Final Brief Oral Argument Not Yet Scheduled

Nos. 17-1237, 17-1260

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEK ARDEN, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEESS INTERNATIONAL UNION, LOCAL 2015

Intervenor

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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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEK ARDEN, LLC	)	
	)	
Petitioner/Cross-Respondent	)	No. 17-1237
	)	
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	20-CA-156352
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Mek Arden, LLC, was the Respondent before the Board in the above-captioned case and is the Petitioner in this court proceeding. The Board's General Counsel was a party before the Board. Service Employees International Union, Local 2015, formerly known as Service Employees International Union, Long Term Care Workers, was the charging party before the Board and is the Intervenor in this court proceeding.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on July 25, 2017, and reported at 365 NLRB No. 109.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, D.C.
this 24th day of August, 2018

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GLOSSARY

Act or NLRA	National Labor Relations Act, (29 U.S.C. § 151 et seq.)
Board or NLRB	National Labor Relations Board
Br.	Opening brief of Petitioner/Cross Respondent Mek Arden, LLC
JA	Joint Appendix
Mek Arden	Mek Arden, LLC
Union	Service Employees International Union, Local 2015, formerly known as Service Employees International Union, Long Term Care Workers

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1237

MEK ARDEN, LLC

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SERVICE EMPLOYEESS INTERNATIONAL UNION,
LOCAL 2015

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Mek Arden, LLC ("Mek Arden") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order finding that

Mek Arden committed numerous violations of Section 8(a)(1) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 158(a)(1). The Order issued on July 25, 2017, and is reported at 365 NLRB No. 109.[1] Service Employees International Union, Local 2015 ("the Union") has intervened in support of the Board.[2]

The Board had subject-matter jurisdiction over the proceedings below under Section 10(a) of the Act, 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction and venue is proper under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which allows an aggrieved party to obtain review of a Board order in this Circuit and allows the Board to cross-apply for enforcement. Mek Arden's petition for review and the Board's cross-application for enforcement were timely, as the Act places no time limitation on such filings.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act and the Board's Rules and Regulations are reproduced in an addendum to this brief.

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[1] Record references in this final brief are to the Joint Appendix ("JA") filed by Mek Arden. References preceding a semicolon are to the Board's findings; those following are to supporting evidence. "Br." references are to Mek Arden's opening brief to the Court.

[2] The Union was formerly known as Service Employees International Union, Long Term Care Workers, and is referred to by this name in the record.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Mek Arden committed numerous violations of Section 8(a)(1) of the Act by engaging in conduct that interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.

2. Whether the Court should deny Mek Arden's motion to remand this case based on the Board's decision in *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495, (Dec. 14, 2017), because the Board's Order can be enforced on grounds unaffected by *Boeing*.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves allegations that Mek Arden committed unfair labor practices during the period before a Board-conducted secret-ballot election among a unit of Mek Arden employees. After the election was held, which the Union lost, the Union filed unfair-labor-practice charges and election objections, and the Board's General Counsel issued a consolidated complaint.

After a hearing, the administrative law judge found merit to five of the allegations and dismissed the remaining allegations. (JA 315-22.) Specifically, the judge found that the employer violated Section 8(a)(1) of the Act by (1) directing employees not to visit areas of the facility to which they were not

assigned, (2) directing employees not to wear union scrubs, (3) creating the impression that employees' union or protected activities were under surveillance, (4) directing employees to wear attire associated with Mek Arden's anti-union campaign, and (5) prohibiting the posting of union literature and removing such postings. The judge also reviewed the Union's election objections, concluded that six objections should be sustained in whole or in part, and recommended setting aside the election results. (JA 326-27.) Mek Arden filed exceptions to the judge's findings, and the Board's General Counsel filed cross exceptions.

Upon review, the Board issued its Decision and Order, affirming the judge's findings of the five violations. (JA 300 & n.3.) In addition, the Board reversed the judge's dismissal of the allegation that Mek Arden had unlawfully solicited employee grievances and impliedly promised to remedy them, finding instead that this conduct violated Section 8(a)(1) of the Act. (JA 301-02 & nn.5, 6.) The Board also adopted the judge's recommendation to set aside the election results and to sever and remand the representation proceeding to Region 20 for a second election. (JA 303.)[3]

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[3] This portion of the Board's Order is not before the Court. A Board order in a certification proceeding is not a final order and thus not directly reviewable by the courts under Section 10(e) of the Act, 29 U.S.C. § 160(e). *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *Bishop v. NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974).

While the case was pending before the Court, the Board issued *Boeing*, which overruled part of the Board's analytical framework for determining the validity of work rules as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Boeing*, 365 NLRB No. 154, 2017 WL 6403495, at *2. In its decision, the Board had applied the *Lutheran Heritage* framework in finding two unfair labor practices. Relying on *Boeing*, Mek Arden filed a motion to remand the entire case to the Board. The Board opposed, explaining that the violations could be upheld on alternative rationales provided by the Board. The Court directed the parties to address the remand issue in their briefs.

II. THE BOARD'S FINDINGS OF FACT

A. Background and Organizational Campaign

Mek Arden operates a long-term-care and rehabilitation facility ("the facility") in Sacramento, California. (JA 301, 304; JA 8, 17.) In late April or early May 2015, the Union began organizing a unit of Mek Arden employees at the facility (JA 304; JA 31-33, 93-94), which primarily consisted of certified nursing assistants (CNAs) but included other employees such as cooks, housekeepers, and maintenance workers (JA 304, 322-23 n.81; JA 5). CNAs Marlene Anderson and

Camila Holcomb were the two primary union organizers. (JA 304; JA 31-36, 39, 41-42, 93-96, 128-29, 146-47.)[4]

B. Management Learns about the Campaign; the Chief Operations Officer Visits the Facility and Asks Anderson about the Union and her Recent Complaints; Employees Present the Election Petition to the Facility Administrator

In mid-June, Anderson complained to Mary Perez, Mek Arden's Interim Facility Administrator, about the new Interim Director of Nursing, Shirin Ramsini. (JA 301, 305; JA 274-75, 288-90.) Perez relayed Anderson's complaint to Markus Mettler, the Chief Operations Officer of Mek Arden's corporate parent, Healthcare Management Services. (JA 301, 305; JA 186-87, 274-75, 290-91.) Mettler visited the facility on June 23 and 24. (JA 301, 305; JA 182, 183-84, 197.)

On June 24, Anderson and Holcomb asked Mek Arden Case Manager Rickesha Collins why Mettler was at the facility. Collins replied that Mettler was there because management had heard that the CNAs were trying to organize and that a "snitch" had reported on the CNAs' union meetings. (JA 305; JA 72-74, 111-15.)

Later that day, Mettler approached Anderson and told her that he had heard rumors that employees were forming a union and that some CNAs had complaints. (JA 301, 305; JA 97-98, 116, 188-90.) Mettler also asked Anderson "how things

[4] The Board inadvertently misspelled Camila Holcomb as "Camilla" Holcomb. (JA 300 n.1, 301, 304; JA 28-29.)

were going." Anderson repeated her complaint about Ramsini and said she was upset about nursing ratios and the unavailability of supplies. (JA 301, 305; JA 97-98, 189-90.) Mettler told Anderson that he would "follow up and look into" her concerns. (JA 301, 305; JA 196.)

About an hour after Mettler's conversation with Anderson and after he left the facility, a group of 20-50 employees, led by Anderson and Holcomb, presented Perez with a copy of the election petition. (JA 305-06; JA 42-43, 98-100, 130-32, 285-86.) The Union filed the petition the next day. (JA 306 & n.12; JA 5.)

C. Perez Directs CNAs not To Visit Areas of the Facility to which They Are not Assigned

On June 29, Perez called a meeting at a nurses' station. She announced that CNAs were no longer permitted to visit other nurses' stations or areas of the facility to which they were not assigned except for work-related reasons, and that CNAs had to take their breaks in the break room or smoking area. (JA 306; JA 44-45, 76, 81-82, 89, 103, 117-18.) Before this announcement, CNAs freely visited other areas of the facility, even to socialize, and took their breaks at various locations, including at nurses' stations. (JA 306 & n.16; JA 45-47, 78-81, 90-91, 104-06, 121-22, 126.) After the announcement, CNAs were frequently harassed and questioned by supervisors when they visited areas outside of their assigned locations, even if they were there for work-related reasons. (JA 306; JA 75-78,

119-20, 122.) This restriction of the CNAs' movement was not enforced or in place after the election. (JA 306; JA 122.)

D. Perez Directs CNAs not To Wear Union Scrubs

Starting on July 1, as part of its organizational campaign, the Union distributed scrubs in its color (purple) and with the Union's logo for employees to wear on Wednesdays. (JA 306; JA 24-25, 37-40, 101-02.) That morning, supervisor Terry Walker told three employees that they could not wear these scrubs, and that they would have to go home to change. (JA 306-07; JA 47-51.) Before the organizational campaign, employees were permitted to wear scrubs in various colors and with various logos. (JA 307, 316; JA 53-54, 65-66, 103.)

Holcomb intervened and told the three employees to stay where they were. She then found Perez and handed her a Board flyer describing employees' right to wear union attire at work. (JA 306; JA 26, 51-54, 103, 282.) Perez said that wearing union scrubs violated company policy and that she would have to check with the corporate office. (JA 306-07; JA 52-53, 281-83, 293.) After doing so, Perez found out that employees have the right to wear union scrubs. (JA 307; JA 281-83, 293.) Mek Arden did not thereafter enforce the rule, but did not rescind it or explain that Perez's directive had been in error. (JA 307; JA 83, 117, 283.) Employees continued to wear union scrubs every Wednesday without interference at least until the election. (JA 307; JA 83-84, 117.)

E. Employee Dangerfield Is Told that Mek Arden Is Monitoring Employees

On July 11, Rita Hernandez, Mek Arden's Director of Marketing and Admissions, asked CNA Danielle Dangerfield to step away from her nurses' station so they could speak privately. Hernandez then told Dangerfield to be careful because security cameras throughout the facility were voice-activated and used to monitor employees' conversations. (JA 309; JA 135-36.) Dangerfield had believed that the cameras were deactivated until Hernandez said otherwise. (JA 309; JA 137-38.) Hernandez admitted to telling Dangerfield that the cameras were operational and voice-activated. (JA 309; JA 210.) Other employees quickly learned of Hernandez's comments, and Hernandez repeated her comments to them. (JA 318 n.71; JA 211.) The cameras outside the facility had not been operational since May, and the cameras inside the facility had not been operational for several years. (JA 310; JA 191-93, 198-201, 217, 219, 244-49, 252-55, 285.)

F. Holcomb Overhears a Supervisor Instruct an Employee To Take Off Union Scrubs and Wear a Pro-Company Uniform

On July 15, Holcomb overheard supervisor Juanita Harmon tell Andres,[5] a janitor, to take off his union scrub top and put on a white shirt. (JA 309; JA 66-67.) When Holcomb later saw Andres, he was wearing a white shirt with a button on it that said "Arden Strong." White was the color associated with Mek Arden's

[5] The record does not identify Andres's last name. (JA 309 n.27.)

election campaign—with supervisors and anti-union employees wearing this color on Wednesdays—and the button was also used by Mek Arden during the election campaign. (JA 309 & n.28; JA 67-71, 110, 267, 283-84, 299.) Andres, who does not speak English, gestured with a disgruntled face toward Harmon's office, which Holcomb interpreted to mean that Harmon had made him wear the pro-company uniform. (JA 309; JA 67.)

G. Mek Arden Removes and Prohibits Pro-Union Postings from Bulletin Boards While Allowing Non-Union Postings

Mek Arden has a posting rule which reads, in relevant part, "[a]ll bulletins other than the ones from Human Resources should be submitted to and approved by Administration before they are posted." (JA 310; JA 10, 18.) During the election campaign, pro-union employees posted union literature on the bulletin board in the employee break room. Perez removed this literature soon after it was posted and instructed Mek Arden managers and supervisors to do the same. (JA 311; JA 56-63, 106-08, 132-33, 149, 296-98.)

Prior to the organizational campaign, Mek Arden allowed employees to post notices, and employees had never sought permission prior to posting. (JA 311 n.43.) These notices had included information about Avon products, baby showers, children's school fund raisers, church events, funeral services, girl-scout-cookie sales, obituaries, potlucks, and weddings. These notices remained posted

for about one to two weeks, and at least one notice remained posted for almost a year. (JA 311; JA 63, 84-86, 108-09, 133-34, 142-43, 148-49.)

H. The Union Loses the Election

The Board held an election for the petitioned-for unit of Mek Arden employees on July 24. (JA 300 n.2, 322-23; JA 22-23.) Of the approximately 93 eligible voters, 41 voted in favor of union representation and 45 voted against it, with 7 challenged ballots. (JA 323; JA 23.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Miscimarra; Members Pearce and McFerran), in agreement with the judge, found that Mek Arden violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by: (1) directing employees not to visit areas of the facility to which they were not assigned; (2) directing employees not to wear union scrubs; (3) creating the impression that employees' union or protected activities were under surveillance; (4) directing employees to wear attire associated with Mek Arden's anti-union campaign; and (5) prohibiting the posting of union literature and removing such postings. (JA 300 & n.3, 326.)

Regarding the first two directives, the Board agreed with the judge's application of *Lutheran Heritage* in finding those directives unlawful. Specifically, the Board agreed with the judge that the directive not to visit unassigned areas of the facility was unlawful because, in addition to employees

reasonably construing the directive as prohibiting protected activity, there was "no doubt" that the rule was implemented in response to the Union's campaign, and that the "rule was enforced and applied to union activity."[6] (JA 300 & n.3, 315.) The Board also agreed with the judge that the directive prohibiting wearing union scrubs was unlawful not only because employees would reasonably interpret the rule as restricting their Section 7 rights, but also because the rule "was announced in response to employees' union activity."[7] (JA 300 & n.3, 316.)

The Board also agreed with the judge to dismiss various other Section 8(a)(1) allegations.[8] (JA 300 n.1, 316-17, 319-20.) However, the Board (Members Pearce and McFerran; Chairman Miscimarra dissenting in part) also found, contrary to the judge, that Mek Arden, through Mettler's conversation with

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[6] Chairman Miscimarra agreed that this directive was unlawful because it was promulgated in response to and applied to restrict Section 7 activity. (JA 300 n.3.)

[7] In agreeing with the majority that this directive was unlawful, Chairman Miscimarra also noted that it this directive "explicitly restricted Sec[tion] 7 activity and was . . . unlawful on this [alternative] basis." (JA 300 n.3.)

[8] These allegations include that Mek Arden unlawfully required CNAs to post their break times on whiteboards, changed employees' break schedules in the housing department, "floated" the work assignment of Holcomb and cancelled her shift, and engaged in surveillance of employees' union activity. (JA 300 n.1, 316-17, 319-20.) The Board also agreed with the judge to dismiss the allegations that statements made by employees Jacinth Castellano and Collins created the impression that Mek Arden was surveilling employees' union activities. (JA 300 n.1, 318-19.)

Anderson, violated Section 8(a)(1) of the Act by soliciting employee grievances and impliedly promising to remedy them. (JA 301-02 & nn.5, 6.)

To remedy the violations, the Board Order requires Mek Arden 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 their Section 7 rights. Affirmatively, it requires Mek Arden to post and, if appropriate, electronically distribute, remedial notices. (JA 302-03.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that Mek Arden committed numerous violations of Section 8(a)(1) of the Act in its attempt to thwart the Union's organization campaign.

Substantial evidence supports the Board's findings that Mek Arden unlawfully solicited grievances and promised to remedy them. The surrounding circumstances show that Mettler's comments to Anderson, inquiring into "how things were going," and stating that he would "follow up and look into" her concerns, made in the context of an organizational campaign and immediately after asking about the Union, were not innocuous statements. Substantial evidence also supports the Board's findings that Mek Arden violated Section 8(a)(1) of the Act by issuing a directive to employees not to leave their assigned work areas, when they had previously been allowed to do so. As the Board explained, this directive

was unlawful because it was made in response to union activity and applied to restrict employees from engaging in such activity. Likewise, substantial evidence supports the Board's finding that Mek Arden's directive not to wear union scrubs was unlawful because it was issued in response to union activity. And while the employees still wore their union scrubs, the lack of enforcement did not cure the initial coercion.

Substantial evidence also supports the Board's finding that Mek Arden unlawfully created an impression of surveillance after telling an employee that security cameras at the facility, which had been non-operational for years, were being used to monitor employees' conversations. Further, substantial evidence supports the Board's finding that Mek Arden's instruction to an employee, overheard by another employee, to remove his union scrubs and wear a pro-company uniform was also unlawfully coercive. The fact that one employee may not have understood the statement does not lessen the coercion, because the employee who overheard the instruction immediately understood its implication. Finally, substantial evidence also supports the Board's finding that Mek Arden discriminately applied its posting rule to prohibit and remove pro-union materials. Contrary to Mek Arden, the Board's finding of discriminatory application was fully and fairly litigated.

The Board's findings regarding Mek Arden's work-area rule and prohibition on union scrubs are not affected by its recent decision in *Boeing*. In finding these directives unlawful, the Board applied portions of the *Lutheran Heritage* framework that *Boeing* did not overrule. Furthermore, the Board did not rely on *Lutheran Heritage* in finding the other unfair labor practices in this case.

STANDARD OF REVIEW

This Court "accord[s] a very high degree of deference to administrative adjudications by the [Board]." *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). It will affirm the findings of the Board if they are supported by substantial evidence in the record considered as a whole, *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999), and will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent," *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). "Substantial evidence" for the purposes of this Court's review of factual findings consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005). Where the Board disagrees with the judge, the standard of review remains the same. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072–73 (D.C. Cir. 2016);

Local 702, Int'l Bhd. of Elec. Workers, AFL–CIO v. NLRB, 215 F.3d 11, 15 (D.C. Cir. 2000).

The Board's adoption of a judge's credibility determinations will not be reversed absent evidence that they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012); *see also United Auto Workers v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971) (a party wishing to overturn the Board's credibility determinations must show not only that the credited testimony "carries . . . its own death wound," but that the "discredited evidence . . . carries its own irrefutable truth"). Finally, this Court will "defer to the Board's interpretation of the Act if it is reasonable." *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT MEK ARDEN COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1) OF THE ACT BY ENGAGING IN CONDUCT THAT INTERFERED WITH, RESTRAINED, OR COERCED EMPLOYEES IN EXERCISING THEIR SECTION 7 RIGHTS

A. An Employer Violates Section 8(a)(1) of the Act if Its Conduct Reasonably Tends To Coerce or Intimidate Employees in Exercising Their Section 7 Rights

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7."

The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct "has a reasonable tendency to coerce or interfere with" the free exercise of an employee's Section 7 rights. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)). Proof of animus or actual coercion is unnecessary to find a Section 8(a)(1) violation. *Exterior Sys., Inc.*, 338 NLRB 677, 679 (2002); *El Rancho Mkt.*, 235 NLRB 468, 471 (1978), *enforced*, 603 F.2d 223 (9th Cir. 1979); *see also Rd. Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 19 n.7 (D.C. Cir. 1982) (intent not an element of a Section 8(a)(1) violation).

Employer statements alleged to have violated Section 8(a)(1) of the Act "must be judged by their likely import to [the] employees." *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978); *accord Progressive Elec.*, 453 F.3d at 545 (assessing the legality of employer's statements based on whether employees would "reasonably perceive" them as threats). In applying this standard, the Board considers "the economic dependence of employees on their

employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). And the Court "must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Id.* at 620; *accord Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 103 (D.C. Cir. 2000); *Avecor*, *Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991).

As shown below, substantial evidence supports the Board's findings that Mek Arden—starting at the inception of the Union's organizational campaign and continuing until the election—engaged in conduct that reasonably tended to coerce employees in exercising their Section 7 rights, and thereby committed multiple violations of Section 8(a)(1) of the Act in its attempt to thwart the Union's efforts.

B. Mek Arden Violated Section 8(a)(1) of the Act by Soliciting Grievances from Anderson and Impliedly Promising To Remedy Them

Section 8(a)(1) of the Act prohibits employers from soliciting grievances in a manner that interferes with, restrains, or coerces employees in the exercise of their Section 7 activities. *Traction Wholesale Ctr.*, 216 F.3d at 102-03. Specifically, "[a]bsent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act." *Maple Grove*

Health Care Ctr., 330 NLRB 775, 775 (2000) (second alteration in original); *accord Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enforced*, 165 F. App'x 435 (6th Cir. 2005). Soliciting grievances during an organizational campaign creates the presumption of an implied promise to remedy those grievances, but the presumption "is a rebuttable one." *Maple Grove*, 330 NLRB at 775; *accord Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994). An employer can rebut this presumption either by showing that it had a past practice of soliciting grievances predating the organizational campaign, *Maple Grove*, 330 NLRB at 775, "or by clearly establishing that the statements at issue were not promises," *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529-30 (2010).

However, an employer "cannot rely on past practice to justify solicitation of grievances where the employer 'significantly alters its past manner and methods of solicitation'" during an organizational campaign. *Manor Care of Easton, Pa*, 356 NLRB 202, 220 (2010) (quoting *Carbonneau Industries*, 228 NLRB 597, 598 (1977)), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011). And an employer can only establish that a seeming solicitation was not in fact an implied promise by evidence that it "made clear to . . . employees that [it] was not promising to remedy their grievances." *Maple Grove*, 330 NLRB at 775; *see also Uarco Inc.*, 216 NLRB 1, 2 (1974) (employer established that statements were not promises where "employees

were repeatedly told that the [e]mployer could make no promises regarding the grievances raised”).

1. Mettler unlawfully solicited grievances from Anderson

Substantial evidence supports the Board’s finding that Mettler violated Section 8(a)(1) of the Act by soliciting Anderson’s grievances and impliedly promising to remedy them. (JA 301.) As the Board found, Mettler, a high-level company official, made a special trip from out of town to visit the facility during the organizational campaign—a visit that Anderson was told was because of the Union. (JA 301, 305; *see* pp.6-7, *supra*.) During that visit, Mettler approached Anderson, a leader of the union effort who had previously made complaints to management, and said that he had heard some rumors that employees were forming a union and that some CNAs had complaints. (JA 301, 305.) Mettler then asked Anderson how things were going. After Anderson stated that she was upset with Ramsini and about nursing ratios and the unavailability of supplies, Mettler responded that he would “follow up and look into” her concerns. (JA 301, 305.) This context supports the Board’s finding that Mettler unlawfully solicited and impliedly promised to remedy Anderson’s grievances.

The Board reasonably rejected Mek Arden’s claim that Mettler’s comments were “innocuous.” As the Board emphasized, Mettler “specifically sought out” Anderson because he wanted to speak with her about her previously voiced

complaints. (JA 302 n.5.) Given those circumstances, the Board properly found that Mettler's question and response, made during an ongoing organization campaign and immediately after referencing the Union, constituted an unlawful solicitation of grievances and an implied promise to remedy them. (JA 302.) And, as the Board explained, Mettler had other lawful responses available to him—for example, he could have simply thanked Anderson for the information to avoid this implication. (JA 302 n.5.)

The record also supports the Board's finding that Mek Arden "has not rebutted the inference of illegality." (JA 302.) Specifically, there was no evidence that Mettler "routinely" solicited employee complaints in this way before the organizational campaign. (JA 302 & n.6.) Indeed, Anderson had been told that Mettler was visiting the facility because of the Union's campaign, and thus his very presence was anything but routine. Moreover, contrary to Mek Arden's assertions (Br. 23-25), the Board correctly found that Mettler's asking non-unit employees "how things were going" during his June 24 visit did not establish a past practice "of addressing employee complaints in this manner that predated the Union's campaign." (JA 302 n.6.)

That rationale is consistent with Board precedent. For example, in *Ryder Truck Rental, Inc.*, 341 NLRB 761 (2004), *enforced*, 401 F.3d 815 (7th Cir. 2005), the Board found unlawful solicitation where two high-level officials came in from

out of town and "asked [an employee] about his concerns with the company." *Id.* at 770. Similarly, in *Clark Distribution Sys., Inc.*, 336 NLRB 747 (2001), the Board found unlawful solicitation where the employer's president and vice-president each approached an employee and asked, "What is going on around here?" *Id.* at 747. The Board found that those questions "c[ould not] be dismissed as innocuous merely because the inquiries were general in nature," given that "the record does not show that . . . high-level officials had a previous practice of individually soliciting grievances from employees on the warehouse floor." *Id.* at 748; *see also J. J. Newberry Co.*, 249 NLRB 991, 998, 1005 (1980) (unlawful solicitation where manager approached employee to ask about her problems because manager "did not make it a practice to visit the store to solicit individual employee complaints and only did so after the commencement of the [u]nion's organizing effort"), *enforced in relevant part*, 645 F.2d 148 (2d Cir. 1981).

The Board's rationale is also consistent with cases where, in the context of an organizational campaign, employer responses suggesting that it will take some action—even if the statements are general or vague—constitute a promise to remedy grievances. For example, in *Reliance Electric Co.*, 191 NLRB 44 (1971), *enforced*, 457 F.2d 503 (6th Cir. 1972), after the employer began to hold meetings with employees "to hear suggestions," management officials said that they would "look into" or "review" the employees' concerns. *Id.* at 44, 46. In finding

unlawful solicitation, the Board explained that "such cautious language, or even a refusal to commit . . . to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions." *Id.* at 46. In *Majestic Star Casino, LLC*, 335 NLRB 407 (2001), the employer also began holding meetings with employees, during one of which a director asked about the employees' "problems and concerns." *Id.* at 407. After hearing complaints, the director stated that she would "look into" the employees' concerns. *Id.* The Board found that "[t]his statement constitute[d] a promise to look into employees' specific grievances, which [the director] had solicited." *Id.* at 408; *see also Flamingo Las Vegas Operating Co., LLC v. NLRB*, 2016 WL 3887170, at *2 (D.C. Cir. June 10, 2016) (offer "to look into fixing" solicited employee grievances was promise to remedy those grievances); *Traction Wholesale Ctr. Co.*, 216 F.3d at 102 (statement that employer "was always willing to help or lend a hand" was promise to remedy grievances); *Bally's Atlantic City*, 355 NLRB 1319, 1326 (2010) (question how employer could "satisfy" employees implied promise to remedy grievances), *enforced*, 646 F.3d 929 (D.C. Cir. 2011); *Maple Grove Health Care Ctr.*, 330 NLRB at 785 (question if employer "could help the employees with any problems" implied promise to remedy grievances).

Mek Arden's attempts (Br. 23-24 & nn.5-7) to distinguish the cases relied on by the Board are unavailing. The Board's finding that Mek Arden had

unlawfully solicited grievances from Anderson was based on the principle articulated in *Reliance Electric*, 191 NLRB at 46, and *Maple Grove*, 330 NLRB at 775, and further elaborated in *Mandalay Bay*, 355 NLRB at 529, that an employer is presumed impliedly to promise to remedy grievances that it solicits during an organizational campaign unless it can show that it had a past practice of soliciting grievances in a like manner before the campaign began. (JA 301-02.) Mek Arden notes that in the above cases, the employers solicited grievances at group meetings and through statements of varying levels of specificity, from asking if the employer could "help the employees with any problems," *Maple Grove*, 330 NLRB at 785, to raising specific questions about overtime concerns, *Mandalay Bay*, 355 NLRB at 530. Regardless of *how* the employers in these cases solicited grievances, there, as here, the Board found a violation based on the fact that the employers had not solicited grievances in this manner *before*. *See Reliance*, 191 NLRB at 46 (employer "adopt[ed] a course" of holding group meetings when it had not done so before); *Maple Grove*, 330 NLRB at 775 ("[T]here is no evidence that the [group employee] council had been used in the past as a forum to air and remedy employees' grievances."); *Mandalay Bay*, 335 NLRB at 530 ("[T]here is no evidence that high-level managers met with [employees] to discuss their complaints about overtime or any other issue prior to the critical period.").

In sum, because Mek Arden provided no evidence that it had previously solicited grievances through Mettler in this manner, the Board was correct in finding that Mettler's seemingly innocuous comments, made at the start of an organizational campaign, comprised an unlawful solicitation.

2. Mek Arden's claim that the Board acted contrary to precedent is meritless

Mek Arden argues (Br. 23-25) that the Board failed to "meaningfully address" or distinguish contrary precedent. Mek Arden's treatment of Board precedent, however, demonstrates that it misunderstands the centrality of past practice for finding unlawful solicitation. In *MacDonald Machinery Co., Inc.*, 335 NLRB 319 (2001) (Br. 25), no violation was found where "the [e]mployer had been presented with employee concerns and had begun to address and correct some of these concerns" before the union came on the scene. *Id.* at 320. Similarly, in *Johnson Technology, Inc.*, 345 NLRB 762 (2005), *overruled in part by Purple Communications, Inc.*, 361 NLRB No. 126, 2014 WL 6989135, at *10 n.47 (Dec. 11, 2014) (Br. 24), no violation was found where the employer "had an established pattern of soliciting employee grievances," and "a custom of asking [employees] . . . about how things were on the job." *Id.* at 764. By contrast, there is no evidence that Mek Arden had an establish method or manner of soliciting grievances as Mettler had done predating the organizational campaign.

Mek Arden's handling (Br. 23-24) of other Board cases, and its claim that they compel a different outcome, is equally problematic. In *Flex-N-Gate Texas, LLC*, 358 NLRB 622 (2012) (Br. 23), the Board found that the employer had unlawfully promised an employee benefits if he refused to support the union but had *not* solicited grievances.[9] *Id.* at 628. There, unlike here, the employee had gone to a manager's office on his own initiative to discuss a work issue unrelated to the union, and while the employer offered to fix whatever problems the employee might have in the future, it did not solicit complaints during the meeting. *Id.* The Board's decision is also not contrary to *Best Plumbing Supply, Inc.*, 310 NLRB 143 (1993) (Br. 24), where the Board did not find an unlawful solicitation after an employer either asked employees "if there were any questions," or "what was going on, whether something was wrong, and whether they wanted to talk about it." *Id.* at 148. In that case, which predates *Maple Grove*, the Board, unlike here, made no mention of whether the employer had a past practice of making similar solicitations and comments, and the employee who testified about the alleged solicitation could not recall how the employer responded to his complaint. *Id.* at 143-45, 148. Thus substantial evidence and applicable precedent support the

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[9] This case was decided by a Board panel that included a member (Member Block) whose recess appointment was deemed invalid in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Board's finding that Mek Arden unlawfully solicited grievances and promised to remedy them.

C. Mek Arden Violated Section 8(a)(1) of the Act When It Promulgated and Enforced a Rule Prohibiting CNAs from Visiting Areas of the Facility to which They Were not Assigned

The Supreme Court has long recognized that the workplace "is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (alteration in original). It is thus well established that "the right of employees to self-organize and bargain collectively [under Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *accord Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016). Therefore, an employer violates Section 8(a)(1) of the Act when it responds to a union's organizational campaign by enforcing more strictly a rule prohibiting employees from leaving their work stations without permission. *See Weyerhaueser Co.*, 251 NLRB 574, 583 (1980).

In finding Mek Arden's directive unlawful, the Board used the analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a workplace rule that "explicitly restricts activities

protected by Section 7" of the Act is unlawful. *Id.* at 646. However, "[i]f the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

After the Board issued its decision in this case, it issued *The Boeing Company* which "overrule[d] the *Lutheran Heritage* 'reasonably construe' standard" and announced a new test to replace it. 365 NLRB No. 154, 2017 WL 6403495, at *2 (Dec. 14, 2017). Under the Board's new standard, "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of [Section 7] rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on [those] rights, and (ii) legitimate justifications associated with the rule." *Id.* at *4. *Boeing*, however, did not alter the second or third prong of the *Lutheran Heritage* test, which the Board (JA 300 & n.3, 315) also relied on here to find the directive unlawful.[10] *See id.* at *1-2 & n.4, *17.

[10] In its remand motion, Mek Arden conceded that *Boeing* did not alter the second or third prong of *Lutheran Heritage*, *see* Motion to Remand at p.3, and it concedes here that the Board found that this rule ran afoul of all three *Lutheran Heritage* prongs. (Br. 9-10.) The Board addresses more fully the remand issue and *Boeing*'s effect on this case on pp.50-53, *infra*.

1. Perez's restriction on the movement of CNAs interfered with their union activity

Substantial evidence supports the Board's finding that the work area restriction was unlawful under *Lutheran Heritage* because the rule was both promulgated in response to, and enforced to restrict, employees' Section 7 activity. (JA 300 & n.3, 315.) In support of that decision, the Board noted that five days after employees presented Perez with the election petition, Perez told the CNAs that they were no longer permitted to visit areas of the facility to which they were not assigned except for work-related reasons, and that they had to take their breaks in designated areas. (JA 306; *see* pp.7-8, *supra*.) Before the Union's campaign began, CNAs freely visited, and took breaks in, various parts of the facility. (JA 306 & n.16.) Notably, this rule was no longer in place or enforced after the election. (JA 306.)

Based on this evidence, the Board found that there was "no doubt" that the restriction was promulgated in response to the Union's campaign, as the timing of its announcement made it "fairly obvious" that the rule was a "blatant attempt" to "disrupt employees' efforts to communicate with each other, and thus stymie their organizational efforts." (JA 315.) Moreover, because CNAs were "harassed" and "follow[ed]" during their visits to other nursing stations, even when they had "bona fide reasons" for their visit, it was clear that the rule was enforced to restrict their union activities. (JA 315 & n.65.)

Mek Arden denies that the rule existed, but claims that even if it did, such a rule was necessary for the "health and safety" of its patients. (Br. 29-30.) Such a claim is pure speculation. Mek Arden offered no evidence at the hearing that the CNAs' ability to move freely about the facility had been a problem in the past. Moreover, the evidence undermines this purported safety justification because the directive was no longer in place after the election. (JA 306.)

2. Mek Arden has not met its burden of proof to overturn the Board's credibility determinations

Mek Arden denies that Perez instructed employees not to wear union scrubs and claims that the judge wrongly applied a presumption in favor of current employee testimony in crediting Anderson's and Holcomb's version of events over Perez's. (Br. 8, 26-28.) Mek Arden urges the Court to overrule that presumption. (Br. 27.) This argument fails for two reasons. First, the Board has no such presumption, and second, it did not apply one here.

Mek Arden misstates the weight that the Board gives to current employee testimony. As the Board explained in *Flexsteel Indus.*, 316 NLRB 745 (1995), *aff'd mem.*, 83 F.3d 419 (5th Cir. 1996), it "do[es] not rely on any . . . 'presumption' of [employee] credibility." *Id.* at 745. Rather, it considers "the testimony of current employees which contradicts statements of their supervisors [to] *likely* . . . be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Id.* (emphasis added). Thus, while "a

witness' status as a current employee may be a significant factor," it is just "one among many which a judge utilizes in resolving credibility issues." *Id.*

Mek Arden gains no ground with its reliance (Br. 27 & n.8) on *Gold Standard Enterprises, Inc*., 234 NLRB 618 (1978), *enforcement denied*, 607 F.2d 1208 (7th Cir. 1979), and *Gateway Transportation Co., Inc.*, 193 NLRB 47 (1971). Neither case establishes any presumption of credibility for current employees, and in fact, *Flexsteel* explicitly states that *Gold Standard* established no such presumption. 316 NLRB at 745. In *Gold Standard*, the Board credited the testimony of employees over a supervisor in light of many factors, not just their current employee status, including that "both [employees] were still in [the employer's] employ at the time of the hearing and both testified in direct contradiction to certain statements of their present supervisors." 234 NLRB at 619; *see also Gateway*, 193 NLRB at 48 n.12 (finding that it was "not likely" that employee witnesses "who were still in the [employer's] employ at the time of the hearing, would deliberately bear false testimony against their employer and thus incur its displeasure").

In any event, the judge applied no presumption of credibility here, but instead explained that Anderson's and Holcomb's current status as employees merely "enhances" their credibility. (JA 305.) The judge also credited their testimony for reasons independent of their employee status. He relied on the fact

that “their testimony regarding th[e] meeting was rich in details, vivid, and unwavering during cross-examination,” and further noted that “Anderson corroborated Holcomb’s testimony.” (JA 306.)

As for Mek Arden’s claim (Br. 27-28) that the judge should have applied a presumption of credibility to former supervisors Perez’s and Johnson’s testimony, it fails to address the judge’s findings that “Perez’[s] denials . . . were general in nature and not persuasive, and her stiff demeanor signaled that there was likely more to the story.” (JA 306.) Furthermore, Mek Arden’s claim ignores that “other conduct by Perez and/or other supervisors appear[ed] to be consistent with this directive,” including Anderson’s credible testimony that after the election petition was filed, Perez followed her and lingered around when Anderson was in the hallways of the facility, and that Perez interrupted nurses’ conversations during breaks to ask them what they were doing and whether they were actually on break. (JA 306, 315 n.65, 325.) Nor does Johnson’s testimony provide a compelling reason to disturb the judge’s credibility finding. Johnson never testified as to whether the directive existed or was implemented. (JA 150-78.) Rather, she was only asked if she had “ever heard Mary Perez say that CNAs could not go into work areas to which they were not assigned,” to which she answered “[n]o.” (JA 159.)

In sum, the judge reasonably found that Anderson and Holcomb had all of the indicia of credibility whereas Perez had none. At most, Mek Arden's arguments show that the record contains "conflicting testimony," which is precisely the situation where "essential credibility determinations [must] be[] made," and where deference to the Board and judge is most appropriate. *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). Mek Arden seeks to have this Court "retry the evidence," which it does not do. *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003).

D. Mek Arden Unlawfully Directed Employees not To Wear Union Scrubs

Employees have a Section 7 right to wear union attire while at work to communicate about self-organization or to show support for a union. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 & n.7 (1945); *accord Pioneer Hotel, Inc. v. NLRB,* 182 F.3d 939, 946 (D.C. Cir. 1999). In finding that Mek Arden's rule not to wear union scrubs violated the Act, the Board again relied on the analytical framework set forth in *Lutheran Heritage*, finding the rule unlawful under both the overruled "reasonably construe" prong and also because Mek Arden implemented the rule in response to Union activity. (JA 300 & n.3, 316.) As

discussed (pp.27-28, *supra*), *Boeing* left intact the Board's standard that a work rule is unlawful if promulgated in response to Union activity.[11]

Substantial evidence supports the Board's finding that Mek Arden violated Section 8(a)(1) of the Act when it responded to the Union's campaign by directing employees not to wear union scrubs. *Lutheran Heritage*, 343 NLRB at 647. Here, after employees began wearing union scrubs during the organizational campaign, Perez told them that doing so violated company policy. (JA 306; *see* p.8, *supra*.) The Board found that prior to the organizational campaign, employees were permitted to wear scrubs of different colors and with various insignia, and hence the timing of the rule change showed that it was made in response to union activity. (JA 316.) Notably, Perez never retracted her statement once she found out she was wrong. (JA 316 & n.66.)

Mek Arden argues that because employees continued to wear union scrubs without being disciplined after Perez issued the directive, there was no interference with employees' Section 7 rights. (Br. 32.) This claim demonstrates that Mek Arden misunderstands the violation. As discussed (p.17, *supra*), an employer's conduct violates Section 8(a)(1) of the Act if it has a reasonable tendency to interfere with employees' exercise of their Section 7 rights, and proof of actual

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[11] In the judge's analysis, which the Board adopted, the judge inadvertently referred to prong one of *Lutheran Heritage* as prong three. (JA 316.)

coercion is unnecessary. Here, the evidence supports the Board's finding that "the mere existence" of this rule would "tend[] to restrain and interfere with employee rights under the Act," and that the lack of enforcement did not cure the initial coercion. (JA 316.) *See Custom Trim Prod.*, 255 NLRB 787, 788 (1981) (evidence of rule's implementation unnecessary because "rule's mere existence tended to 'inhibit the union activities of conscientious minded employees'") (quoting *Automated Products, Inc.*, 242 NLRB 424, 429 (1979)); *Staco, Inc.*, 244 NLRB 461, 469 (1979) ("The mere existence of an overly broad rule tends to restrain and interfere with employees['] rights under the Act even if not enforced."). For this reason, Mek Arden's alternative argument (Br. 32) that there was no violation because the effect of the rule was *de minimis* is also meritless, as a Section 8(a)(1) violation "does not depend on . . . the successful effect of the coercion" but only on its reasonable tendency to coerce. *Exterior Sys.*, 338 NLRB at 679.

In a final attempt to escape liability, Mek Arden again challenges (Br. 31-32) the judge's credibility determinations and again falls short of showing that those determinations were hopelessly incredible or patently unsupportable. The judge properly credited Holcomb's account that Perez told employees that they could not wear union scrubs. As the judge noted, Holcomb's version of events was corroborated in relevant part by Anderson's testimony and "more likely and

accurately reflect[s] how these events unfolded." (JA 307.) In any event, the judge noted that "it [wa]s unnecessary to make a detailed credibility resolution" in this matter because he would have found a violation on Perez's facts. (JA 307.) Mek Arden has failed to provide any evidence to rebut the Board's finding that it unlawfully responded to the campaign by directing its employees not to wear union scrubs.

E. Mek Arden Violated Section 8(a)(1) of the Act by Creating the Impression that Employees' Union Activities Were Under Surveillance

Under Section 7 of the Act, "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993). Accordingly, an employer violates Section 8(a)(1) of the Act if it creates the impression among employees that they are subject to surveillance. *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996); *see also Miss. Transp., Inc. v. NLRB*, 33 F.3d 972, 978 (8th Cir. 1994) (creating impression of surveillance "inhibit[s] the employees' right to pursue union activities untrammeled by fear of possible employer retaliation"). The Board does not require evidence that an employer is actively engaged in spying to show that an employer has created an impression of surveillance. *Flexsteel Indus.*, 311 NLRB

at 257. Rather, the Board's test is "whether [an] employee would reasonably assume from the [employer's] statement that [his or her] union activities had been placed under surveillance." *Id.*; *accord Martech Med. Prod., Inc. v. NLRB*, 6 F. App'x 14, 15 (D.C. Cir. 2001).

The record evidence amply supports the Board's finding that Mek Arden violated Section 8(a)(1) of the Act by unlawfully creating the impression that it had engaged in surveillance of employees' union activities. (JA 300, 318.) As shown, for many years employees were told that the facility's cameras had been deactivated. (JA 309; *see* p.9, *supra*.) Then, weeks after the organizational campaign began, supervisor Hernandez took aside employee Dangerfield and told her to be careful because security cameras throughout the facility were voice-activated and used to monitor employees' conversations. (JA 309.) Hernandez repeated her comments to other employees. (JA 318 n.71.) In fact, none of the security cameras at the facility were operational during the organizational campaign. (JA 310.)

In addition, it was "not significant" that Mek Arden did not actually surveil employees. (JA 317-18.) Rather, as the Board explained, "it was reasonable for Dangerfield to assume that Hernandez, a department manager, knew what she was talking about [regarding the operation of the cameras], and thus reasonable for Dangerfield to assume that the cameras were in fact operational and being used to

monitor their activities." (JA 317-18.) Nor did it matter (Br. 35-36) that Hernandez did not accuse any employee of being a Union supporter, or state that Mek Arden was surveilling union activity. Dangerfield clearly understood the coercive implications of Hernandez's comments, for as she testified, after their conversation, she and other employees tended to limit their conversation about the Union to outside the facility or in the employee break room, where there were no cameras. (JA 139-40.) The facts as found by the Board—that a supervisor told an employee that cameras long-believed to be non-operational are now functioning—were sufficient to find the violation.

Trodding a well-worn path, Mek Arden disputes this finding by again challenging the Board's credibility determinations. (Br. 13-15, 34-35.) It contends (Br. 13-15, 34) that the Board should have credited Hernandez's testimony that, in response to questions from Dangerfield, she said that the cameras were operational and voice-activated (not that they were used to record employees' conversations), and that she later corrected her statements after finding out that they were untrue. The judge, however, explained that Hernandez's account of the conversation "appear[ed] self-serving and contrived, and thus not as plausible [as Dangerfield's account]." He further noted that since employees had long been told that the cameras were not functional, Dangerfield "would have had no reason to ask Hernandez about the cameras." (JA 309.) Mek Arden provides no reason to find

that Dangerfield's testimony was patently unsupportable, or that Hernandez's testimony was irrefutably true. Hence, the Board's credibility determinations should not be overturned.

Finally, Mek Arden contends (Br. 35-36) that the Board relied on cases in finding this violation that are easily distinguishable from the facts here. But this argument simply misreads the Board's decision. The Board did not claim that the cases it cited were factually similar to this case; rather, it only relied on those cases to support the well-settled proposition that an employer's statement creates the impression of surveillance if employees could reasonably assume from the statement that their activities had been placed under surveillance. (JA 318 (citing *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014), *enforcement denied in part*, 790 F.3d 816 (8th Cir. 2015)[12]; *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); *Flexsteel Indus.*, 311 NLRB at 257).)

F. Mek Arden Violated Section 8(a)(1) of the Act by Instructing an Employee To Wear Pro-Union Attire

As discussed (*see* p.33, *supra*), employees have a right to wear union attire at work. Absent special circumstances, an employer violates Section 8(a)(1) of the

[12] While the reviewing court in *Greater Omaha* did not find that the employer's statements there created the impression of surveillance, it agreed with the general principle that during an organizational campaign, "it is often reasonable to infer that the employer's monitoring of union activities or adherents was done for precisely that reason." 790 F.3d at 824.

Act by prohibiting such attire, *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009); *Waterbury Hotel Mgmt., LLC v. NLRB,* 314 F.3d 645, 655 (D.C. Cir. 2003), or by directing employees to wear pro-employer attire, *Tappan Co.*, 254 NLRB 656, 656 (1981); *Pillowtex Corp.*, 234 NLRB 560, 560 (1978).

Substantial evidence supports the Board's finding that Mek Arden violated Section 8(a)(1) of the Act by directing Andres, within earshot of Holcomb, to take off his union scrub top and put on pro-employer attire. Prior to the organizational campaign, employees were permitted to, and did, wear whatever scrubs they wanted, and employees' choice in scrubs only became a problem when the Union came on the scene. (JA 307, 316.) Then, a few weeks after the start of the campaign, Holcomb overheard Supervisor Harmon tell Andres, an employee who does not speak English, to take off his union scrub top and put on attire indicating support for Mek Arden. (JA 309 & n.28; *see* pp.9-10, *supra*.) As the Board explained, the lack of evidence showing whether Andres understood the statement did not "exonerate" Mek Arden. (JA 317.) Instead, because another employee (Holcomb) "witnessed this incident" and "clearly understood what was said—and its implications," Harmon's instructions were coercive and violated the Act. (JA 317.)

Mek Arden defends its conduct by claiming that any coercion of Holcomb was "unintentional." (Br. 33.) But this claim shows that Mek Arden

fundamentally misunderstands the elements of a Section 8(a)(1) violation. Actual coercion is not required for a violation; rather, the evidence must show that the alleged conduct had a "reasonable tendency" to coerce. (*See* p.17, *supra*.) As the Board explained, Holcomb clearly understood the implications of Harmon's statement to Andres to take off the Union scrubs.

Mek Arden further misses the mark with its argument that the Board should have dismissed this allegation because it was not pled as "third-party coercion," and that issue was not fully and fairly litigated. (Br. 33.) First, the complaint alleged the violation found, namely, that Harmon instructed employees not to wear union scrubs. The complaint did not need to allege who overheard the instruction, and Mek Arden cites no authority for its claim that such an allegation was required. Moreover, this arguments ignores well-settled Board precedent establishing that an employer violates Section 8(a)(1) of the Act by reasonably interfering with the Section 7 rights of *any* employees who witnesses or learns of coercive employer conduct, even if it is not directed toward them. *See, e.g.*, *McKenzie Eng'g Co. v. NLRB*, 182 F.3d 622, 628 (8th Cir. 1999) (employer's anti-union statements overheard by, but not directed toward, employees violated Section 8(a)(1)); *Cooper Indust.*, 328 NLRB 145, 174 (1999) (management's discussion of surveillance of union meeting overheard by employees violated Section 8(a)(1)), *enforced*, 8 F. App'x 610 (9th Cir. 2001); *Frontier Hotel & Casino*, 323 NLRB

815, 816 (1997) (supervisor's comment that he will fire employees for wearing union buttons violated Section 8(a)(1) where an employee overheard the comment, even though comment not directed at the employee), *enforced in relevant part*, 118 F.3d 795 (D.C. Cir. 1997). As in the cases above, Holcomb's Section 7 rights were implicated in the allegation because she overheard Harmon's coercive comments, and the General Counsel was not required to plead "third-party coercion" in the complaint.

Lastly, Mek Arden claims (Br. 33) that Holcomb's testimony was "self-contradictory and patently unsupportable" and that the judge should have credited its witnesses, Harmon and janitor Theodore Davis, over Holcomb. The judge's credibility determinations are well supported, and Mek Arden offers no compelling reason for their rejection. The judge noted that Holcomb's account of the incident was "more plausible than Harmon's simple denial that this conversation took place," while Davis's testimony seemed "to describe a different event, perhaps on a different day." (JA 309.) The only effort Mek Arden makes to support its claim is to suggest that Holcomb could not have overheard Harmon give instructions to Andres in English because he does not speak English. (Br. 33 n.9.) Mek Arden's argument ignores the fact that its own witness acknowledged that he spoke to Andres in English. (JA 260, 268, 272.)

G. Mek Arden Violated Section 8(a)(1) of the Act by Prohibiting and Removing Pro-Union Postings While Permitting Non-Union Postings

Because Section 7 of the Act guarantees employees "the right effectively to communicate with one another regarding self-organization at the jobsite," *Beth Israel Hosp.*, 437 U.S. at 491, an employer may not place restrictions on that right without demonstrating that they are "necessary to maintain production or discipline," *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (citing *Republic Aviation*, 324 U.S. at 803). At the same time, an employer retains a legitimate interest in controlling its property, *Eastex*, 437 U.S. at 571-72; *Republic Aviation*, 324 U.S. at 797-98, and thus may limit use of its equipment, such as bulletin boards, to its business purposes. *See HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1073 (D.C. Cir. 2015) (employees have "no statutory right . . . to use an employer's bulletin board"). The task of balancing employees' Section 7 rights with employers' property interests is delegated to the Board, subject to "very narrow and limited judicial review." *NLRB v. Honeywell, Inc.*, 722 F.2d 405, 407 (8th Cir. 1983).

In striking this balance, "[t]he critical question is whether the employer is discriminating against union messages, or if it has a neutral policy of permitting only certain kinds of postings." *HealthBridge*, 798 F.3d at 1073 (citing *Loparex*

LLC v. NLRB, 591 F.3d 540, 545 (7th Cir. 2009)). Generally, unlawful discrimination occurs when an employer treats nonunion solicitations or activities differently than union solicitations or activities. *See, e.g.*, *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996). Particularly, if an employer otherwise allows employees to use its bulletin board, then employees' right to post union materials becomes protected by Section 7 of the Act. *HealthBridge*, 798 F.3d at 1073 (citing *Carbide Corp. v. NLRB*, 714 F.2d 657, 660-61 (6th Cir. 1983)); *see also Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1076 (D.C. Cir. 2001) ("Once an employer allows employee speech in a specific area of company property, the employer may not selectively censor the employees' union-related speech."); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986) (employer's interest in limiting access to bulletin boards for particular purposes "outweighed by the employees' [Section] 7 rights of communication" where employer "allowed non-work related announcements" and hence did not "have a valid managerial reason to exclude union notices").

1. Mek Arden removed or prohibited pro-union postings from its bulletin board while allowing non-union postings

Substantial evidence supports the Board's finding that Mek Arden violated Section 8(a)(1) of the Act by discriminately enforcing its posting rules by "routinely and repeatedly" removing union literature from its bulletin boards. (JA 300 & n.3, 320.) Mek Arden's posting rule states that "[a]ll bulletins other than

the ones from Human Resources should be submitted to and approved by Administration before they are posted." (JA 310; *see* pp.10-11, *supra*.) Prior to the organizational campaign, Mek Arden allowed employees to post notices about various sales and events on its bulletin boards. (JA 311.) These notices remained posted for weeks—one up to almost a year—despite that no employees ever sought prior approval. (JA 311 n.43.) When pro-union employees began posting union literature on the bulletin boards during the organizational campaign, Perez removed it soon after it was posted and instructed managers and supervisors to do the same. (JA 311.)

This evidence fully supports the Board's finding that Mek Arden discriminatorily prohibited the posting of pro-union notices on its bulletin boards. As the judge explained, the four employees—Anderson, Dangerfield, Holcomb, and Angela Snipes—corroborated each other's testimony that Mek Arden had previously permitted employees to post various non-union materials on the bulletin board, but began to crack down during the organizational campaign. (JA 311.) Contrary to Mek Arden's claim (Br. 37), the judge did not ignore its witnesses' "credible and uniform" testimony that they "knew nothing about non-work related postings." Rather, as the judge made clear, the five Mek Arden witnesses—Castellano, Collins, Harmon, Hernandez, and Perez—gave non-corroborating testimony, with some stating they had never seen these postings, others claiming

that they did not pay attention or go near the bulletin board often enough to know what was posted, and others admitting that they had seen non-union materials being distributed or on the table in the employee break room. (JA 311.) Indeed, the judge noted that Hernandez and Harmon, who admitted signing or seeing potluck announcements, actually corroborated the testimony of the employees. (JA 311.)

2. Mek Arden's discriminatory policy was fully and fairly litigated

Contrary to Mek Arden's claim (Br. 37), the Board did not err in finding that Mek Arden's discriminatory policy was "fully litigated" at trial. (JA 319.) The record demonstrates that Mek Arden mounted a vigorous defense against employee testimony showing it selectively removed union postings while allowing other non-union postings. Mek Arden therefore cannot now claim that it was "never made aware" of a potential violation based on the theory that it had treated union and *non-union* postings disparately—rather than treating union and *anti-union* postings disparately, as the complaint alleged. As discussed below, the Board properly found that where a matter is fully litigated, the Board can find a violation on a different theory than explicitly pleaded by the General Counsel. (JA 319.)

Actions before the Board "are not subject to the technical requirements that govern private lawsuits," and the charge need only generally inform the party charged of the nature of the violations. *NLRB v. Carilli*, 648 F.2d 1206, 1210 (9th

Cir. 1981); *see also Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727, 734 (D.C. Cir. 1983) (explaining that in Board cases, "it is sufficient that the respondent 'understood the issue and was afforded full opportunity to justify its actions'") (quoting *Bakery Wagon Drivers & Salesman, Local 484 v. NLRB*, 321 F.2d 353, 356 (D.C. Cir. 1963)). The Board may find an unfair labor practice "when the issue has been fully and fairly litigated even though no specific charge was made in the original complaint." *Carilli*, 648 F.2d at 1211; *see also George Banta Co. v. NLRB*, 686 F.2d 10, 22 (D.C. Cir. 1982) (judge may decide an uncharged violation where "all pertinent issues and allegations were exhaustively litigated at hearing"); *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981) (court will enforce order if the complaint supports the allegation *or* there was a "meaningful opportunity to litigate the underlying issue in the hearing itself") (emphasis added). Put simply, the Board can render a decision upon the issues actually tried. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 728 (9th Cir. 1980).

The Board properly found that Mek Arden's discriminatory enforcement of its posting rules was "fully litigated" at trial. Notably, "[t]he evidence introduced by the General Counsel . . . focused on nonwork, noncampaign related postings by employees that [Mek Arden] allegedly allowed," rather than on anti-union postings. (JA 311 n.40.) Rather than object to the introduction of that evidence, Mek Arden instead "vigorously cross-examined General Counsel's witnesses who

testified about these matters." (JA 319 & n.76.) Moreover, Mek Arden "called several witnesses of its own in rebuttal." (JA 319 & n.76.) *See Tasty Baking*, 254 F.3d at 122 (matter was fully and fairly litigated where employer had full opportunity to cross-examine General Counsel's witnesses and to rebut those witnesses); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1412 (9th Cir. 1985) (issue fully litigated where unpleaded issue was central at trial, and employer cross-examined witnesses on the issue). Mek Arden also does not explain how it would have altered its litigation strategy if the complaint allegation had been phrased differently. *See Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 232-33 (4th Cir. 2015) (finding matter fully litigated where, *inter alia*, employer did not explain how it would have altered litigation strategy or introduce exculpatory evidence). Thus, Mek Arden's vigorous defense (Br. 37-39) of how it applied its postings rule belies its assertion that it had "no notice" of the discriminatory posting theory at trial.

Mek Arden's reliance on *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017), to challenge the Board's "fully litigated" finding is unavailing. In *Bellagio*, the complaint alleged, and the judge found, that the employer had promulgated an unlawful rule. On review, however, the Board found that the violation was not an unlawful rule but instead a one-time unlawful coercive statement made by a supervisor. *Id.* at 713. As this Court found, the employer "never had an

opportunity to defend itself against this charge because it was not in the complaint . . . and it was not an issue in the case that was tried before the [judge]." *Id.* Here, by contrast, the issue of Mek Arden's disparate treatment of union postings was vigorously litigated, at length, at the trial.

Mek Arden's claim (Br. 37-38) that it was never made aware of the General Counsel's theory because it was "not alleged in the [c]omplaint" ignores the principle that the Board can find a violation based on an un-alleged theory so long as the matter was fully litigated at trial. Having vigorously defended against the theory of disparate treatment of union postings, Mek Arden cannot now fault the complaint for failing to provide it notice of this violation. Mek Arden likewise gains no ground in faulting (Br. 37-38 & n.10) the Board's reliance (JA 319) on *Space Needle, LLC*, 362 NLRB No. 11, 2015 WL 416476 (Jan. 15, 2015) and *Hawaiian Dredging Contr. Co.*, 362 NLRB No. 10, 2015 WL 535027 (Feb. 9, 2015), *enforcement denied on other grounds*, 857 F.3d 877 (D.C. Cir. 2017). As Mek Arden admits (Br. 17), the Board primarily relied on those cases for the proposition that it can find a violation based on a "different theory than *explicitly* pleaded by the General Counsel" if the issue is fully litigated. (JA 319 (emphasis added).) Mek Arden's discriminatory enforcement of its postings rule, while not explicitly pleaded, was "sufficiently encompassed" by the complaint, *Hawaiian Dredging*, 362 NLRB No. 10, 2015 WL 535027, at *2 n.6, which alleged that Mek

Arden enforced its posting rule "selectively and disparately by prohibiting the posting of pro-union flyers." (JA 10.) This allegation was sufficient to put Mek Arden on notice that it would have to defend its disparate treatment of posted union literature during the organizational drive—and Mek Arden did in fact marshal such a defense.[13] (JA 311, 319 & n.76.) Because the evidence shows that Mek Arden was on notice of the theory of the found violation, and the matter was fully litigated at trial, the Court should enforce the Board's finding that Mek Arden discriminatorily enforced its rule to prohibit union postings.

II. THE COURT SHOULD DENY MEK ARDEN'S MOTION TO REMAND THIS CASE BECAUSE THE BOARD'S ORDER CAN BE ENFORCED ON GROUNDS UNAFFECTED BY *BOEING*

The Court should reject Mek Arden's contention (Br. 20, 39-40) that the Board's recent decision in *Boeing* requires remand of "some or all" of the issues. As shown below, Mek Arden overstates the effect of *Boeing* on *Lutheran Heritage* and misreads the Board's rationale in this case, which does not rely on the precedent overruled in *Boeing* as the sole basis for finding any violation.

As explained (*see* pp.27-28, *supra*), *Lutheran Heritage* sets forth the Board's analytical framework for determining the validity of a workplace rule. Under

[13] The Board did not cite *Space Needle* to support the sufficiency of the complaint, but rather to support the principle that the Board can find a violation on a different theory than alleged in the complaint if the matter is fully litigated. (JA 319.) Thus, Mek Arden's citation to *Space Needle* (Br. 38 n.10) is misleading because it cites to a portion of that decision that the Board simply did not rely on here, and which discusses a different issue.

Lutheran Heritage, a rule that explicitly restricts Section 7 activity is unlawful. A rule that does *not* explicitly restrict Section 7 activity is unlawful if: (1) employees would "reasonably construe" the rule to prohibit Section 7 activity; (2) it was promulgated in response to union activity; or (3) it has been applied to restrict the exercise of Section 7 rights. 343 NLRB at 647. *Boeing* overruled the *Lutheran Heritage* "reasonably construe" prong and announced a new test to replace it. *Boeing*, 365 NLRB No. 154, 2017 WL 6403495, at *2. The Board also found it "appropriate to apply the standard . . . retroactively [to *Boeing*] and to all other pending cases." *Id.* at *18. *Boeing*, however, did *not* alter the second or third prongs of *Lutheran Heritage*. *See id.* at *1-2 & n.4, *17.

Because the *Boeing* test does not apply to rules that—as here—were promulgated in response to protected activity, or have been applied to restrict protected activity, there is no basis for remanding to the Board for reconsideration the violations based on Mek Arden's directives prohibiting employees from visiting certain areas of the facility and from wearing union scrubs. Rather, because the Board found that Mek Arden promulgated each of those directives in response to protected activity, and applied one (the instruction not to visit unassigned areas) to restrict protected activity, the Board's Order is supported on grounds that are independent of the *Lutheran Heritage* "reasonably construe" standard overruled by *Boeing*.

Moreover, the Board did not rely on *Lutheran Heritage* in finding the other four violations—soliciting employee grievances and impliedly promising to remedy them; creating the impression that employees' union or protected activities were under surveillance; instructing employees to wear attire associated with Mek Arden's anti-union campaign; and prohibiting the posting of union literature and removing such postings. As explained, those violations turn on separate and distinct areas of Board law, wholly unaffected by the Board's decision in *Boeing*.

For these reasons, Mek Arden's reliance (Br. 20, 31, 39, 40) on *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974), in arguing for remand is misguided. In *Food Store*, the Supreme Court stated that appellate courts, following an intervening change in Board policy, should remand a case so that "the Board . . . be given the first opportunity to determine whether the new policy should be applied retroactively." *Id.* at 10. This holding is irrelevant because the Board has *already* determined that *Boeing* should be applied retroactively. *Boeing*, 365 NLRB No. 154, 2017 WL 6403495, at *18. But, as explained above, its newly announced standard does not apply here.

Mek Arden's reliance on the Court's Order in *Volkswagen Group of America, Inc. v. NLRB*, No. 16-1309 (D.C. Cir. Dec. 26, 2017), is similarly misplaced. There, this Court granted the Board's motion to remand the case in light of its recent decision in *PCC Structurals, Inc.*, 365 NLRB No. 160, 2017 WL

6507219 (Dec. 15, 2017), which had "express[ly] overrul[ed]" precedent relied on by the Board in finding that *Volkswagen* had violated the Act. *See* Motion of Respondent/Cross Applicant at 3, *Volkswagen Group of America, Inc. v. NLRB*, No. 16-1309 (D.C. Cir. Dec. 19, 2017). Here, by contrast, the unfair-labor-practice findings at issue were found on grounds that are unaffected by the intervening change in policy and are not overruled. (JA 315-16.)

CONCLUSION

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

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August 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEK ARDEN, LLC	)	
	)	
Petitioner/Cross-Respondent	)	No. 17-1237
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case Nos.
Respondent/Cross-Petitioner	)	20-CA-156352
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,338 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
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Dated at Washington, DC
this 24th day of August, 2018

ADDENDUM

STATUTES AND REGULATIONS

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2012):

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

Sec. 8. [§ 158] (a) 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. 10. [§ 160](a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in 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 predominantly 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 subchapter or has received a construction inconsistent therewith.

***

Sec. 10. [§ 160] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in 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 questions 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.

Sec. 10. [§ 160] (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a 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. 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 DISTRICT OF COLUMBIA CIRCUIT**

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	)	
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and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION, LOCAL 2015	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 24th day of August, 2018