Oral Argument Not Yet Scheduled

No. 18-3322

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CONSOLIDATED COMMUNICATIONS D/B/A ILLINOIS CONSOLIDATED TELEPHONE COMPANY,
Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

The jurisdictional statement provided by Local 702, International Brotherhood of Electrical Workers, AFL-CIO ("the Union") is not complete or correct. This case is before the Court on the Union's petition to review a Supplemental Decision and Order of the National Labor Relations Board ("the

Board") dismissing an unfair-labor-practice complaint allegation against Consolidated Communications d/b/a/ Illinois Consolidated Telephone Company ("Consolidated"). (A 56-61.)[1] The Board's Order issued on October 2, 2018, and is reported at 367 NLRB No. 7.

The Board had subject matter jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, 160(a) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Order is final, and this Court has jurisdiction over the petition under Section 10(f) of the Act, 29 U.S.C. § 160(f), because the alleged unfair labor practice occurred in Illinois. The Union's petition for review was timely, as the Act places no time limit on such filing. Consolidated has intervened on the side of the Board.

STATEMENT OF THE ISSUE

Whether the Board had a rational basis for concluding that Consolidated did not violate Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), when it discharged employee Patricia Hudson for engaging in strike-related misconduct because that misconduct was of sufficient severity to cost her the Act's protection.

[1] "A" references are to the Appendix and "Br." references are to the Union's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

The Supplemental Decision and Order currently under review results from the Board's acceptance of the District of Columbia Circuit's remand in *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016). In that opinion, the D.C. Circuit remanded a portion of the Board's order on review related to Consolidated's discharge of Hudson. The D.C. Circuit concluded that the Board had misapplied the applicable legal standards in evaluating her strike-related misconduct, which happened on a public highway while traveling at high speed.[2] *Id.* at 5, 15-20.

The Board fully addressed the court's concerns regarding the single issue remanded for its consideration and correctly applied the appropriate legal standards. It found that Hudson's misconduct during the high-speed driving incident was of sufficient severity to forfeit the Act's protection. (A 56-58.) Accordingly, the Board dismissed the complaint allegation that Consolidated had unlawfully discharged her. (A 56, 58.) The facts relevant to the Board's decision are detailed below, followed by summaries of the Board's initial decision, the D.C. Circuit's opinion, and the Board's Supplemental Decision and Order on remand.

[2] The D.C. Circuit upheld the Board's findings that Consolidated committed a handful of other violations of the Act.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Consolidated Employees Strike

Consolidated is a telecommunications company that operates in several states and provides commercial and residential telephone, television, and broadband services. (A 3; A 255.) The Union represents approximately 175 employees. (A 3; A 100.) Unit employees at Consolidated's facilities in Taylorsville and Mattoon, Illinois voted to strike on December 6, 2012, after the parties' collective-bargaining agreement expired and negotiations on a new agreement stalled. (A 3, 56; A 73, 86.)

The Union instructed the strikers that, in addition to picketing at company facilities, they could picket at Consolidated's commercial worksites, a practice known as ambulatory picketing. (A 6, 57; A 101-04.) Management and non-unit employees continued to work during the strike, and Consolidated used replacement workers, including Troy Conley (Director of Network Engineering) and Lawrence Diggs (a manager from Texas), to perform the jobs of striking employees. (A 4, 6, 57; A 110, 174-76, 221.)

B. Hudson Follows Replacement Workers on a Public Highway, Maneuvers in Front of Them, and Deliberately Blocks Their Company Truck

Hudson worked as an office specialist in Consolidated's fleet department and participated in the December strike. (A 3; A 146-47.) On the morning of

December 10, Hudson and fellow striker Brenda Weaver decided to drive, in separate vehicles, from one of Consolidated's facilities to its corporate headquarters to picket. (A 6, 56-57; A 123, 134, 149.) On the way to headquarters, Hudson spotted a company truck driving on Route 16 in Mattoon. (A 6, 57; A 152.) Route 16 is a divided highway with two lanes in each direction and speed limits ranging from 45-55 miles per hour. (A 7, 57; A 62-63, 108-09, 116-18.) Instead of turning towards headquarters, Hudson followed the company truck to see if it was going to a commercial worksite where the Union could set up an ambulatory picket. (A 6, 11, 57; A 125-26, 152, 162.) Weaver followed Hudson. (A 6, 57; A 125, 134, 152.)

Conley was driving the company truck in the right lane, with Diggs as his passenger. (A 6, 8, 57; A 129, 161, 176-77, 221-22.) The strikers caught up to the company truck, and Weaver passed both Hudson and the non-strikers in the company truck in the passing lane. (A 7, 57; A 128-30, 135, 157, 165, 179, 223.) Weaver then returned to the right lane in front of the company truck. (A 7, 57; A 130, 157, 179, 223.) Next, Hudson passed the non-strikers in the passing lane but remained in that lane traveling parallel to Weaver at roughly the speed limit. (A 7-8, 57; A 139-40, 172, 180-81, 223.) Conley recognized each of the strikers as they passed him. (A 7, 57; A 178-80, 223.) While Hudson and Weaver were driving next to each other in front of the non-strikers, they impeded the flow of

traffic. (A 7, 57; A 180-81, 200, 210-11, 223-24.) Cars began to queue up behind Hudson in the passing lane. (A 7, 57; A 181, 200, 224.)

Eventually, Hudson sped up and moved to the right lane in front of Weaver to let the backed-up traffic pass. (A 7, 57; A 181, 200, 224.) Conley moved to the passing lane to follow the line of cars that was passing the two strikers. (A 7, 57; A 181, 200, 224-25.) When it was his turn to pass, however, Hudson returned to the passing lane in front of him, intentionally blocking the company truck. (A 7, 57-58; A 181, 200, 203, 215-16, 224-25.) They were all still traveling at highway speeds. (A 57; A 139, 172.) Conley braked and returned to the right lane behind Weaver. (A 7, 57; A 182, 201-02, 225, 231-32.)

The non-strikers were stuck behind the strikers' rolling blockade for approximately one mile and one minute, until Conley exited Route 16 to avoid further incident. The detour lengthened the non-strikers' commute to their worksite. (A 7-8, 57-58; A 74, 182-83, 212-14, 225.) Conley called Consolidated immediately after he reached the site to report the incident, and he later submitted an incident report. (A 8; A 83-84, 184-85, 219.)

C. Consolidated Discharges Hudson for Her Serious Strike-Related Misconduct

On December 13, two days after the strike ended, Consolidated suspended Hudson pending investigation for the high-speed driving incident, along with two other strike-related incidents (not at issue here). In suspending Hudson,

Consolidated cited her "extremely dangerous vehicular activity . . . on the public roads . . . follow[ing] and torment[ing] our drivers for up to several miles away from the strike." (A 3; A 85, 87.) Four days later, Consolidated discharged Hudson for violating its workplace-violence and employee-conduct policies.[3] (A 3; A 75-77, 115.)

II. THE BOARD'S INITIAL DECISION AND ORDER

Based on unfair-labor-practice charges filed by the Union, the Board's Acting General Counsel issued complaint against Consolidated, alleging, among other things, that Consolidated violated Section 8(a)(3) and (1) of the Act by discharging Hudson for three instances of protected, strike-related conduct, including the high-speed driving incident. (A 64-72.) Following a hearing, an administrative law judge found that Hudson's discharge violated the Act, purportedly applying the Board's framework set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985). (A 11-13.) The judge found that Hudson engaged in no misconduct in two of the three instances Consolidated had cited for her discharge. (A 12.) And the judge further found that any misconduct by Hudson during the high-speed driving incident "provides no

[3] Consolidated also suspended and discharged Weaver for strike-related misconduct. The Union, Consolidated, and Weaver settled their dispute over her discharge, with Board approval, after the Board issued its initial (2014) decision. (A 57 n.3.)

justification for [her] discharge" because it was "not egregious enough to warrant her termination." (A 8-9, 12.) Specifically, the judge emphasized that Hudson had not "committed an act of violence" and stated that "any ambiguity as to whether [Hudson's misconduct] was serious enough to forfeit the protection of the Act should be resolved against [Consolidated]." (A 8-9, 12.) The Board (Chairman Pearce and Members Johnson and Schiffer) adopted the judge's recommended decision regarding Hudson's discharge, with slight modification. (A 1 & n.2.)

III. THE D.C. CIRCUIT'S OPINION AND REMAND ORDER

Consolidated filed a petition for review with the D.C. Circuit, challenging the Board's unfair-labor-practice findings. The Board cross-applied for enforcement and the Union intervened. The D.C. Circuit enforced the bulk of the Board's 2014 order, but granted Consolidated's petition for review as to Hudson's discharge, disagreeing with the Board's analysis of the high-speed driving incident.[4] 837 F.3d at 1-20. According to the court, the Board "committed reversible legal error in evaluating Hudson's misconduct" because it misapplied both "the *Clear Pine Mouldings* standard and the [*NLRB v.*] *Burnup & Sims*[, 379

[4] The D.C. Circuit upheld the Board's finding that Hudson did not engage in misconduct in the other two strike-related incidents and agreed that the high-speed driving incident should be analyzed as strike-related misconduct. 837 F.3d at 12-15, 17-18.

U.S. 21 (1964)] burden of proof."[5] 837 F.3d at 17-18. Specifically, the Board erred in stressing the absence of violence, rather than considering "*all* of the relevant circumstances, and evaluat[ing] the objective impact on a reasonable non-striker of misconduct committed on a high-speed public roadway with third-party vehicles present." *Id.* (emphasis in original). The Board "[c]ompound[ed] its error" by improperly shifting the burden of proving that Hudson's strike-related misconduct remained protected under the Act from the General Counsel to Consolidated. *Id.* at 19. As a result, the D.C. Circuit "vacate[d] the Board's determination that Hudson did not engage in misconduct punishable under the Act" and remanded to the Board for further proceedings consistent with its opinion. *Id.* at 18-20.

IV. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER ON REMAND

The Board accepted the court's remand and invited the parties to file position statements. (A 56.) On October 2, 2018, the Board (Chairman Ring and Member Kaplan, Member McFerran dissenting) issued the Supplemental Decision and Order now under review. (A 56-58.) Having reexamined Hudson's discharge in light of the court's opinion, a majority of the Board concluded that Consolidated

[5] As the D.C. Circuit explained, the General Counsel bears the burden of proving that the strike misconduct did not occur or that it was not serious enough to forfeit the protection of the Act. 837 F.3d at 8 (citing cases).

did not violate Section 8(a)(3) and (1) of the Act by discharging Hudson for her strike-related misconduct during the high-speed driving incident. (A 56-58.) Her misconduct, maneuvering in front of and deliberately blocking non-strikers on a public highway with third-party vehicles present, was too egregious to remain protected. (A 56.) Accordingly, the Board dismissed the complaint allegation. (A 56, 58.)

SUMMARY OF ARGUMENT

This case involves the Board's decision, on remand from the D.C. Circuit, to dismiss an unfair-labor-practice complaint allegation that Consolidated violated the Act by discharging Hudson. The Board plainly had a rational basis for concluding that Consolidated did not violate the Act because the record shows that Hudson forfeited the Act's protection by engaging in serious strike-related misconduct. Hudson, along with a fellow striker in a separate vehicle, targeted and followed two replacement workers driving in a company truck. She passed the non-strikers, engaged in high-speed maneuvering in front of them, and purposefully blocked their truck by creating a rolling blockade with her fellow striker. Her misconduct, though brief, occurred on a public highway, at high speed, with third-party vehicles present. And although Hudson's misconduct did not cause an accident, the non-striker driver mitigated the confrontation's severity by braking when Hudson pulled in front of him and by turning off the highway to avoid further incident.

The Board, applying its well-settled *Clear Pine Mouldings*, 268 NLRB 1044 (1984) test, found Hudson's misconduct unprotected; it would reasonably tend to coerce or intimidate non-strikers in exercising their Section 7, 29 U.S.C. § 157, rights, including the right to refrain from striking.

The Union presents no valid basis for the Court to grant its petition for review. The Union's assertion that the Board, on remand, impermissibly established a *per se* rule regarding striker conduct fails both at the threshold and on the merits. The Union failed to raise this argument before the Board by filing a motion for reconsideration and, therefore, the Court is jurisdictionally barred from considering it. 29 U.S.C. § 160(e). In any event, the Board did not articulate a "rule" that striker conduct on a public highway is always unprotected, as the Union claims. Rather, the Board duly examined the totality of the circumstances of this case, which happened to occur on a public highway, and considered where those circumstances fit with analogous Board and court precedent. The Board's determination appropriately balanced Hudson's right to strike with competing interests such as the employer's right to maintain order, the public's right to safety, and the non-strikers' right to refrain from striking.

The Board's decision is also supported by substantial evidence, contrary to the Union's assertion otherwise. As the Union concedes, the Board's factual findings and the correct legal test are undisputed. (Br. 25.) And at most, the

Union suggests alternative inferences that the Board might have drawn from the evidence. That is not enough to upset the Board's well-supported factual findings. The Court should deny the Union's petition for review.

STANDARD OF REVIEW

The Court "must uphold the Board's determination if its factual findings are supported by substantial evidence in the record as a whole and its legal conclusions have a reasonable basis in the law." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992) (citing 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Where the Board finds that conduct does not violate the Act, the Board's determination must be upheld unless it "has no rational basis in the record." *Kankakee-Iroquois County Employer Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987). In dismissal cases, the "rational basis" standard essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'" *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-87 (D.C. Cir. 1991) (citations omitted).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support the Board's conclusion." *United Steel & Serv. Workers v. NLRB*, 544 F.3d 841, 848 (7th Cir. 2008). Under that standard, the Court will not displace the Board's choice between two fairly conflicting views

"even though [it] might justifiably have reached a different conclusion had [it] looked at the matter *de novo*." *NLRB v. Deutsch Post Glob. Mail, Ltd.*, 315 F.3d 813, 815 (7th Cir. 2003); *accord Kankakee-Iroquois*, 825 F.2d at 1093. The standard "is not modified in any way when the Board and the [administrative law judge] disagree . . . . It is the independent validity of the Board's order that is under review." *Augusta Bakery*, 957 F.2d at 1471 (citation omitted); *see FedEx Freight E., Inc. v. NLRB*, 431 F.3d 1019, 1027 (7th Cir. 2005) ("We apply the substantial evidence standard of review here, where the Board and the [administrative law judge] disagree as to derivative inferences made from the testimony." (internal alteration, citation, and quotation marks omitted)).

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR CONCLUDING THAT CONSOLIDATED DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING HUDSON FOR ENGAGING IN SERIOUS STRIKE-RELATED MISCONDUCT

The D.C. Circuit's narrow remand asked the Board to "consider, consistent with precedent, *all* of the relevant circumstances, and evaluate the objective impact on a reasonable non-striker of misconduct committed on a high-speed public roadway with third-party vehicles present." 837 F.3d at 18 (emphasis in original) (citing *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 392 (4th Cir. 1967); *Int'l Paper Co.*, 309 NLRB 31, 36 (1992), *enforced sub nom., Local 14, United Paperworkers Int'l Union v. NLRB*, 4 F.3d 982 (1st Cir. 1993) (Table)). The

Board faithfully heeded the court's directive in its Supplemental Decision and Order, correctly applied the appropriate standards, and construed any ambiguities in the evidence in favor of Consolidated. As shown below, substantial evidence supports the Board's finding that Hudson's serious misconduct during the high-speed driving incident would reasonably tend to coerce or intimidate non-strikers in the exercise of their Section 7 rights. (A 56-58.) Thus, it cost her the Act's protection, and Consolidated did not violate the Act in discharging her.

A. A Striking Employee Who Engages in Serious Misconduct Loses the Act's Protection

An employer violates Section 8(a)(3) and (1) of the Act by discharging employees for their participation in protected conduct, including strike-related activity.[6] *NLRB v. International Van Lines*, 409 U.S. 48, 52 (1972); *Nat'l Conference of Firemen & Oilers, SEIU, AFL-CIO v. NLRB*, 145 F.3d 380, 384 (D.C. Cir. 1998) (stating that striking employee "may not generally be fired or

[6] Section 7 of the Act, 29 U.S.C. § 157, grants employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining, or to refrain from such activities. *Axelson, Inc.*, 285 NLRB 862, 864 (1987). Section 8(a)(3), in turn, prohibits "discrimination in regard to . . . tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer that violates Section 8(a)(3) also derivatively violates Section 8(a)(1), which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

refused reinstatement at the conclusion of the strike"). That principle, however, is not absolute. Strikers who engage in serious strike-related misconduct forfeit the protection of the Act, and employers may lawfully discharge them for engaging in that misconduct. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252-257 (1939); *Augusta Bakery*, 957 F.2d at 1477. Although striking employees have some leeway to engage in impulsive behavior during a strike, an employer is justified in discharging or disciplining a striker when, "under the circumstances existing, [the striker's misconduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046; *see Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 295 (7th Cir. 1987). An analogous standard applies to striker misconduct directed at nonemployees, such as supervisors. *Detroit Newspaper Agency*, 340 NLRB 1019, 1025 (2003); *Clear Pine Mouldings*, 268 NLRB at 1046 n.14.

The Board and the courts, applying that standard, have found strikers' misconduct unprotected when they, for example, blocked non-strikers' ingress to and egress from the employer's facility, *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1410-11 (4th Cir. 1984); *Tube Craft*, 287 NLRB 491, 492-93 (1987), or drove recklessly around or impeded non-strikers and third parties on a public highway, *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978) (finding "no right to accost, pursue, block, or otherwise interfere

with the right of any citizen in the use of the public highway while attempting peaceably and lawfully to go to work"); *Oneita Knitting*, 375 F.2d at 392 (driving in front of and blocking non-striker's car "inherently dangerous in that it involved obstruction of the public highway"); *Richmond Recording Corp. d/b/a PRC Recording Co.*, 280 NLRB 615, 663-64 (1986) (finding unprotected striker's attempt to run non-striker's truck and security escort off road by braking and zigzagging in front of it), *enforced*, 836 F.2d 289 (7th Cir. 1987). *Cf. NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 755 (7th Cir. 1998) ("[O]therwise protected activity surely loses its protection when it compromises the safety of others."). The Court gives "considerable deference" to the Board's determination as to whether a striker's conduct exceeds acceptable limits. *Richmond Recording*, 836 F.2d at 295; *see Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 256 (6th Cir. 1990) ("The determination of whether employees have exceeded acceptable limits in the exercise of their rights must initially rest with the Board, and its determination, unless illogical or arbitrary, ought not to be disturbed." (alterations, citations, and quotation marks omitted)).

B. Hudson Lost the Act's Protection When She Engaged in Serious Strike-Related Misconduct While Traveling at High Speed on a Public Highway

In reconsidering the merits consistent with the D.C. Circuit's directive, the Board had a rational basis for concluding that Consolidated did not violate the Act

in discharging Hudson for her serious strike-related misconduct. (A 57-58.) As the Board found, "it is beyond doubt" that Hudson's deliberate, "high-speed maneuvering" on a public highway would reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights, including their right to refrain from striking. (A 57-58.) While participating in a labor dispute with Consolidated, Hudson targeted and followed replacement workers Conley and Diggs in a company truck, traveling at highway speed, on their way to perform work for their mutual employer. She passed the non-strikers, then blocked them, by traveling side-by-side with another striker's vehicle, slower than the flow of traffic. When traffic backed up behind her, Hudson moved into the right lane to let the line of cars pass. But when the non-strikers in the company truck tried to follow suit, Hudson deliberately pulled back into the passing lane in front of them, effectively blocking their passage. Not only was Conley forced to apply the brakes, but he ultimately opted to turn off the highway to avoid further incident, resulting in a longer commute to the jobsite.

Considering the totality of the circumstances, the Board found that "[i]t is readily apparent that Hudson's driving would reasonably cause Conley and Diggs to fear for their safety." (A 57.) When Hudson changed lanes directly in front of the non-strikers as they tried to join the line of passing cars, she "sent a clear message to Conley and Diggs that she was intentionally using her vehicle to

obstruct or impede their passage." (A 57.) Such a move was not "some momentary emotional response in the context of a strike's heightened tensions." (A 57.) *See PRC Recording*, 280 NLRB at 663-64 (finding game of "chicken" on public highway was "no act of animal exuberance" and no "trivial act of misconduct"). Rather, it was "calculated to intimidate" and was "inherently dangerous." *Oneita Knitting*, 375 F.2d at 392. Hudson's high-speed maneuvering in and out of the passing lane in front of the non-strikers also injected an element of unpredictability in a situation where even the smallest miscalculation could be deadly. (A 57-58.) "Any employees would reasonably fear that Hudson's next maneuver could cause a collision that would jeopardize their lives or the lives of other motorists on the highway." (A 57.) Thus, the Board concluded (A 58), the General Counsel failed to meet his burden of showing that Hudson's "misconduct was not sufficiently egregious to warrant discharge." *Detroit Newspaper Agency*, 340 NLRB at 1024; *see Burnup & Sims*, 379 U.S. at 23 n.3.

Although the dangerous misconduct here was "relatively brief" (A 58), Conley, not Hudson, can be credited for the incident's brevity. He chose to exit the highway to avoid further confrontation. (A 58.) *See Newport News*, 738 F.2d at 1410-11 (short duration of strikers' blocking gate did not mitigate seriousness of misconduct because third party (police) intervened to clear the way). Moreover,

given that the vehicles were traveling at highway speed, a miscalculation by anyone during that minute could have caused a serious accident. (A 58.)

The Fourth Circuit in *Oneita Knitting*, 375 F.2d at 392, addressed a similar scenario, finding that the employer there had lawfully denied two strikers reinstatement for driving their car in front of a non-striker's car and refusing to let her pass. The *Oneita* strikers' misconduct resembles Hudson's because it "was calculated to intimidate" the non-striker and "was inherently dangerous in that it involved obstruction of the public highway." *Id.* Hudson's misconduct here, however, is even more egregious than that of the *Oneita* strikers. Unlike them, she was traveling at highway speed and her deliberate maneuver effectively cut off the non-strikers' truck from passing. (A 58.)

Although Hudson's highway misconduct was less egregious than the "more extreme reckless driving" addressed in some of the Board's other striker-misconduct cases, those cases are nevertheless instructive. (A 58 n.8 (citing *Int'l Paper Co.*, 309 NLRB at 36; *Teamsters Local 812 (Pepsi-Cola Newburgh Bottling Co.)*, 304 NLRB 111, 111, 117 (1991), *PRC Recording*, 280 NLRB at 663-64).) They did not set a standard of recklessness the Board would tolerate before finding a striker's driving misconduct unprotected; rather, those cases, like this one, turned on their facts. And, as the Board here explained, "[n]othing in this precedent suggests that anything less reckless" than weaving or abruptly braking in front of

non-strikers, or trying to run them off the road, "would not reasonably tend to intimidate or coerce a targeted nonstriker." (A 58 n.8.)

Finally, in finding Hudson's misconduct forfeited the Act's protection, the Board also weighed public safety interests against Hudson's protected right to strike. (A 58.) *See Consol. Commc'ns*, 837 F.3d at 7 ("employees' right to organize and bargain collectively must be balanced against the employer's right to maintain order and respect and the public's right to safety" (citation and internal quotation marks omitted)). Considering the safety of the non-strikers and other motorists in the vicinity, the Board reasonably found that Hudson's strike-related misconduct went too far. The protected right to strike did not immunize her "high-speed maneuvering on public highways in a manner that interferes with other vehicles." (A 58.)

C. The Union's Arguments Are Unavailing

The Union cannot show, as it must, that the Board's conclusions lack a reasonable basis in the law or that its factual findings are not supported by substantial record evidence. At the outset, the Court lacks jurisdiction to consider the Union's claim that the Board's decision on remand amounts to an impermissible *per se* rule, because the Union failed to present that claim to the Board through a motion for reconsideration. In any event, the Board established no such "rule." Rather, the Board duly examined the "totality of circumstances in

this case" (A 57)—which happened to occur on a public highway—and considered where those circumstances fit with analogous Board and court precedent. Therefore, the Union presents no valid basis for this Court to grant its petition for review.

1. The Union's claim that the Board promulgated an impermissible *per se* rule is jurisdictionally barred and fails on the merits

The Union claims that the Board created an impermissible "*per se* rule that highway driving is inherently dangerous to the exclusion of other factors." (Br. 11-23.) But the Court cannot consider this argument because the Union never raised it to the Board.

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The purpose of Section 10(e) is "to provide the Board with the first opportunity to consider objections so that [the Court does] not review any Board determination without receiving the full benefit of the Board's expertise." *NLRB v. Howard Immel, Inc.*, 102 F.3d 948, 951 (7th Cir. 1996) (citing cases). Here, to preserve its *per se* rule argument for judicial review, the Union needed to first raise it to the Board by filing a motion for reconsideration after the Board issued its Supplemental Decision and Order where the asserted *per se* rule arose.

29 C.F.R. § 102.48(c); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (finding that Section 10(e) precluded Court from reviewing challenge to Board's *sua sponte* conclusion because employer did not file motion for reconsideration or rehearing); *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012) (Court "lack[ed] authority" to reach party's due process argument because not raised to Board through motion for reconsideration); *accord Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 313, 316 (D.C. Cir. 2015) ("where a petitioner objects to a finding on an issue first raised in the Board's decision, a petitioner must file for reconsideration to afford the Board an opportunity to correct the error, if any"). Under certain circumstances, the Court has found that a motion for reconsideration was not needed, but in those cases the objecting party had put the Board on notice of its objections. *See Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 n.2 (7th Cir. 2012); *Augusta Bakery*, 957 F.2d at 1478-79. The Union neither filed such a motion, nor presents the Court with extraordinary circumstances excusing its neglect to put the Board on notice that it viewed the decision on remand as creating an impermissible *per se* rule. *See Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) ("mere inconvenience of severing the issues or delaying a petition for review does not constitute an extraordinary circumstance").

Although the dissenting Board member fleetingly raised the idea that the majority's opinion "*approach[ed]* a per se rule" (A 59 (emphasis added), 61), that is not enough to preserve the Union's claim here. As an initial matter, the jurisdictional bar turns on whether an issue is adequately presented to the Board by a party, not on whether the Board (or any of its members) mentioned the issue in its opinion. *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (finding Section 10(e) barred court's review of issue even though raised by dissenting Board member); *Contractors' Labor Pool*, 323 F.3d at 1061-62 (same); *accord Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 343 n.1 (3d Cir. 1984) (stating that dissent and "brief reference to the merits in the Board's decision does not excuse petitioner from its statutory obligation under § 10(e)"). Moreover, here the dissenting member's reference to a *per se* rule targeted the majority's factual inferences and emphases, rather than suggesting dire implications for future cases. In contrast, the Union greatly amplifies the *per se* rule idea in its arguments to the Court, claiming that the Board effectively rendered *all* striker conduct on the highway unprotected, contrary to both precedent and the Board's role in weighing competing rights under the Act. (Br. 11-23.) The Board had no opportunity to consider those claims. *See Howard Immel*, 102 F.3d at 951 ("to effectively preserve an issue, [a party] must apprise the Board of the issue that [it] intends to

press on review"). Thus, the Court lacks jurisdiction to consider the Union's belated *per se* rule argument here.

In any event, the Union fails to show that the Board promulgated a *per se* rule.[7] Although the Union exaggerates the Board's decision as rendering unprotected any striker conduct on the public highways, that is neither the Board's holding, nor its practical result. Rather, the Board here couched its findings in terms specific to the facts of this case, not as encompassing any and every case involving striking employees who take their labor dispute to the roads. As the Union's quotations of the Board's decision make clear, the Board evaluated the objective impact of "*Hudson's* driving" and "*Hudson's* next maneuver" on non-strikers such as Conley and Diggs. (Br. 12 (emphasis added).) It then concluded that "it is inherently dangerous to make *such* moves"—notably, it did not say *any*

[7] The Board's fact-specific findings do not resemble the rigidly described *per se* rules that courts found troublesome in the Union's cited cases, and those cases are distinguishable factually and legally. (Br. 13-15.) *E.g.*, *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 669 (1961) (hiring-hall agreements unlawful); *California Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1101 (9th Cir. 1998) (strike automatically unfair-labor-practice strike if union mentions unfair labor practice); *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1245-50 (3d Cir. 1994) (subcontracting always mandatory subject of bargaining); *NLRB v. Vill. IX, Inc.*, 723 F.2d 1360, 1369 (7th Cir. 1983) (employer may never question employee about union affiliation); *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 151-52 (6th Cir. 1984) (once employer decides to discharge employee for unlawful reason it may never later adopt lawful reason); *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 719-20 (D.C. Cir. 1981) (employer may never threaten discipline to compel employees to answer questions relating to grievance proceeding).

moves—"at highway speeds in the presence of other vehicles and to obstruct or impede their progress." (A 58 (emphasis added).) The Board's decision thus turned on the facts of this case—a striker, traveling at highway speed, with third-party vehicles nearby, who deliberately maneuvered in front of and blocked non-strikers. (A 57-58.) And to the extent the Union quibbles with how much weight the Board gave to the dangerous setting or claims that the Board ignored other important contextual factors (Br. 11-13, 18-20), those arguments boil down to nothing more than a substantial evidence challenge, addressed in section C.3, below.

In effect, the Union practically suggests the Board should not have considered the dangers of highway driving at all. But the Union seems to overlook that the D.C. Circuit specifically directed the Board to consider on remand the incident's setting—Hudson's "misconduct committed *on a high-speed public roadway with third-party vehicles present.*" 837 F.3d at 18 (emphasis added). The Board's cited statistics, which the Union picks at (Br. 12, 20, 21, 30), simply back up the common-sense proposition that driving can, and often does, turn deadly. The non-strikers would reasonably recognize that danger, exacerbating the coercive or intimidating tendency of Hudson's conduct. And with non-strikers' and the public's safety in mind, the Board need not wait until Hudson's high-speed maneuvering caused, or nearly caused, an accident, as the Union insinuates

(Br. 20), before finding it too egregious to remain protected. *See Assoc. Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1337 (1st Cir. 1977) (finding Board, pre-*Clear Pine Mouldings*, erred in relying on evidence that non-striker's "fear was eventually put to rest and [that] intimidation did not ripen into physical harm"); *Clear Pine Mouldings*, 268 NLRB at 1046, 1048-49 (rejecting prior "per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts").

Similarly, there is no merit to the Union's disingenuous claim that the Board's decision is due no deference because, in considering the dangers of highway driving, it was "playing traffic cop" (Br. 22) or "highway patrol" (Br. 30-31), rather than interpreting the Act. The Board was not interpreting Illinois traffic laws. It was applying its striker-misconduct standard to the unique context presented here and duly determining whether Hudson's high-speed misconduct reasonably tended to coerce or intimidate the non-strikers driving on the highway behind her. (A 57-58.) Contrary to the Union's claim, this Court gives "considerable deference" to a Board's determination that striker misconduct reasonably tended to coerce or intimidate non-strikers, *Richmond Recording*, 836 F.2d at 295, as it does for Board findings as to what conduct is coercive in other contexts, *see AutoNation, Inc. v. NLRB*, 801 F.3d 767, 774 (7th Cir. 2015) (citation omitted) (emphasizing "deference to 'the Board's expertise in matters of labor

relations'" in finding employer's statements coercive); *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370-72 (7th Cir. 2001) (same).

2. The Board's decision is consistent with precedent

The Union further argues that the Board's decision is contrary to striker-misconduct precedent (Br. 20-23), but none of the Union's cited cases mandates a different result. The Union's cases (Br. 21-22, 31), where driving strikers did not lose the Act's protection, "involved much different circumstances than present here," as the Board explained (A 58 n.8). Those strikers either followed non-strikers at a safe distance, *Altorfer Mach. Co.*, 332 NLRB 130, 141-42, 144-47 (2000), or passed them without impeding their progress, *Batesville Casket Co.*, 303 NLRB 578, 580-81 (1991).[8]

Hudson's misconduct, in contrast, was more egregious and certainly not "everyday driving," as the Union suggests. (Br. 21.) She did not simply follow Conley and Diggs or get "ahead of the [truck] so as to arrive at the plant before it."

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[8] In *Consolidated Supply Co.*, 192 NLRB 982 (1971), also cited by the Union (Br. 18, 21), the misconduct did not occur at highway speed, and the striker's driving did not "endanger[] anyone." *Id.* at 988-90. Moreover, that case, which issued before *Clear Pine Mouldings*, appears to apply an outdated standard—for instance, emphasizing a lack of violence and that "no physical assaults ever resulted." 192 NLRB at 989; *see Consol. Commc'ns*, 837 F.3d at 18 (criticizing initial Board decision for erroneously "stress[ing] the 'absence of violence'"). (A 58 n.8 (distinguishing another case because it applied pre-*Clear Pine Mouldings* standard).)

Batesville Casket, 303 NLRB at 580. She targeted and "deliberately blocked the truck with her highway-speed maneuvers" (A 58 n.8), moving in and out of the passing lane to accomplish that task, and at one point causing uninvolved vehicles to back up behind her. The Union's argument that precedent allows strikers to temporarily delay non-strikers (Br. 18) overlooks that, unlike here, the strikers and non-strikers in those cases were not traveling at high speed. *E.g.*, *Ornamental Iron Work Co.*, 295 NLRB 473, 480 (1989) (strikers' briefly blocking non-striker truck's entry "was solely to gain the attention of the driver in order for them peaceably to deliver their message"), *enforced*, 935 F.2d 270 (6th Cir. 1991) (Table). And although Hudson's blockade may have been brief, it was Conley who limited its duration by exiting the highway to avoid her; he had to resort to that evasion even though it lengthened his commute in the process.

The Union's attempt (Br. 22, 31) to distinguish *Oneita Knitting* by arguing that the strikers there repeatedly passed the non-striker, creeped, and called her a "scab," fails for similar reasons. The Fourth Circuit did not rely on the name-calling or the repetition in finding the strikers' conduct unprotected. *See* 375 F.2d at 392. And the fact that Hudson's maneuvers took place at highway speed, unlike the creeping *Oneita* strikers, makes her conduct more, not less egregious. (A 58 & n.6.)

Finally, the Union provides no support for its hyperbolic claims that the Board's decision unduly restricts the right of employees to engage in ambulatory picketing (Br. 16-17, 20) or trumps their right to picket (Br. 12). The Board distinguished, rather than overruled, its precedent finding that strikers could safely follow, or even pass, non-strikers in their vehicles without losing the Act's protection. (A 58 n.8.) In suggesting that the Board did not give sufficient weight to Hudson's right to ambulatory picket here, the Union, in turn, gives short shrift to factors specifically prescribed by the D.C. Circuit in remanding the case: "the employer's right to maintain order and respect," "the public's right to safety," and the non-strikers' "right to refrain from striking." *Consol. Commc'ns, Inc*., 837 F.3d at 7. The Board's decision, finding that Hudson's right to strike did not "confer immunity" on high-speed misconduct that put other drivers in "fear of becoming a fatality statistic" (A 58), strikes an appropriate balance among those competing interests. *See, e.g., NLRB v. Truck Drivers Local Union No 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 96 & n.28 (1957) (the function of balancing competing interests under the Act "is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

3. The Board's decision is supported by substantial evidence

The Union's substantial evidence challenge (Br. 25-32) fares no better. The Union claims "no great dispute as to facts in this case" and concedes that the Board on remand "essentially adopted the [administrative law judge's] findings." (Br. 25.)[9] Nevertheless, it asks the Court to reweigh the undisputed record evidence, listing factors (from a coercive interrogation case) that it thinks the Court should consider. (Br. 26 (citing *Multi-Ad Servs.*, 255 F.3d at 372).) As shown below, the Board did not fail to consider any relevant evidence. And the Union quibbles, not with the sufficiency of the evidence, but with the inferences the Board drew from that evidence. *See Multi-Ad Servs.*, 255 F.3d at 370 ("as long as substantial evidence in the record supports the Board's opinion, it is irrelevant if evidence also exists in the record supporting [employer's] view of the case").

Contrary to the Union's allegations, the Board took into consideration what the Union coins "contrary record evidence." (Br. 12-13, 27-28.) For example, the

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[9] The Union insinuates that because the administrative law judge had the "opportunity to observe" Hudson and other witnesses, his determination that she did not lose the Act's protection was correct. (Br. 31-32.) But contrary to the Union's suggestion (Br. 10, 24-25, 31-32), this Court does not modify the standard of review where, as here, "the Board's disagreement with the [judge] is grounded upon derivative inferences," rather than on witness credibility. *Augusta Bakery*, 957 F.2d at 1471, 1475. The Board did not overturn the judge's credibility findings, including his discrediting Hudson's claim that she never pulled back into the passing lane in front of Conley. (A 7.)

Board acknowledged that the incident was "relatively brief, lasting only a minute or so." (A 58.) And, as the Union admits (Br. 12), the Board considered that "Hudson was driving within legal speed limits and that Conley may have sought to exceed those limits in attempting to pass" (A 58 n.7). Nevertheless, the Board reasonably discounted those facts, in light of other relevant concerns such as how fast the other vehicles on that road were traveling in the flow of traffic, the presence of third parties, and Conley's role in limiting the incident's duration.[10] (A 58.)

The Union's assertions (Br. 13, 27-30) that the Board overlooked other relevant mitigating evidence find flimsy support in the record and precedent. Confusingly, the Union credits Hudson (Br. 13, 27) for keeping a car's length in front of Conley and for not coming close to causing an accident, but it is undisputed that Conley had to brake when Hudson pulled into the passing lane in front of him. *Cf. Batesville Casket*, 303 NLRB at 580-81 (finding significant that strikers, although they passed company van, did nothing to impede its progress).

[10] The Union disingenuously claims that "[i]t is divorced from reality" (Br. 28) for the Board to find that Hudson coercively blocked Conley because he would have had to exceed the speed limit to pass her. But the incident derives its coerciveness not from Hudson's preventing Conley from speeding. Rather, the incident was coercive because the non-strikers, once blocked, had no practical way to avoid the strikers until they could safely turn off the highway. (A 212.) Given Hudson's earlier high-speed maneuvers, they would reasonably worry about what she planned to do next and whether Conley could react in time.

The Union further praises Hudson for "not speeding or creeping or swerving or tailgating" (Br. 27) and for not yelling profanities or gesturing rudely as she passed (Br. 30), but the Board carefully considered striker-misconduct precedent examining such behavior and found nothing in that precedent "suggest[ing] that anything less reckless would not reasonably tend to intimidate or coerce a targeted nonstriker" (A 58 n.8). The Union also emphasizes (Br. 30-32) that Hudson's other strike-related incidents did not cost her the Act's protection. But that does not make her misconduct during this incident any less intimidating or coercive.

Further, the Union's argument that Hudson had "innocuous reasons" for being in front of the non-strikers (Br. 13, 27-28) is misplaced given that the striker-misconduct standard is objective and does not "involve inquiry into the intent of the discharged striker." *See Universal Truss, Inc.*, 348 NLRB 733, 734 (2006). In any event, Hudson did not lose the Act's protection for simply following or passing the strikers, as the Board made clear (A 58 n.8); she lost the Act's protection for her high-speed maneuvers and deliberately blocking the company truck on a public highway. The Union's suggestion that Hudson's pulling in front of and blocking the company truck was unintentional (Br. 30) defies reason. If Hudson intended simply to follow the non-strikers and set up an ambulatory picket, it makes little sense that she would have passed the truck in the first place, given the difficulty of following a vehicle *behind* her, traveling at highway speed. Thus,

far from a "baseless assertion[]" (Br. 29), the Board drew the reasonable inference that Hudson's actions after passing—pulling in front of Weaver to let a line of neutral vehicles pass, then pulling back into the passing lane precisely when it was Conley's turn to pass—appeared to the non-strikers as calculated and deliberate, not accidental or innocuous bad driving, or even an excusable moment of animal exuberance (A 57, 58 n.8). Such intentional conduct would exacerbate the coerciveness, as the non-strikers could not disregard it as inadvertent or unrelated to the strike.

Likewise, the Union's claim that Hudson's misconduct had no coercive effect (Br. 28-29) is not only irrelevant to the objective inquiry, *see Universal Truss*, 348 NLRB at 734, but belied by the record evidence.[11] Conley testified that he felt "harassed" (A 183, 198, 211) and explained that he "would be surprised honestly if she thought that was the right, safe thing to do" (A 202-03). And Diggs testified that he was worried about getting rear-ended when Hudson pulled in front of them and Conley braked. (A 224.) Moreover, Conley immediately reported the incident to Consolidated when he reached the worksite.

[11] Moreover, the Union's arguments are inconsistent. It hyperbolically complains that the Board's decision "holds striking employees hostage . . . to the subjective fears of others" (Br. 20), yet later suggests the Board should have considered the non-strikers' subjective reactions to Hudson's misconduct (Br. 26-27).

As for the Union's suggestion that Hudson's misconduct is mitigated because she "may have" used her turn signal before changing lanes (Br. 13, 27, 29-30), surely the Union cannot fault the Board for failing to mention this ambiguous piece of evidence. At most, Conley testified "I don't know that she did" use her turn signal, and when later pressed, speculated that "she could have." (A 7; A 202.)

Finally, the Union repeatedly exaggerates the breadth of the Board's decision by downplaying Hudson's misconduct as "ambiguous" and unpersuasively claiming that incidents like this one "happen[] hundreds if not thousands of times per day."[12] (Br. 9-10, 20, 29.) Even if the Union's dubious claim were accurate, and driving misconduct like Hudson's is commonplace, that does not make it somehow excusable. Moreover, the Union omits a few salient details in characterizing the incident as a "daily occurrence" (Br. 20, 29) and suggesting that Conley and Diggs should have handled it with "aplomb" (Br. 20).[13]

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[12] The Union's use of the term "ambiguous" is curious, given the D.C. Circuit's clear directive that "any ambiguity or equivocation in the evidence on the question of the conduct's seriousness must be resolved in favor of the employer." 837 F.3d at 19 (alteration, citation, and quotation marks omitted).

[13] For the idea that Conley and Diggs should not have been coerced or intimidated by the high-speed driving incident, the Union cites *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223, 227-28 (7th Cir. 1996). That case is inapposite. It did not involve unsafe driving or even striker misconduct; it examined the

Hudson was not just any random driver who coincidentally moved her vehicle in front of Conley and Diggs and drove slower than Conley wanted. Hudson was a striker engaged in a labor dispute with their mutual employer. She, along with a fellow striker in a separate vehicle, purposely targeted and followed the two replacement workers, passed them, caused traffic to back up behind her in the passing lane, engaged in high-speed maneuvers in and out of the passing lane in front of them, and deliberately blocked their vehicle. Her misconduct caused Conley to "avoid the situation entirely and turn off and take an alternate route." (A 183.) Under those circumstances, it was objectively reasonable for Conley and Diggs to fear for their safety and what Hudson would do next.

The Union's attempts to manipulate the evidence and paint a different picture of what happened are not enough to "overcome the deferential standard of review that [the Court] must afford the Board's conclusions" regarding coerciveness and striker misconduct. *See Multi-Ad Servs.*, 255 F.3d at 372; *Richmond Recording*, 836 F.2d at 295 (giving "considerable deference" to Board's determination that strikers lost the Act's protection). The Board's finding that Hudson's misconduct was serious enough to cost her the protection of the Act is

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coerciveness of a supervisor's single question to an employee about who attended a union meeting the night before.

amply supported by the record, and the Board had a rational basis for concluding that Consolidated did not violate the Act in discharging her.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying the petition for review.

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March 2019

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	*	
Petitioner	*	No. 18-3322
v.	*	
NATIONAL LABOR RELATIONS BOARD,	*	Board Case Nos. 14-CA-094626 14-CA-101495
Respondent	*	
and	*	
CONSOLIDATED COMMUNICATIONS d/b/a ILLINOIS CONSOLIDATED TELEPHONE COMPANY,	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,429 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 20th day of March, 2019

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CERTIFICATE OF SERVICE

I certify that on March 20, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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