

Oral Argument Not Yet Scheduled

Nos. 17-3522, 17-3680

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

IMAGEFIRST UNIFORM RENTAL SERVICE, INC.

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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INTRODUCTION

Four union representatives gathered in the early morning near ImageFirst's facility to engage in one of the quintessential actions protected by the National Labor Relations Act: handing out union-related leaflets to employees. While the representatives stood on the shoulder of the road adjacent to the property, ImageFirst's general manager tried to get them to leave. When they did not, he called the police, who refused to arrest the representatives because they were in the

public right-of-way. Based on the general manager's actions, the Board found that ImageFirst violated Section 8(a)(1) of the National Labor Relations Act by prohibiting the representatives from distributing union literature in the public right-of-way; by attempting to remove them from that public area; and by threatening to and summoning the police when they refused to leave the right-of-way. ImageFirst does not challenge the first two findings, and substantial evidence supports the third.

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This unfair-labor-practice case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petition of ImageFirst Uniform Rental Service, Inc. to review, a Board Order issued against ImageFirst. The Board's Decision and Order issued on September 22, 2017, and is reported at 365 NLRB No. 132. (JA 1-17.)¹ The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

¹ "JA" references are to joint appendix, and "Br." refers to ImageFirst's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in Columbia, Pennsylvania. The Board's application for enforcement and ImageFirst's cross-petition for review were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of its uncontested findings that ImageFirst violated Section 8(a)(1) of the Act by prohibiting union representatives from distributing literature in, and attempting to remove them from, the public right-of-way adjacent to ImageFirst's property?

2. Does substantial evidence on the record as a whole support the Board's finding that ImageFirst violated Section 8(a)(1) of the Act by threatening to and summoning the police when the union representatives refused to leave the public right-of-way?

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

The Philadelphia Joint Board, Workers United a/w Service Employees International Union ("the Union") filed an unfair-labor-practice charge alleging that ImageFirst's actions to prevent the union representatives from distributing leaflets in the public right-of-way violated Section 8(a)(1) of the National Labor

Relations Act, 29 U.S.C. § 158(a)(1). After an initial investigation, the Board's General Counsel issued an unfair-labor-practice complaint against ImageFirst. An administrative law judge conducted a hearing and issued a recommended decision, finding that ImageFirst's conduct violated the Act. (JA 16.) ImageFirst filed exceptions to the judge's findings. (JA 93-97.) On review, the Board found no merit to ImageFirst's exceptions and adopted the judge's findings and recommended order as modified. (JA 1 & nn.1-2.) The following subsections summarize the Board's findings of fact and its Conclusions and Order.

II. THE BOARD'S FINDINGS OF FACT

A. While Standing in the Public Right-of-Way, Union Representatives Distribute Literature Outside ImageFirst's Facility

ImageFirst provides linen and laundry services for healthcare facilities. At its non-union facility in Columbia, Pennsylvania, ImageFirst employs 50 non-supervisory workers. The facility is located on Prospect Road, which is owned and maintained by the Commonwealth of Pennsylvania. (JA 3; JA 393-94, 401.) Prospect Road does not have a sidewalk, but it does have a shoulder. Under Pennsylvania law, the shoulder of a road is designated for public use when there is no sidewalk. (JA 7; 394, 401, 638.) The shoulder on Prospect Road is wide enough for a parked vehicle and is used extensively by pedestrians, bicyclists, and drivers. (JA 3 & n.5; JA 402, 577.) Drivers, for example, use the shoulder to

retrieve mail from mailboxes along the road or to make routine and emergency stops. (JA 3; 401-02, 638.)

ImageFirst's property is separated from the shoulder by a concrete curb. (JA 3, 7 n.11; JA 577, 612.) The curb borders a strip of grass, which itself borders a small parking lot, all of which is owned by ImageFirst. (JA 4 n.8, 11; JA 577, 612.) Under state law, ImageFirst's property fee goes to the center of Prospect Road, but the shoulder and roadway are under an easement for public use. (JA 7 n.11, 10; JA 401, 411-12, 638.)

On December 16, 2015, Jennifer Valentin and three other union representatives arrived at ImageFirst's facility between 4:45 and 5:00 a.m. to distribute pro-union literature to employees arriving for the first shift. (JA 3; JA 179-80, 613.) The representatives arrived in three cars and parked on the shoulder adjacent to ImageFirst's property, north of the driveway, to avoid blocking vehicles arriving for work. (JA 3 & n.6, 4; JA 190-92, 612.)

Valentin, the field organizer in charge of the leafleting that day, first met with the other representatives to discuss safety. Valentin instructed them to stay on the shoulder of the road, to be mindful of the traffic, and not to block ImageFirst's driveway. (JA 4; JA 197-98.) Initially, the representatives occasionally stepped into the driveway to hand out leaflets or briefly onto the concrete curb when cars passed dangerously close. (JA 3-4 n.7, 5; JA 200, 209, 238.)

B. ImageFirst Attempts To Eject the Union Representatives from the Public Right-of-Way, then Threatens To and Summons the Police

Bryan Cunningham, ImageFirst's general manager, arrived at the facility around 5:20 a.m. after receiving a telephone call alerting him to the presence of the union representatives. When Cunningham arrived, one of the representatives handed him a leaflet. He then parked his car and approached the representatives, who were standing on the shoulder. Valentin stepped onto the grassy area that was part of ImageFirst's property to talk with Cunningham. (JA 5, 11; JA 213, 217, 250, 475-76, 478, 482, 614.) Cunningham told Valentin that they were on private property and were not allowed to leaflet there. Valentin demurred, noting that she believed the shoulder to be public property, and refused to leave. (JA 5; JA 217-22, 482-83.) In response, Cunningham told her that ImageFirst owned property 10 feet into the street. Valentin maintained that the union representatives were on public property and refused to leave. (JA 5; JA 220.)

Cunningham returned to his car and telephoned two members of ImageFirst's upper management. They instructed him to tell the union representatives one final time to leave the property, then telephone the police. (JA 6; JA 483.) Following those instructions, Cunningham again approached the union representatives, who were standing on the shoulder. (JA 6; JA 483, 641.) He asked them to stay off the property. The union representatives reiterated their position that the shoulder was public property, and they had the right to be there.

Cunningham replied, “if you’re not going to stay off our property, I’m going to have to call the police.” (JA 6; JA 483-84.) Cunningham returned to his car and phoned the police. (JA 6; JA 488, 641.)

C. The Police Refuse To Remove the Union Representatives Because They Are Not Trespassing

When Police Officers Villano and Stutzman arrived at 5:44 a.m., the union representatives were standing on the shoulder of Prospect Road. (JA 6-8; JA 391, 398, 425, 427, 439, 617-18.) Officer Villano spoke with Cunningham, who told Villano that he called the police because the union representatives were trespassing. In response to Officer Villano’s request for more information about the alleged trespassing, Cunningham told Villano that the union representatives were where they had been when Villano arrived—on the shoulder. Cunningham opined that because ImageFirst owned Prospect Road to the double yellow line, which included the shoulder, the representatives were trespassing. Cunningham added that he wanted the police to arrest the representatives. (JA 7; JA 392-94.)

Officer Villano explained to Cunningham that Prospect Road is a public road, and the union representatives were not trespassing. Cunningham insisted that the officers tell the representatives that they would be arrested if they came onto the property. Officer Villano assured Cunningham that if the representatives came onto the property or tried to enter the building, Cunningham could call the police and they would be arrested. (JA 8; JA 393-96.)

Officers Villano and Stutzman then spoke with the union representatives and instructed them to stay on the shoulder and off the curb, and not to block the entrance to the driveway or traffic lanes. (JA 8; JA 396-97, 618.) The officers further reminded the representatives to be careful in the dark. (JA 429.) The union representatives told the officers that they would stay on the shoulder and planned to leave in the next 10 to 15 minutes. (JA 8; JA 409, 429-30.)

The police officers took no action against the union representatives because they were not trespassing when they stood on the shoulder of Prospect Road. (JA 8; JA 397, 432, 618.) The officers left around 5:55 a.m., and Cunningham moved his car and went into the building to begin work. (JA 6, 14; JA 237, 398, 493, 617.) The union representatives departed 10 minutes later. (JA 14; JA 180, 237.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Miscimarra and Members Pearce and McFerran) found, in agreement with the administrative law judge, that ImageFirst violated Section 8(a)(1) of the Act by prohibiting union representatives from distributing literature in the public right-of-way adjacent to ImageFirst's property, attempting to remove the representatives from the right-of-way, and threatening to and summoning the police when the representatives refused to leave the right-of-way. (JA 1 n.1, 16.) To remedy ImageFirst's unlawful conduct, the Board's Order requires ImageFirst to cease and desist from the unfair labor

practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. Affirmatively, the Order directs ImageFirst to post the Board's required remedial notice. (JA 1, 16.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

SUMMARY OF THE ARGUMENT

In its opening brief, ImageFirst fails to challenge the Board's reasonable findings that it violated Section 8(a)(1) of the Act by prohibiting the four union representatives from handing out leaflets in a public right-of-way adjacent to its facility, and by attempting to remove them from that public space. Accordingly, the Court should summarily enforce the portions of the Board's Order that correspond to the uncontested findings.

On the contested issue, substantial evidence supports the Board's finding that ImageFirst violated Section 8(a)(1) of the Act by threatening to summon and summoning the police because the representatives would not leave the public right-of-way. When General Manager Cunningham summoned the police, the representatives were engaged in protected leafleting on the public shoulder of the road, and ImageFirst concedes it has no property interest that would have allowed it to exclude the representatives from that public right-of-way.

ImageFirst argues only that the Board should have found that its call to police was reasonable because the union representatives allegedly were on its property, and therefore its call was prompted by a concern over its private property interests. The Board reasonably rejected this argument. Cunningham's own statements, corroborated by the testimony of the police officers and the union representatives, show that the representatives were actually on the shoulder of the public road when he called the police and when they arrived. His statements to the police officers reveal that he called them because he mistakenly believed that ImageFirst could eject the union representatives from the shoulder, not because they were on ImageFirst's property. Given the overwhelming weight of Cunningham's own admissions, in conjunction with the corroborating testimony of the union representatives and the police officers, the Board's finding is supported by substantial evidence and should be enforced.

STANDARD OF REVIEW

The Court will not disturb the Board's factual findings, or the reasonable inferences drawn from those findings, even if the Court would have made a contrary determination had the matter been before it *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Board's credibility determinations are entitled to deference and must be affirmed unless they are

shown to be “inherently incredible or patently unreasonable.” *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 609 (3d Cir. 2016). Finally, the Board’s legal conclusions must be upheld if based on a “reasonably defensible” construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

In its opening brief, ImageFirst concedes that it no longer challenges the Board’s findings that it prohibited the union representatives from using, and attempted to remove the representatives from, the public right-of-way. (JA 16.) Specifically, ImageFirst admits (Br. 1 n.1) it had no property interest that would allow it to prohibit the representatives from using the shoulder. ImageFirst further concedes that it violated the Act “by seeking to have the Union representatives removed from the shoulder of Prospect Road.” (Br. 9 n.4.) The Board and this Court have long held that an employer violates the Act when it attempts to prohibit or remove union representatives from property in which it does not have the right to exclude others. *Polly Drummond Thriftway*, 292 NLRB 331, 332-33 (1989), *enf’d mem.*, 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 351, 351 n.2 (1986), *enf’d mem. sub nom. NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

ImageFirst's failure to contest the Board's findings constitutes a waiver of any direct defense on the merits and warrants summary enforcement of the corresponding portions of the Board's Order. *See, e.g., NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996). *Accord Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006). Indeed, where a party fails to challenge the Board's findings in its opening brief, the Court will "accept [those findings] as true." *Konig*, 79 F.3d at 356 n.1. Moreover, by not raising the issues in its opening brief, ImageFirst has abandoned these arguments and may not raise them later in the reply brief. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 n.3 (3d Cir. 1993). Thus, because ImageFirst failed to challenge the merits of two of the Board's unfair-labor-practice findings in its opening brief, the Court should "accept them as true" and grant summary enforcement of the portions of the Board's Order that correspond to those findings. *Konig*, 79 F.3d at 356 n.1.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT IMAGEFIRST UNLAWFULLY THREATENED TO AND CALLED THE POLICE WHEN UNION LEAFLETTERS REFUSED TO LEAVE THE PUBLIC RIGHT-OF-WAY

A. An Employer Violates the Act by Threatening to and Summoning the Police To Remove Union Representatives Who Are Engaged in Lawful Leafleting on Public Property

Section 7 of the Act protects employees' 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.” 29 U.S.C. § 157. Those rights are enforced through Section 8(a)(1) of the Act, which provides that “[i]t shall be 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. § 158(a)(1).

As the Supreme Court has explained, employees’ Section 7 rights “are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Thus, Section 7’s guarantee of the right to self-organization includes “the right of union officials to discuss organization with employees.” *Id.* at 542.

Nevertheless, the right of nonemployees to engage in organizing activity is not unlimited. With certain exceptions that do not apply here, an employer can prohibit union representatives from soliciting employees or distributing literature on its private property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992). But an employer cannot restrict union access to public property or property from which the employer has no right to exclude others. Thus, where an employer attempts to bar union organizing activity, the Board, with court approval, imposes an affirmative defense on the employer to prove that it possessed a private-property interest that “*entitled* it to exclude individuals from the property.” *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997) (quotation omitted), *enf’d sub nom. NLRB v.*

Calkins, 187 F.3d 1080 (9th Cir. 1999). *See also Barkus Bakery*, 282 NLRB 351, 351 n.2 (1986), *enf'd mem. sub nom. NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987). ImageFirst concedes it did not have a private-property interest that allowed it to exclude the union representatives from the public right-of-way adjacent to its facility. (Br. 1 n.1.)

Moreover, the Board and courts, including this Court, have found that employers violate the Act by calling the police to remove lawful union demonstrators where the employers do not have a private property interest sufficient to exclude them. *See, e.g., Polly Drummond Thriftway*, 292 NLRB 331, 332-33 (1989), *enf'd mem.*, 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB at 351 n.2, *enf'd mem. sub nom. NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987). *Accord NLRB v. Calkins*, 187 F.3d 1080, 1088, 1095 (9th Cir. 1999); *O'Neil's Mkts. v. NLRB*, 95 F.3d 733, 739 (8th Cir. 1996); *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 242 (6th Cir. 1995); *Double Eagle Hotel & Casino*, 341 NLRB 112, 122 (2004), *enf'd as modified*, 414 F.3d 1249 (10th Cir. 2005); *KLB Indus.*, 357 NLRB 127, 163-64 (2011), *enforced*, 700 F.3d 551 (D.C. Cir. 2012); *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007).² Likewise, it is settled that an employer violates Section 8(a)(1) of the Act

² *Snyder's of Hanover, Inc. v. NLRB*, 39 F. App'x 730, 733-34 (3d Cir. 2002), *denying enforcement in relevant part to* 334 NLRB 183 (2001), a nonprecedential, unpublished opinion, is not to the contrary. In *Snyder's*, the question before the

by threatening to call the police. *See, e.g., Polly Drummond Thriftway*, 292 NLRB at 332-33. *Accord Calkins*, 187 F.3d at 1083.

But where an employer can show that its threat or call to the police were “motivated by some reasonable concern, such as public safety or interference with legally protected interests,” the Board will not find a violation of the Act. *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004). *See also Victory Markets, Inc.*, 322 NLRB 17, 21, 24 (1996). In its brief, ImageFirst does not argue that it called the police because of a safety concern, and it concedes it had no right to exclude the union representatives from the shoulder.³ Thus, as we now show, ImageFirst violated the Act by threatening to and summoning the police to remove lawful union leafletters from that public right-of-way.

Court was whether the municipality’s easement explicitly authorized union leafleting. 39 F. App’x at 734. Moreover, the union leafletters in *Snyder’s* were on “a portion of the driveway to Snyder’s facility.” *Id.* at 735 n.2. By contrast, ImageFirst summoned the police because the union representatives refused to leave the shoulder of the road, a public area from which ImageFirst concedes it had no right to exclude them.

³ ImageFirst has therefore waived any challenge to the Board’s finding that Cunningham’s call to police was not prompted by safety concerns. (JA 13.) *See NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996).

B. Cunningham Unlawfully Threatened to and Summoned the Police To Remove the Union Representatives from the Public Right-of-Way

Ample evidence supports the Board's finding that the union representatives were standing on the shoulder of Prospect Road, a public right-of-way, when Cunningham called the police. (JA 1 n.1.) Indeed, in Cunningham's own telling of the events that morning, the union representatives moved to the shoulder upon his request. (JA 11; JA 483-84, 516-17, 641.) Based on this evidence, the Board determined that Cunningham "had no authority to ask the union representatives to leave or to threaten them with police action because they did exactly as he demanded." (JA 11.) ImageFirst acknowledges these facts in its brief, noting that Cunningham only threatened to and called the police after the representatives "had moved to the shoulder of Prospect Road." (Br. 6.) Thus, given Cunningham's own admission and ImageFirst's concession, the Board's finding that Cunningham had "no reason . . . to call the police because the four representatives were now on the shoulder and not on [ImageFirst's] property" is unassailable. (JA 11.)

But the Board did not simply rely on Cunningham's admission. The Board also cited the credited and mutually corroborative testimony of the union representatives and the police officers who arrived in response to Cunningham's call. The union representatives testified that they remained in the public right-of-way after their initial conversation with Cunningham. (JA 12; JA 202-03, 220,

225-28, 234, 331-32, 336-37.) Officers Villano and Stutzman likewise testified that the representatives were on the shoulder when they arrived and remained there while they were on the scene. (JA 7, 8; JA 391, 429-30.)

Officer Villano's testimony further shows that Cunningham wanted the union representatives removed from the public right-of-way, not ImageFirst's private property. When Villano asked Cunningham exactly where the union representatives had trespassed, he replied that they "were basically where they were" when Villano arrived—namely, on the shoulder of Prospect Road. (JA 7, 12 n.15; JA 393.) Attempting to explain why he had called the police, Cunningham conveyed his mistaken understanding of ImageFirst's property rights, telling Villano that because its property extended to the center of Prospect Road, and the representatives were on the shoulder of that road, they were trespassing. (JA 7, 12; JA 393.) As shown above, however, the shoulder is part of a public right-of-way. Accordingly, as Officer Villano explained to Cunningham, "[s]ince they never actually physically came onto the property or into the building of the business, there was no trespassing violation." (JA 395.) Once Villano pointed out that the representatives were in a public right-of-way, Cunningham acquiesced in their remaining on the shoulder. (JA 12; JA 395, 491.)

Thus, the credited and uncontradicted testimony provides abundant evidence to support the Board's finding that ImageFirst violated the Act by threatening to

call the police to remove union leafletters from a public right-of-way, and by following through on that threat. *See Double Eagle Hotel & Casino*, 341 NLRB 112, 122 (2004), *enf'd. as modified*, 414 F.3d 1249 (10th Cir. 2005).

C. ImageFirst Lacked a Reasonable Concern for Its Private-Property Interest To Justify Threatening to and Calling the Police

As noted above (p. 15), an employer concerned about its private-property rights may threaten to or call the police if it is “motivated by some reasonable concern, such as public safety or interference with legally protected interests.” *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004). Here, there was no such concern. ImageFirst concedes that it had no property interest that would allow it to exclude the union representatives from the shoulder and admits that the representatives were on the shoulder of the road when Cunningham phoned the police.⁴ (Br. 1 n.1, 6.) Nevertheless, ImageFirst argues that Cunningham’s call to the police was justified because he had a “reasonable concern” the union representatives were on its private property. This argument is contrary to the credited evidence.

As the Board found, when Cunningham threatened to and then called the police, he did not have a reasonable concern that ImageFirst’s property interests were being violated. (JA 1 n.1.) Rather, Cunningham admitted that he summoned the police only after the union representatives had moved to the public shoulder of

⁴ Nor did ImageFirst raise any safety concerns in its opening brief (see n.3 above).

the roadway. (JA 11; JA 483-84, 516-17, 641.) Moreover, the police officers credibly testified that the representatives were on the shoulder when they arrived and remained on the shoulder. Officer Villano further testified that Cunningham's only explanation for calling the police was his complaint that the union representatives were trespassing *on the shoulder*. (JA 6-8; JA 391, 393-95, 427, 430, 439-40, 618.) Thus, the overwhelming weight of the evidence supports the Board's finding that Cunningham made the call—not because the union representatives were on ImageFirst's private property—but because of his “mistaken belief that [ImageFirst's] control of its property extended to the middle of the road without regard[] to the public's right-of-way or easement.” (JA 11.) The Board therefore reasonably found that ImageFirst violated Section 8(a)(1) of the Act by summoning the police “in the absence of any evidence indicating the need for a police presence.” *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007).

ImageFirst challenges this conclusion by asserting (Br. 2, 8, 10, 13, 15, 16) that the Board “ignored” the administrative law judge's findings and the “undisputed” fact that the union representatives were trespassing when Cunningham called the police. This is incorrect. The judge found with ample record support, and the Board affirmed on review, that the representatives “had moved to the shoulder consistent with Cunningham's demands minutes after he

told them to do so.” (JA 1 n.1, 11; JA 483-84, 516-17, 641.) And as ImageFirst concedes, the shoulder is a public right-of-way—an area from which it could not rightfully seek to exclude the representatives. (Br. 1 n.1.)

In challenging this finding, ImageFirst relies heavily on Cunningham’s discredited testimony that he called police because the union representatives were trespassing in ImageFirst’s driveway before and after he called police. (Br. 6, 7, 8, 12, 15, JA 484.) As an initial matter, the issue before the Board was not whether the union representatives trespassed onto ImageFirst’s property *before* Cunningham asked them to move. The issue was whether ImageFirst “had a property interest in the shoulder that privileged it to exclude the union representatives from the shoulder” when Cunningham called the police. (JA 1 n.1.) ImageFirst concedes that it did not.

Moreover, the administrative law judge based his findings on Cunningham’s own admission, as well as the substantiating testimony of the union representatives and the police, that the representatives were on the shoulder when Cunningham threatened to and called police, when the police arrived, and while the police were on the scene. (JA 6-8, 11-12; JA 202-03, 220, 225-28, 234, 331-32, 336-37, 391, 429-30, 641.) The judge explicitly discredited Cunningham’s testimony that he called police because he “just [did]n’t want them on our property.” (JA 11; JA 491.) ImageFirst does not even attempt to meet its heavy

burden of showing that the judge's credibility ruling was "inherently incredible or patently unreasonable." *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 609 (3d Cir. 2016).⁵

Nor do ImageFirst's other citations to the record support its claim that Cunningham had a reasonable concern for its property interest. For example, as evidence that Cunningham called the police because of the union representatives' purported "forays" onto its property, ImageFirst cites (Br. 12 & n.5, 15) Valentin's testimony that they briefly stepped onto the curb when cars passed too closely (JA 200, 238, 274-75), or momentarily into the driveway to leaflet; that she stepped onto the grass to talk to Cunningham before he called the police (JA 217); that she and another representative spoke to Officer Villano (JA 230); and that she denied spending most of her time leafleting on ImageFirst's property (JA 299).

ImageFirst also cites Officer Stutzman's testimony that he saw a representative leaflet a car but did not "really recall where [the representative] was standing" (JA 437-38). None of this testimony undermines the Board's finding that when Cunningham called the police, "the union representatives had already moved to the shoulder of the highway at [his] request . . . and it was not reasonable for

⁵ ImageFirst asserts, without citation, that the union representatives trespassed "[a]fter the police left and Cunningham went into the Facility." (Br. 8.) Nothing in the record supports this claim.

[ImageFirst] to believe it had a property interest in the shoulder that privileged it to exclude the union representatives.” (JA 1 n.1.)⁶

Finally, in addition to its unsupported rewriting of the Board’s factual findings, ImageFirst argues (Br. 16-21) that under *Nations Rent, Inc.*, 342 NLRB 179 (2004), it had a reasonable concern the union representatives were trespassing when Cunningham called the police. Contrary to ImageFirst’s claim (Br. 20), *Nations Rent* does not hold that any reasonable concern—no matter how attenuated from the union representatives’ conduct at the time police are summoned—would justify calling the police.

In *Nations Rent*, the employer summoned police when a union picketer moved his car onto company property. The picketer did not move his car until after the employer called police, leading to the employer’s reasonable concern that the picketers were using police scanners (a jailable offense). *Nations Rent*, 342 NLRB at 181, 189. In addition, employees had complained about being followed, and the employer had a reasonable concern that the picketers were following

⁶ ImageFirst gains no ground in relying (Br. 10, 12, 15) on a statement by the administrative law judge that Officer Stutzman observed a union representative leaflet a car, which “more likely than not” occurred on ImageFirst’s property. (JA 12.) The Board did not rely on the judge’s finding that this leafleting constituted a de minimis trespass. (JA 1 n.1.) In any event, Stutzman was not certain where the leafleting occurred (JA 437-38), and he and Officer Villano concluded the representatives were not trespassing. Further, whatever happened could not have served as the basis for Cunningham’s call to police, as they were already on the scene.

employees home. *Id.* at 181. The Board found that there was “no dispute that the trespass ended shortly after [the employer] called the police,” and that picketers admitted following employees as they left the facility. *Id.* In light of these facts, the Board determined that the employer could be reasonably concerned that the picketers used police scanners and followed employees home. *Id.*

Here, of course, the Board explicitly found that ImageFirst did not have a reasonable concern about its property interest when it called police.⁷ (JA 1 n.1.) Cunningham’s own testimony showed that the union representatives were on the shoulder of Prospect Road when he made that call. Moreover, unlike *Nations Rent*, any purported trespass ended before Cunningham called the police. ImageFirst conceded before the Board that “it does not object to the presence of the public or the Union . . . on the shoulder of the road.” (JA 10; JA 468, 634.) Given “the open and notorious public use of the shoulder by, for example, pedestrians, cyclists, and people picking up their mail, of which [ImageFirst] was well aware,” the Board found that it was not reasonable for ImageFirst to believe it had a property interest in the shoulder that would allow it to exclude the union representatives. (JA 1 n.1; JA 401-04, 548-49.) In these circumstances, the Board

⁷ ImageFirst also cites several memoranda issued by the Board’s Division of Advice. (Br. 20 n.11.) As ImageFirst acknowledges, advice memoranda are not Board law. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002). In any event, in each of the cited memoranda, a question existed as to the employer’s property interest. There is no such question here.

reasonably found that ImageFirst violated the Act by threatening to and summoning the police when it did not have the right to exclude the union representatives from the shoulder.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full and deny ImageFirst's cross-petition for review.

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May 2018

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner/Cross-Respondent)
)
v.) Nos. 17-3522, 17-3680
)
IMAGEFIRST UNIFORM RENTAL SERVICE, INC.)
)
)
Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Kellie Isbell certifies that she is a member in good standing of the State Bar of Maryland. She is not required to be a member of this Court's bar, as she is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,467 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; 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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Dated at Washington, DC
this 21st day of May 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 21st day of May 2018