

Nos. 18-70029 & 18-70324

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

UNITE HERE! LOCAL 5

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of UNITE HERE! Local 5 (“the Union”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Union on December 16, 2017, and reported at 365 NLRB No. 169. (ER

1.)¹ The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper because the unfair labor practices occurred in Honolulu, Hawaii. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel’s property.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following the investigation of charges filed by Aqua-Aston Hospitality, LLC d/b/a Waikiki Beach Hotel and Hotel Renew (“the Company”), the Board’s

¹ “ER” references are to the Excerpts of Record filed by the Union and “SER” references are to the Supplemental Excerpts of Record filed by the Board with this brief. “Br.” references are to the Union’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

General Counsel issued two complaints alleging that the Union had violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel's property. (ER 5, 12.) After separate hearings, both administrative law judges found that the Union had violated the Act as alleged. (ER 1, 11, 13.) On review of the now-consolidated cases, the Board affirmed the judges' rulings, findings, and conclusions, and adopted the recommended Orders, with modifications. (ER 1.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: Parking and Access at the Company's Aston Hotel; the Union's Picketing Campaign at the Aston

The Company operates and manages the Aston Waikiki Beach Hotel ("the Aston"), a hotel in Waikiki, Hawaii. (ER 5; SER 2-3.) The Aston is located on the corner of Kalakaua Avenue and Paoakalani Avenue, both one-way streets, with its entrance off Paoakalani Avenue. (ER 5; ER 92.) To access the Aston, pedestrians and vehicles pass through the hotel's *porte cochere*, or covered driveway. The Aston's *porte cochere* is a one-way, u-shaped driveway with a designated vehicular entrance and exit off Paoakalani Avenue. Vehicles entering or exiting the *porte cochere* cross the public sidewalk that runs alongside Paoakalani Avenue. (ER 5; ER 93-94.)

The Aston offers guest parking in a garage that only its valets may access; guests may not self-park or retrieve their vehicles from the garage, which is located

around the corner from the hotel.² (ER 5, 12; ER 92, SER 4.) Guests instead must drop off and pick up their vehicles from inside the *porte cochere*, where Aston's valet service is located. (ER 5, 12; SER 5-6, 36.) To park a guest's vehicle, valets depart the *porte cochere* via its designated exit, crossing the public sidewalk where it bisects the driveway, turn right onto Paoakalani Avenue, and follow an indirect route (due to one-way streets) to the Aston's garage. (ER 5-6; ER 92, 94.) To retrieve a vehicle, valets follow a circuitous route (again due to one-way streets) from the garage back to Paoakalani Avenue, where they turn right to enter the *porte cochere*, again crossing the public sidewalk along Paoakalani Avenue. (ER 6; ER 92-93.) The Company employs approximately 16 valets/bell employees, who work in or near the *porte cochere* either at the curbside bell desk or in the hotel lobby. (ER 6; SER 36, 70.)

In February 2015, the Union commenced an organizing campaign that included near weekly union-sponsored rallies and/or pickets in front of or around the Aston. (ER 6; SER 7, 31, 71, 112-15.) The smaller pickets ranged from 15 to approximately 40 individuals and the larger pickets between 75 and 200 individuals. (ER 6, 12; SER 9, 112-15.) The Union staged the smaller weekly pickets in the mornings and the larger pickets once or twice a month in the

² Limited short-term parking in the *porte cochere* is available to waiting taxis, vehicles that valets recently retrieved but guests have not picked up, and vehicles belonging to patrons at the Aston's restaurant. (ER 5; ER 34.)

afternoons. (ER 6; SER 7-9, 112-15.) For the smaller pickets, the Union generally maintained a picket line at the *porte cochere*'s exit; on occasion, it maintained the picket line at the entrance. (ER 6; SER 8, 112-15.) For larger pickets, the Union maintained picket lines at the *porte cochere*'s entrance and exit. (ER 6; SER 9-10, 112-15.) Regardless of size, picketers marched in an oblong circle on the sidewalk where it crossed the *porte cochere*'s entrance or exit driveways while carrying signs, chanting slogans, and banging on cans or using other noisemaking instruments. (ER 6, 12; SER 11, 72, 77-78.) The signs included messages such as "No Respect" and "No Union Contract." (ER 6, 12; SER 27-28, 43, 72.)

The Union designated a "captain" for each picket line, a trained individual responsible for monitoring and directing the picket line and stopping vehicular traffic. (ER 6, 12; ER 54, SER 11-12, 47-48, 53, 55-57.) When a vehicle approached, the captain placed himself between the vehicle and the picket line and raised a hand, palm outward, to signal that the vehicle must stop. (ER 6, 12; ER 57-58, 88, SER 12-14, 62.) The captain indicated to the picketers that they should continue marching in the oblong circle, generally permitting a small picket line to complete two full rotations and a larger picket line to complete one full rotation. (ER 6, 12; SER 49-50, 58-60, 64-65.) After one to four minutes, the captain would call "break," a signal to the picketers to finish marching, move away from the *porte cochere* driveway, and allow the waiting vehicle to pass. (ER 6, 12; SER

14.) The picket line captain exercised discretion over how long to stop a vehicle while the picketers continued to march. (ER 6; SER 61-62, 68-69, 75.) A captain could break the line as soon as a vehicle approached, but the practice was to make vehicles wait in order to draw attention to the picketing. (ER 12; ER 69, SER 63, 66-69, 74, 76.) During the pickets, all vehicles—whether driven by valets, guests, taxi drivers, or the general public—were stopped and made to wait before entering or exiting the Aston’s *porte cochere*. (ER 6; ER 61, 70, SER 78-79.)

B. The August Picket

On August 18, 2015, the Union picketed the Aston for 1 hour in the afternoon, with approximately 170 union members participating. The Union maintained picket lines at the *porte cochere*’s entrance and exit and picketers also marched on both sides of Kalakaua Avenue. A majority of picketers carried signs, chanted, and used noisemaking devices, and some had bullhorns. The Company contacted the local police department to assist with crowd control and noise. (ER 7; SER 15-20, 33-34, 107-11.)

During the August 18 picket, picket line captains stopped 15 to 20 vehicles attempting to enter or exit the Aston’s driveway. (ER 7; SER 18-20.) Andrew Smith, who works for Universal Protection Services, is the Aston’s head of security. Smith personally timed some vehicles stopped by Daniel Kerwin, the Union’s director of internal organizing, who served as picket line captain at the

entrance. (ER 7; ER 62-63, SER 2, 19-20, 46.) Kerwin made multiple vehicles wait between three and four minutes before allowing them to enter the *porte cochere*. (ER 7; SER 19-20.) In addition, vehicular traffic backed up on Paoakalani Avenue because the picket line blocked vehicles attempting to enter the driveway. (ER 7; SER 19.)

C. The October Pickets

On October 3, 2015, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. Picketers carried signs, chanted, including through bullhorns, and used noisemaking devices. The Company contacted the local police department to assist with crowd control and noise. (ER 7; SER 20-24, 102-06.) Smith personally timed the vehicles stopped by Victor Gonzales, a union organizer serving as picket line captain. (ER 7; SER 22, 51-52.) During the October 3 picket, Gonzales stopped six or seven vehicles attempting to exit the Aston's driveway and forced those vehicles to wait between two and four minutes before they could pass. (ER 7-8; SER 22, 104-05.)

On October 14, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 21 individuals participating. As before, picketers carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police three times to

assist with crowd control and noise. (ER 8; SER 24-27, 97-101.) During the October 14 picket, picket line captain Gonzales stopped a vehicle attempting to exit and, after less than a minute, the vehicle reversed and exited the *porte cochere* through its entrance. (ER 8; SER 25-27, 99, 119.) Gonzales also stopped another vehicle for approximately one-and-a-half minutes before allowing it to pass. (ER 8; SER 119.)

On October 24, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 23 individuals participating. Once again, picketers carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police to assist with crowd control and to "protect[] . . . the working [h]otel employees." (ER 8; SER 92-96.) During the October 24 picket, picket line captain Gonzales stopped three to four vehicles attempting to exit and forced those vehicles to wait approximately three minutes before they could pass, as timed by Aston security officers. (ER 8; SER 95.)

On October 30, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. As before, the Company contacted the local police to assist with crowd control and noise and "for the safety of working [h]otel employees." (ER 9; SER 27-30, 86-91.) During the October 30 picket, picket line captain Gonzales stopped seven or

eight vehicles attempting to exit and forced those vehicles to wait between one and two minutes. (ER 9; SER 28, 88-90.) After waiting for a while, one vehicle accelerated toward the picket line as if it was going to strike the picketers. (ER 9; SER 88-89.) Additionally, after waiting for approximately one minute, another vehicle reversed and exited the *porte cochere* through its entrance. (ER 9; SER 89.) Randy Tolentino, bell captain at the Aston, valeted guest vehicles that morning and he was stopped three times by the picket line. (ER 9; SER 29-30, 35, 37-41.) Tolentino observed fellow valets being stopped at the picket line. (ER 9; SER 41.)

D. The December Pickets

On December 7, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. The picketers again carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police to assist with crowd control and noise and "for the safety of non-working hotel employees." (ER 9; SER 81-85.) During the December 7 picket, picket line captain Gonzales stopped Tolentino for between two and four minutes while he was valeting a vehicle. (ER 9; SER 42-44.) Gonzales also stopped one other vehicle for approximately two minutes, as timed by Aston security officers. (ER 9; SER 83-

84.) At least four guests and one valet drove vehicles out of the entrance because of the picket line at the exit. (ER 9; SER 83-84.)

On December 15, the Union picketed for roughly one hour in the morning at the Aston *porte cochere*'s exit. (ER 12 & n.3; SER 186-90.) During the picket, the picket line captain stopped seven vehicles attempting to exit and forced those vehicles to wait between one and three minutes, as timed by Aston security officers. (ER 12; SER 188-89.) No valets were stopped, but valets and bell employees would have been able to observe the picket line stopping those vehicles from the valet/bell stand in the *porte cochere*. (ER 13; SER 139-40, 149-50.)

E. The January Pickets

On January 9 and 16, 2016, the Union picketed for roughly one hour in the morning at the Aston *porte cochere*'s exit. (ER 12 & n.3, 13; SER 176-85.) During the January 9 picket, the picket line captain stopped one vehicle for approximately one minute, as timed by Aston security, and two vehicles exited through the entrance because of the picket line. (ER 13; SER 136-37, 153, 183-84.) During the January 16 picket, the picket line captain stopped two vehicles for approximately one minute each and at least eight vehicles exited the *porte cochere* through its entrance because of the picket line. (ER 13; SER 139, 154, 158, 178-79.) No valets were stopped on either date, but valets and bell employees would

have been able to observe the picket line stopping those vehicles from the valet/bell stand. (ER 13; SER 139-40, 149-50.)

On January 29, the Union picketed for roughly 1 hour in the afternoon at the *Aston porte cochere's* entrance and exit, with approximately 60 individuals participating. (ER 12 & n.3; SER 166-75.) During the January 29 picket, the picket line captain at the exit stopped at least seven vehicles driven by valets and forced those valets to wait approximately one to two minutes each, as timed by Aston security. (ER 12; SER 122-34, 142-47, 152.) In addition, the picket line captain stopped numerous other vehicles attempting to exit, similarly delaying those vehicles one to two minutes each. (ER 12; SER 152, 169-70.) As before, valets and bell employees would have been able to observe the picket line stopping those vehicles from the valet/bell stand. (ER 13; SER 139-40, 149-50.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Miscimarra and Member McFerran; Member Peace, dissenting) found that the Union had violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel's property. (ER 1, 11, 13.) The Board's Order requires the Union to cease and desist from the unfair labor practice found and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the

Act. Affirmatively, the Order requires the Union to post a remedial notice in English, Ilocano, and Tagalog at its offices in Honolulu, Hawaii, and distribute it electronically. In addition, if the Company wishes, the Union must provide a sufficient number of signed copies of the notice so that the Company may post them at its facility in all places where it customarily posts notices to employees. (ER 1.)

STANDARD OF REVIEW

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). *Accord Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1150 (9th Cir. 2003) (citing *Curtin Matheson*). “So long as the Board’s interpretation [of the Act in a case] is ‘rational and consistent’ with the statute, its rulings are afforded ‘considerable deference.’” *Id.* at 1151.

The Court will uphold the Board’s legal conclusions “as long as they are reasonably defensible.” *NLRB v. Int’l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003). The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion,” and is “more than a mere scintilla, but less than a preponderance.”

Local 48, 345 F.3d at 1054-55 (quoting *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). As to a factual finding, the “court may not ‘displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.’” *United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Universal Camera*, 340 U.S. at 488). Given the Board’s “special expertise” in the field of labor relations, the Court will defer to “reasonable derivative inferences drawn by the Board from the credited evidence.” *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986).

SUMMARY OF ARGUMENT

Under the Act, employees have a right to refrain from “any or all” union activities, including the right to freely cross a picket line. In turn, unions cannot engage in conduct that would reasonably tend to restrain or coerce employees’ exercise of that right. Here, the Board found that the Union violated the Act by blocking or impeding employees, or others while employees were present, from entering or exiting the hotel’s *porte cochere* where its picketing stopped traffic.

Substantial—and undisputed—evidence supports the Board’s finding that the Union “deliberately, repeatedly, and persistently” blocked on-duty valet employees and others from crossing its picket line. Based on the totality of the circumstances, the Board reasonably found that the Union’s blocking tended to

restrain or coerce employees' right to refrain from union activity, including freely crossing a picket. The Board's finding is consistent with precedent that similar widespread and repeated picket-line blocking unlawfully restrained or coerced employees.

In finding the unfair labor practice, the Board reasonably rejected various claims made by the Union, including that its conduct was *de minimis*. The Union engaged in widespread and repeated blocking or impeding of employees (and others in the presence of employees), the type of conduct the Board previously has found unlawful. The Board explicitly stated, contrary to the Union's assertion here, that it was not applying a *per se* rule that all blocking or impeding access is unlawful. Instead, the Board emphasized that its finding was based on the specific facts of the case and in accordance with relevant precedent.

The Union incorrectly asserts that various requirements must be met to find blocking unlawful. In doing so, it sets up and knocks down a series of straw-man claims—that there must be a “nexus” between its picketing and employees' rights or that a strike, violence, or threats must be present in conjunction with blocking for the blocking to be unlawful. Board law does not require certain factual circumstances, as suggested by the Union, in order to find unlawful blocking. Although the Union identifies cases with arguably more egregious conduct than here, they do not purport to create a categorical floor under which lesser union

conduct is not restraining or coercive. Because substantial evidence supports the Board's finding of restraint or coercion, there is no basis to the Union's claims that the Board exceeded its jurisdiction in finding its conduct unlawful.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY BLOCKING OR IMPEDING EMPLOYEES, OR OTHERS WHILE EMPLOYEES WERE PRESENT, FROM ENTERING OR EXITING THE HOTEL'S PROPERTY

A. A Union Violates Employees' Right to Refrain from Union Activity by Blocking or Impeding Employees, or Others in Their Presence, from Crossing a Picket Line

Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157. At the same time, however, Section 7 guarantees employees "the right to refrain from any or all of such activities." *Id.* Section 8(b)(1)(A) makes it "an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7" 29 U.S.C. § 158(b)(1)(A).

In accordance with the foregoing, "employees have a statutory right to pass through picket lines without physical hindrance," *Sheet Metal Workers Local 19*

(*Delcard Assocs.*), 316 NLRB 426, 431 (1995), such as when reporting for or departing from work, or in performance of their job duties. *Int'l Bhd. of Elec. Workers, Local Union No. 98 (Tri-M Grp., LLC)*, 350 NLRB 1104, 1104, 1107 (2007) (employee blocked by picket line while attempting to access dumpster on public street), *enforced*, 317 F. App'x 269 (3rd Cir. 2009); *Int'l Union of Operating Eng'rs, Local Union No. 17 (Hertz Equip. Rental Corp.)*, 335 NLRB 578, 584 (2001) (employees blocked by picket line while attempting to report to, and depart from, work). Where a union blocks or impedes employees from freely crossing its picket line, thereby coercing employees into union activity, the Board, with court approval, has found that the union interfered with employees' right to refrain from union activity, in violation of Section 8(b)(1)(A). *See, e.g., Dist. 30, United Mine Workers v. NLRB*, 819 F.2d 651, 655 (6th Cir. 1987) (per curiam); *NLRB v. Serv. Emps. Int'l Union, Local 254*, 535 F.2d 1335, 1337 (1st Cir. 1976); *Local Union No. 98*, 350 NLRB at 1107-08.

In addition to prohibiting misconduct affecting employees, Section 8(b)(1)(A) prohibits “misconduct when directed toward nonemployees so long as the acts were committed in the presence of employees” *Local Joint Exec. Bd. of Las Vegas (Casino Royale, Inc.)*, 323 NLRB 148, 159 (1997). As the Board explained in analogous circumstances, although directed at non-employees, such union misconduct reasonably tends to coerce employees because “employees

would regard [the misconduct] as an indication of what may befall them if they fail to support the [picketing].” *Id.* (second alteration in original) (internal quotation marks omitted). Therefore, a union may violate Section 8(b)(1)(A) if, in the presence of employees, its picket line blocks or impedes other individuals’ (i.e. non-employees’) ingress or egress. *See Shopmen’s Local Union No. 455 (Stokvis Multi-Ton Corp.)*, 243 NLRB 340, 340, 343, 346, 348 (1979) (picketing blocked third-party drivers but finding employees would have been present based on time of day).

In determining whether a union has violated Section 8(b)(1)(A), the Board employs an objective test. It examines whether the ostensibly unlawful conduct, here blocking or impeding employees from freely crossing a picket line, would reasonably tend to restrain, coerce, or intimidate employees in the exercise of their Section 7 right to refrain from union activity. *Local 254*, 535 F.2d at 1337; *Local Union No. 98*, 350 NLRB at 1107; *Metro. Reg’l Council of Phila. & Vicinity, United Bhd. of Carpenters & Joiners (Society Hill Towers Owners’ Ass’n)*, 335 NLRB 814, 814-15 (2001), *enforced*, 50 F. App’x 88 (3rd Cir. 2002); *Local Joint Exec. Bd.*, 323 NLRB at 159.

Applying those principles, the Board has found unlawful a range of union blocking. Thus, the Board has found a violation of Section 8(b)(1)(A) where a union repeatedly blocked or impeded employees attempting to cross a picket line at

their workplace. *See, e.g., Local Union No. 17*, 335 NLRB at 583 (during months-long picket, “numerous occasions” when union blocked employees’ ingress or egress). At the same time, a union may violate Section 8(b)(1)(A) by one instance of blocking or impeding a single employee at a picket line. *See, e.g., Local Union No. 98*, 350 NLRB at 1104 (one employee stopped at picket line during single instance of unlawful blocking). In addition, while blocking or impeding an employee at a picket line for a lengthy period of time supports a violation of Section 8(b)(1)(A), so may a delay of just a few minutes. *Compare Local Union No. 98*, 350 NLRB at 1108 (employee blocked for approximately 30 minutes), *with Metal Polishers, Buffers, Int’l Local 67 (Alco-Cad Nickel Plating Corp.)*, 200 NLRB 335, 336 (1972) (employees blocked between 1 and 5 minutes).

A Board finding that a union’s blocking or impeding of employees constitutes a violation of Section 8(b)(1)(A) does not depend on the existence of additional unlawful conduct, such as threats or physical violence. *See Local Union No. 98*, 350 NLRB at 1107 (“the Board has been clear that the mere absence of violence is not a defense” to the unfair labor practice); *Int’l Local 67*, 200 NLRB at 336 & n.10 (finding violation notwithstanding lack of violence because “absence of physical violence does not lessen the restraining effect” of blocking employees). A violation of Section 8(b)(1)(A) likewise does not require that the picketing have occurred in connection with a strike. *See, e.g., Local Union No. 98*, 350 NLRB at

1105-08 (finding unfair labor practice notwithstanding absence of strike); *Int'l Bhd. of Elec. Workers, Local 98 (MCF Servs., Inc.)*, 342 NLRB 740, 750-52 (2004) (same), *enforced*, 251 F. App'x 101 (3rd Cir. 2007). In sum, “[i]t is well settled that picketing which interferes with or blocks the ingress and egress of employees and others at a place of employment, or which, in effect, forces employees to ‘run a gauntlet,’ is inherently coercive and in contravention of the Act.” *NLRB v. United Mine Workers*, 429 F.2d 141, 146 (3d Cir. 1970) (citing cases).

B. The Union Violated Section 8(b)(1)(A) by Repeatedly Blocking or Impeding Employees, or Others While Employees Were Present, from Entering or Exiting the Aston’s *Porte Cochere*

Substantial evidence supports the Board’s finding (ER 1, 11, 13) that the Union violated Section 8(b)(1)(A) by blocking or impeding employees, or others while employees were present, from entering or exiting the hotel’s property. Specifically, the credited evidence—which the Union does not dispute (*see, e.g.*, Br. 13-15, 18-19, 27)—demonstrates that during the October 30, December 7, and January 29 incidents, the Union blocked or otherwise impeded at least 11 vehicles driven by valets for 1 to 2 minutes each, including one incident where the picket line blocked the valet for between 2 and 4 minutes. (ER 9, 12; SER 29-30, 37-44, 122-34, 142-47, 152.)

In addition, the credited (and similarly undisputed) evidence fully establishes that over the course of the 10 dates discussed above (*see* pp. 6-11), the Union blocked or otherwise impeded at least 44 vehicles driven by non-employees, such as guests or taxi drivers, for between 1 and 4 minutes. (ER 7-9, 12-13; SER 18-20, 22, 28, 83-84, 88-90, 95, 104-05, 119, 136-37, 139, 152-54, 158, 169-70, 178-79, 183-84, 186-90.) As the Board found, valets and bell employees would have been able to observe the Union picket line blocking and impeding vehicles driven by non-employees at the *porte cochere*'s exit. (ER 6, 13; SER 36, 139-40, 149-50.)

The evidence also supports the Board's finding that the picket line caused other adverse effects on operations that valets and bell employees would have been able to observe. (ER 6, 13; SER 36, 139-40, 149-50.) Thus, on several occasions numerous guests, and at least one valet, drove vehicles out the entrance because of the delays caused by the picket line at its exit. (ER 8-9, 13; SER 25-27, 83-84, 89, 99, 119, 136-37, 153-54, 178-79, 183-84.) By delaying vehicles from entering the *porte cochere*, the picket line also caused traffic to back up on Paoakalani Avenue. (ER 7; SER 19.)

Based on the foregoing evidence, the Board found (ER 13; *see also id.* at 10) that the Union had "deliberately, repeatedly, and persistently blocked numerous vehicles" driven by employees for several minutes at a time, and "engaged in

similar conduct” by “temporarily blocking numerous vehicles in the presence or view of the hotel valet and bell employees.” Accordingly, the Board found (ER 10; *see also id.* at 13) that under “the totality of the circumstances . . . the Union’s picketing activities would reasonably tend to coerce or intimidate employees in the exercise . . . of their Section 7 rights,” in violation of Section 8(b)(1)(A).

That finding is, as the Board reasoned (ER 1 n.2, 10, 13), consistent with the aforementioned principles and relevant precedent as well as additional cases involving repeated blocking ranging from less than a minute to more than a half hour. Thus, for instance, the Board, with court approval, found that a union violated Section 8(b)(1)(A) where on five days it blocked numerous employee-driven vehicles, some with multiple employees inside, from entering one jobsite, blocked two employee-driven vehicles from entering a second jobsite, and blocked one employee-driven vehicle from entering a third jobsite. *Local 19*, 316 NLRB at 426-27, 430-33, 435-36, *enforced in relevant part*, 154 F.3d 137 (3d Cir. 1998).³ Because of the union’s conduct, employees waited at the picket line from approximately thirty seconds to three to five minutes. *Id.* Similarly, the Board found a violation where, during a months-long picket, on “numerous occasions”

³ Although the Third Circuit granted the union’s petition for review based on its rejection of the Board’s application of a joint venture theory of liability, the court expressly “affirm[ed] the Board’s conclusion that the [u]nion itself committed unfair labor practices at the [three] job sites.” *NLRB v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 19*, 154 F.3d 137, 139 n.3 (3d Cir. 1998).

the union blocked the ingress or egress of vehicles driven by employees, employer officials, and third parties, for periods ranging from 5 to 7 minutes up to 30 to 45 minutes. *Local Union No. 17*, 335 NLRB at 582-84.

In finding that the Union violated Section 8(b)(1)(A), the Board reasonably rejected (ER 10, 13) the Union's assertion (Br. 29, 38, 42-43, 51, 54, 56, 59, 67) that its conduct did not amount to unlawful restraint or coercion because any blocking was "brief and merely inconvenienced vehicles" (ER 10) and was "minor or de minimis" (ER 13). Factually, the credited—and uncontroverted—evidence establishes that over the course of several months the Union, through its picket line, "repeatedly" (ER 10) blocked or otherwise impeded vehicles for between one and four minutes. As just shown, the Board has found that similar widespread and repeated blocking constitutes a violation of Section 8(b)(1)(A) by coercing employees into union activity, in contravention of their Section 7 right to refrain from it. In any event, as the Board further observed (ER 1 n.2, 10, 13), under established Board law a union need not engage in recurring or especially lengthy blocking conduct in order to violate Section 8(b)(1)(A). *See, e.g., Local Union No. 98*, 350 NLRB at 1104 (single instance where employee blocked at picket line for 30 minutes); *Local 98*, 342 NLRB at 740-41, 751-52 (single instance where employee blocked for 15-30 minutes); *Local 19*, 316 NLRB at 436 (at "Stong" jobsite, single instance where employee and apprentice blocked at picket for four

minutes); *Int'l Local 67*, 200 NLRB at 336, 399-400 (two employees blocked two to three minutes, one employee blocked three to five minutes).

In rejecting the Union's de minimis argument, the Board reasonably found (ER 1 n.2, 10 & n.64, 13) cases relied on by the Union (*see* Br. 38-41, 50, 59) distinguishable. As the Board explained, "the relatively few 'haphazard' and/or isolated attempts to temporarily block ingress or egress" in those cases "did not rise to the level of" unlawful restraint or coercion under Section 8(b)(1)(A). (ER 13.) Thus, there was no unlawful restraint or coercion where picketers on a sidewalk briefly stopped a total of three employees walking to work, two chairs were placed alongside one of two driveways into the employer's facility but the driveways remained open, and a total of three third-party trucks temporarily were prevented from entering or leaving the facility. *Serv. Emps. Int'l Union Local 50 (Evergreen Nursing Home & Rehab. Ctr., Inc.)*, 198 NLRB 10, 10-13 (1972). As the Board reasoned in that case, the union's "haphazard efforts" at the driveways and "obstructive capers" on the sidewalk did not amount to "effective" blocking under the totality of the circumstances. *Id.* at 12. Similarly, the "evidence [fell] short" of restraint or coercion where, despite months of picketing, there were only two dates on which vehicles were "delayed briefly," affecting a total of three employees and one foreman. *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1082, 1098-99 (1979). Those facts, the Board explained, bore "a closer

resemblance” to its decision in *Local 50* finding no violation than to cases finding a violation. *Id.* at 1099. Accordingly, notwithstanding the Union’s (Br. 38, 42) assertion that it, too, merely engaged in “run-of-the-mill” picketing, the Board reasonably found those cases factually distinguishable from the present case, where the Union engaged in widespread and repeated blocking of numerous employee-driven vehicles and others while employees were present.

Moreover, the Board also reasonably rejected (ER 10) the Union’s assertion that “no employee’s rights were restrained since its pickets were not directed at non-striking employees.”⁴ That assertion is misplaced because the relevant inquiry is whether the Union’s conduct adversely affected employees’ Section 7 rights; that it was “directed at” someone else is beside the point. As foregoing evidence thoroughly establishes, “the valet employees were directly affected by and prevented from entering/exiting the Hotel due to [the Union’s] pickets.” (ER 10.) Under accepted Board law, these facts—employees prevented from freely crossing a picket line—establish the violation because the valets were coerced into union

⁴ Although, as the Union points out (Br. 52-53), one of the administrative law judges mistakenly referred to “non-striking” employees (ER 10), it is limited to a single page of the decision, which otherwise makes clear that there was no strike. (*See, e.g.*, ER 1 n.2.) In any event, that errant description does not affect the Board’s analysis because employees’ Section 7 rights encompass refraining from “any or all” union activities, such as picketing, notwithstanding the Union’s fixation on picketing during strikes (*see, e.g.*, Br. 28, 32-34, 41-42, 48, 52-53) and its attempt to narrow Section 7 to protect only employees’ “right to refrain from striking” (Br. 33).

activity, in contravention of their Section 7 right to refrain from it. *See supra* 15-16. Although, as the Union argues (Br. 44-46), some valets responded positively to the picket by smiling or giving the “shaka” sign,⁵ the Board found (ER 10) that “does not negate the fact that those employees were blocked from entering/exiting” the *porte cochere* where they worked. That finding is consistent with the Board’s governing standard for Section 8(b)(1)(A) violations generally—specific employees’ reactions or feelings are not relevant where, as here, the legal standard for evaluating the Union’s conduct is objective, not subjective.⁶ *See supra* 17.

In addition, the Board found (ER 10) that the other undisputed evidence in the case further undermined the Union’s blanket claim that employees remained unrestrained and uncoerced by its picketing. Specifically, as discussed, the pickets were loud, included bullhorns, shouting, and chanting, and featured picket signs, and the police were called to control the crowd and noise as well as to protect working employees. *See supra* 5-9. Thus, “it is certainly reasonable to conclude that non-striking employees would have seen/heard the commotion of the Union’s protests and redirected themselves away from the front of the [h]otel.” (ER 10.)

While the Union argues (Br. 51-53) that this was speculation, under the Board’s

⁵ “Shaka” is a hand gesture that is used in Hawaii as a friendly greeting. (ER 9; ER 88-89, SER 54, 148.)

⁶ The Union acknowledges as much, though it claims that the Board “should” consider such evidence. *See* Br. 44 (“evidence of the subjective reactions of . . . employees is not dispositive or even necessary”).

objective test, whether employees actually redirected themselves is not germane. Moreover, the Board's reasonable inference is supported by evidence showing that the recurring pickets caused commotions often necessitating a police presence, employees watched the scenes from inside the hotel (SER 73), and a valet exited the *porte cochere* via its entrance to avoid the picket line at the exit (ER 9; SER 32, 83-84). *See Carson Cable TV*, 795 F.2d at 881 (Board permitted to draw "reasonable derivative inferences").

There is also no merit to the Union's repeated assertion (Br. 54-68) that the Board created or applied a "*per se* rule" that any blocking or impeding is coercive. As the Board expressly stated in rejecting that claim (ER 1 n.2), it "do[es] not conclude that any picket line blockage is a *per se* violation regardless of duration." (*Id.* (internal quotation marks omitted).) Instead, based on its review of the record evidence and the relevant law, the Board found that "under the particular circumstances of this case, the [Union's] conduct was reasonably calculated to coerce" employees' right to refrain from union activity. (*Id.*) Thus, unlike cases where there was insufficient evidence to find unlawful coercion, "[h]ere, conversely, the [Union] picketed at least 10 different times over many months, and

any valet employee who attempted to cross the picket line was delayed for several minutes.”⁷ (*Id.*)

C. There Is No Merit to the Union’s Remaining Legal Claims that a Nexus and Specific Factual Circumstances Are Required to Establish a Violation of 8(b)(1)(A)

Established, court-approved, principles governing the Board’s analysis of Section 8(b)(1)(A) violations, and the cases applying them, dispose of the Union’s remaining claims. As demonstrated, the test for determining whether a union violated Section 8(b)(1)(A) is objective, asking whether the conduct would reasonably tend to restrain or coerce employees in violation of their Section 7 right to refrain from “any or all” union activities.⁸ *See supra* 17. As applied here, the

⁷ To the extent the Union suggests (Br. 56) that the Board erred in finding further unlawful conduct where employees would have witnessed *non*-employees being blocked or impeded by the picket line, on-point precedent plainly provides that union misconduct directed at non-employees, but observed by employees, reasonably tends to coerce employees. *See supra* 16-17.

⁸ The Union claims (Br. 63-65) that the Board treats union activity differently than employer activity when analyzing alleged violations of Section 8(b)(1)(A) as opposed to Section 8(a)(1), which restricts employer activity. Because the Union failed to raise that claim in its exceptions to the Board (*see* SER 192-94), the Court lacks jurisdiction to consider it. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court”); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011) (citing § 160(e)). In any event, the question under both provisions is whether the conduct reasonably tends to restrain or coerce employees in the exercise of their Section 7 rights. *See, e.g., Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006) (a question constitutes unlawful interrogation in violation of Section 8(a)(1) if it “reasonably tends to interfere with, restrain, or coerce employees in the exercise of

right to refrain from union activity encompasses freely crossing a picket line and continuing to work.

Accordingly, the Union’s many arguments fail because it claims—incorrectly—that certain requirements for establishing a violation of Section 8(b)(1)(A) are unmet. Specifically, extant Board law does not, as the Union repeatedly posits (Br. 31-32, 44, 50, 56-58, 65, 67), require “proof” of “an unmistakable nexus” (Br. 57) between a union’s picketing and its “antagonism” toward employees’ Section 7 right to refrain from union activity and freely cross a picket line. In support of that proposition, the Union solely relies (Br. 31-32, 57) on the legally distinguishable *Laborers Local 806*, 295 NLRB 941 (1989). In that case, the Board required a “nexus” in order to find the respondent union itself responsible for the misconduct of a non-agent member, who had physically assaulted another member involved in dissident activity. *Id.* at 962.

Those agency-type principles are plainly not at issue here. Instead, Section 8(b)(1)(A) broadly—and by its express terms—prohibits union conduct that “restrain[s] or coerce[s]” employees in the exercise of their Section 7 rights.⁹ Consistent with the statute’s proscription, and as discussed above (p. 17), the

their Section 7 rights”). The Union does not appear to dispute (Br. 63-65) that relevant standard, only its application (and the adverse outcome) here.

⁹ There is, therefore, no basis for its claim (Br. 32) that the “need to find a nexus is inherent in the statutory language of Section 8(b)(1)(A)”

Board examines whether, objectively, a union’s challenged conduct would reasonably tend to restrain or coerce. Moreover, notwithstanding the Union’s contentions (Br. 31, 57) regarding the necessity of proving its “antagonism” towards employees exercising their Section 7 rights, Board case law—including the decision the Union cites (Br. 31)¹⁰—makes plain that a union’s intent to coerce is “not essential to finding an 8(b)(1)(A) violation.” *Local Joint Exec. Bd.*, 323 NLRB at 148.

Relying on its mistaken legal premise that a “nexus” is required (Br. 32), the Union incorrectly argues that “[p]icketing-related delays violate Section 8(b)(1)(A) only” when certain factual circumstances exist. The Union first claims (Br. 32-36, 42-43) that because its picketing occurred outside of a strike and without other misconduct, such as threats or violence, the Board’s unfair-labor-practice finding cannot stand. Board precedent, however, plainly does not require either a strike or additional misconduct in order to find that a union violated Section 8(b)(1)(A) by blocking or impeding of employees from freely crossing a picket line, *see supra* 18-19, which the Union itself acknowledges (*see* Br. 32, 35 (“most” and “many” cases involve those facts)).

¹⁰ The Union cites (Br. 31) a footnote in the administrative law judge’s portion of *Local Joint Executive Board*, where the judge relied on *Laborers Local 806*.

The Union next claims (Br. 36-38, 42-43) that its picketing was not violative of Section 8(b)(1)(A) because picketing runs afoul of that section where it either (Br. 36) “singled out” employees based on their views or (Br. 38) “entirely prevented” employees from working. Once again, Board precedent demonstrates that a union may unlawfully block or impede employees regardless of whether it targeted specific employees or completely prevented employees from performing their duties. *See, e.g., Local Union No. 17*, 335 NLRB at 583 (during months-long picket, union unlawfully blocked or impeded numerous employees at worksite, none of whom were singled-out); *Int’l Local 67*, 200 NLRB at 336 (finding unfair labor practice where employees blocked between 1 and 5 minutes).

Moreover, although the Union claims (Br. 50-51) that the “calculated and recurring” nature of its picketing is immaterial, the Board has found that such a pattern and practice supports a violation. *See Local 19*, 316 NLRB at 436, 439 (discussing “pattern” of unlawful picketing). In addition, despite its contention (Br. 43), a violation of Section 8(b)(1)(A) for blocking or impeding employees is not limited to situations where employees were reporting to, or leaving from, work. *See, e.g., Local Union No. 98*, 350 NLRB at 1104, 1107 (on-duty employee blocked while performing task); *Local 98*, 342 NLRB at 740-41, 751-52 (same).

More broadly, in making its arguments the Union cites (Br. 32-38) some cases where unions arguably committed “worse” acts than it did, but they do not

compel a finding that its conduct here was non-coercive or non-restraining.

Simply stated, those cases do not purport to create a categorical floor under which lesser union conduct is not coercive or restraining, and Board counsel are unaware of such a case. Given the established Board law in this area and the uncontested evidence, the Union's blanket assertion (Br. 44) that "[n]othing about the actions of the . . . picketers bore any connection to the Section 7 rights of the valet employees" falls far short. Accordingly, the absence of those facts emphasized by the Union does not undermine the Board's present finding.¹¹

Furthermore, the Union makes a plethora of misplaced claims (Br. 60-63, 65-67)—including that the Board exceeded its jurisdiction (Br. 60, 62-63) and otherwise interfered with the parties' "economic weapons" (Br. 60, 62, 66). As the Union acknowledges, however, the Board properly finds a violation of 8(b)(1)(A) where "a union's conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights." (Br. 65-66 (internal quotation marks omitted).) Thus, the Union's arguments ultimately circle back to the same

¹¹ Focusing on those facts, the Union claims (Br. 41) that there is "not a single" prior Board decision with identical facts to those here. However, the relevant conduct the Union engaged in—repeatedly picketing so as to block and impede employees—is precisely the type of conduct the Board has found violates 8(b)(1)(A) because it reasonably tends to restrain or coerce employees. *See Local 19*, 316 NLRB at 426-27, 430-33, 435-36 (finding violation where union repeatedly blocked numerous employee-driven vehicles at several jobsites from approximately thirty seconds to three to five minutes); *see also Local Union No. 17*, 335 NLRB at 583; *Int'l Local 67*, 200 NLRB at 336.

question of whether it coerced or restrained employees' rights. As demonstrated, the Board found that it did after reviewing the totality of the circumstances and determining that the Union had "deliberately, repeatedly, and persistently" blocked and impeded employees (and others) from freely crossing its picket line while attempting to enter or exit the Aston's *porte cochere*. That finding is based on substantial, credited evidence—which the Union does not dispute—and consistent with Board law.

Finally, even if the Union's picketing is characterized as "peaceful" (Br. 1), it was unlawful. As discussed, the Act is not limited to prohibiting only violent or threatening conduct.¹² In accordance with that proscription, and exercising its role as the agency charged with setting national labor policy, the Board has determined that blocking or impeding employees (or others, if employees are present) violates Section 8(b)(1)(A) where it would reasonably tend to restrain or coerce employees' Section 7 right to refrain from union activity. The Court should defer to the Board's interpretation of the Act and that established policy choice. *See supra* 12.

¹² In passing, the Union asserts (Br. 53) that the judge "penalize[d] constitutionally-protected speech." To the extent that argument is not waived, *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229 (9th Cir. 2008) (arguments made in passing are waived), the Board rejected (ER 10 n.66) the Union's First Amendment affirmative defense because its *conduct*, not its speech, was the basis of the unfair labor practice.

CONCLUSION

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

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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June 2018

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**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69:**

Sec. 7 [Sec. 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 8(a)(3) [section 158(a)(3) of this title].

Sec. 8(a) [Sec. 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 [section 157 of this title];

Sec. 8(b) [Sec. 158(b)] [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]

Sec. 10 [Sec. 160]

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately

local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such 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 [section 2112 of title 28]. 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.

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

UNITE HERE! LOCAL 5)	
)	
Petitioner/ Cross-Respondent)	Nos. 18-70029
)	18-70324
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	20-CB-163657
)	20-CB-166055
Respondent/Cross-Petitioner)	20-CB-171212

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,875 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 25th day of June, 2018

**UNITED STATES COURT OF APPEALS
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)	18-70324
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	20-CB-163657
)	20-CB-166055
Respondent/Cross-Petitioner)	20-CB-171212

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user 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 25th day of June, 2018