

Nos. 18-1509, 18-1963

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEXICAN RADIO CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Mexican Radio Corporation (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Decision and Order (366 NLRB No. 65) issued against the Company on April 20, 2018. (SA. 1-25.)¹

¹ “SA.” references are to the special appendix; “Supp.A.” references are to the supplemental appendix. “Br.” refers to the Company’s opening brief. Where

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Company’s petition and the Board’s cross-application were timely; the Act imposes no limit on the time for initiating actions to review or enforce Board orders. The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by reprimanding and discharging four employees because of their protected, concerted activity.

2. Whether the Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(1) of the Act by retroactively issuing an additional reprimand to one of the four employees in response to her unemployment claim.

applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case addresses the Company’s unlawful response to its employees’ repeated and collective attempts to raise concerns regarding their working conditions—a response that culminated in the reprimand and discharge of four employees. After investigating unfair-labor-practice charges, the Board’s General Counsel issued an amended complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by reprimanding and discharging employees Tangni Fagoth, Juliana Palomino, Nadgie Santana, and Stephanie Garcia because of their protected, concerted activity. (SA. 3-4; Supp.A. 6-7, 655-65, 670-75.) Following a hearing, the administrative law judge found that the Company violated the Act as alleged. (SA. 3-25.)

Specifically, the judge found that the four employees engaged in protected, concerted activity when they replied in agreement to a nonpublic email written by a former coworker that complained about numerous terms and conditions of employment. That email was the culmination of a series of concerted complaints the employees had raised over the preceding months. (SA. 17-18.) The judge also found that the Company’s sole reason for reprimanding and discharging the employees was their protected email replies, thus “[t]he only question remaining” was whether—as the Company contended—the replies were so opprobrious as to

cause the employees to lose the Act’s protection. (SA. 18-21.) The judge rejected that contention, finding that, regardless of what test he applied—the “totality of the circumstances” test² or the *Atlantic Steel* test³—the employees did not forfeit protection, and the Company’s actions were therefore unlawful. (SA. 21.)

The judge also found that the same result would obtain under a *Wright Line* analysis.⁴ (SA. 18-23.) Under that framework, the judge examined the Company’s purported reasons for the adverse actions that ostensibly were unrelated to the employees’ protected activity and found those reasons to be pretextual—that is, false or not actually relied upon. (SA. 21-22.)

On review, the Board found no merit to the Company’s exceptions and adopted the judge’s findings and recommended order, as modified. (SA. 1.) The Board found merit to the General Counsel’s limited cross-exception that the Company further violated the Act by retroactively issuing an additional, backdated reprimand to employee Fagoth in response to her claim for unemployment benefits. (SA. 1-2.)

² See, e.g., *Pier Sixty, LLC*, 362 NLRB No. 59, 2015 WL 1457688 (Mar. 31, 2015) (examining totality of circumstances), *enforced*, 855 F.3d 115 (2d Cir. 2017), as amended (May 9, 2017).

³ See *Atlantic Steel Co.*, 245 NLRB 814 (1979).

⁴ *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981).

II. THE BOARD'S FINDINGS OF FACT

A. Company Operations; Employees Complain About General Manager Alfredou's Disrespectful Treatment and Other Working Conditions

The Company, owned by Mark Young and Lori Selden, operates three restaurants, including one in New York, New York. (SA. 4; Supp.A. 21, 654, 657-58, 666-67.) At all relevant times, Steve Morgan was director of operations. Young, Selden, and Morgan worked out of the Company's corporate office, travelling as necessary to the restaurants. (SA. 4; Supp.A. 19-21, 212, 654.)

The New York City restaurant has approximately 23 employees, including about 12 "front of the house" employees: servers, bartenders, runners, and hostesses. (SA. 4; Supp.A. 21-22.) Tangni Fagoth, Juliana Palomino, Nadgie Santana, and Stephanie Garcia worked as servers. (SA. 4; Supp.A. 27-28, 305, 465-66, 518-19, 586.) In August 2015, the Company hired Theodora Alfredou to replace John Petrow as general manager. (SA. 4; Supp.A. 24-25, 92, 149-51, 654.) Petrow returned to his former bartender position, although he still performed some managerial tasks, such as granting employees sick leave. (SA. 4-5, 7; Supp.A. 25-26, 101, 161-64, 185-87, 276, 311, 314, 323-24, 466-68, 722, 728, 730, 807.)

Almost immediately, front of the house employees had concerns about Alfredou's disrespectful manner, and about changes that she made, especially concerning their schedules. Fagoth, Palomino, Santana, and Garcia discussed these concerns among themselves and with other coworkers. (SA. 5-7, 17;

Supp.A. 175, 223-25, 284-85, 317-18, 326-29, 339, 470, 520-24, 526, 560, 592-94, 645, 653.) Some of these employees—including Fagoth, Santana, and Garcia—complained directly to Selden, Young, and/or Morgan. (SA. 5-7, 17; Supp.A. 72, 85-86, 223-25, 278-80, 284-86, 327-29, 520-24, 592, 702-06, 731-33.) For example, on August 9, Fagoth emailed the owners and Morgan to complain about Alfredou’s treatment of the workers, stating that she was “very aggressive,” had a “disrespectful” manner, and used “demeaning” speech. (SA. 5, 17; Supp.A. 702-03.) Similarly, on August 14, Fagoth emailed Morgan objecting that Alfredou had reduced her shifts and complaining that “[s]o far it seems like everyone’s schedule is revolving around [Petrow] and I don’t find that fair.” (SA. 5, 17; Supp.A. 704.)

B. During an August 25 Meeting, Employees Complain About Schedules and Tip-Pooling; Alfredou Threatens Employees

On August 25, Alfredou led a meeting attended by Fagoth, Palomino, Santana, and other employees, including bartender/server Annette Polanco. During this meeting, employees complained about reduced shifts, and that Alfredou gave too many shifts to Petrow. Employees also protested that runners were afforded an equal share of the pooled tips, thereby reducing the servers’ and bartenders’ potential earnings. (SA. 5-7, 10, 17-19; Supp.A. 42-43, 95-96, 172-73, 175, 197, 209, 333-37, 470-72, 525-27, 629-30, 636-45, 711-12.) Alfredou responded by threatening employees, stating, “[i]f you guys don’t like how things

working here, then you can go look for another job, you can leave.” (SA. 5-7, 18-19; Supp.A. 337, 472.)

C. Employees Jointly Prepare Lists Compiling Their Concerns, and Present the Lists to Morgan in September and to Morgan and Young at an October 5 Meeting

Despite Alfredou’s threat, the employees continued discussing workplace concerns. In late August and September, Fagoth, Palomino, Santana, Garcia, Polanco, and others agreed to prepare a list of complaints to deliver to Morgan. (SA. 6-8, 17-18; Supp.A. 339-44, 348-49, 425-26, 473, 527-30, 593-97.) Fagoth, in consultation with coworkers, created the list, which cited the staff’s ongoing concerns about Alfredou’s harsh and demeaning treatment, the reduction of employee shifts, and problems with tip sharing. The list also reflected complaints regarding unsanitary working conditions, such as rodents in the restaurant, dirty bathrooms, and insufficient gloves for the kitchen staff. (SA. 7-8, 18; Supp.A. 163, 277-78, 311, 314-16, 342-51, 425-26, 472-77, 485-86, 500, 529-31, 533-34, 570, 589, 593-97, 600, 646-47.)

When Morgan next visited in September, Fagoth, Polanco, and another employee gave him the list, explaining that it documented concerns shared by the front of the house staff. They then summarized those concerns to Morgan. Morgan took the list, saying he would look into it. (SA. 8, 18; Supp.A. 349-52, 425-426.)

Employees saw no improvements in the following weeks and concluded that management had ignored their concerns. (SA. 8, 18; Supp.A. 353, 356.)

Accordingly, after learning that Morgan and Young would be at the restaurant on October 5, Fagoth, Palomino, Santana, Garcia, Polanco, and others resolved to present their grievances as a group to management—in the hope that, this time, they would be heard. (SA. 8, 18; Supp.A. 352-53, 356, 477-79, 501-05, 531-32, 564, 598-99.) These workers discussed what issues to present, ultimately creating a list that included similar workplace complaints as the earlier list. (SA. 8, 18; Supp.A. 352-57, 453-54, 478, 504-05, 532, 564, 598-600, 622.)

On October 5, employees, including Fagoth, Santana, Garcia, and Polanco met with Young and Morgan. The employees shared their complaints about Alfredou’s disrespectful behavior, scheduling and reduced shifts, sharing tips, and unsanitary working conditions. (SA. 8, 18; Supp.A. 69-72, 109, 174, 354-57, 479, 532-33, 599-600, 614-19, 631-32, 713-14.) Young said that he did not want his employees to be unhappy and indicated that improvements would be forthcoming at least as to some of their grievances. (SA. 8; Supp.A. 357-58, 533, 601, 617-18.)

D. Employees Agree to File Anonymous Complaints with the Health Department Regarding Unsanitary Working Conditions; The Company Seeks to Uncover Who Filed the Complaints

Nothing changed after October 5. (SA. 8, 18; Supp.A. 358-61, 480, 533, 601.) Increasingly frustrated with management’s inaction, Fagoth, Palomino,

Santana, and Garcia jointly decided to file complaints with the New York City Department of Health and Mental Hygiene (“Health Department”). In mid-October, they each filed an anonymous complaint reporting the restaurant’s mice infestation, unkempt bathrooms, insufficient kitchen gloves, and mold in the restaurant’s bar area and basement. (SA. 8-9, 18; Supp.A. 177, 256-57, 358-61, 365, 480-82, 533-34, 594, 600-603, 649-51, 715, 740, 744-46, 819-22.) In response, the Health Department sent notices to the Company and inspected the restaurant. (SA. 9; Supp.A. 176-77, 362, 534, 602, 648-52, 715.)

These complaints incensed management. (SA. 9-10, 20; Supp.A. 258-59, 742-48.) The owners and Alfredou deduced that current or former employee(s) filed the complaints, but wanted to identify exactly who was responsible. (SA. 9-10, 20; Supp.A. 258-59, 717, 742-48.) On October 23, Selden emailed Young, Morgan, Alfredou, and Petrow, urging: “[w]e need to find out who it is ASAP.” (SA. 9-10, 20; Supp.A. 747.) Selden further suggested that, once the Company uncovered the complainers’ identity, it could “file a cease and desist order” against them. (SA. 9-10, 20; Supp.A. 747.) Around the same time, Petrow—pursuant to Selden’s direction—approached Fagoth, Garcia, and another employee and began fuming over the Health Department complaints, calling them “harassment” against the owners, and advising that the Company had “ways of finding out” who the

complainers were, and that they were “going to pay.” (SA. 9, 20; Supp.A. 177, 365-66, 602-03, 747.)

E. On October 29, Employee Polanco Emails Managers and Employees Announcing Her Resignation and Criticizing Working Conditions and Management’s Failure to Address Employees’ Concerns; While Off Duty, Employees Fagoth, Palomino, Santana, and Garcia Send Reply-All Emails in Support of Polanco’s Email

On October 29, Polanco sent a group email to Young, Selden, Morgan, and Alfredou as well as several employees, including Fagoth, Palomino, Santana, and Garcia. (SA. 1, 10-11, 18, 21; Supp.A. 43-44, 686-701.) That email announced her immediate resignation and criticized the Company’s working conditions, including many of the complaints that she, Fagoth, Palomino, Santana, Garcia, and others had repeatedly voiced over the preceding months. (SA. 1, 10-11, 18, 21; Supp.A. 44, 698-701.) For example, Polanco complained about Alfredou’s disrespectful treatment of employees, unfair schedule changes, tip-sharing procedures that reduced the servers’ and bartenders’ incomes, and the restaurant’s unsanitary conditions. (SA. 10-11; Supp.A. 698-701.) Polanco also vented over the employees’ repeated, unsuccessful attempts at collectively seeking redress of their concerns from management. She criticized management for repeatedly “looking the other way” or failing to take action, and, in Alfredou’s case, for threatening to discharge the complaining employees. (SA. 1, 10-11, 18, 21; Supp.A. 699-701.) Additionally, Polanco urged the other employees to continue to

“stand up for what they deserve,” and she pledged to “help them in any way I can.” (SA. 11; Supp.A. 700-01.)

After receiving the email, Fagoth, Santana, and Garcia spoke by phone and discussed sending replies. (SA. 12, 18; Supp.A. 433-36, 535-36, 571-73, 609-10.) Over the next 2 hours, they, as well as Palomino—while off duty and not present at the restaurant—sent short, reply-all emails expressing support for Polanco’s email. (SA. 1, 11-12, 18, 21; Supp.A. 45-47, 225-27, 229, 366-67, 436-37, 469-70, 472, 482, 485-86, 506, 535-36, 603-04, 686-701, 734.) Palomino’s response stated: “I agree a 100 % as well.” (SA. 12; Supp.A. 698.) Fagoth’s reply provided: “Wow Anette [sic], gracias. Thank you for standing up for us. We will miss you.” (SA. 11; Supp.A. 690.) Garcia wrote: “Just finish [sic] reading and I agree. Sad that things have to be this way.” (SA. 12; Supp.A. 686.) And finally, Santana stated: “I’m glad you said what you felt was right. I understand your point of view 100%. Thanks [sic] you for being voice for us all.” (SA. 12; Supp.A. 694.)

F. On October 30 and 31, the Company Reprimands and Discharges Fagoth, Palomino, Santana, and Garcia

1. The events of October 30

The next day, October 30, Santana was scheduled to work the daytime shift, and Fagoth and Palomino were scheduled to work in the evening. (SA. 12-14; Supp.A. 49, 59, 369, 482, 536, 734.) That afternoon, Young, Selden, and Morgan came to the restaurant and told Alfredou that they wanted to meet individually, in

the downstairs office, with each server who had replied to Polanco's email. (SA. 12; Supp.A. 48-50-51, 229-33, 537.) Near the end of Santana's shift, Alfredou told her to go downstairs and speak with the owners and Morgan. Santana, too nervous to do this immediately, asked that Alfredou give her a few minutes, and Alfredou acquiesced. (SA. 12-13; Supp.A. 537.)

Meanwhile, Fagoth arrived for her evening shift, and Alfredou told her to meet with the owners downstairs. (SA. 12-13; Supp.A. 369, 538.) Shortly after Fagoth went downstairs, Alfredou told Palomino, who had arrived for her shift, that the owners would want to speak with her as well. (SA. 13; Supp.A. 484.) Fagoth met with Morgan and the owners in the downstairs office. At the outset, Morgan expressed that the meeting's purpose was to discuss the prior day's emails, and he asked Fagoth why she supported Polanco's email. Fagoth responded that Morgan had failed to act on the employees' requests, and reaffirmed her support for Polanco's email. Morgan replied that, if that was Fagoth's position on the email, it was "insubordination," and they were letting her go. Fagoth left the office. (SA. 12-13, 20-21; Supp.A. 50-55, 127, 233-37, 373-75.)

Fagoth then encountered Palomino and told her that she had been fired for replying to the email. (SA. 12-13; Supp.A. 375-76, 484.) Palomino and Fagoth left the restaurant and did not return. Palomino never met with the owners as she had been instructed. (SA. 12-13; Supp.A. 55-62, 128-29, 377-80, 485, 489, 512.)

Santana also encountered Fagoth after Fagoth's meeting. Fagoth advised Santana that she had just been fired for replying to Polanco's email. This made Santana anxious such that when Alfredou told her again to meet with the owners, Santana responded that she was too nervous. When Alfredou walked away without responding, Santana told Petrow that she was too nervous to meet with the owners and Morgan; Petrow told Santana that she could go home, and, since her shift was over, she did. (SA. 12-14; Supp.A. 156-57, 237-39, 537, 539-41, 574.)

Garcia was not scheduled to work on October 30, and no one informed her that management wanted to meet with her. That evening, Fagoth phoned Garcia and recounted that she had been discharged for agreeing with Polanco's email. (SA. 14, 21-22; Supp.A. 128, 604, 734.)

Meanwhile, the Company drafted two sets of written reprimands memorializing the discharges of Fagoth, Palomino, Santana, and Garcia. (SA. 14-15, 20, 22; Supp.A. 54-55, 65-68, 237, 244, 248-53, 271-72, 302-03, 737-39, 792-95.) Fagoth's first reprimand provided that she had "replied [to Polanco's email] stating that she agreed," and that, "[a]s a result" of this "insubordination," Fagoth was "terminated." (SA. 14, 20; Supp.A. 738.) Similarly, the first reprimands for Palomino and Santana asserted that they had "demonstrated insubordination" when they "replied to [Polanco's] email . . . stating that [they] agree[d]." (SA. 14-15, 20; Supp.A. 248-49, 737, 739.) Palomino's and Santana's first reprimands also

referenced that both of them had “walked out of the restaurant” and were “considered to have resigned.”

Fagoth’s second reprimand stated that she engaged in “insubordination [that] will not be tolerated” when she “replied to the e-mail in support of [Polanco],” and acknowledged that she was “terminated” for this “insubordination.” (SA. 15, 20; Supp.A. 792.) Similarly, the remainder of the second set of reprimands stated that Palomino, Santana, and Garcia engaged in “insubordination [that] will not be tolerated” when they “replied to the e-mail in support of [Polanco].” (SA. 15, 20, 22; Supp.A. 793-95.) Palomino’s second reprimand also claimed that she had “walked out and abandoned her shift,” and Garcia’s reprimand likewise referenced job abandonment. Santana’s provided that she was discharged for “insubordination” in responding to Polanco’s email and in leaving the restaurant without meeting with management, as well as for failing to notify management of an absence from work on October 31. (SA. 15, 20, 22; Supp.A. 793-95.)

2. The events of October 31

Santana and Garcia were scheduled to work the evening of October 31. (SA. 13-14, 20, 22; Supp.A. 64, 240, 541-43, 605, 734.) That morning, Santana texted Alfredou, stating that she did not think she could make it to work that day. (SA. 13; Supp.A. 541-43, 735-36, 808.) When Alfredou did not respond, Santana texted the same message to Petrow, who responded that she could take the day off. (SA.

13-14; Supp.A. 160-61, 241-43, 541-45, 735-36, 809.) Alfredou and Petrow informed Selden and Morgan of Santana's text messages. (SA 13-14; Supp.A. 241-43, 735-36.)

That afternoon, Morgan left Santana a voicemail stating that the day before she had left the restaurant after refusing to speak with management, and thus they had "assumed" that she "just didn't want to work here anymore," so she "[did not] have a job anymore." (SA. 13-14, 22; Supp.A. 544, 549, 735-36, 810.) A few minutes later, after listening to this voicemail, Santana called Morgan back. She recorded their conversation. (SA. 14, 22; Supp.A. 552-53, 811-14.)

During that conversation, Santana insisted that she had not refused to meet with management or walked out on October 30. She explained that she had finished her shift and was having an anxiety attack when she left. Therefore, she had informed both Alfredou and Petrow that she could not meet with management at that time. In response, Alfredou walked away but Petrow approved her request to leave. (SA. 14, 22; Supp.A. 811-14.)

Morgan rebuffed Santana's explanations, and stated that management had wanted to meet with her because she was "one of the ones that responded that [she] agreed with [Polanco's email]." (SA. 14, 22; Supp.A. 811-14.) Morgan described Santana's email as "insubordination," and stated: "[w]e're not going to tolerate it. . . . We're not going to have people working there that feel that way about the

company.” (SA. 14, 22; Supp.A. 811-12.) Morgan added that when Santana and her coworkers supported Polanco’s email: “everybody ganged up . . . [and] we can’t have that.” (SA. 14, 22; Supp.A. 812.) Santana mentioned that she had panicked the day before when Fagoth told her that “everybody[] . . . that was involved in [replying to Polanco’s] email is gonna get fired.” (SA. 14, 22; Supp.A. 813-14.) Morgan denied telling that to Fagoth, but when Santana pressed him, he stated, “I’m telling you that now.” (SA. 14, 22; Supp.A. 814.)

Later that afternoon, Santana called Garcia and informed her that Morgan had discharged her for supporting Polanco’s email, and played Garcia the recording of that conversation. (SA. 14, 22; Supp.A. 605-06.) Based on Morgan’s recorded statements, Garcia understood that she also had been discharged, since she was among those who had replied in agreement to Polanco’s email.

Accordingly, Garcia did not go to the restaurant that evening for her shift or thereafter. (SA. 14, 22; Supp.A. 64-65, 605-06, 811-14.) The Company made no attempt to contact Garcia after that. (SA. 14, 22; Supp.A. 64-65, 606, 611, 724.)

**G. Fagoth, Palomino, and Santana File Unemployment Claims;
the Company Creates a Backdated Reprimand for an Incident that
Occurred Weeks Prior to Fagoth’s Discharge**

Fagoth, Palomino, and Santana filed claims for unemployment insurance benefits with the New York State Department of Labor. In response, the Company provided statements and filings confirming that the employees—whom it described

as having formed “their own little cartel”—were discharged for replying to Polanco’s email. (SA. 15-17, 20, 22; Supp.A. 707-10, 796-806, 815-18.) For example, the Company advised that Fagoth—the employees’ “group leader”—was “discharged for agreeing to [Polanco’s email],” and that, by supporting the email, Fagoth “exhibited insubordinate behavior that required termination.” (SA. 16-17; Supp.A. 709-10, 796-97, 817.) Similarly, the Company stated that Santana was discharged because she “sent [her] email supporting [Polanco],” which constituted “[i]nsubordination.” (SA. 16; Supp.A. 804-05.) Likewise, the Company informed the State that Palomino engaged in “insubordination” by “agreeing with [Polanco’s] email,” and further explained that: “[w]e called her in to the office . . . We were going to fire her but we did not tell her before we called her in to the office that we were going to discharge her because she agreed with [Polanco’s] email.” (SA. 16-17, 22; Supp.A. 816.)

Additionally, the Company retroactively issued a written reprimand to Fagoth for her purported failure to notify management immediately about an incident that had occurred on October 9, when another employee allegedly threatened staff with a knife. (SA. 1; Supp.A. 448-50, 678, 681-85.) The Company became aware of this incident on October 10. At that time, it discharged the employee who allegedly made the threat, but did not discipline Fagoth for her purported failure to report it. (SA. 1; Supp.A. 30, 33-37, 449-50, 620-21, 623-24,

632, 676-77, 679-80.) On November 5, the Company drafted a reprimand concerning Fagoth's purported failure, and backdated it to October 10. (SA. 1; Supp.A. 448-50, 624-28, 678, 681-85.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by reprimanding and discharging Fagoth, Palomino, Santana, and Garcia because they replied in agreement to Polanco's email. (SA. 1.) The Board noted its agreement with the judge that the employees' replies constituted protected, concerted activity, and that they were not so egregious as to cause them to lose the Act's protection. (SA. 1.) It further noted that, "[t]o the extent that" the Company contended that the discharges were based on reasons other than responding to Polanco's email, it agreed with the judge that those other purported reasons were pretextual. (SA. 1.) Additionally, the Board found that the Company further violated Section 8(a)(1) by retroactively issuing Fagoth the reprimand it created on November 5 in response to her unemployment claim. (SA. 1-2.)

The Board's Order directs the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. Affirmatively, the Order

requires the Company, among other things, to offer reinstatement to the four employees and make them whole. It also requires the Company to post a remedial notice. (SA. 2-3.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by reprimanding and discharging employees Fagoth, Palomino, Santana, and Garcia because they replied in agreement to a group email written by former employee Polanco that raised ongoing employee complaints about working conditions. The Board reasonably found that the four employees' replies constituted protected, concerted activity because they furthered the employees' continuing, months-long participation in concerted efforts to raise the same shared grievances to management.

The Board also reasonably found that the Company clearly reprimanded and discharged the four because of their protected email replies. Indeed, the Company admitted this motivation on several occasions, most notably in its October 30 reprimands and in manager Morgan's October 31 recorded statements. The Board therefore properly determined that if the employees' replies did not lose the Act's protection, then the Company's adverse actions were unlawful.

Further, substantial evidence supports the Board's finding that, whether evaluated under the totality of the circumstances or under the four-factor *Atlantic*

Steel test, the replies were not so objectively egregious as to cause the four employees to forfeit the Act’s protection. Under the totality of the circumstances, the Board reasoned that the employees’ email replies were a continuation of the dialogue between workers and management about working conditions, and a reaction to the Company’s failures to address employees’ concerns; the replies merely agreed with Polanco’s email and contained no profanity, hostility, or other negative comments; Polanco’s email included little profanity and was primarily a critique of the Company’s working conditions and treatment of employees—a culmination of the ongoing complaints brought by the four employees and others; the replies were circulated only within the Company and thus did not cause any loss of reputation or business; and, finally, as the employees sent their replies while off duty and away from the restaurant, there was no disruption of operations.

The Board reasonably found in the alternative that under *Atlantic Steel*, the email replies likewise were not so objectively opprobrious as to lose the Act’s protection. The place of the discussion favors protection since the replies were nonpublic electronic messages and involved no disruptive behavior at the workplace. The subject matter also favors protection because they addressed a continuing dialogue of protected complaints about working conditions. The only “outburst” was the four employees simply noting their agreement to Polanco’s email, and thus, this factor likewise favors protection. Finally, the replies were

provoked by Alfredou's coercive threat to fire employees for raising protected complaints, and by the Company's other dismissive responses to the complaints, all of which led to and was cited in Polanco's email.

The Company's meritless claims that the employees lost protection rest on its misguided and myopic view of this case—it focuses on Polanco's conduct, rather than the distinct conduct of the four employees; it considers the emails through the lens of management's subjective opinion, rather than assessing them objectively as required; and it fixates on the emails themselves in isolation, rather than also accounting for their context—namely, the three-month-long dialogue that led to them.

The Company's inadequate briefing has waived any contention that the employees were reprimanded and discharged for any reason other than their protected email replies. In any event, substantial evidence supports the Board's alternative finding that the Company's adverse actions violated the Act under the *Wright Line* framework. The protected replies were plainly a motivating factor in the Company's decisions, and the other purported reasons it proffered were mere pretext.

Additionally, the Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(1) by retroactively issuing an additional reprimand to Fagoth in response to her unemployment claim.

STANDARD OF REVIEW

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477; *accord NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121-22 (2d Cir. 2017), as amended (May 9, 2017). The Board’s reasonable inferences may not be displaced on review even though this Court might justifiably have reached a different conclusion had the matter been before it *de novo*; as this Court has explained, “[w]here competing inferences exist, we defer to the conclusions of the Board.” *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). In other words, this Court will not reverse the Board based on a factual determination unless it is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Additionally, this Court will not disturb the Board’s adoption of a judge’s credibility determinations unless they are “hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony.” *Pier Sixty*, 855 F.3d at 122 (quotation marks omitted).

This Court “reviews the Board’s legal conclusions to ensure that they have a reasonable basis in law [, and] . . . afford[s] the Board a degree of legal leeway.” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (quotation marks omitted). Accordingly, the Court will uphold the Board’s legal determinations unless they are “arbitrary and capricious.” *Cibao Meat Prod., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008) (quotation marks omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(A)(1) OF THE ACT BY REPRIMANDING AND DISCHARGING FOUR EMPLOYEES BECAUSE OF THEIR PROTECTED, CONCERTED ACTIVITY

A. An Employer Violates the Act by Disciplining or Discharging Employees for Engaging in Protected, Concerted Activity

Section 7 of the Act guarantees to employees not only the “right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively,” but also the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection” 29 U.S.C. § 157. Section 7’s “broad protection . . . applies with particular force to unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’” *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)). Determining whether activity is protected within the meaning

of Section 7 is a task that “implicates [the Board’s] expertise in labor relations” and is for “the Board to perform in the first instance.” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quotation marks omitted). The Court therefore grants “considerable deference” to a Board finding that employees have engaged in Section 7 activity. *Pier Sixty*, 855 F.3d at 122 (quotation marks omitted).

Employees’ Section 7 rights are protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) by taking adverse action against employees for engaging in concerted activity protected by Section 7. *Washington Aluminum*, 370 U.S. at 12-18; *Caval Tool*, 262 F.3d at 188-91.

Nonetheless, an employee engaged in protected, concerted activity may act “in such an abusive manner that he loses the protection” of the Act. *City Disposal*, 465 U.S. at 837. Depending on the factual context, the Board analyzes such purported employee conduct under the totality of the circumstances, *e.g.* *Pier Sixty, LLC*, 362 NLRB No. 59, 2015 WL 1457688 (Mar. 31, 2015), *enforced*, 855 F.3d 115, or under the four-factor test set forth in *Atlantic Steel Company*, 245 NLRB 814 (1979), as discussed in detail below. In doing so, there is a general recognition that when employees engage in protected activity, some leeway is necessary, “since passions may run high and impulsive behavior is common.” *Caval Tool*,

262 F.3d at 192 (quotation marks omitted); *accord NLRB v. Chelsea Labs., Inc.*, 825 F.2d 680, 683 (2d Cir. 1987). Indeed, “[t]he protections Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *accord Dreis & Krump Mfg., Inc.*, 221 NLRB 309, 315 (1975), *enforced*, 544 F.2d 320 (7th Cir. 1976).

B. The Company Reprimanded and Discharged Fagoth, Palomino, Santana, and Garcia Because of Their Protected, Concerted Activity

The Board’s court-approved test for determining whether activity is concerted is whether it is “engaged in with or on the authority of other employees,” and encompasses circumstances where an individual employee “seek[s] to initiate or to induce or to prepare for group action,” or “bring[s] truly group complaints to the attention of management.” *Meyers Indus.*, 281 NLRB 882, 885, 887 (1986) (quotation marks omitted), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *accord Ewing v. NLRB*, 861 F.2d 353, 361-62 (2d Cir. 1988). An individual’s activity also is concerted “if it represents either a continuation . . . or a logical outgrowth of [earlier] concerted activities.” *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785 (8th Cir. 2013) (quotation marks omitted); *accord Ewing*,

861 F.2d at 361 (“a lone act is concerted if it stems from prior [concerted activity]”).

Additionally, employees participate in activity for “mutual aid or protection” when they “seek to improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Both the concertedness element and the “mutual aid or protection” element are analyzed using an objective standard. *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 153 (2014).

1. The four employees’ activity was protected and concerted

With those principles in mind, substantial evidence supports the Board’s finding (SA. 1, 18) that Fagoth, Palomino, Santana, and Garcia engaged in protected, concerted activity when they replied in agreement to Polanco’s group email. In doing so, the four employees affirmed, in a group forum, the shared complaints that Polanco articulated regarding the employees’ terms and conditions of employment. Those complaints concerned wages, work schedules, tip policies, working conditions, and management’s treatment of employees. (SA. 1.) The four employees thereby furthered Polanco’s effort to bring these group complaints to the attention of management—answering her call to “stand up for what they deserve”—and sought to induce their coworkers to do the same. (SA. 18.) *See Caval Tool*, 262 F.2d at 188-91 (an individual employee engages in protected,

concerted activity by expressing concerns over working conditions during a group meeting); *Timekeeping Sys., Inc.*, 323 NLRB 244, 247-48 (1997) (individual employee engaged in protected, concerted activity by sending reply-all email to manager and coworkers criticizing proposed change in vacation policy).

Moreover, as the Board further found (SA. 17-18), Fagoth, Santana, and Garcia discussed replying to Polanco’s email before they did so.⁵ And they and Palomino had—for months—discussed the group complaints that the email cited and engaged in concerted efforts, along with Polanco and others, to raise them to management. For example, as the Board found, the employees engaged in protected, concerted activity when they raised their complaints during the group meeting with Alfredou in August, and when they jointly compiled and presented lists of their complaints to Morgan in September, and to Morgan and Young in

⁵ In the only portion of its brief that offers a supporting transcript citation, the Company disputes Fagoth’s and Santana’s claim that they discussed Polanco’s email with others before sending their replies, because they offered contradictory testimony on that point at an unemployment hearing. (Br. 10-11.) From there, the Company makes the unsupported leap that all of Fagoth’s testimony is not credible, but it fails to identify a single disputed finding of fact that purportedly should be overturned based on this claim, and fails to meet the high burden for overturning such Board findings. *See NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (credibility determinations will not be overturned unless they are “hopelessly incredible”).

early October.⁶ (SA. 17-18.) They engaged in further protected activity when they filed coordinated complaints with the Health Department regarding their unsanitary working conditions. (SA. 18.) *See Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 812-13 (2d Cir. 1980) (employees who submitted report to Joint Commission on Accreditation of Hospitals that included complaints about unsanitary conditions and staff shortages engaged in Section 7 activity “similar to protected complaints made to an appropriate administrative agency”).

Accordingly, the four employees’ replies in support of Polanco’s email were, as the Board aptly described, a protected, concerted “culmination” of these prior protected activities. (SA. 18.) *See Pier Sixty*, 362 NLRB No. 59, 2015 WL 1457688, at *3 (employee’s Facebook post protesting manager’s mistreatment of employees was “part of a sequence of events involving the employees’ attempts to protest and ameliorate what they saw as [management’s] rude and demeaning treatment”), *enforced*, 855 F.3d 115.

In its opening brief, the Company does not directly contest that these activities, including the email replies, constituted “concerted activities” for the purpose of “mutual aid or protection.” 29 U.S.C. § 157. It therefore has waived any such contention. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A.*

⁶ The Company is mistaken in suggesting (Br. 10) that the Board did not find the employees’ complaints during the October 5 meeting to be protected activity; the Board plainly did so. (SA. 18.)

de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (“arguments not made in an appellant’s opening brief are waived”).

Rather than directly challenging the Board’s findings regarding the employees’ concerted activity, the Company raises several arguments premised on a misunderstanding of the Act. The Company’s claim (Br. 9-10) that the Board’s findings regarding the earlier protected activities that culminated in the email replies were “extraneous” or “irrelevant” overlooks that those findings demonstrate that the replies were part of an ongoing dialogue with the Company regarding employment terms and a continuation of prior Section 7 activities. (SA. 1, 18, 21.) Further, contrary to the Company’s claim that applying the Act’s protections to non-unionized employees is “a relatively recent trend” (Br. 2-3, 9), it is well established that “the protection afforded to concerted activities under the [Act] applies equally to workers in unionized or in non-unionized firms.” *NLRB v. Columbia Univ.*, 541 F.2d 922, 931 (2d Cir. 1976). Finally, there is no basis for the Company’s cursory and wholly unsupported attempt (Br. 2-3, 10) to claim refuge in its status as a “small business.” The Company’s characterization of its size does not restrict the breadth of its employees’ Section 7 rights, nor license the Company to violate the Act at will.

2. The Company discharged the employees because of their protected activity

Substantial evidence also supports the Board’s finding that the email replies were “clearly the reason that [the employees] were reprimanded and discharged.” (SA. 20.) With respect to Fagoth—whom the Company identified as “the ‘group leader’ of all those who . . . agree[d] with [Polanco’s] email” (Supp.A. 710)—Selden and Young admitted at trial that she was discharged in the basement office on October 30 because she stood by her support for the email. (SA. 20-21; Supp.A. 54-55, 127, 233-37.) And the Company made the same admission in its October 30 reprimands for Fagoth, and in its later responses to her unemployment claim—which state, for example, that Fagoth “replied stating that she agreed [with Polanco’s email],” and “[a]s a result,” was “terminated” (Supp.A. 738); or, more succinctly, that she was “discharged for agreeing to [Polanco’s email].” (Supp.A. 817; *see also* Supp.A. 792, 796-802.)

As for the rest of the group—Palomino, Santana, and Garcia—the Board noted (SA. 20, 22) that Morgan’s October 30 reprimands similarly state that they engaged in “insubordination [that] will not be tolerated” when they “replied to the e-mail in support of [Polanco].” (Supp.A. 793-95.) Moreover, as the Board further found (SA. 22), Morgan laid bare in his recorded conversation with Santana on October 31 that the Company was “not going to tolerate” and “not going to have . . . working there” anyone who replied in agreement to Polanco’s email—

because it was “insubordination,” and the Company “can’t have” its employees “gang[ing] up” and “deciding . . . how they think the restaurant should be run.” (Supp.A. 811-12.) As these admissions reveal, and as Morgan further acknowledged: “everybody involved in [replying to Polanco’s email] was considered fired.” (Supp.A. 813-14.) Accordingly, the Board reasonably found it “clear” that the four employees were reprimanded and discharged “for agreeing to the contents of the Polanco email.” (SA. 20-21.)

Having made that finding, the Board reasoned that “[t]he only question remaining” was whether the employees “lost the protection of the Act by merely responding to Polanco’s email.” (SA. 21.) If, as shown below, the employees did not forfeit protection, then their reprimands and discharges violated Section 8(a)(1). (SA. 21.)

C. The Email Replies Did Not Lose the Act’s Protection

The Board adopted (SA. 1) the judge’s finding that “[r]egardless” of whether the employees’ email replies were analyzed under the totality of the circumstances, or, in the alternative, under *Atlantic Steel*, the employees did not lose the Act’s protection. (SA. 21.) “Typically,” the Board has applied *Atlantic Steel* when analyzing “direct communications, face-to-face in the workplace, between an employee and a manager or supervisor.” *Desert Springs Hosp. Med. Ctr.*, 363 NLRB No. 185, 2016 WL 2753320, at *1 n. 3 (May 10, 2016) (quoting *Three D*,

LLC, 361 NLRB 308, 311 (2014), *affirmed*, 629 F. App'x 33 (2d Cir. 2015)). As the *Atlantic Steel* framework is “tailored to [such] workplace confrontations,” it well enables the Board to balance employee rights with an employer’s interest in maintaining workplace order. *Three D*, 361 NLRB at 311.

By contrast, the Board has applied the totality of the circumstances framework in the context of employees’ off-duty social media comments, and in other circumstances where employee comments are made available to coworkers in a nonwork setting and do not occur during a conversation with a supervisor or manager. *See Pier Sixty*, 362 NLRB No. 59, 2015 WL 1457688, at *3 (examining Facebook comments under totality of circumstances in absence of exceptions; declining to rely on *Atlantic Steel* since comments “initially were made available to other employees and others in a nonwork setting and did not occur during a conversation with a . . . management representative”); *Richmond Dist. Neighborhood Ctr.*, 361 NLRB 833, 834-35 & n.6 (2014) (evaluating egregiousness of employees’ Facebook conversation under all circumstances in absence of exceptions); *Honda of Am. Mfg., Inc.*, 334 NLRB 746, 747-49 (2001) (examining under totality of circumstances statements made by employee in newsletter that was directed toward other employees but also available to management).

Whichever of these two analytical frameworks applies, the ultimate question remains whether the employee’s otherwise protected conduct was “so egregious as to lose the protection of the [Act].” *Pier Sixty*, 855 F.3d at 125; *accord Goya Foods, Inc.*, 356 NLRB 476, 477 (2011) (applying *Atlantic Steel*). (see also pp. 24-25 above.) The Board answers that question from an objective standpoint. *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 29 n.2 (D.C. Cir. 2011) (approving of Board’s consistent use of objective standard in considering whether employees have lost protection); *Pier Sixty*, 362 NLRB No. 59, 2015 WL 1457688, at *3, *4 n.10; *Blue Chip Casino, LLC*, 341 NLRB 548, 555 (2004). As demonstrated below, the Board here reasonably determined that, under either framework, the conduct of the four employees did not objectively rise to such a level of egregiousness as to forfeit statutory protection—a determination that is entitled to “considerable deference.” *Pier Sixty*, 855 F.3d at 122, 124; *accord Caval Tool*, 262 F.3d at 188, 191-92; *Am. Tel. & Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975).

1. The four employees did not forfeit protection under the totality of the circumstances

Analyzing all surrounding circumstances in light of the credited evidence, the Board reasonably concluded that the employees did not lose protection by “merely responding” to Polanco’s email. (SA. 1, 21.) The Company’s claim that the circumstances warrant a loss of protection lacks evidentiary support.

a. The emails continued an ongoing dialogue about working conditions

As the Board found (SA. 1, 21), Polanco’s email and the four employees’ supportive replies were “part of an ongoing dialogue between the workers and the [Company].” (SA. 1.) Indeed, as explained (pp. 26-28), Polanco’s email restated many of the same complaints over working conditions that she, Fagoth, Palomino, Santana, Garcia, and other employees had raised to management many times. The Company suggests, without any basis, that Polanco’s email was primarily intended “to express her individual animosity towards management” and was only “cloaked in alleged concern for her fellow employees,” (Br. 5), but Polanco’s discussion of the shared complaints belies that assertion. Moreover, her email not only echoed those complaints—the subject of the ongoing dialogue—it expressly referenced and commented on the dialogue itself, noting, for example: “[w]e brought up the runner tip out situation [to Alfredou]” in August, and “[w]e [n]aively told [Morgan] all of our concerns from day one.” (SA. 10-11; Supp.A. 699-701.) *See Pier Sixty*, 362 NLRB No. 59, 2015 WL 1457688, at *4 (employee’s Facebook post “echoed employees’ previous complaints about management’s disrespectful treatment”). Notably, the Company concedes that the four employees “[brought] complaints” about working conditions to management “throughout the period from August through October,” and that Polanco’s email “discuss[ed] similar concerns.” (Br. 7.)

b. The employees reacted to the Company's failure to address concerns

Polanco's email and the four employees' replies also constituted "a reaction to the [Company's] failure to correct the problems [that the workers] perceived." (SA. 1, 21.) The employees' repeated attempts to ameliorate their concerns through concerted activity had proved fruitless. Polanco's email gave voice to their shared frustration about management's inattention to their long-simmering dissatisfaction, and as Polanco's email demonstrates, that dissatisfaction had reached its boiling point. Indeed, Polanco specifically vented that, despite the employees' numerous complaints, management had "look[ed] the other way," "not even acknowledged [our concerns]," and "[done] absolutely nothing"—or even threatened "to fire us all." (SA. 10-11; Supp.A. 699-701.) Thus, when the four employees replied in agreement, they were reacting to the Company's repeated failures to remedy their shared concerns, and to the shared frustration that Polanco had articulated. *See Pier Sixty*, 855 F.3d at 124 (Board reasonably found employee's Facebook post "was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment"); *N. W. Rural Elec. Coop.*, 366 NLRB No. 132, slip op. at 16 (July 19, 2018) (where employee had raised "same safety concerns . . . prior to his [Facebook] post, but to no avail," he "likely [was] frustrated . . . [and thus] provoked to some degree in making his comments").

c. The four employees' email replies were devoid of hostility, profanity, and negativity

The employees' replies did not add to Polanco's email "with any negative comments of their own." (SA 1, 21.) As the Board elaborated, the replies did not contain any "curs[ing]," any expressions of "animosity," or any "derogatory" or otherwise "negative" comments. (SA. 1, 21.) Rather, the replies merely stated—in a few, unadorned words—their agreement with, and support for, Polanco's email. (*see* p.11.) *See N. W. Rural*, 366 NLRB No. 132, slip op. at 16 (lack of profanity or threats favors protection).

The Company overlooks that indisputable fact. Instead, it rushes to consider only Polanco's email, and faults the Board for ignoring its contents. (Br. 5). In doing so, the Company inappropriately attributes Polanco's statements to the four discharged employees. (Br. 17-18, 20.) The Company's focus on Polanco's email fails to appreciate that—"[g]iven the severe consequences" of a finding that an employee has lost the Act's protection—the Board, when analyzing facts "involving multiple employees," must properly "account[] for [any] material differences in the nature of the individual employees' conduct." *Crowne Plaza Laguardia*, 357 NLRB 1097, 1099-1100 (2011). Indeed, not "every participant in concerted activity is liable for his fellow employees' actions." *Id.* at 1100, n.11; *accord Three D*, 361 NLRB at 312 (rejecting contention that two employees who participated in Facebook discussion could be held responsible for comments posted

by others that the two did not endorse). Thus, in determining whether employees have engaged in behavior so opprobrious as to lose the Act's protection, the Board focuses on the conduct of each individual employee. *Crowne Plaza*, 357 NLRB at 1099-1100.

Here, the Board properly concentrated on the replies' simply expressed agreement in determining whether the four employees lost the Act's protection. Viewing the replies objectively—particularly in light of their participation in the ongoing, months-long dialogue with management over working conditions—they merely conveyed their agreement with Polanco's criticisms of management's role in that dialogue and perceived unfair treatment of employees. *See Kiewit*, 652 F.3d at 29 n.2 (objective standard applies); *Blue Chip*, 341 NLRB at 555 (same). Thus, the Board here (SA. 21) appropriately recognized as improper the Company's effort to attribute to the four employees certain isolated and gratuitous comments scattered across Polanco's lengthy email and not integral to its driving message. *See Three D*, 361 NLRB at 312 (employees did not lose protection "merely by participating in an otherwise protected discussion in which other persons made unprotected statements").

d. Polanco's email primarily criticized working conditions and management's inattention

In finding that the employees' replies signaling their agreement with Polanco's email did not lose the Act's protection, the Board also reasonably

determined (SA. 1, 21) that Polanco’s email “contained little profanity and was merely a critique of the [Company’s] management style.” (SA. 1.) Substantial evidence supports that determination because, as discussed, her email addressed the perceived negative toll inflicted on employees by management’s actions and inaction—protesting management’s effectuation of unfair working conditions as well as its failure to correct course, even in the face of employees’ persistent complaints. The Company’s objections (Br. 17, 20, 22) about other language in the email that it claims is false, denigrates the owners’ character, or is otherwise profane do not undermine the Board’s finding that Polanco’s email objectively viewed as a whole, as it must be, was “merely a critique.” (SA. 1.) And, as the Board and courts have long recognized, labor disputes are “often . . . heated [and] likely to engender ill feelings and strong responses,” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (internal quotation marks omitted), and thus, employees engaged in them must be afforded “some leeway . . . [for] impulsive behavior,” *Caval Tool*, 262 F.3d at 192, such as “salty language or defiance.” *Chelsea*, 825 F.2d at 683. *See also* cases cited at p. 25.

e. The emails were nonpublic and did not cause any loss of reputation or business

As the Board further found (SA. 1, 21), the employees’ emails were “nonpublic and [therefore] did not cause a loss of reputation or business for the [Company].” (SA. 1.) The emails went to a “significantly limited” audience. (SA.

21.) The employees sent their replies only to the Company’s management and about half (not “virtually all,” as the Company contends, Br. 5, 14) of their coworkers—they did not disseminate the emails to the public at large, or, for example, to the Company’s customers or vendors, and the Company presents no evidence of such dissemination or of any purported loss of reputation or business. *Cf. NLRB v. Starbucks Corp.*, 679 F.3d 70, 79-80 (2d Cir. 2012) (remanding to Board for further analysis of employee’s obscene outburst in presence of customers); *Crowne Plaza*, 357 NLRB at 1100 (finding no evidence noise from employee outburst interfered with guest service although two hotel guests in vicinity of confrontation and others possibly overheard it).

f. The emails did not disrupt operations

Finally, the Board reasonably determined that the employees’ emails caused “no disruption of business.” (SA. 1, 21.) The Company concedes, as the record shows, that the employees sent the emails “on their own time” (Br. 22), outside of working hours. Further, the Company points to no evidence showing that the emails disrupted operations. *See Pier Sixty*, 855 F.3d at 125 (employee’s Facebook post made during authorized break “was not in the immediate presence of customers nor did it disrupt the . . . event” at which employee was working); *N. W. Rural*, 366 NLRB No. 132, slip op. at 16 (Facebook posts were “not made at work”

and there was “no evidence that [they] impacted [the employer’s] relationship with its customers or affected its ability to provide services”).

Despite the substantial evidence supporting the Board’s finding, the Company argues (Br. 18-22) that the totality of the circumstances weighs in favor of losing protection. It claims (Br. 20) that the employees’ conduct interfered with its business by challenging scheduling decisions, making fraudulent accusations, and suggesting the restaurant was about to close. As discussed, however, these contentions improperly and myopically focus on Polanco’s email, and not the employees’ conduct in benignly expressing their agreement regarding their substandard working conditions and the Company’s failure to address them. The Company (Br. 21) likewise gains no ground in claiming that this case is similar to the unprotected conduct in *Richmond District Neighborhood Center*, 361 NLRB 833 (2014). There, the Board found the employees’ Facebook posts unprotected because they contained extensive, detailed advocacy of insubordination in such “magnitude and detail” that the employer reasonably believed they would be acted on. *Id.* at 833-35. The employees’ emails here are completely devoid of any such statements. *See Pier Sixty*, 362 NLRB No. 59, 2015 WL 1457688, at *4 n.13 (finding no insubordination, distinguishing *Richmond*).

In sum, the Board, applying *Pier Sixty*, examined the totality of the circumstances and determined that the employees’ replies did not lose the Act’s

protection. The Company challenges the Board’s reliance on *Pier Sixty* and its application of the totality of the circumstances test to this context, claiming, based on irrelevant considerations, that it is “of no help” to the Board here. (Br. 13 n.2.) Such an argument is of no moment, however, because the Board alternatively applied the Company’s preferred test—*Atlantic Steel*—and reached the same conclusion, as discussed below.

2. The four employees did not forfeit protection under *Atlantic Steel*

As noted, the Board found in the alternative that “even applying” *Atlantic Steel* (SA. 21), the four employees’ email replies were not so egregious as to cause them to lose the Act’s protection. (SA. 1, 21.) *Atlantic Steel* requires the Board to consider four factors, which frequently overlap with those considered in the Board’s totality of the circumstances test, to determine if the employee has lost the Act’s protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practice. *Atlantic Steel*, 245 NLRB at 816. Here, the Board found that all four factors weigh in favor of protection.

a. Place of the discussion

Substantial evidence supports the Board’s finding that the place of the discussion weighs in favor of protection. (SA. 21.) As discussed (pp. 38-39), the

emails were nonpublic electronic messages, involved no discussion in the workplace, and had a constricted audience. (SA. 21.) *See Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970) (supervisor “was not assailed with abuse on the floor of the plant where he stood as a symbol of the Company’s authority”). Given these facts, and because, as discussed (pp. 11, 39), the employees sent the emails while they were off duty and away from the restaurant, there was “no disruption of the workplace or with the patrons.” (SA. 21.) *See Inova*, 795 F.3d at 86 (interchange “occurred in a non-work area . . . where no patients or members of the public could have been disturbed”).

The Company errs in suggesting, based on inapposite authority, that the place of the discussion *invariably* disfavors protection whenever employee comments are “made in front of other employees, regardless of whether those employees are on or off duty.” (Br. 14.) The Company principally relies on *Starbucks Corp.*, 354 NLRB 876, 877-78 (2009), *incorporated by reference* at 355 NLRB 636 (2010). There, an employee participating in a boisterous, nighttime rally immediately outside of the coffee shop’s storefront confronted a manager just as he exited the shop and, along with five others, proceeded to follow the manager for two city blocks while shouting threats, taunts, and profanity. *Id.* at 877-78. In that context, the *Starbucks* Board stated that the location of an employee’s conduct weighs against protection “when the employee engages in insubordinate or profane

conduct toward a supervisor in front of other employees regardless of whether those employees are on or off duty.” *Id.* at 878. Indeed, the Board has since noted the “exceptional circumstances” in which it made that statement, and has observed that *Starbucks* only “confirm[s] that *Atlantic Steel* typically applies to workplace confrontations.”⁷ *Three D*, 361 NLRB at 311 n.14. Here, as the Board found (SA. 1, 21), the four employees’ email replies did not involve a workplace confrontation—or any in-person confrontation—nor were they “insubordinate or profane.”

The Company’s reliance (Br. 15) on *Trus Joist Macmillan*, 341 NLRB 369 (2004) is likewise inapposite. The Board there found that the confrontation’s particular workplace locus—a manager’s office—“accentuated and exacerbated” the egregiousness of the employee’s conduct, as he had deliberately “orchestrated” the attendance of multiple management representatives at the meeting, and then launched a planned, “vituperative personal attack on [one of them], replete with obscene language and gestures” for the specific purpose of humiliating him in front of the other managers. *Id.* at 370-71. Here, the conduct did not occur in any workplace location symbolic of managerial authority, and, contrary to the Company’s bald assertion (Br. 15), there is no basis to conclude that Polanco—let

⁷ The other two cases that the Company cites (Br. 14)—unlike the present case—involved confrontational, in-person encounters that occurred inside the workplace. *See Daimlerchrysler Corp.*, 344 NLRB 1324, 1328-29 (2005); *Aluminum Co. of Am.*, 338 NLRB 20, 20-22 (2002).

alone the four employees who are properly the focus of the analysis—acted with any similar premeditated intent to embarrass.

b. Subject matter

Likewise, ample evidence supports the Board’s finding (SA. 21) that the subject matter of the discussion favors protection. As the Board stated, and as discussed above (pp. 26-28, 34-35), Polanco’s email and the four employees’ replies “invoked a continuing dialogue of concerted activity regarding the terms and conditions of employment and is protected under the Act.” (SA. 21.)

Datwyler Rubber & Plastics, 350 NLRB 669, 670 (2007) (subject matter favored protection where outburst occurred during discussion of employee complaints about employment terms).

The Company wrongly suggests that the emails did not involve a protected conversation about working conditions because Polanco resigned her employment concurrent with sending her email (Br. 15), and because the four employees replied after a “lengthy delay.” (Br. 16.) As discussed, the emails were part of an ongoing, months-long dialogue over working conditions in which Polanco and the four employees were active participants, and whether Polanco remained employed has no bearing on the subject matter of the discussion or whether it was protected.⁸

⁸ Although Polanco had just ended her employment with the Company, she remained a statutory “employee.” *See* 29 U.S.C. § 152(3) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a

Additionally, the employees sent their replies within two hours of Polanco sending her email. In any event, the degree of immediacy in the employees' replies is irrelevant to determining whether the discussion concerned the protected topic of working conditions.

c. Nature of the outburst

Substantial evidence also supports the Board's finding (SA. 21) that the third *Atlantic Steel* factor—the nature of the outburst—favors protection. The only “outburst” was, as the Board noted, the four employees “merely agreeing” in response to Polanco's email. (SA. 21.) As demonstrated above, Fagoth, Palomino, Santana, and Garcia do not stand in the shoes of Polanco for purposes of this analysis, but instead must be treated in their own right. (*see pp. 36-37*). The Company has failed to show that their agreement to an email was so egregious that it favors loss of protection. (*see pp. 36-38*.)

The Company does not help itself by citing (Br. 17) inapposite precedent where the nature of employees' conduct was found to disfavor protection. The flagrant, profane outbursts featured in those cases stand in stark contrast to the employees' muted email replies here.

particular employer . . .”); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (the Board “has long held” that the broad statutory term “employee” encompasses “members of the working class generally,” including “former employees of a particular employer”).

d. Provocation

Finally, substantial evidence supports the Board’s finding (SA. 1, 19-21) that the fourth *Atlantic Steel* factor favors protection. Specifically, the Board found that the email and the employees’ replies were provoked by Alfredou’s threat to discharge workers after they complained about working conditions and were also a “reaction to the [Company’s] failure to correct the problems perceived by the employees.” (SA. 1, 19-21.) As the Board found (SA. 17-20), Alfredou’s pronouncement—leveled in immediate response to employees’ protected, concerted complaints—that, “[i]f you guys don’t like how things working here, then you can go look for another job, you can leave,” implicitly threatened discharge and “clearly had the tendency to restrain and coerce employees in the exercise of their Section 7 rights.” (SA. 19.) *See Conley v. NLRB*, 520 F.3d 629, 638-39 (6th Cir. 2008) (employer violates Section 8(a)(1) by responding to employees’ concerted work complaints with invitation to quit).

The Board acknowledged (SA. 20 n.24) that Alfredou’s threat was not alleged as a violation in the General Counsel’s complaint, but *Atlantic Steel*’s provocation factor “does not require that the employer’s conduct be explicitly alleged as [an unfair labor practice].” *United States Postal Serv.*, 360 NLRB 677, 684 (2014). Rather, this factor favors protection when an employer’s unalleged conduct constitutes a “hostile” response to employees’ protected activities

(*Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004)), or “evinces an intent to interfere” with such activities (*Postal Serv.*, 360 NLRB at 684), or when it “likely would have been found to be an unfair labor practice had it been alleged” (*Felix Indus., Inc.*, 331 NLRB 144, 145 (2000), *aff’d in relevant part, remanded on other grounds*, 251 F.3d 1051). Alfredou’s statement fits all three descriptions.

Additionally, the Board reasonably found (SA. 1, 21) that Alfredou’s threat and the Company’s refusal to address the employees’ complaints provoked the employees’ replies agreeing with Polanco’s email. Polanco, Fagoth, Palomino, and Santana witnessed Alfredou’s threat, and Polanco’s email explicitly referenced the threat, and identified it as one of the Company’s many unsatisfactory responses thwarting the employees’ ongoing, concerted complaints. In essence, then, by resigning, Polanco was submitting to Alfredou’s coercive invitation to “leave” and “go look for another job.” And, in turn, her email announcing her decision, and expressing the employees’ shared frustration over Alfredou’s threat and the Company’s other unsatisfactory responses, prompted the four employees’ supportive replies.

D. Substantial Evidence Supports the Board’s Finding that the Company Reprimanded and Discharged the Four Employees Because of Their Protected Activity

The Board also found that “[t]o the extent that the [Company] contends that the discharges were based on reasons other than responding in agreement to

Polanco's email," those purported reasons were mere pretext, meant to mask the Company's true motive for taking adverse action against the employees. (SA. 1.) This finding is based on substantial evidence and should be affirmed.

An employer violates Section 8(a)(1) of the Act by retaliating against an employee for engaging in protected, concerted activity. *Caval Tool*, 262 F.3d at 188-91. The legality of an employer's adverse action depends on its motivation. In *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-89 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the action would have been taken even in the absence of the protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 400-03; *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001). If the employer's proffered reasons for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer has failed to establish its affirmative defense, and the inquiry is at an end. *Transp. Mgmt.*, 462 U.S. at 398;

NLRB v. S.E. Nichols, Inc., 862 F.2d 952, 957-58 (2d Cir. 1988); *Rood Trucking Co., Inc.*, 342 NLRB 895, 898 (2004).

Unlawful motive is shown where, as here, an employer admits that protected activity was a motivating factor. *See Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523, 525-28 (7th Cir. 1992) (burden met with evidence that amounted to employer admissions). The Board may also infer discriminatory motive from circumstantial evidence. *G & T Terminal*, 246 F.3d at 116. Such evidence may include the employer's knowledge of its employees' protected activities, and, as shown here, its demonstrated hostility toward those activities. *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 591 (2d Cir. 1994). The Board's motive findings are afforded particularly deferential review because "the Act vests primary responsibility in the Board to resolve these critical issues of fact." *S.E. Nichols*, 862 F.2d at 956.

1. The Company has waived any contention that it would have reprimanded and discharged the four employees absent their protected activity

The Federal Rules of Appellate Procedure require that an appellant's opening brief "must" contain "[its] contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). "These requirements are mandatory." *Sioson v. Knights of Columbus*, 303 F.3d 458, 459 (2d Cir. 2002). Further, "[t]o make a legal argument

is to advance one’s contentions by connecting law to facts” (*id.* at 460), and “[i]ssues not sufficiently argued” in an appellant’s opening brief “are in general deemed waived and will not be considered on appeal.” *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) (quotation marks omitted). It is “simply not [the Court’s] job, at least in a counseled case,” to form an argument by “looking into the record to document the ‘facts’” asserted in a party’s brief. *Sioson*, 303 F.3d at 460.

Here, the Company’s challenge to the Board’s finding that the employees’ discipline and termination were unlawfully motivated lacks a sufficient factual or legal argument, and therefore the Company has waived any contention that the employees were reprimanded and discharged for any reason other than their protected activity. Factually, its explanation for the adverse actions consists of a handful of wholly conclusory assertions lacking a single supporting record citation. The Company’s legal challenge is equally lacking; it fails to acknowledge—let alone apply—the well-established *Wright Line* framework for resolving questions of employer motive. Accordingly, because the Company has provided no “citations to . . . the record,” and has utterly failed to “connec[t] law to facts,” the Company has waived any challenge to the Board’s finding that it discharged the employees for their protected activity. *Sioson*, 303 F.3d at 459-60 (dismissing challenge to lower court finding where appellant’s brief “develops not one ‘contention’ within the meaning of [Fed. R. App. P. 28]”).

2. In any event, substantial evidence supports the Board's finding that the Company's actions were unlawfully motivated

Substantial evidence supports the Board's finding (SA. 1, 18-23) that the Company's reprimand and discharge of the employees were unlawfully motivated. As demonstrated above (pp. 23-28), Fagoth, Palomino, Santana, and Garcia plainly engaged in protected, concerted activity when they replied in agreement to Polanco's email, and the Company indisputably knew about this activity. Additionally, the record overwhelmingly demonstrates that the four employees' protected activity was "a motivating factor" in the Company's decision to reprimand and discharge them. *Transp. Mgmt.*, 462 U.S. at 400-01. First, the Company admitted several times that the email replies motivated the adverse actions. Such admissions are found in the Company's October 30 reprimands, Morgan's October 31 recorded statements, the Company's unemployment submissions, and, finally, Selden's and Young's testimony. (*See* Supp.A. 50-51, 54-55, 65-69, 127, 233-37, 249, 302-04, 707-10, 737-39, 792-806, 811-818.) Moreover, ample evidence supports the Board's finding (SA. 19-20) that the Company harbored animus towards the employees' protected activities. Specifically, the Company threatened employees with discharge for raising some protected complaints (SA. 19-20) (*see* p. 46); and reacted to others made to the Health Department by urging the discovery of who made them and suggesting legal action against the complaining employees. (SA. 20.) These facts undercut

the Company's characterization (Br. 7) of its reactions as being receptive to such employee complaints.

Furthermore, the Company utterly "failed to meet its burden of showing that it would have taken the same action absent the [employees'] protected activity," because the Company's other purported reasons for the adverse actions were mere pretext. (SA. 1, 21-23.) (*see* cases cited at pp. 48-49.) The Company vaguely asserts that it discharged Fagoth because of her "insubordinate behavior during" the October 30 meeting with the owners and Morgan. (Br. 24.) As a result of this unspecified behavior, the Company cryptically suggests, the "only result" Fagoth "would accept . . . was the termination of Alfredou," and her alleged attempt to secure Alfredou's discharge was unprotected insubordination. (Br. 24.) This unsupported assertion does not rebut the Board's finding, supported by record evidence, that "[t]he only insubordination charge [was] [Fagoth's] agreement with the email." (SA. 21.)

With respect to Palomino, the Company claims that she was "not actually fired" but simply "refused to speak with the [o]wners and walked out" on October 30, thereby abandoning her job. (Br. 8, 23.) The Board reasonably rejected (SA. 1, 22) these claims. First, notwithstanding the Company's claim that Palomino was not discharged, Morgan acknowledged in a recorded conversation that "everybody involved in [replying to Polanco's email] was considered fired."

(Supp.A. 814.) (SA. 22.) Moreover, while the Company now insists that “[s]imply wanting to interview” Palomino “[did] not mean [that the Company was] going to terminate [her]” (Br. 23), it confessed to the New York State Department of Labor that: “We were going to fire [Palomino] but we did not tell her before we called her in to the office that we were going to discharge her because she agreed with [Polanco’s] email.” (Supp.A. 816.) (SA. 22.) Thus, as the Board found, “it was already a foregone conclusion that [Palomino] was going to be discharged once she met with the owners[,] and her refusal to meet . . . can only be seen as a pretext for her termination.” (SA. 22.)

The Company similarly defends its discharge of Santana by claiming that she abandoned her job by refusing to meet with management and walking out on October 30. (Br. 8, 23.) But again, in an October 31 phone call, Morgan told Santana—despite her insistent explanations that she had not abandoned her job but had left with Petrow’s approval after the end of her shift—that the Company was “not going to tolerate” and “not going to have . . . working there” anyone who, like Santana, had replied in agreement to Polanco’s email. (Supp.A. 811-14.) (SA. 22.) The Company also claims that Santana “abandoned her shift[] over the weekend,” meaning on Saturday, October 31. (Br. 23.) But Morgan advised her by phone that she was discharged hours before the scheduled start of her evening shift that day. (SA. 22.) Moreover, as the Board further noted, Selden “testified that

Santana was not discharged for her [purported] failure to report to work on October 31.” (SA. 22 n. 29; Supp.A. 244.)⁹ Accordingly, the Board reasonably rejected the pretextual reasons that the Company offered for Santana’s discharge, and found that the only “real reason . . . was her agreement with [Polanco’s] email.” (SA. 22.)

The Company claims that it discharged Garcia because she “never returned to work, and was thus deemed to have abandoned her position.” (Br. 23.) The Board reasonably rejected this claim as “merely a smokescreen” and “a false reason.” (SA. 21-22.) Garcia’s failure to go to work on October 31 was not job abandonment. Rather, she had heard the recording of Morgan stating that the Company would not stand for anyone working at the restaurant who had replied to the email, and she reasonably concluded that she had been discharged. (SA. 22.) Moreover, the Company drafted the reprimand to justify Garcia’s discharge on October 30—before she had missed her October 31 shift, and “before Garcia even had an opportunity to speak and explain her position over the email with the owners and Morgan.” (SA. 22.) Furthermore, as the Board also found, the Company’s abandonment claim is additionally undermined by the evidence demonstrating that other employees who had not shown up for a shift were not

⁹ Selden reinforced this by further testifying that Santana (as well as Palomino and Fagoth) no longer worked for the Company as of October 30. (Supp.A. 302-04.)

deemed to have abandoned their jobs and were not discharged. (SA. 22-23; Supp.A. 111, 205-07, 210-11, 633, 713, 749-51, 757-58, 760-74, 779-83, 786-89.)

Accordingly, the Board properly found that the Company's adverse actions were motivated by the four employees' protected activity, and that the other reasons the Company proffered for those actions were mere pretext.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(A)(1) OF THE ACT BY RETROACTIVELY ISSUING AN ADDITIONAL REPRIMAND TO EMPLOYEE FAGOTH IN RESPONSE TO HER UNEMPLOYMENT CLAIM

Before this Court, the Company does not contest the Board's finding (SA. 1-2) that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when, in response to Fagoth's unemployment claim, it "retroactively issued [her] a written reprimand on November 5 . . . concern[ing] . . . an incident that occurred on October 9 . . . and backdated [the reprimand] to October 10." (SA. 1.) The Company's failure to contest this Board finding constitutes a waiver of any defense, and the Board "is entitled to summary affirmance of portions of its order identifying or remedying [this] . . . uncontested violation[] of the Act." *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009); accord *Torrington*, 17 F.3d at 590.

CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board
December 2018

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

MEXICAN RADIO CORPORATION)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1509, 18-1963
)	
v.)	Board Case No.
)	02-CA-168989
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,612 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

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

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