In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 18-2370, 18-2568

SOUTHERN BAKERIES, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

On Petition for Review from the National Labor Relations Board

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REPLY BRIEF FOR THE PETITIONER

David L. Swider
Philip R. Zimmerly
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Ste. 2700
Indianapolis, IN 46204
DSwider@boselaw.com
PZimmerly@boselaw.com

Counsel for Petitioner, Southern Bakeries, LLC

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INTRODUCTION

Southern Bakeries LLC ("SBC") enforced its work rules to protect consumer safety and deter workplace harassment. In October 2015, Tony Hagood, a new production manager, drew a "line in the sand" and warned employees not to eat product off the line. Spurning Hagood's directive, Lorraine Marks-Briggs ("Briggs") did so anyway. Believing that Briggs' actions put SBC and the public at risk, Eric McNiel, the new manager of human resources, issued Briggs a last chance agreement ("LCA"). In February 2016, after an incident of intimidation in the facility, Hagood and McNiel met with employees to remind each of them of the rules against harassment and intimidation. Briggs again ignored their directive, entering a coworker's space and intentionally bumping into the coworker. McNiel terminated Briggs for her insubordination and threatening conduct.

McNiel referenced Briggs' May 2013 LCA in her disciplinary paperwork, but testified that he would have made the same decisions regardless. His account was not contradicted in any way, but was instead supported by the contextual evidence. This included that McNiel and Hagood were new to the facility, which meant both that

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they had no anti-union bias to cause them to treat Briggs differently and that they needed to assure that their directives were respected. Briggs' misconduct jeopardized the safe operation of the business and warranted serious discipline.

Ignoring all this, the Board contends that McNiel's explanation was properly disregarded because "the record demonstrates that employees who abrogated the same rules as Marks Briggs routinely received less severe discipline." (Resp.11-12, 17.) The Board's position misses the mark. No evidence was presented by the Board that the decision makers, McNiel or Hagood, encountered an employee eating product off the line or physically targeting another coworker after they specifically warned against such misconduct. The evidence otherwise fails to show that Briggs was subjected to disparate treatment.

Ultimately, McNiel's testimony that the discipline he issued would have been the same absent any reference to the May 2013 LCA stood unrebutted and was corroborated by context and common sense. The Board's Decision improperly imposes its own sense of workplace justice and food safety and should be overturned.

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I. The Board Ignores Contextual Evidence That Explains and Corroborates SBC's Position.

As set forth below, the Board improperly disregards or mischaracterizes evidence that confirms that the May 2013 LCA was not the "but for" cause for the October 2015 LCA or the February 2016 discharge. "In considering whether substantial evidence supports the Board's decision, [the Court] must take into account whatever in the record fairly detracts from its weight . . . ." *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 553 (8th Cir. 2015) (internal citations and quotation marks omitted). There was plainly no attempt by the Board to fairly balance consideration of the evidence in this case.

A. The decision makers, McNiel and Hagood, did not act with any discriminatory intent.

The Board fails to rebut that McNiel or Hagood did not know about Briggs' past union activity or harbor any anti-union animus. (Resp.21.) Thus, it is undisputed that McNiel and Hagood, the decision makers in this case, did not seek to "discriminat[e]" against Briggs (Resp.9), and that they did not intentionally take an adverse action against Briggs "because of" her past protected conduct (Resp.14). While the Board suggests that McNiel and Hagood acted "contrary to the

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directives of the Board and this Court," (Resp.15), it overlooks that their actions (in October 2015 and February 2016) predated those directives.

Even though McNiel and Hagood did not harbor any animus toward Briggs, the Board contends that their decision "squarely relied" upon the May 2013 LCA and tainted their later decisions. (Resp.11, 22-23.) This is the only thread of bias the Board can attempt to weave into this case, but the evidence shows otherwise. Indeed, if they had relied upon the May 2013 LCA (which, by definition, was a "last chance" agreement), McNiel would have terminated her in October 2015. That McNiel gave Briggs a *second* "last chance" necessarily means that he did not stack the new discipline on the old. The Board has never explained why, if SBC was motivated to discriminate against Briggs, it did not simply terminate her employment in October rather than grant her another chance.

B. The Board ignores the context and seriousness of Briggs' misconduct.

The Board also avoids the context behind Briggs' discipline. In both instances, Briggs acted to violate a recent directive against the exact type of misconduct in which she engaged. In October 2015, after Hagood warned employees not to eat off the line, Briggs ate product

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from the line. (Jt.App.121, 387-88.) In February 2016, two weeks after McNiel and Hagood met with Briggs and told her not to intimidate or harass her coworkers, Briggs targeted and physically bumped into a coworker. (Jt.App.133, 259-261, 276, 389-90.) Not surprisingly, McNiel viewed these violations as being serious infractions and imposed commensurate discipline. (Jt.App.276, 283, 285.)

The Board also downplays the seriousness of Briggs' misconduct, claiming in a footnote that it "accepted as true that she violated several rules but found that employees who engaged in similar conduct received less severe discipline." (Resp.29 n.10.) The Board improperly overlooks the gravity of Briggs' actions. By eating product off the line, as the product was about to be packaged for customers, Briggs violated a rule designed to protect consumers' safety and health. (Jt.App.256-257.) And by targeting and then physically bumping into a coworker, Briggs created a hostile work environment. (Jt.App.276.) Put simply, these are not "comparatively minor actions." (Add.2) Moreover, as set forth below, the Board's claims of dissimilar treatment are not supported.

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C. There is no evidence that McNiel and Hagood treated other employees dissimilarly.

The Board contends that Briggs' discipline was influenced by the May 2013 LCA by arguing that Briggs received a harsher penalty than others who ate in a work area or who failed to observe facility safety or good manufacturing rules. (Resp.24.) The evidence shows otherwise.

Regarding the October 2015 LCA issued to Briggs, there is no evidence that any of the alleged comparators engaged in the same type of misconduct by eating product off the line. (*See* Resp.24 (citing Jt.App. 447, 449, 453-54, 456, 530, 534, 693-97, 699-700, 703 ¶ 5, 717, 719).) The Board has also not identified any evidence to support its supposition that grazing on the line – picking topping directly off of products as they proceed to packaging for customers – is "less likely" to cause product contamination than having a peppermint in one's mouth while one works. (Resp.25.) The Board's claim that the governing food safety code does not make a distinction is incorrect, as the SQF Code includes a section pertaining to Personnel Hygiene and Welfare that "[s]moking, chewing, eating, drinking or spitting is not permitted in any food processing or food handling areas," (Jt.App.651 (Section 11.3.1.3)), and includes a separate section pertaining to Personnel Processing

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Practices that "[s]taff shall not eat or taste any product being processed in the food handling/contact zone." (Jt.App.652-653 (Section 11.4.1.1(vi)).)

Permissible human resource discretion and common sense align with SBC's position, as one can surely understand the difference between a deli worker who chews gum while she prepares a customer's sandwich versus a worker who steals nibbles from her customer's food. Treating all similar offenses exactly the same regardless of timing and circumstances, as the Board does to bolster its position, strips the human resource function of the discretion and judgment necessary to maintain a balanced approach to business needs and employee protections. In the Board's evidentiary world, once permitting a non-union food production employee to expectorate in a tissue would forever permit a known union sympathizer to spit directly on finished product without facing a harsher consequence. This Court must draw the line on such imbalance, unfairness, and overreach.

McNiel's professional opinion supporting the seriousness with which he viewed Briggs' misconduct (Jt.App.256-257, 340-341) in contrast to the less noxious transgressions the Board attempts to

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equate with her offense (Resp.24) should not be so easily undercut without additional evidence to support the Board's conclusion. Indeed, no evidence was offered to support the Board's one-size-fits-all motivational conjecture. Rather, Gloria Lollis and Sandra Phillips – two witnesses called by the Board – affirmed that eating on the line was prohibited and that the rule was a serious one. (Jt.App.66, 78.)

In the same overreaching pattern, the Board conveniently overlooks the facts that neither McNiel nor Hagood was involved in previous disciplinary comparisons the Board attempts to draw which preceded their tenure and that none of Briggs' alleged comparators engaged in their conduct after a direct mandate from their supervisor telling them that a line was being drawn in the sand and that harsher consequences would follow. *Cf. Canandaigua Plastics*, 285 NLRB 278, 280 (1987) (finding that where employee ignored warning by employer to stop harassing other employees, employer's determination that further action was necessary was not evidence of disparate treatment because of union activity). This failed analysis further strips the human resource function of the ability to change course when business necessity dictates, even when there is absolutely no evidence that the

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announcement of a stronger enforcement position was wrought by impermissible motivation.

With regard to Briggs' intimidation of coworker Ashley Hawkins, the same analytical shortcomings invalidate the Board's reasoning. The Board argues that "the record evidence establishes that employees who engaged in similar conduct were not terminated." (Resp.12.) That some employees were immediately terminated for misconduct and others were given LCAs does not prove that the May 2013 LCA affected Briggs' discharge.

Indeed, the Board's contention that employees who were discharged "engag[ed] in more serious misconduct than Marks Briggs," is simply mistaken. (Resp.27-28.) For example, in pointing to instances where employees were discharged for leaving their work area, the Board notes that one employee did so in violation of "a supervisor's direct instruction" and another "refused several direct orders to return to work." (*Id.*) That was the very situation that confronted Hagood and McNiel. As McNiel explained, he viewed Briggs' actions to be a serious breach of workplace safety and a direct violation of his directive:

> You know, creating a hostile work environment is very serious. And after just having the [Cheryl Muldrew] incident

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> and us saying, you know – meeting with employees and saying hey, you know, we need to calm it down, this is what's going on, let's stop this, and her signing off on it, we took that in agreeance, that she agreed to what we were asking. So yeah, I felt this would have definitely happened this way.

(Jt.App.284-285.)

The Board diminishes the seriousness of Briggs' physical contact with Hawkins, claiming that her "conduct involved disregarding a general anti-harassment directive." (Resp.28, 25.) But Hagood and McNiel's instruction was much more than that. Rather, in response to a disruption in the bread department caused by Cheryl Muldrew, Hagood and McNiel held ***individual meetings*** with each of the employees in that department, including Briggs. (Add.6; Jt.App.259-261, 133.) At those meetings, they reviewed SBC's work rules and policy prohibiting hostile workplace conduct to deter harassing and violent conduct. (*Id.*) Briggs was issued another copy of the Facility Rules and Disciplinary Procedures and SBC's policy against harassment. (Jt.App.260, 133, 600-602.) McNiel and Hagood made clear that engaging in any conduct prohibited by these rules and policy was a serious offense, that failing to comply with SBC's appeal for cooperation would be considered insubordination, and that the consequence would be disciplinary action

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up to and including immediate suspension and discharge. (Jt.App.600-602, 261.) Briggs signed a confirmation that she had received the Facility Rules and policy against harassment and that management had appealed for her cooperation in complying with them. (A6; Jt.App.261, 133, 600-602.) Yet, just two weeks later, on February 8, 2016, Briggs left her work area without permission and targeted Hawkins. (Jt.App.389-390.)

The Board also claims that Briggs' misconduct – targeting a coworker with physical intimidation – is "dissimilar to the instances cited by the Company." (Resp.28.) Respectfully, Briggs' actions of going into another employee's workstation and intentionally bumping into that employee is every bit as "egregious" as sharing nude photos on the work floor, swearing at a supervisor, or using profanity and displaying intimidating behavior toward a coworker. (*Id.*) This is especially true in the recently charged atmosphere in which Briggs' department found itself.

Finally, the Board points out that in five cases, SBC rescinded its initial discharge decisions and provided employees with LCAs. (Resp.29.) Yet the Board overlooks that, in each of those cases, the

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discharged employee filed an appeal under the company's open door policy and asked for reconsideration. (*See* Jt.App.473, 475-500.) Briggs chose not to appeal and cannot claim disparate treatment on that basis. (Jt.App.132, 437.)

The Board oversteps its mandate and thwarts the appropriate respect that should be accorded the human resource function by failing to even consider the contrary evidence that McNiel and Hagood were new managers who knew nothing of Briggs' previous protected activity; that they had announced to all employees the harsher consequences they were going to apply to harassment activities in the face of a recent employee imbroglio without any knowledge that Briggs was about to commit such an offense; that no comparators cited by the Board arose within the new decision maker McNiel's realm or context; and that McNiel swore under oath that the 2013 LCA did not play a role in Briggs' termination decision. (Jt.App.284-285, 365.) Only the Board's guilty-until-proven-innocent mindset permits an analysis that elevates a 2013 disciplinary step in which neither McNiel nor Hagood was involved above the more recent and more serious violation and final

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warning in which McNiel was involved and testified under oath caused Briggs' discharge.

Stated differently, "[t]here are simply too many other explanations for [any disparity in rule enforcement] that do not raise concerns under the Act." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998). McNiel testified that he would have reached the same decision regardless of his reference to the May 2013 in Briggs' disciplinary paperwork. (Jt.App.284-825.) His testimony was supported by his lack of anti-union animus, the timing of his decision, and the seriousness of Briggs' misconduct, all of which detracted from the Board's position but which it chose to ignore. The Board's finding that Briggs was subjected to disparate discipline is simply not supported by the evidence and should not be upheld by this Court.

D. The "Do Not Rehire" notation was not unlawful.

The Board's finding that the "Do Not Rehire" notation was also unlawful fails for the same reasons. Additionally, there is no mention of the May 2013 LCA in the notation, as Hagood wrote: "Violation of 2nd Last Chance Agreement[,] Intimidation of Another Associate[,] Do Not Rehire," (Add. 2, 7; Jt.App.392, 438.) Thus, by the Board's own logic, the

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do not rehire notation is not unlawful because it does not even mention the May 2013 LCA.

II. The Evidence Confirming McNiel's Account in Relation to Briggs Undermines the Board's Analysis of the Muldrew Investigation.

With regard to the Muldrew charges, the ALJ credited Muldrew over McNiel "given McNiel's incredible testimony regarding [SBC's] use of Marks Briggs' May 30, 2013 discipline." (Add.8.) As set forth above, McNiel's testimony was not incredible when viewed through a comprehensive and objective lens. Rather, his account was fully corroborated by the evidence. He openly discussed how he reached his decision and his account was not rebutted in any way. Thus, the Board improperly disregarded McNiel's testimony concerning Muldrew, which was also corroborated by the other accounts of employees who met with McNiel (including Briggs). (Opening Br. 39-41.) Accordingly, if the Court decides in favor of SBC on the previous issue it should appropriately overturn the Board ruling as it relates to Muldrew.

CONCLUSION

Southern Bakeries respectfully renews its request that the NLRB's May 1, 2018 order not be enforced and for all other appropriate relief.

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Respectfully submitted,

s/*David L. Swider*
David L. Swider
Philip R. Zimmerly
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
317-684-5000; 317-684-5173 (Fax)
DSwider@boselaw.com
PZimmerly@boselaw.com

Attorneys for Petitioner, Southern Bakeries, LLC

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface using Microsoft Word 2010 Century font face in font size 14.

This brief and the accompany addendum have been scanned for viruses and are virus-free.

s/*David L. Swider*
David L. Swider

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, I electronically filed the foregoing "Reply Brief for the Petitioner" with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

Gary Shinners, Executive Sec. Linda Dreeben, Esq. Julio Broido, Esq. Jared Cantor, Esq. National Labor Relations Board Office of the Executive Secretary 1015 Hal Street SE Washington, DC 20570 Gary.shinners@nlrb.gov appellatecourt@nlrb.gov Julie.broido@nlrb.gov jared.cantor@nlrb.gov	M. Kathleen McKinney, Reg'l Dir. National Labor Relations Board Region 15 600 South Maestri Place, 7th Floor New Orleans, LA 70130-3408 Kathleen.mckinney@nlrb.gov
Linda Mohns, Esq. Erin West, Esq. Counsel for the General Counsel National Labor Relations Board Subregion 26 80 Monroe Avenue, Suite 350 Memphis, Tennessee 38103 linda.mohns@nlrb.gov erin.west@nlrb.gov	

s/*David L. Swider*
David L. Swider

3525744

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