholding her services from her employer, in concert with other employees. EYM King's claim that the one-day strike was over at the time of Ortiz's shift is simply incorrect. EYM King concedes, as it must, that the April 15 strike was organized and announced as a "one-day" strike (Br. 15-16, 26) and that Ortiz signed a copy of the strike notice (Br. 16), which unmistakably manifested her intent to participate in that "one-day" strike on "April 15th, 2015," and then to "return to work . . . after April 15th for [her] next regularly scheduled shift."[9] (A. 266.) Ortiz therefore clearly fulfilled her intent to participate in the one-day strike when she refrained from reporting for her shift on April 15. Ortiz spent almost 14 hours participating in strike-related activities before going home on

[9] Ortiz's unmistakable intent is confirmed by her signing and delivering the return-to-work notice on April 16 (A. 267), and by her testimony at the hearing concerning her participation in the strike (A. 91-93 (Tr. 193-94, 196, 199)). As she testified, the April 15 strike notice that she signed, "say[s] that I'm not going to show up for work *because* I went on a strike that day." (A. 91 (Tr. 193) (emphasis added).)

April 15 (A. 91-92 (Tr. 193-94, 196), 94-95 (Tr. 203-06), 96 (Tr. 212-13), 272-73), but her concerted withholding of labor from her employer on April 15 ends the inquiry.[10]

[10] EYM King relies on the judge's inartfully phrased statement that "[t]he strike and activities associated with the strike lasted from about 4 a.m. to 6 p.m." (A. 246.) However, as the Board found, the strike was a one-day strike called for April 15, and employees agreed to withhold their labor and offered to "return to work unconditionally after April 15th for our next regularly scheduled shift.'" (A. 241 n.4.)

CONCLUSION

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

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National Labor Relations Board
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner and WORKERS ORGANIZING COMMITTEE OF KANSAS CITY Intervenor v. EYM KING OF MISSOURI, LLC D/B/A BURGER KING Respondent	No. 17-1944

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,195 words of proportionally-spaced, 14-point type, and 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.

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this 18th day of August 2017

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner and WORKERS ORGANIZING COMMITTEE OF KANSAS CITY Intervenor v. EYM KING OF MISSOURI, LLC D/B/A BURGER KING Respondent	)	No. 17-1944

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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