

Nos. 16-1317, 16-1348

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

H&M INTERNATIONAL TRANSPORTATION, 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**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

H&M INTERNATIONAL)	
TRANSPORTATION, INC.,)	
)	
Petitioner/Cross-Respondent	)	Nos. 16-1317, 16-1348
)	
v.	)	Board Case Nos.
	)	22-CA-089596
NATIONAL LABOR RELATIONS BOARD	)	22-CA-095095
	)	22-CB-106127
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

H&M International Transportation, Inc. (“H&M”) and United Food and Commercial Workers, Local 312 (“the Union”) were the Respondents before the Board. H&M is the Petitioner/Cross-Respondent before the Court. The Union is not a party before the Court. The Board’s General Counsel was a party before the Board, and the Board is the Respondent/Cross-Petitioner before the Court. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

The rulings under review are a Decision and Order of the Board (then-Chairman Pearce and Members Hirozawa and McFerran) in *H&M International Transportation, Inc.*, 363 NLRB No. 139 (Mar. 1, 2016) (JA 1577-1611) and an

Order of the Board (then-Chairman Pearce and Members Hirozawa and McFerran) Denying [H&M's] Motion for Reconsideration and To Reopen the Record in *H&M International Transportation, Inc.*, 363 NLRB No. 189 (May 11, 2016) (JA 1623-25).

C. Related Cases

H&M previously filed a Petition for Review of the same Decision and Order in this Court. Petition for Review, *H&M Int'l Transp., Inc. v. NLRB*, No. 16-1102 (D.C. Cir. Mar. 28, 2016). The Court dismissed that Petition as premature because H&M's Motion for Reconsideration before the Board was still pending. Order, *H&M Int'l Transp., Inc. v. NLRB*, No. 16-1102 (D.C. Cir. Aug. 29, 2016). This case has not previously been before any other court, and Board counsel is not aware of any related cases.

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Dated at Washington, DC
this 21st day of November 2017

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GLOSSARY

The Act	The National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
The Board	The National Labor Relations Board
Br.	Opening Brief of Petitioner/Cross- Respondent H&M International Transportation, Inc.
FVRA	Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.)
H&M	H&M International Transportation, Inc.
JA	Joint Appendix (as corrected and filed November 17, 2017)
Norfolk	Norfolk Southern Railway Company
The Order	<i>H&M Int'l Transp., Inc.</i> , 363 NLRB No. 139 (Mar. 1, 2016)
The Union	United Food and Commercial Workers, Local 312

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of H&M International Transportation, Inc. (“H&M”) for review, and the cross-application of the National

Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against H&M on March 1, 2016, and reported at 363 NLRB No. 139.¹

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Board’s Decision and Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, 29 U.S.C. § 160(e), which allows the Board to cross-apply for enforcement. The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that H&M violated Section 8(a)(3) and (1) of the Act when it suspended and discharged four employees for engaging in union and protected concerted activity.

¹ In this final brief, JA refers to the Joint Appendix (listed on the docket as “Amended Joint Supplemental Appendix”) and “Br.” to H&M’s brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following the semicolon are to the supporting evidence. The Joint Appendix, prepared by counsel for H&M and corrected on November 17, 2017, contains several pages with handwritten notations, including but not limited to: JA 2036, 2037, 2040, 2043, 2062, 2391, 2416, 2419. Those notes are not part of the official record.

2. Whether the Board properly rejected H&M's challenge to the complaint's validity.

APPLICABLE STATUTORY PROVISIONS

The applicable statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint issued by the Regional Director on behalf of the Board's Acting General Counsel based on unfair-labor-practice charges filed by an employee. (JA 1749-62.) The complaint alleged that H&M violated Section 8(a)(1) and (3) of the Act, 29 U.S.C.

§ 158(a)(1), (3), and that United Food and Commercial Workers Local 312 ("the Union") violated Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A).

(JA 1749-62.) H&M answered, and its answer included an affirmative defense challenging the authority of the Acting General Counsel and the Regional Director (on his behalf) to issue the complaint. (JA 1763-71.) Following a hearing, an administrative law judge issued a decision finding that H&M violated Section 8(a)(1) and (3) of the Act by unlawfully suspending and discharging four employees, but dismissed the remaining allegations. (JA 1578-1611.) Before the Board, H&M excepted to the judge's findings. (JA 1577 & n.1.)

On February 5, 2016, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification, ratifying the original complaint and its continued prosecution.

(JA 1572-76.) On March 1, the Board issued a Decision and Order, affirming the judge's rulings, findings, and conclusions and adopting her recommended order, with slight modification. (JA 1577 & n.3.)

On March 28, H&M filed a motion for reconsideration and to reopen the record, challenging Acting General Counsel Lafe Solomon's appointment under the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§ 3345 et seq., and asserting that he lacked the authority to delegate to the Regional Director the power to issue the complaint. (JA 1613-22.) On May 11, the Board issued a decision, reported at 363 NLRB No. 189, denying the motion. (JA 1623-25.)

II. THE BOARD'S FINDINGS OF FACT

A. H&M's Operations

H&M contracts with Norfolk Southern Railway Company ("Norfolk") to provide railroad terminal services, such as loading and unloading cargo trains, at Norfolk's facility in Jersey City, New Jersey (known as the Croxton facility).

(JA 1579; JA 31-32, 751, 1781-98.) H&M employees, called "loaders" or "crane operators," use cranes to load cargo containers and trailers onto and off of trains.

(JA 1579, 1580; JA 320-21.) "Hostlers" or "switchers" use trucks to move that cargo to and from the trains to a storage lot. (JA 1579, 1580; JA 319-20.)

H&M management decides when its employees should begin loading or unloading a particular train and determines the size and composition of each crew. (JA 1580; JA 357-62, 569, 653, 757.) The ideal, most effective, crew ratio is approximately five or six hostler drivers for every crane operator. (JA 1580; JA 361-62, 653, 708, 1155.)

Norfolk sets the outbound trains' scheduled release times (the times H&M releases the trains for departure). (JA 1580; JA 365, 1407-08.) Norfolk considers H&M's failure to meet a scheduled release time to be a "service failure." (JA 1579 n.3, 1580; JA 38-39, 365, 755, 1407-08.) Crew size and composition, volume of cargo per train, weather, equipment issues, and accidents affect employee productivity and trains' release times. (JA 1580; JA 373-74, 662-64, 757-58, 966, 1323-25.)

B. The Union Represents a Unit of H&M Employees, and Neilan, Gonzalez, Martinez, and Ventre All Actively Participate in the Union

The Union has represented a 35-member unit of H&M's employees since at least 1996. (JA 1580; JA 309.) As of the date of the hearing, the Union and H&M operated under a collective-bargaining agreement effective August 1, 2012 through July 31, 2015.² (JA 1580; JA 1815-30.)

² Under that agreement, employees are subject to discharge for "[d]ishonesty, defective work, chronic lateness, gambling, chronic absenteeism, excessive

Harry Neilan, Abraham Gonzalez, Ernesto Martinez, and Alessandro Ventre were among the most senior and experienced members of the unit, and both management and colleagues viewed them as leaders. (JA 1579, 1580, 1602; JA 309, 396.) Since 1999, Neilan served as the Union's shop steward and employees' first point of contact for contract or other employment-related issues. (JA 1579, 1580, 1601; JA 313-15, 646-47, 753-54, 904, 961, 1104, 1131-32, 1362.) Ventre and Gonzalez also helped field employee complaints when Neilan was not available. (JA 1601; JA 647, 1104-05.)

In addition, Neilan, Gonzalez, Martinez, and Ventre all participated in contract negotiations at various points during their tenure at H&M. (JA 1580, 1601; JA 313, 394-95, 397, 588, 773, 903, 978.) In negotiations several months before their discharge, Neilan and Ventre, along with Union Business Agent Bill Domini, represented the Union. (JA 1581-82; JA 38, 190, 310, 397-405, 978-84.) Chuck Connors (H&M's owner and chief operating officer) and Ed Burke (then Terminal Manager) uncharacteristically met with the Union only a couple of times before issuing a last, best, and final offer that a majority of the employees voted to ratify over Neilan and Ventre's objections. (JA 1582; JA 403-05, 773-77, 981-84, 1471.)

chargeable accidents, unauthorized slowdowns, and insubordination"; however, in practice, H&M used a system of progressive discipline. (JA 1588, 1606; JA 66, 1198-99, 1224-25, 1824 (Art. 12), see JA 2047.)

C. H&M Selectively Enforces Its Safety Rules

H&M maintains that its employees should follow the rules set forth in its safety manual, as well as “meet or exceed” Norfolk’s separate safety standards. (JA 1581; JA 66, 301,764, 1368-69, see JA 1406-07, 1799-1814, 1841-2035, 2468-90.) For example, the H&M safety manual requires employees to wear seatbelts and personal protective equipment. (JA 1581; JA 702, JA 1805-07, see JA 68-69, 2533, 2535-36.) Both the H&M safety manual and the Norfolk operations manual require drivers to obey the posted speed limit of 15 miles per hour. (JA 1581 & n.4; JA 378, 584, 651, 703, 762, 911, 967, 1062, 1154-55, 1320, 1811, 1940, 1965, 2165.) And while the H&M safety manual requires employees to stop at all stop signs and use extreme caution at intersections and rail crossings, the Norfolk rules specifically require drivers to stop at all crossings.³ (JA 1581; JA 265, 1060-61, 1419, 1811, 1965.)

Before the fall of 2012, Terminal Manager Burke selectively enforced H&M’s safety rules. (JA 1580; JA 68, 257, 575, 579, 586, 626, 667, 702, 932, 977, 1056, 1363-64.) Although he required the men to wear hardhats and vests, for

³ A paved roadway (called the main or middle crossing) connects the five sets of railroad tracks where H&M employees load and unload trains to the lot where they store the containers. (JA 1579; JA 80, 329, 2038.) The main crossing has two upright stop signs, positioned on either side of the yard’s active railroad track, and several other faint, unmaintained stop signs painted on the ground. (JA 1581; JA 380-84, 581-82, 765-66, 841-42, 848, 925-27, 971, 2040-43.)

example, he did not enforce the seatbelt rule or require employees to wear additional protective equipment. (JA 1580; JA 389, 575, 579, 667, 849, 771, 977.) In particular, employees disliked the seatbelts because they inhibited productivity – drivers frequently got into and out of their trucks, and the belts were cumbersome to buckle and they locked unexpectedly. (JA 1581; JA 123-24, 133, 390-92, 575-77, 667-68, 771, 850, 948-49, 976-78.)

Management also typically let slide other safety rules that inhibited productivity. Though at times they sent “mixed signals,” neither H&M nor Norfolk typically enforced the posted speed limit or required drivers to come to a full stop at rail crossings. (JA 1581 & n.4 & n.5 & n.6, 1605; JA 135, 141-42, 265, 380, 388, 580-81, 659, 703, 763, 765, 770-71, 847, 972-73, 1061, 1177, 1200, 1321, 1365, 1417, 1419-20.) Instead, H&M employees would drive as fast as their trucks would go and would proceed with caution through crossings, rather than routinely stopping, to maximize their productivity.⁴ (JA 1581, 1605; JA 265, 584-85, 703, 763, 836, 848-49, 968, 972-73, 1061, 1063, 1178, 1200-01, 1203, 1274, 1320-21, 1365-66, 1417-18.)

⁴ H&M’s hostler trucks are governed to go no more than 27 miles per hour, but proceed more slowly when loaded with cargo. (JA 1581; JA 208-09, 1063, 1200-01, 1417.)

D. In Response to Complaints From Norfolk, H&M Implements New and Enforces Established (but Previously Unenforced) Work and Safety Rules

In the fall of 2012, H&M was in danger of losing its contract with Norfolk unless it satisfactorily addressed Norfolk's concerns with late train releases, service failures, accidents, and equipment damage. (JA 1579 n.3, 1580, 1587 n.16; JA 58-60, 249-51, 289-90, 292-94, 1411.) H&M brought in a new management team, led by General Manager of Rail Operations Timothy Newcomb, to improve safety and efficiency at Croxton. (JA 1579-80, 1582-83, 1602 n.43; JA 55-56, 67, 122-23, 185-86, 249, 253-54, 587, 698, 1319, 1364.) Among other personnel changes, John Nunnery replaced Burke as terminal manager, directly reporting to Newcomb.⁵ (JA 1579; JA 31, 33, 122, 185-87, 311-13, 644, 646, 698, 902.)

The new management team redistributed the safety manual, conducted safety briefings, and performed spot audits at Croxton. (JA 1581; JA 123, 125-26, 128, 384-85, 574, 765, 969-70, 1064, 1197, 1320.) More controversially, they began to enforce both new and existing, but previously unenforced, work and safety rules. (JA 1582-87.)

Before September 2012, the Union and H&M had few conflicts, but the new management's changes sparked tension between unit employees and H&M.

⁵ In addition to Nunnery, Newcomb brought in Jonathan Bartee, (in training for a terminal manager position), and Charles Oliphant (an additional operations manager). (JA 1579-80; JA 188-89, 254, 310, 312, 698, 1194-95, 1318.)

(JA 1580-81; JA 1363-65, 1465-66, 1473.) Between September and December 2012, numerous modifications – including to H&M’s call-out policy, its use of casual employees or supervisors to perform unit work, its overtime policies and practices, employees’ schedules and shifts, and its enforcement of previously unenforced safety rules – resulted in “heated” interactions between unit members and the new management. (JA 1582-90, 1601-03; JA 165-66, 264, 282-83, 970, 1473-74.)

E. Neilan, Gonzalez, Martinez, and Ventre Resist H&M’s Changes to Work and Safety Rules

As the more senior members of the bargaining unit, Neilan, Gonzalez, Martinez, and Ventre met with the new management frequently to discuss the rule changes in the fall of 2012. (JA 1582-90.) A brief timeline of those interactions follows.

On September 14, Newcomb and Nunnery met with Neilan and employee Antonio Vicente to discipline them for failing to comply with H&M’s previously unenforced call-out policy. (JA 1582-83; JA 408-11, 412-14, 1132, 2045, 2047, 2049.) At that meeting, Newcomb rescinded Vicente’s discipline, mistakenly thinking he had complied with the policy. (JA 1583; JA 413-14, 596, 1133, 1259.) The Union filed a grievance. (JA 1583; JA 414, 1260.)

On September 17, Neilan, Gonzalez, Ventre, and Domini met with Nunnery to discuss perceived contract violations, including H&M’s use of casual employees

and supervisors to perform unit work, its overtime policy, and the timing of lunch breaks. (JA 1583-84, 1602; JA 424-25, 778, see JA 2050-58, 2498-2505.) At that meeting, Neilan claimed that H&M was discriminating against him for his activities as shop steward, specifically citing H&M's withdrawal of Vicente's discipline but not his. (JA 1584; JA 425, 596.)

On September 18, Newcomb and Nunnery met with Vicente to reinstate his discipline because Neilan had complained and because they determined that Vicente had violated the call-out policy after all. (JA 1584; JA 426, 1134-35, 1259-60, 2371, 2379-82.) Neilan filed a charge with the Board on behalf of himself and Vicente. (JA 1584, 1602; JA 427.)

In September, H&M announced shift changes. (JA 1584; JA 262, 417, 667, 985-86.) Unit employees, including Neilan, complained to management about these changes, and the Union agreed to submit the matter to mediation. (JA 1584; JA 264, 416-18.)

On September 25, Neilan, Domini, Newcomb, and Nunnery met to discuss various workplace issues, including a dispute over the flextime provision in the contract. (JA 1585, 1602; JA 436-38, 1439, see JA 2060.) During that conversation, Newcomb asked Neilan if he wanted H&M to go out of business and if he was there for the men or for himself. (JA 1585, 1603; JA 438-39.) He also stated, "I don't have a problem with you. It's Chuck [Connors] that has a problem

with you.” (JA 1585, 1603; JA 439.) Later, Norfolk’s Intermodal Division Manager Michael Scacco confirmed that Connors did not like Neilan. (JA 1587, 1603; JA 479, 1020.)

At some point after the new management arrived, Gonzalez lodged numerous complaints to Norfolk and H&M management (including Nunnery) about the safety of a new bridge constructed that summer. (JA 1585, 1602; JA 787-89.) Eventually Norfolk responded by adding a walkway to the bridge. (JA 1585; JA 789.)

On October 3, Domini, Neilan, and Ventre attended a mediation session with Connors, Nunnery, and a federal mediator. (JA 1585, 1602; JA 441, 987, 2061-68.) As a result, H&M reimbursed Neilan and Gonzalez for missed overtime and withdrew Neilan and Vicente’s discipline for violating the call-out policy. (JA 1585; JA 597-98, 988, 2061-68.) The parties also discussed, but did not resolve, H&M’s shift changes. (JA 1585; JA 443-44, 2506.)

In early October, H&M posted several memoranda in the employees’ break room. (JA 1585; JA 449-55, 2069-93.) Some of the notices restated existing company policies; some echoed policies in existence, but not enforced; and some were considered new. (JA 1585, 1586 n.14, 1603 n.44; JA 449-55, 992-94, 2069-93.) H&M managers asked employees to sign and acknowledge the policies, but Neilan, Gonzalez, and Ventre resisted, perceiving some of them as changes to the

existing contract requiring negotiation. (JA 1585-86, 1603; JA 449-55, 781-84, 991-94, 1013-14, 2069-93.) At various points during the dispute, Oliphant became angry, and Newcomb screamed at the men, “[W]hy [do] you keep fighting?” (JA 1586, 1603; JA 781-84, 1014.)

In mid-October, after implementing the new shift schedule, Nunnery informed Neilan of a change in H&M’s overtime scheduling. (JA 1586, 1602; JA 460-61.) Neilan countered that weekend overtime should be bid and awarded by seniority based on the contract and on past practice. (JA 1586, 1602; JA 460.)

On October 24, Neilan, Gonzalez, Martinez, Ventre, and Domini met with H&M (including Newcomb and Nunnery) to discuss various scheduling and overtime issues. (JA 1586, 1602; JA 462, 1016-17, 1071-74.) The meeting culminated in a document entitled “Understanding of Shift Hours,” which included a commitment to work together to resolve workplace issues. (JA 1586; JA 2095.)

In November, Gonzalez notified H&M that one of the employees’ bathroom facilities had broken. (JA 1586, 1602; JA 465-66, 784-85, 1260.) Gonzalez also told Domini that if H&M did not fix it, he was going to call the health department. (JA 1586, 1602; JA 785, 1260, 1376.) Domini relayed Gonzalez’s concerns to Nunnery, and H&M fixed the facility. (JA 1586; JA 467, 786, 1260-61, 1376-77.) Nunnery, however, later told Neilan that Gonzalez “didn’t have to go and call [Domini] on me I don’t like to be threatened.” (JA 1586, 1603; JA 467, 786.)

On December 1, additional issues arose regarding Neilan's and Martinez's overtime shifts. (JA 1586; JA 467-69, 1263-64.) Martinez discussed the issues with Nunnery, and Nunnery complained that Neilan had embarrassed him in front of Newcomb during an earlier conversation and stated that Neilan did not want to see his bad side. (JA 1586; JA 469, 906.) Martinez responded that the contract clearly addressed the issue and that "we're all union here – we all stick together." (JA 1586, 1602; JA 906, 928-29.)

On December 2, a shift of men who had already worked for twelve hours complained to H&M about not being released to go home. (JA 1586-87; JA 471.) Newcomb addressed the men over the radio, stating, "Nobody's going anywhere. You guys think you're a bunch of tough guys Wait 'til tomorrow. I'm going to do what I have to do." (JA 1586-87, 1603; JA 471.) In his role as union steward, Neilan attended a meeting with unit members, Newcomb, Nunnery, and Oliphant to discuss the issue, and the employees opted to stay to finish the job. (JA 1587, 1602; JA 472, 1264-65, 1442.)

On December 3, Neilan and Domini discussed the matter further with Newcomb and Nunnery. (JA 1587, 1602; JA 473, 1268.) Newcomb and Nunnery maintained that H&M could hold employees for as long as 16 hours. (JA 1587, 1602; JA 1278-79.) Neilan objected, and Newcomb responded that Neilan would then be responsible for booking manpower. (JA 1587, 1603; JA 473-74.)

Newcomb and Nunnery again expressed frustration with the Union's resistance to their changes. (JA 1587, 1603; JA 473, 1268-69.)

F. On December 12, Nunnery Conducts a Safety Meeting in Which He Concedes that Employees May Observe the Posted Speed Limit and Stop at Rail Crossings

Notwithstanding the above tension, unit employees initially followed the previously unenforced safety rules. (JA 1588; JA 133-34, 145-46, 2163-64.) In December 2012, however, Nunnery believed they were slipping in compliance, particularly with seatbelts. (JA 1588; JA 133-34.) On the morning of December 12, Nunnery told Neilan that he wanted to meet that evening to discipline four individuals found in a spot audit to have violated seatbelt and protective equipment requirements.⁶ (JA 1588; JA 68-69, 480, 610, see JA 1064, 1198.) That evening, Nunnery and Bartee held a meeting (hereinafter "safety meeting") with 12-15 unit members (including Neilan, Gonzalez, Martinez, and Ventre). (JA 1588; JA 69-71, 481, 610-11, 671, 792-93, 856-57, 909, 1021-23, 1198-1200, 1225.) Employee James Roper secretly recorded the safety meeting, along with a later private meeting in which he received discipline for an unrelated infraction. (JA 1588; JA 483, 611-13, 2099, 2100-40.)

⁶ Of the four employees at issue here, only Martinez was to receive discipline at the safety meeting. (JA 1588; JA 68.)

Nunnery began the safety meeting by imploring employees to follow the safety rules and pointed out the noncompliance found in the spot audit. (JA 1588; JA 72, 481, 793, 1023, 2102-04.) Neilan expressed frustration that Nunnery was disciplining the men after promising not to write them up for “any nonsense” and expressed concern that Nunnery would start enforcing other previously unenforced safety rules because “[w]hen you catch us, we’re doing something that you feel that you could hurt us with, you do it.” (JA 2104-05, see JA 613-14, 1588.) Throughout the safety meeting, he, along with other employees, maintained that strict compliance with all H&M and Norfolk safety rules would inhibit their productivity, particularly if employees were required to stop at every crossing, wear seatbelts, and obey the 15 mile-per-hour speed limit. (JA 1588-89; JA 481-82, 613-14, 641, 910, 935, 1077, 1270, 2105-06, 2113-15, 2121-24, 2130.) Unit members also brought up concerns with the seatbelts hurting employees, the condition of the trucks, and back injuries. (JA 1589 & n.18; JA 2111-12, 2120-21, 2130.)

Nunnery maintained that they merely needed to exercise “common sense” regarding certain safety rules; however, he conceded that he would not write anyone up for strictly obeying the rules, including stopping at crossings and complying with the speed limit. (JA 1588-89, 1605; JA 794-95, 1024, 1202, 1204, 1272-74, 2105-07, 2115-16, 2119, 2124, 2136, see JA 481-82, 672.) He stressed

that he wanted the men to be efficient, but he did not want them to violate the safety rules for the sake of efficiency. (JA 1589, 1599-1600; JA 795, 910, 1023, 2108, see JA 482.) He further stated that solely focusing on productivity was deceptive because insurance, accidents, and injuries also cost H&M money. (JA 1589; JA 641, 1023, 2119-20, see JA 910.)

Ventre and Gonzalez then proposed that the employees commit to following the safety rules in exchange for Nunnery's rescinding the four disciplines. (JA 1589-90, 1602; JA 74-75, 482, 671, 793-94, 910, 1024, 1204-05, 1226, 2133.) Nunnery agreed. (JA 1589-90; JA 482, 794, 910, 1024, 1205, 1226, 2134.) Neilan promised to tell the bargaining unit to comply with the safety rules the next day. (JA 1589, 1602; JA 2135-36, see JA 616.) Notwithstanding this agreement, Nunnery sent an email to other H&M managers the next day, reporting that he had disciplined the four employees. (JA 1590, 1605; JA 2197.)

G. On December 13, Employees Follow the Safety Rules and Encounter Challenges with Small Crews; H&M Releases the 23Z Train 40 Minutes Late

On December 13, unit members adhered to the safety protocols as promised the prior evening, including seatbelt and protective equipment requirements. (JA 1591; JA 151, 509-10, 617-18, 804, 911, 1042, 1111, 1123-25.) Some employees also stopped at the crossings and followed the 15 mile-per-hour posted

speed limit. (JA 1591, 1605; JA 509, 618, 804-05, 911, 940, 1042, 1111, 1118-19, 1155.)

That day, Neilan, Gonzalez, Martinez, and Ventre worked the 11 a.m. to 7:30 p.m. shift, along with seven other employees.⁷ (JA 1590; JA 503, 673, 796, 911, 1027, 1837, 2097-98.) Oliphant worked as the scheduled operations supervisor from approximately 6:30 a.m. to 11 p.m. (JA 1590; JA 194, 508, 796, 1322, 1340, 1359-60.) And an usually large number of supervisors, including Newcomb, Nunnery, and Bartee, were also onsite at various points during the day and into the evening. (JA 1590, 1593 n.27; JA 77, 88, 193-94, 1162-63, 1205-06.)

At or near the start of the 11 a.m. shift, management assigned two crews – each with one crane operator and three drivers – to work together to unload the 212 train. (JA 1591; JA 512, 514-15, 673, 797, 1028-29, 1154.) Shortly after they started this task, Gonzalez’s crane broke down. (JA 1591; JA 515, 797.) Gonzalez reported the issue to Oliphant, who made Gonzalez wait with the crane for about an hour and a half while a mechanic repaired it onsite. (JA 1591; JA 797-98.)

After the repair, Gonzalez was reassigned to unload a different train, where his

⁷ Three employees who were scheduled to work the 11 a.m. shift called out. (JA 1590 & n.21; JA 504-05, 1326, 1837.) And the eleven total 11 a.m. shift employees included three new employees in training, two of whom were assigned to work directly with unit members, slowing down their work. (JA 1590; JA 84, 105, 149, 206-07, 508, 676, 796-97, 1027, 1029, 1153-54, 1326, 1329-30, 1351, 1837.)

crew included Martinez, who left for an appointment for an hour and a half, and Vicente, who was working with a trainee and had to leave for half an hour.

(JA 1591; JA 105, 517, 676, 798-99, 911-12, 1033, 1125, 1153, 1330.)

Due to the disabled crane and Gonzalez's reassignment, for a time, only one crane remained to unload the 212 train, along with a crew of approximately three employees, one of whom also had a trainee working with him. (JA 1591; JA 516, 674-75, 676.) That crew also suffered setbacks in manpower, and the crane operator was left working with just one or two drivers at times. (JA 1591; JA 518.) At approximately 1:15 p.m., the trainee had a serious accident for which he was discharged, and the employee working directly with the trainee had to leave the crew for an hour to give a statement.⁸ (JA 1591; JA 516-17, 675, 807, 1029-30, 1342-43, 1832, 1834, 2492.) And at 2:30 p.m., Oliphant sent Ventre, who had arrived earlier than the other 11 a.m. crew members, to lunch. (JA 1591; JA 519-20, 1024-25, 1030-31.) The suboptimal driver to operator ratio created lag times during which the crane operator sat idle while his drivers completed their tasks. (JA 1591, 1606; JA 520, 675.) At least two employees (Gonzalez and Vicente) complained to Oliphant that small crew size was inhibiting productivity. (JA 1591, 1606; JA 1156-57.)

⁸ H&M did not promptly report the accident to Norfolk, later claiming that the delay was due, in part, to their distraction with "union issues." (JA 1591, 1603; JA 2196.)

At 2 p.m. another small crew (one crane operator and two drivers) reported to work and assisted the 11 a.m. crew on the 212 train. (JA 1591 & n.24; JA 518-19, 1326.) Together, the two crews were “cycling,” or taking cargo off the 212 train to the storage lot and returning with empty containers to load onto the 23Z (an outbound train). (JA 1591 n.24; JA 375, 519, 1032, 1334-35.)

At some point that afternoon, Oliphant perceived issues with productivity and brought them up with Newcomb, Nunnery, and a Norfolk manager. (JA 1591-92, 1605-06; JA 76-77, 1327, 1330-31, 1348-49, 1352-54.) Oliphant reviewed reports for two cranes for a one-hour period in the afternoon, and determined that productivity for that period was below average. (JA 1592; JA 1331, 1354-55.)

At 3:30 p.m., Oliphant sent the 11 a.m. shift to lunch, which was unusual timing since they had only a small amount of material left to unload from the inbound trains. (JA 1591; JA 520-21, 676, 800-01, 913, 1332.) On that break, Oliphant addressed his productivity concerns. (JA 1592; JA 521-22, 801, 913-14, 1333-34.) The men responded that they were shorthanded and were taking special care to follow the safety rules. (JA 1592; JA 521-22, 801-02, 913-14.) Oliphant told them that they would be held over until they finished loading the 23Z. (JA 1592; JA 522, 801, 1158.)

By 5 p.m., after finishing unloading the inbound trains, three crews (three crane operators and nine drivers) were working on the 23Z. (JA 1592; JA 522-24,

677-79, 802, 914.) Around 5:30 p.m. Neilan complained to Oliphant that the configuration of the crews – too few drivers per operator – was inhibiting productivity and recommended that Oliphant move Gonzalez from crane operator to driver. (JA 1592; JA 525, 803, 860, 1336.) Oliphant agreed, reconfiguring a crew with one crane operator and six drivers. (JA 1592; JA 525, 803, 860-62, 1336-37.) The reconfiguration increased the crew's productivity. (JA 1592, 1606; JA 525-26, 1157.) Sometime between 6 and 8:30 p.m. two more employees unexpectedly left the facility. (JA 1591 n.22, 1592; JA 507, 525, 807, 1033, 1039, 1294, 2417, 2492.)

At various points after 5:30 p.m., members of H&M management, who uncharacteristically had been driving around the site, interrupted Neilan, Gonzalez, Martinez, and Vicente to discuss perceived issues with their productivity. (JA 1593 & n.27, 1594; JA 77-78, 204, 209, 528-30, 808-09, 916-17, 1159, 1162, 1231-32.) After those discussions, around 7:30 p.m., the pace of the work picked up. (JA 1594, 1599, 1605, 1606; JA 94, 218, 532-33, 2166, 2180.)

Around the same time, Oliphant sent the 2 p.m. crew, which was working on the 23Z, to lunch, and a new four-member crew arrived and began to work on the 23Z. (JA 1592; JA 525-27, 678, 1036-37, 1107-08, 1337-38.) When the 2 p.m. crew returned from lunch, Oliphant did not send them back to the 23Z; rather, he

sent them to load a train that was not due to be released until 2:30 a.m. the following day. (JA 1592; JA 527, 678, 1038, 1338.)

Between 9 and 9:15 p.m., H&M finished loading the 23Z. (JA 1594; JA 527, 680, 806, 1038, 1163.) H&M released the 23Z to the railroad at 9:40 p.m. – 40 minutes past its scheduled release time. (JA 1594-95; JA 85, 862, 1158, 1214-15, 1244-45, 1338-39, 1408, 1423, 2492.)

H. H&M Suspends and Discharges the Four Men; Norfolk Bars Them From Its Facility

On the morning of December 14, H&M suspended Neilan, Gonzalez, Martinez, and Ventre and told them not to report to work until further notice. (JA 1595; JA 89, 151-52, 221, 536, 811, 920, 1043-44.) That same day, management posted new work rules and policies in the break room. (JA 1596 & n.33, 1603; JA 681-82, 2141-49.) Some of the postings, dated December 14 and effective the following day, stated that a failure to comply could result in discipline. (JA 1596, 1603; JA 820, 2141-49.)

Newcomb conducted a brief investigation and decided to terminate the four men on December 17, eventually claiming that they had engaged in an intentional slowdown of work on December 13. (JA 1596-97; JA 222-32.) On December 18, in a meeting initiated by Scacco, Gonzalez spoke with Nunnery, Bartee, and Oliphant. (JA 1597, 1603-04; JA 817.) Gonzalez denied being part of an intentional slowdown and told Nunnery that productivity was below average on

December 13 because the crews were too small, his crane had broken down, and the men were trying to follow the safety rules. (JA 1597, 1603-04; JA 817-18.)

Gonzalez also noted that the men had loaded a lot of empty containers on the 23Z in the morning, which were not recorded until later that evening, making them appear less productive. (JA 1597; JA 818.) Nunnery said that was not what he wanted to hear and if Gonzalez said the right thing, he could keep his job.

(JA 1597, 1603-04; JA 817-18.) Gonzalez refused to lie. (JA 1597; JA 817-18.)

That same day, Connors informed the Union that the four men were discharged and that Norfolk had barred them from Croxton.⁹ (JA 1598; JA 1496.) In a December 21 letter to the Union, H&M stated that the men were discharged and barred for intentionally slowing down production at Croxton between 7 a.m. and 9:30 p.m. by (i) driving at least 10 miles per hour below the posted speed limit and (ii) taking 30 or more minutes to make a single move, which should take 5 minutes.¹⁰ (JA 1597; JA 1839-40.)

⁹ Pursuant to the Norfolk/H&M contract, Norfolk can “ban” or “bar” an H&M employee from coming on their property. (JA 166, JA 1785 ¶ 1.E(5).)

¹⁰ A “move” is the time it takes a driver to drive from the train track to the storage lots, pick up or drop off a load, and return to the track. (JA 1580; JA 548, 661.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 1, 2016, the Board (then-Chairman Pearce and Members Hirozawa and McFerran) affirmed the administrative law judge's finding that H&M had violated Section 8(a)(3) and (1) of the Act. (JA 1577-78.) Specifically, the Board found that H&M unlawfully suspended and discharged the four employees for engaging in union and protected concerted activity. (JA 1577.)

The Board's Order directs H&M to cease and desist from the unfair labor practices found and from "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act," 29 U.S.C. § 157. (JA 1577, 1610.) Affirmatively, the Order requires H&M to offer the four employees full reinstatement, to make them whole for any loss of earnings and benefits, and to remove any reference to the unlawful discipline from H&M's files. (JA 1577, 1610.) The Board's Order also requires H&M to compensate the employees for any adverse income tax consequences of receiving a lump sum backpay award and to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. (JA 1610.) Finally, the Board ordered H&M to post a remedial notice. (JA 1577-78, 1610.)

SUMMARY OF ARGUMENT

Substantial record evidence supports the Board's conclusion that H&M violated Section 8(a)(3) and (1) of the Act when it discriminatorily suspended and

discharged employees Neilan, Gonzalez, Martinez, and Ventre for their protected activity. Before the Court, H&M does not dispute the Board's finding that the four men engaged in sustained and increasing protected conduct in response to changes to work and safety rules. Nor does H&M dispute that its managers did not like the employees' resistance to its changes, explicitly telling them so on a number of occasions, then suspending and discharging them. Finally, H&M does not dispute any of the many reasons the Board rejected H&M's affirmative defense that the men engaged in an intentional slowdown. Accordingly, H&M offers no basis for the Court to decline to enforce the Board's Order.

Instead, H&M argues that the administrative law judge erred in admitting a single piece of evidence – an audio recording of the December 12 safety meeting. But whether or not the recording was admitted is irrelevant on this record because the judge did not rely on the recording to reject H&M's affirmative defense that the discharged employees engaged in an intentional slowdown. Rather, she rejected H&M's affirmative defense as “inherently improbable” in light of the credited evidence and found that H&M had disparately treated the four union adherents. As a result, the resolution of whether the recording was properly admitted into evidence does not affect the Board's holding in this case. Even assuming its admission were error, which is not the case, the Board found that credited testimony independently corroborated the management statements heard

on the recording, and thus H&M has no basis to claim prejudice from its admission.

Finally, the Court lacks jurisdiction to consider H&M's FVRA-based challenge to the initial complaint, which was waived before the Board and thus jurisdictionally barred from review under Section 10(e) of the Act. Additionally, even if it were properly before the Court, the issue of the initial complaint's validity is moot because General Counsel Griffin ratified the complaint's issuance and continued prosecution, correcting any alleged defect.

STANDARD OF REVIEW

This Court "accords a very high degree of deference to administrative adjudications by the [Board]." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted). In reviewing the Board's decision, the Court must uphold the Board's findings of fact, and the Board's application of law to particular facts is "conclusive," if supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); accord *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Bally's Park Place*, 646 F.3d at 935. A reviewing court should not disturb the Board's factual findings, even if it would reach a different result on *de novo* review. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004).

The Court is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Bally’s Park Place*, 646 F.3d at 939 (quotation marks and citations omitted). Further, the Court gives great deference to an administrative law judge’s credibility determinations, as adopted by the Board, and defers to such credibility determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quotation marks and citations omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT H&M VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT SUSPENDED AND DISCHARGED NEILAN, GONZALEZ, MARTINEZ, AND VENTRE FOR ENGAGING IN UNION AND PROTECTED CONCERTED ACTIVITY

Before the Court, H&M does not dispute the essential elements of the violation that the Board found – that H&M violated Section 8(a)(3) and (1) of the Act when it discriminatorily suspended and discharged employees Neilan, Gonzalez, Martinez, and Ventre for their union and protected concerted activity. And it does not even dispute the reasons the Board rejected its contention that the employees engaged in an intentional slowdown. (JA 1606; see also JA 1839-40.)

Even though not disputed, we first set out the legal framework and the factual underpinnings for the violation that the Board found. Then we turn to the

limited argument that H&M does make in its opening brief: that the administrative law judge erred in admitting an audio recording. We show (i) that even without the information on the recording, the elements of the Board's violation remain intact; (ii) that, in any event, the judge properly admitted the recording; and (iii) that, alternatively, substantial evidence supports the Board's finding that because the judge's findings "were independently supported by the credited testimony," the admission of the recording could not have prejudiced H&M. (JA 1577 n.1.)

A. An Employer Violates Section 8(a)(3) and (1) of the Act When It Suspends and Discharges Employees for Engaging in Union and Other Protected Concerted Activity

Section 7 of the Act protects employees' right to engage in union activity as well as other "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Thus, conduct protected by the Act includes not only union-related activities, such as performing shop steward functions, processing grievances, or policing and asserting rights set forth in a collective-bargaining agreement, but it also includes "other concerted activities" related to legitimate employee concerns about employment-related matters. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-67 (1978); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 836, 841 (1984) (honest and reasonable invocation of a collectively bargained right constitutes concerted activity); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005) (concerted activity

includes both “circumstances where individual employees work to initiate, induce or prepare for group action” and where an individual “brings a group complaint to the attention of management”) (citations omitted).

Section 8(a)(3) of the Act, in relevant part, prohibits employer “discrimination in regard to . . . tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.”

29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse employment actions against employees for engaging in activity protected by Section 7 of the Act.¹¹ *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In evaluating the lawfulness of an employer’s adverse action, the Board applies the well-established test from *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under *Wright Line*, the legality of an adverse action depends on the employer’s motivation. If substantial evidence

¹¹ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce” employees in the exercise of their Section 7 rights. 29 U.S.C. § 8(a)(1). A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *accord Power, Inc. v. NLRB*, 40 F.3d 409, 417 n.3 (D.C. Cir. 1994).

supports the Board's finding that hostility toward union or other protected concerted activities was "a motivating factor" in an employer's adverse action against an employee, the employer's action violates the Act unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of these activities. *Wright Line*, 251 NLRB at 1089.

A showing of unlawful motivation typically requires three elements: "[1] union or protected concerted activity by the employee, [2] employer knowledge of that activity, and [3] union animus on the part of the employer." *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007) (citing *Willamette Indus.*, 341 NLRB 560, 562 (2004)), *enforced*, 577 F.3d 467 (2d Cir. 2009); *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). An employer fails to prove that it would have taken the adverse action against an employee even absent the employee's union or other protected activity when, for example, the record shows that the employer's justification for its action is pretextual. *Transp. Mgmt. Corp.*, 462 U.S. at 395, 398-403; *Wright Line*, 251 NLRB at 1084, 1089; *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230-32 (D.C. Cir. 1995).

Proof of an employer's discriminatory motive can come from either direct evidence or be inferred from circumstantial evidence taken from the record as a whole. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003); *accord Mesker Door, Inc.*, 357 NLRB 591, 592 (2011) (citation omitted). Such

evidence includes an employer's disparate treatment of union adherents, *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993), an employer's departure from past practice, *Southwire Co. v. NLRB*, 820 F.2d 453, 460-61, 463 (D.C.Cir.1987), and its shifting or pretextual reasons for the adverse action, *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual "not only dooms [employer's] defense but it buttresses the . . . affirmative evidence of discrimination" and supports an inference of unlawful motive), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

B. H&M's Decision To Suspend and Discharge Neilan, Gonzalez, Martinez, and Ventre Was Unlawfully Motivated

1. The four employees engaged in union and protected concerted activity, and H&M was aware of that activity

Neilan, Gonzalez, Martinez, and Ventre engaged in "an ongoing pattern" of union and protected concerted activity, of which H&M was well aware, in the months leading up to their suspensions and discharge. (JA 1601-02, 1604.) In the fall of 2012, as the Board found, "employees communicated their unhappiness about the enforcement of new policies and work rules frequently[, and t]here is little dispute that such complaints resulted in union discussions with H&M management several times a week." (JA 1601.) Neilan, Gonzalez, Martinez, and Ventre, as four of the most senior and well-respected unit members, were active in

the Union generally and were at the forefront of those complaints and discussions. (JA 1580-91, 1601-02.)

To start, Neilan was the Union's shop steward from 1999 until his discharge. (JA 1579-80, 1601.) He served on the bargaining committee for every contract negotiated during his tenure at H&M, including participating in the somewhat contentious negotiations in the spring of 2012. (JA 1580-82, 1601.) That fall, Neilan's role as steward ramped up with the new management's focus on new and previously unenforced work and safety rules, and he contacted the Union and H&M frequently to address perceived contract violations. (JA 1580, 1582-90, 1601-02.) Specifically, as shown (pp. 10-15), he met with H&M's new management (often including the Union and other employees) to discuss work-related issues on September 17, September 25, October 9, October 24, December 2, and December 3. (JA 1582-87, 1602.) He also engaged in more formal proceedings related to workplace issues, including filing an unfair-labor-practice charge on behalf of himself and another employee and attending an October 3 mediation. (JA 1584-85, 1601-02.)

Gonzalez, in turn, helped handle employee complaints and address contract issues when Neilan was not available and participated in contract negotiations in the past. (JA 1580, 1601.) Specifically, he attended the September 17 and October 24 meetings and was awarded overtime in the October 3 mediation. (JA 1584-86,

1602.) Gonzalez also brought health and safety complaints to H&M and Norfolk regarding the unsafe bridge and the broken bathroom facilities.¹² (JA 1585, 1586, 1602.)

Martinez participated in contract negotiations in the past and attended the October 24 meeting. (JA 1580, 1601.) In addition, in a December 1 discussion with Nunnery regarding an overtime disagreement, Martinez specifically invoked the contract and referred to worker solidarity, stating “that’s the way the contract – it’s a four-hour shift; and we’re all union here – we all stick together.” (JA 1586, 1602; JA 906.)

Ventre also helped address employment-related issues in Neilan’s stead and served on the bargaining committee for every contract negotiated since his hire, including negotiations just months before his discharge. (JA 1580-82, 1601.)

Ventre participated in the September 17 and October 24 meetings, and the October 3 mediation. (JA 1584-86, 1601-02.)

Additionally, all four men attended and spoke at the safety meeting, in which employees discussed discipline, safety, productivity, and workplace injuries with management. (JA 1588-90, 1602; JA 2100-40.) *See NLRB v. Talsol Corp.*,

¹² Not only did Gonzalez suggest that he was bringing a “group complaint” about the broken facilities to management (JA 785), but his complaint was also rooted in the collective-bargaining agreement, which provides that H&M “shall keep its premises ‘in a clean and sanitary condition’” (JA 1602 & n.42; JA 1821 (Art. 6)).

155 F.3d 785, 797 (6th Cir. 1998) (finding that employee's challenges to employer's safety measures in group meeting was protected and concerted activity). In particular, Ventre and Gonzalez proposed that Nunnery rescind proposed discipline in exchange for the senior unit members' policing H&M's safety rules, and Neilan promised to assist. (JA 1589-90, 1602.) As the Board found, "[s]uch action, inuring to the benefit of coworkers, [] comes well within the ambit of protected conduct under the Act." (JA 1602.)

2. H&M exhibited animus toward the four employees' union and protected concerted activity

Both direct and circumstantial evidence proves H&M's animus toward the discharged employees' union and protected concerted activity. (JA 1603-04.) Newcomb, in particular, made no attempt to hide his hostility for the employees' protected conduct. During a meeting to discuss various workplace issues, Newcomb demanded to know whether Neilan "wanted the company to go out of business" and wondered whether Neilan was "up here for the men or . . . up here for yourself?" (JA 438-39, see JA 1603.) In that same meeting, he told Neilan "I don't have a problem with you. It's [Connors] that has a problem with you" – a sentiment later echoed by Scacco. (JA 439, see JA 1603.) Newcomb also warned a shift of men, who had complained about H&M's holding them past twelve hours, "[y]ou guys think you're a bunch of tough guys Wait 'til tomorrow. I'm going to do what I have to do." (JA 471, see JA 1603.) And when Neilan met

with Newcomb and Nunnery the next day, and objected to H&M's position that it could hold employees for as long as 16 hours, Newcomb again expressed frustration with the Union's resistance to H&M's changes and informed Neilan that he would be responsible for booking manpower – a task clearly outside his normal job responsibilities. (JA 473, see JA 1603.) Newcomb's animus toward the unit members' resistance is further evidenced by his "screaming" at Gonzalez, Neilan, and Ventre, "Why [do] you guys keep fighting?" when they objected to changes that H&M implemented without negotiation. (JA 1014, see JA 1603.)

Nunnery also expressed hostility toward union and protected concerted activity. The Board found direct evidence of animus in Nunnery's warning to Neilan that he did not like being "threatened" into fixing the broken bathroom facilities and in his email to Norfolk attributing H&M's failure to timely report the December 13 accident, in part, to "union issues." (JA 1603; JA 2196.)

H&M's animus is further evidenced by its posting new work rules on December 14, the day the men were told not to report to work. (JA 1596 & n.33, 1603.) The timing of those postings, some of which referenced disciplinary consequences, communicated to the remaining employees that once the senior men "were no longer on the scene[,] management could proceed" with its changes without resistance. (JA 1603.)

Finally, H&M's various pretextual reasons for suspending and discharging the four employees prove animus. (JA 1603-04.) For example, at Neilan's unemployment hearing, Nunnery stated that Norfolk first barred the men from its terminal, so he "had no other alternative other than to terminate them." (JA 1604; JA 2160.) At the Board hearing, however, H&M managers attributed the termination decision to a purported intentional slowdown, of which they gave exaggerated and conflicting accounts. (JA 1604, 1605-06.) Both stories are belied by credited evidence, and the Board rejected them as pretextual. (JA 1604.) As additional evidence of pretext, when Gonzalez later explained to H&M managers that manpower issues, broken equipment, and compliance with the safety rules all contributed to the slower-than-normal pace on December 13, Nunnery told him that was not what he wanted to hear and that if he said the "right thing," he could keep his job. (JA 1603-04; JA 817-18.)

3. H&M failed to show that it would have suspended and discharged the four employees even absent their union and other protected concerted activity

Not only did the General Counsel easily show that H&M's hostility toward union and protected concerted activities was "a motivating factor" in its decision to suspend and discharge the four employees, but H&M also failed to prove its affirmative defense. As the Board found, H&M "failed to show, by a preponderance of credible evidence, that Neilan, Ventre, Gonzalez, and Martinez

engaged in the sort of misconduct as alleged, and further that they would have been discharged for their actions on December 13 [r]egardless of their protected, concerted conduct.” (JA 1606.) *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (stating that employer must “prove, as an affirmative defense, that despite any anti-union animus, [it] *would* have fired [the employee] *because of* his insubordination, not that it *could* have done so”) (emphasis in original)).

H&M maintained that it was justified in suspending and discharging the four employees because they engaged in an intentional work slowdown on December 13. The Board found, however, that H&M’s description of that intentional slowdown – that the men were driving just 3-5 miles per hour, sitting idle, and working incredibly slowly – was “inherently improbable” and that the testimony supporting that version of events was not credible. (JA 1603-04, 1606; see JA 79-81, 147-49, 1272-73 (Nunnery version), 198-205 (Newcomb version), 1207-13, 1233-37 (Bartee version); see also JA 1839-40, 2165-66.) That finding rests largely on the judge’s well-reasoned credibility determinations, in which the judge discredited the testimony of H&M witnesses and credited that of current H&M employees, properly considering, among other things, context, the witnesses’ demeanor, and the extent to which their testimony was corroborated or inconsistent. (JA 1578-79 n.2, 1605-06.) H&M does not challenge those findings,

let alone allege that those findings are “hopelessly incredible,” “self-contradictory,” or “patently unsupportable.” *See Stephens Media*, 677 F.3d at 1250; *Ozburn–Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 222 (D.C. Cir. 2016) (declining to overturn Board’s “well-reasoned credibility findings, which rested on a comparison of ‘testimonial demeanor,’ ‘specificity,’ and ‘internal corroboration.’” (citation omitted)).

Indeed, the judge found Nunnery generally “cannot be relied on” (JA 1605) based on three major inconsistencies: (i) he initially denied discussing speed limits and stopping at crossings at the safety meeting until confronted with evidence to the contrary (compare JA 72, with JA 1272-74); (ii) he claimed in Neilan’s unemployment hearing that the men were discharged because Norfolk had barred them, when the bulk of the evidence suggests the opposite (compare JA 2160, with JA 541, 546, 815-16, 924-25, 1424, 1435-36); and (iii) he told his colleagues by email that he disciplined four men in the safety meeting, but testified otherwise at the hearing (compare JA 2197, with JA 74-75). Likewise, the judge found unreliable (JA 1605) Bartee’s testimony regarding the pace of the discharged employees’ work because it was inconsistent with testimony from other H&M witnesses. Bartee did not arrive at the facility until 7:30 p.m. on December 13 – after the men had resumed their normal pace, according to Newcomb and Nunnery. (JA 94, 218, 1205, 1237, 2166.) The judge similarly discredited (JA 1605)

Newcomb's testimony that Oliphant noticed the purported slowdown in the morning, as it directly contradicted Oliphant's testimony that he did not notice any issues until mid-afternoon (compare JA 195-96, with JA 1327-28, 1349, 1353).

In addition to inconsistencies casting doubt on the H&M managers' truthfulness, the judge found that their description of the misconduct was simply implausible in light of other record evidence. As the judge noted, "[i]f all four employees had been driving that slowly, and working at such a deliberately obstructive pace, very little would have been accomplished prior to 7:30 p.m." (JA 1606.) The judge pointed to evidence that other trains were loaded and unloaded that day, that Oliphant did not notice an issue until mid-afternoon, and that Norfolk personnel did not independently perceive any sort of slowdown until H&M brought it to their attention. (JA 1606; JA 216, 1327, 1330-31, 1349, 1421-23, 2492.)

In determining what actually happened that day, the judge credited (JA 1606) current employees' testimony. *See, e.g., Advocate S. Suburban Hosp.*, 346 NLRB No. 23, 2006 WL 6924523, at *1 n.1 (Jan. 10, 2006) (stating that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests" (quoting *Flexsteel Indus.*, 316 NLRB 745 (1995)), *enforced*, 468 F.3d 1038 (7th Cir. 2006)). Specifically, two current employees

credibly testified that the pace of the work was slower at times because of small crews and that productivity improved once the crews were reconfigured.

(JA 1606; JA 674-75, 677, 1155-57.)

Finally, the Board found (JA 1606) that H&M's disparate treatment of the four vocal union adherents warranted a finding that its justification for their suspensions and discharge was pretextual. H&M released the 23Z late on "numerous occasions"¹³ in the months before the four employees' discharge, sometimes much later than 9:40 p.m., yet acknowledged that no Croxton employee had been disciplined, let alone discharged and barred, for issues related to those late releases. (JA 1606; JA 248, 1425.) Moreover, H&M's "failure to use [its] progressive discipline system supports the inference of unlawful motive." *Citizens Inv. Servs. Corp.*, 430 F.3d at 1201; *see Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016). H&M's decision to jump straight to suspending, then discharging four of its most experienced men for a not-uncommon service failure, after months of their "push back," and the day after the contentious safety meeting, certainly bolsters the Board's finding that H&M failed to carry its burden of proving that it had a legitimate basis for what otherwise had been shown to be discriminatorily motivated suspensions and discharges.

¹³ See, e.g., JA 2276, 2280, 2282, 2283, 2286, 2289, 2290, 2292, 2294, 2389, 2411, 2413, 2421, 2422, 2461, 2462, 2464.

C. The Board’s Unfair-Labor-Practice Finding Does Not Hinge on Whether the Recording Was Properly Admitted

In the underlying proceeding, H&M raised the defensive claim, which it had the burden of establishing, that it legitimately suspended and discharged the four employees for engaging in an *intentional* work slowdown on December 13 by “[d]riving at least 10 mph below the posted speed limit[] and [t]aking 30+ minutes to make a single move.” (JA 1605-06; JA 1839-40.) As shown (pp. 36-40), the judge found, on the basis of the credited evidence presented at hearing, and evidence of H&M’s disparate treatment of the four union adherents, that H&M had not carried its burden of proving that claim. Critically, for our purposes here, the judge rejected that defense without relying on the contents of the recording of Terminal Manager Nunnery’s safety meeting.¹⁴

While the judge found that H&M did not prove that the four employees engaged in an *intentional* work slowdown, she did find that “employees were indeed working more slowly on December 13; in particular by driving at a speed less than usual and by stopping at every crossing.” (JA 1605.) She then proceeded

¹⁴ See JA 1605: “I further find, however, for the reasons discussed below, that the managers’ various descriptions of the nature and extent of the conduct (or alleged misconduct) exhibited by the discriminatees on this day is not credible. And, the evidence otherwise fails to show that they would have been discharged if not for their concerted, protected conduct, as outlined above.” In none of the paragraphs that follow this quoted paragraph from the judge’s decision does she rely on the contents of the recording to reject H&M’s claim that the employees engaged in the purported intentional slowdown.

to use both credited testimony and the contents of the recording to determine that management had acquiesced in the use of the practices that caused even this *unintentional* slowing of work. Only if she had found that there was an intentional slowdown would the contents of the recording have become germane. And even then the contents would have been germane not to H&M's burden of showing it had a legitimate basis for the suspensions and discharges, but to a defense possibly advanced by the four employees that their intentional slowdown was ordered or acquiesced in by management. In short, given that the Board rejected H&M's defense that the four employees had engaged in an intentional slowdown warranting discharge, and given that the Board arrived at this finding without using the recording, H&M's argument that the recording should not have been admitted does not affect the Board's holding in this case.

In any event, as the Board found (JA 1577 n.1, 1605 n.48), the judge's admission of the recording was consistent with Board precedent. Unfair-labor-practice proceedings "shall, so far as practicable, be conducted in accordance with the [federal] rules of evidence."¹⁵ 29 U.S.C. § 160(b); 29 C.F.R. § 102.39; *accord McKenzie-Willamette Reg'l Med. Ctr. Assocs., LLC v. NLRB*, 671 F. App'x 1, 2 (D.C. Cir. 2016). To authenticate a piece of evidence under those rules, the

¹⁵ The Board, however, "is not bound absolutely to apply the Federal Rules of Evidence." *NLRB v. Maywood Do-Nut Co.*, 659 F.2d 108, 110 (9th Cir. 1981).

proponent must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). One way to satisfy that rule is through testimony of a witness with knowledge. *Id.* 901(b)(1). Thus, the Board interprets Rules 901(a) and (b)(1) to allow the proponent of an audio recording to authenticate that evidence through the testimony of a participant in the recorded conversation showing that the recording reflects the actual conversation and is an accurate recording of that conversation. *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (admitting surreptitiously recorded tape based on testimony “that the tape reflected the actual conversation”); *E. Belden Corp.*, 239 NLRB 776, 782 (1978) (admitting recording based on judge’s review, two witnesses’ testimony as to identity of speakers, and employer’s failure to present evidence challenging its accuracy), *enforced*, 634 F.2d 635 (9th Cir. 1980). A recording that captures only a portion of a conversation or contains unintelligible parts may still be admitted, as such issues “go to the weight, rather than admissibility.” *K. W. Elec., Inc.*, 342 NLRB 1231, 1238 (2004) (citing *United States v. Parks*, 100 F.3d 1300 (7th Cir. 1996)).

The Board did not abuse its discretion in upholding the judge's admission of the recording. (JA 1577 n.1, 1605 n.48.)¹⁶ Neilan and Nunnery both testified to the contents of the recording, they identified the voices on the recording, and Nunnery admitted to making the statements captured by the recording. (JA 1605 n.48; JA 483-99, 1269-74, 1289-1310.) Moreover, as discussed below, the recording was "generally corroborated in significant part by the testimony of witnesses who stated that they did not listen to the tape," including a current employee and an H&M supervisor. (JA 1588 n.17.)

H&M makes much (Br. 18-23) of Neilan's admission that the recording was once part of a longer recording, which included Roper's private disciplinary meeting for an unrelated infraction. (JA 552-53, 612, see JA 1227-28.) Neilan,

¹⁶ H&M appears to concede (Br. 14-18) that the judge admitted the recording consistent with the Board's precedent, and instead argues that the judge should have applied a different, more stringent standard – that purportedly used in criminal cases in the D.C. and Third Circuits. That argument misses the mark, for not only is the Board's approach a reasonable interpretation of Rule 901, but this Court appears to have acknowledged the Board's interpretation. *See, e.g., United States v. Strothers*, 77 F.3d 1389, 1392 (D.C. Cir. 1996) ("Tapes may be authenticated 'by testimony describing the process or system that created the tape' or 'by testimony from parties to the conversation affirming that the tapes contained an accurate record of what was said.'" (emphasis added)) (citation omitted); *United States v. Sandoval*, 709 F.2d 1553, 1555 (D.C. Cir. 1983) (finding that although strict chain of custody requirements may be "typical" or "preferable," district court did not abuse discretion in admitting recording where accuracy was corroborated by independent testimony of two police officers and defendant (participant in conversation) did not challenge accuracy).

however, testified that the exhibit was a complete and uninterrupted recording of the group safety meeting, and that the remainder of the original recording consisted only of Roper's separate disciplinary meeting. (JA 483, 501-03, 553, 612-13, see also JA 1291, 1309-10.) As the judge specifically noted (JA 1588 n.17), neither Nunnery nor Bartee testified that they discussed anything relevant to the unfair-labor-practice proceedings in that separate meeting, much less the "smoking gun" that H&M now misleadingly posits would "completely exonerate[] the Company" (Br. 22).

H&M's suggestion that the recording should not have been admitted (Br. 21-22) because it is unintelligible in places is similarly unpersuasive. Contrary to H&M's assertions (Br. 21-22, 24), although Nunnery initially suggested that pertinent "things" were not picked up by the recording device (JA 1269, 1288-89), when pressed for specifics while listening to the recording, he could only point to one missing conversation where, according to Nunnery, Neilan suggested work would slow down if employees had to wear protective equipment. (JA 1590; JA 1293-94, 1309-10, 1312, 2133 (line 2).) Given that the bulk of the recording was understandable (and corroborated), H&M's concerns about the recording's sound quality go to its weight, rather than its admissibility. The judge duly acknowledged this principle when admitting the evidence and when making her

ultimate findings, later approved by the Board.¹⁷ (JA 1577 n.1, 1588 n.17, 1590, 1605 n.48; see JA 1394 (“[T]here is still an issue as to the probative nature and the reliability of the evidence – something else I have to consider.”). Thus, the Board did not err in upholding the judge’s admission of the recording.

In any event, apart from upholding the judge’s admission of the recording, the Board also found that H&M was not prejudiced by its admission because “the judge’s factual findings were independently supported by credited testimony.” (JA 1577 n.1.) Neilan, along with several witnesses who had not listened to the recording (including a current employee and a supervisor), verified that Nunnery told unit members that they could or should stop at crossings and obey the yard speed limit. (JA 1588 n.17; JA 481-83, 613-14 (Neilan), 672, 716 (current employee Richard Barrett), 794-95, 857 (Gonzalez), 910 (Martinez), 1023-24, 1076 (Ventre) 1202-04 (H&M supervisor Barteel).) A number of witnesses also testified that Nunnery maintained that safety was more important than productivity.

¹⁷ *Colburn Elec. Co.*, 334 NLRB 532 (2001), cited by H&M (Br. 24), is easily distinguishable. There, the judge excluded “unintelligible” tapes of “poor audio quality” under Federal Rule of Evidence 403, specifically noting that he had discredited the witnesses who recorded the tapes and thus questioned the tapes’ reliability given their extremely poor quality. *Id.* at 554 n.3. Here, in contrast, the judge and the Board explicitly noted that the recording was independently corroborated by credited witnesses. (JA 1577 n.1, 1588 n.17, 1605 n.48.) Moreover, the judge here stated that Nunnery, who testified to the purported missing conversation, generally “cannot be relied on as a reliable witness.” (JA 1605.)

(JA 641 (Neilan), 795 (Gonzalez), 910 (Martinez), 1023 (Ventre).) Crucially, when confronted with the recording on both direct and cross-examination (*before* the judge admitted the recording into evidence), Nunnery admitted to making the remarks recorded on the tape. (JA 1605 n.48; JA 1272-74, 1289-1310, 1394.) And neither Nunnery nor Bartee offered testimony suggesting that Nunnery retracted or later clarified to the men his admitted authorization to “roll 15, stop at the crossings[, f]ollow the rules.” (JA 2116, see JA 1588 n.17, 1605 n.48.)

H&M does not challenge the above-referenced testimonial evidence, and indeed admits that Nunnery “conceded that productivity was less important than safety and that bargaining unit members should follow all safety rules, regardless of the impact on productivity.” (Br. 6, see also JA 2168.) Nor does H&M meaningfully challenge the Board’s finding that, in light of that independent evidence, the recording is unnecessary to establish that Nunnery “acquiesced in, and his statements reasonably could have been construed as endorsing, employees’ strict adherence to safety rules, including stopping at all rail crossings and complying with the posted speed limit” on December 13.¹⁸ (JA 1577 n.1.) Thus,

¹⁸ H&M suggests (Br. 24-30) that the Court should disregard Nunnery’s admitted acquiescence to employees’ strict adherence to the safety rules because the four discharged employees somehow set Nunnery up to make those remarks, directed Roper to record the safety meeting, and ensured Roper’s absence at the hearing to avoid his testimony. That theory is belied by substantial record evidence showing (i) that the employees were unaware that Roper was recording the safety meeting

the contents of the recording not only are unnecessary to the Board's unfair-labor-practice finding in this case, but even if they were necessary, those contents are independently established by credited testimonial evidence.

II. THE BOARD PROPERLY REJECTED H&M'S CHALLENGE TO THE COMPLAINT'S VALIDITY

In *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015), the Supreme Court held that Acting General Counsel Solomon served in violation of the FVRA, 5 U.S.C. §§ 3345 et seq., after January 5, 2011, when President Obama nominated him to be General Counsel. The initial complaint here issued during the period Acting General Counsel Solomon served in violation of the FVRA. Nevertheless, for two reasons, the Supreme Court's decision in *SW General* does not support H&M's argument (Br. 13-14) that the Court should dismiss the case.

First, the Court does not have jurisdiction to consider H&M's challenge (Br. 13-14) to Solomon's service under the FVRA. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes court

and (ii) that the General Counsel attempted to call Roper, but was unable to effectuate service. (JA 483-84, 552, 747, 857, 1076, 1393.)

of appeals from reviewing claim not raised to the Board); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice”). Following this principle, several courts of appeals have recently declined to hear challenges to Acting General Counsel Solomon’s authority that were not first properly raised before the Board. *See, e.g., Quality Health Servs. of P.R. v. NLRB*, 873 F.3d 375, 381-84 (1st Cir. 2017); *Creative Vision Res., L.L.C. v. NLRB*, 872 F.3d 274, 292 (5th Cir. 2017); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 120-21 (2d Cir. 2017), *as amended* (May 9, 2017).

Here, although H&M raised the issue as an affirmative defense to the complaint, H&M thereafter failed to “offer any argument in support of this affirmative defense during the hearing before the administrative law judge, [] did not mention it in its posthearing brief to the judge[, and did not] raise any question about the authority of the [Acting General Counsel] or the Regional Director in its exceptions to the judge’s decision, or in its brief in support of its exceptions.” (JA 1623.) Accordingly, as the Board found (JA 1623-24), H&M waived the

argument.¹⁹ See *SW General*, 796 F.3d at 83 (“[w]e address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision,” and “[w]e doubt that an employer that failed to timely raise an FVRA objection – regardless whether enforcement proceedings are ongoing or concluded – will enjoy the same success,” citing 29 U.S.C. § 160(e)); *Marquez Bros. Enter., Inc. v. NLRB*, 650 F. App’x 25, 27 (D.C. Cir. 2016) (holding that the “typical NLRA exhaustion doctrine applies” to FVRA challenges to Solomon’s service as Acting General Counsel).

Second, unlike in *SW General*, a Senate-confirmed General Counsel ratified the unfair-labor-practice complaint in this case. Accordingly, as explained below, even if the Court does not hold H&M’s challenge to Solomon waived, General Counsel Griffin’s ratification of the complaint moots the challenge.

Section 3348(d) of the FVRA provides that “[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect” and “may not be ratified.” 5 U.S.C. § 3348(d)(1)-(2). Significantly, however, Section 3348(e) exempts “the General Counsel of the National Labor Relations Board” from the provisions of “this section.” 5 U.S.C. § 3348(e). Thus, as this Court

¹⁹ The Board also rejected H&M’s motion for reconsideration as an untimely effort to file additional exceptions. (JA 1624.) See *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (to preserve objections for appeal party must raise them in time and manner that Board requires).

recognized in *SW General*, the Board’s General Counsel is one of only several officers expressly exempted from the FVRA’s “void-ab-initio” and “no-ratification” provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e) and assuming that Sec. 3348(e) “renders the actions of an improperly serving Acting General Counsel *voidable*, not void”) (emphasis in original).²⁰ The Board’s General Counsel therefore retains the authority to ratify a previous officer’s actions. Exercising that prerogative, General Counsel Griffin – who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid – issued a notice of ratification stating that, “[a]fter appropriate review and consultation with [] staff,” he had “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.” (JA 1573-74, see JA 1624.)

This Court’s precedent confirms that a properly appointed official can subsequently validate decisions made by those whose appointments were improper. In *Doolin Security Savings Bank, FSB v. Office of Thrift Supervision*,

²⁰ The Supreme Court acknowledged but did not address this Court’s statement that the FVRA renders actions of an improperly serving Acting General Counsel voidable, because the issue was not presented in the petition for certiorari. 137 S. Ct. at 938 n.2.

139 F.3d 203, 213-14 (D.C. Cir. 1998), for example, the Court upheld a cease-and-desist order issued by a validly appointed official, which implicitly ratified the prior action of a possibly improperly appointed “acting” official. 139 F.3d at 213.²¹ *Accord FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding that reconstituted FEC could properly ratify prior decisions made when unconstitutionally constituted). *See also Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (upholding ratification of prior decisions made by director who served in violation of the FVRA but was subsequently properly appointed); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 370-72 (D.C. Cir. 2017) (properly-constituted Board’s ratification of Regional Director’s appointment remedied any defect arising from the quorum violation).

Because General Counsel Griffin ratified the prior actions of Acting General Counsel Solomon in this case, H&M cannot show that the case is based on an unauthorized complaint. Indeed, by ratifying the issuance and continued prosecution of the complaint against H&M, General Counsel Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue the complaint. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d

²¹ In *SW General*, this Court contrasted *Doolin* with the case before it, noting that “no properly appointed General Counsel ratified the ULP complaint against Southwest.” 796 F.3d at 79.

111, 118-19 (D.C. Cir. 2015) (“de novo review” by properly appointed members sufficiently cured taint caused by invalid members’ prior actions).

In sum, General Counsel Griffin’s ratification is sufficient to cure the unauthorized complaint issued under Acting General Counsel Solomon.

Therefore, H&M’s challenge, even if it were properly before the Court, is moot.

CONCLUSION

The Board respectfully requests that the Court deny H&M's petition for review and enforce the Board's Order in full.

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National Labor Relations Board
November 2017

STATUTORY AND REGULATORY ADDENDUM

National Labor Relations Act

Section 7 (29 U.S.C. § 157) A-1
 Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... A-1
 Section 8(a)(3) (29 U.S.C. § 158(a)(3))..... A-2
 Section 10(a) (29 U.S.C. § 160(a)) A-2
 Section 10(b) (29 U.S.C. § 160(b)) A-2
 Section 10(e) (29 U.S.C. § 160(e)) A-2-3
 Section 10(f) (29 U.S.C. § 160(f)) A-3

Federal Vacancies Reform Act

5 U.S.C. § 3348..... A-3-5

National Labor Relations Board’s Rules and Regulations

29 C.F.R. § 102.39 A-5

Federal Rules of Evidence

Fed. R. Evid. 901 A-5

NATIONAL LABOR RELATIONS ACT

Sec. 7. [29 U.S.C. §157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8 [29 U.S.C. §158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

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

.....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Sec. 10 [29 U.S.C. § 160.]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

. . . .

(e) 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 such 2112 of title 28, United States Code. 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. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

FEDERAL VACANCIES REFORM ACT

5 U.S.C. § 3348. Vacant office

(a) In this section--

(1) the term “action” includes any agency action as defined under section 551(13); and

(2) the term “function or duty” means any function or duty of the applicable office that--

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to--

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory

provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

THE BOARD'S RULES AND REGULATIONS

Section 102.39 [29 C.F.R. § 102.39.] Rules of evidence controlling so far as practicable.

The hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Sections 723–B, 723–C).

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 901. Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

.....

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

H&M INTERNATIONAL)	
TRANSPORTATION, INC.,)	
)	
Petitioner/Cross-Respondent	)	Nos. 16-1317, 16-1348
)	
v.	)	Board Case Nos.
	)	22-CA-089596
NATIONAL LABOR RELATIONS BOARD	)	22-CA-095095
	)	22-CB-106127
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,256 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 21st day of November, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 21st day of November, 2017